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UNITED STATES REPORTS

VOLUME 157

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1894

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.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
HOWELL EDMONDS JACKSON, Associate Justice.[1]
EDWARD DOUGLASS WHITE, Associate Justice.

RICHARD OLNEY, Attorney General.
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Jackson, by reason of illness, heard argument in no case here reported, after October 23, 1894.

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PROPERTY OF
UNITED STATES SENATE
LIBRARY.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1894.

BATE REFRIGERATING COMPANY *v.* SULZBERGER.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 687. Argued November 15, 16, 19, 1894.— Decided March 4, 1895.

The provision in Rev. Stat. § 4887 respecting a "patent granted for an invention which has been previously patented in a foreign country" refers to foreign patents granted previously to the issue of letters patent for the same invention by the United States, and not to foreign patents granted previously to the application for the American letters.

When such foreign letters issue before the United States letters issue, the American patent is so limited as to expire at the same time with the foreign patent having the shortest term, but in no case is it to be in force more than seventeen years.

When the language used in a statute is plain and unambiguous, a refusal to recognize its natural obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress.

United States v. *Bowen*, 100 U. S. 508, cited approvingly to the point that "the Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873," and that "when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress."

Statement of the Case.

THE certificate of questions sent up in this case was as follows:

"A decree dismissing the bill in this cause after a hearing upon the setting down of pleas thereto having been made in the Circuit Court for the Southern District of New York, and an appeal having been taken therefrom to this court, and the cause having come on for final hearing, certain questions of law arose concerning which this court desires the instruction of the Supreme Court of the United States for its proper decision. The facts out of which the questions arose appear from the bill and pleas thereto on file in the cause and are as follows:

"On the first day of December, 1876, John J. Bate applied for letters patent for an improvement in processes for preserving meats, etc., and after sundry proceedings in the United States Patent Office, including an appeal to the examiners-in-chief, as well as a subsequent contested interference with a patent to one Ezekiel S. Halsted, a patent was issued to said Bate on the 20th day of November, A.D. 1877, the grant being in terms for seventeen years. Afterwards, on the 22d day of November, 1877, said John J. Bate assigned said patent to the Bate Refrigerating Company, the assignment being duly recorded on the 23d day of November, 1877.

"After the application had been filed in the United States Patent Office and before the patent was issued two foreign patents were granted for the same invention, to wit, one patent granted by the British government to William Robert Lake on a communication from said Bate dated January 29, 1877, for the term of fourteen years from said date, said patent being sealed July 13, 1877, and the complete specification being filed July 26, 1877, and the said invention was patented or caused to be patented by the said Bate; the other of said patents granted by the government of the Dominion of Canada to the same John J. Bate under date of January 9, 1877, for five years. Both foreign patents expired before the expiration of the seventeen years specified in the grant of the United States patent to Bate. The bill was filed July 25, 1892, and prayed for an injunction against infringement and for an account.

Argument for Appellant.

"Upon these facts this court desires instruction upon questions of law for the proper decision of said cause, namely, whether the invention for which the United States patent aforesaid was issued to said John J. Bate had been 'previously patented in a foreign country' within the meaning of those words in section 4887 of the Revised Statutes, and whether the said patent expired under the terms of said section before the expiration of the term of seventeen years from its date, and to that end hereby certifies said questions to the Supreme Court."

Mr. Charles E. Mitchell, (with whom was *Mr. James J. Storrow* on the brief,) for appellant.

Mr. Benjamin F. Lee by leave of court filed a brief on behalf of the Chemical Rubber Company in support of the contention of the appellant.

Mr. Wheeler H. Peckham and *Mr. Edmund Wetmore* for appellees. *Mr. Leonard E. Curtis* was on their brief.

Mr. B. H. Bristow and *Mr. William H. Kenyon* by leave of court filed a brief on behalf of the Harrison International Telephone Company in support of the contention of the appellees.

Mr. Charles H. Aldrich by leave of court filed a brief on behalf of Milo G. Kellogg in support of the contention of the appellees.

Mr. James C. Carter closed for appellant.

I. The defendants, in support of their contention that "previously patented" means patented before the issue of the American patent, put themselves upon what is called the rule of literal, grammatical interpretation, and insist that such meaning is the necessary import of the language; and that it would therefore be to no purpose to show that such a construction would make the law a piece of senseless and mischiev-

ous folly, unjust to inventors, prejudicial to the public, and utterly inconsistent with a long-settled policy of the government. This position cannot be maintained. Undoubtedly language may be employed which is so precise and clear as to admit of but one meaning. In such a case, as there can be no doubt, none of those inquiries which are designed to remove doubt are legitimate. It matters not in such a case what the consequences may be. The legislature must be taken to have meant what it has indubitably said. But there are very few such cases as these; and the above-mentioned rule, therefore, carries us but a short way, and has but a *prima facie* preference. Statutory Interpretation, (edited by Endlich,) §§ 25–27.

At what point are we to determine whether the language of a clause of a statute admits of but one interpretation? Single sentences often seem quite clear of themselves, but become open to doubt when read in connection with something which precedes or follows. An unlearned person may interpret a clause in a statute, and think that but one interpretation is possible; but a lawyer, skilled in the subject to which it relates, might be immediately perplexed with doubt.

In order to know whether the statute is open to doubt, it must be intelligently applied to the subject-matter to which it relates. That subject is the patent system of the United States and the laws regulating it.

When it is so applied, its language will be the better understood, and it can be the better determined whether it admits of more than one interpretation. *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 458; *United States* v. *Lacher*, 134 U. S. 624; *Atkins* v. *Disintegrating Co.*, 18 Wall. 272.

Applying the section to that subject-matter, a doubt immediately arises as to the soundness of the first-blush interpretation. Take the first clause of section 4887. "No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid by reason of its having been first patented or caused to be patented in a foreign country." The defendants insist that the words "first patented" mean patented in a foreign country at some time before the issuing a patent in the United States. But why

should Congress enact that a prior foreign patent should not be a bar to an American patent when it never was, and was never by any one supposed to be, a bar? It was only in case the foreign patent had been taken out prior to the application for the American patent, that it could have, under the law as it had always stood, any effect to debar, or otherwise injure, the American discoverer.

The mind cannot do otherwise than doubt whether Congress did not by the words "first patented" mean patented before application; because the clause then becomes intelligible and reasonable.

Any unjust result or consequence which would flow from a particular interpretation of a statute has always been regarded as a reason which, of itself, should induce a close examination of everything having a bearing upon the meaning of the legislature; that is to say, it justifies and requires the work of interpretation. *Wilson* v. *Rousseau*, 4 How. 646.

Section 4887 is, on all hands, admitted to be a mere revision and reënactment of sec. 25 of the act of 1870, and means precisely what that section means. *Edison Co.* v. *United States Co.*, 35 Fed. Rep. 134; *Siemens* v. *Sellers*, 123 U. S. 276. The proper question, therefore, is, what is the meaning of sec. 25 of the act of 1870? But the act of 1870 is itself a revision of the then existing law, and this 25th section, if the interpretation of the defendants is correct, changes, in a very material respect, the law which it affects only to revise; for there is no doubt that, by the law as it stood at the time of the revision of 1870, and had stood for a generation, the taking out of a foreign patent had no effect upon the right of the domestic inventor, except when it was taken out prior to his application. It is a rule, without exception, that all revisions, when it is suggested that they change the preëxisting law, are open to examination, in order that it may be more clearly seen whether the preëxisting law is really changed; and, upon such examination, there is a *fixed presumption* that the prior law is *not* changed, unless there be evidence that such was the legislative intent.

The reason of this rule is apparent. Revisions are usually

the work of one mind, or a few minds, selected for the purpose of improving the form, without changing the substance of laws; minds, too, which are always endeavoring to express, and thinking they can better express, what another mind has attempted to express. When they are brought before the legislative body for enactment they are accompanied with the declaration, express or implied: "No change has been made by this revising bill in the substance of the existing law as it is settled by statute or judicial decision." The revisers themselves intend no change. The legislative body intends none. But the work of revising laws, of consolidating various statutes, pruning away redundancies, reconciling apparent contradictions, removing ambiguities, etc., is a task for the highest abilities, and is seldom well performed. Changes of language are inevitable, and yet are pregnant with the greatest danger of changing the meaning.

But for the rule above mentioned, every considerable revision would, in the language of Mr. Justice Baldwin, *McClurg* v. *Kingsland*, 1 How. 202, 211, by "changing the law according to every change of mere phraseology, make it a labyrinth of inextricable confusion."

A multitude of authorities have sanctioned this doctrine. *Yates's case*, 4 Johns. 316; *Goodell* v. *Jackson*, 20 Johns. 693; *In re Brown*, 21 Wend. 316, 319; *Douglass* v. *Howland*, 24 Wend. 35; *Theriat* v. *Hart*, 2 Hill, 380; *Crosswell* v. *Crane*, 7 Barb. 191; *Elwood* v. *Kloch*, 13 Barb. 50; *Dominick* v. *Michael*, 4 Sandf. 374; *Taggard* v. *Roosevelt*, 8 How. Pr. 141; *Jenkins* v. *Fahey*, 73 N. Y. 355; *The L. W. Eaton*, 9 Ben. 289; *The Brothers*, 10 Ben. 400.

Section 25 of the statute of 1870 declared that "the patent shall expire" with the foreign patent. Rev. Stat. § 4887 enacted that "the patent shall be so limited as to expire," etc. It was contended that under the Revised Statutes the patent would be void unless it was so limited by its terms. The words added in the Revised Statutes were apt to convey this meaning, and, if they did not effect this, their insertion was totally without effect. Undoubtedly the fact was that the commissioners intended this change, though their report did

not call attention to it, and that Congress voted without noticing the change, or actually intending to make any. Thereupon the courts held that a change of plan or policy was not to be deduced from a revision, unless the language was not only apt, but so "plain and unequivocal" as to "demonstrate that intention beyond a doubt." In other words, the use in a revision of language plain enough, if taken by itself, to effect a change in the law, will not be allowed to have the effect, unless the court is satisfied that Congress in fact realized that effect, contemplated it and actively intended it.

This decision was made in *Canaan* v. *Pound Mfg. Co.*, 23 Blatchford, 173. In *Bate* v. *Hammond*, 129 U. S. 151, 169, the Supreme Court, deciding the same question the same way, referred with approval to this decision.

The Supreme Court, in *United States* v. *Bowen*, 100 U. S. 508, approved this rule, and their application of it is instructive. See also *Blake* v. *National Banks*, 23 Wall. 307; *Meyer* v. *Car Co.*, 102 U. S. 1; *Butterworth* v. *Hoe*, 112 U. S. 50.

II. The statute (Rev. Stat. § 4887) is therefore open to interpretation; and the inquiry is what Congress intended by the words "first patented or caused to be patented in a foreign country," and by the words "previously patented in a foreign country." Do they mean patented in a foreign country before the issue of the patent here, or before the application for it? A review of the course of legislation upon the subject, in the light of justice and reason, and the clear policy of the law, will leave no reasonable doubt that the latter meaning was the one intended.

It will be agreed that the true method of inquiry is to ascertain what the law was upon the point in question prior to the employment of the particular language under interpretation, to the end that we may see whether there were any, and what, mischiefs or difficulties in the preëxisting law which the language was calculated to correct.

A review of legislation down to 1836 makes the following points clear:

(1) That the statutes of 1790 and 1793, by making it, among other things, essential to a patent that the invention should not

have been "known" by others than the inventor before the application, rendered a foreign patent issued to the same inventor, prior to his application, a bar to a patent here. This was a result not agreeable to justice or sound policy; but at that time the evil was not of sufficient consequence to attract notice and call for a remedy.

(2) Prior to 1836 it had become otherwise. There was a growing advantage to inventors to be derived from foreign patents, and there was no reason why the taking of one should be made to involve a forfeiture of the inventor's privilege here, or any other punishment. The practice of taking them, so guarded as not to be the source of incidental mischief, was, on the contrary, one which our law should encourage.

(3) It was the intention of Congress in 1836 to do away with this objectionable feature in our patent law, as it then stood, and to encourage the taking out of patents in foreign countries. To this end, while by § 6 of the act of that year careful provision was made to insure that the applicant for a patent should be the first inventor, clauses were inserted in § 7 apparently designed to prevent mere knowledge of the invention prior to the application, as distinguished from use, from being a bar. Patenting, or description in a printed publication, if after the discovery by the applicant, was no longer to be a bar, unless the invention had been "in public use or on sale, with the inventor's consent or allowance, prior to the application." Mere disclosure before application was apparently to be no longer fatal. It would seem, however, that some one who had a hand in shaping the statute was, apparently, not sure that this result was secured by § 7; and, perhaps, it was not secured; for the choice of a foreign patent in preference to an American one may furnish, in some cases, material support to the vague and uncertain doctrine of abandonment. To remove all doubt upon this point, and it being at the same time thought important that one who had taken out a patent abroad should not long delay in making his application in this country, a clause was framed and introduced into § 8, designed to have the double effect of making it clear, that a foreign patent should not bar a patent here, and that the

application here, thus encouraged, should not be long delayed. This clause is the one beginning with the words, "but nothing in this act contained shall be construed to deprive."

(4) This language must be construed as if the supposition or assumption upon which it proceeds were really the fact, and then the effect of the provision becomes, what no one will doubt it really is, a liberty to a certain class of inventors to take out patents abroad without affecting their privilege of taking out patents in this country. That class is those who use diligence and apply for a patent here within six months after obtaining the foreign patent.

This provision gave facility for patenting abroad; but Congress extended it in the act of March 3, 1839. This act did not operate upon those to whom the privilege was given by the act of 1836, but upon persons outside of that class. It did not repeal, alter or modify the act of 1836, but it created a new class of persons who, after patenting abroad, might still receive patents here. This was the wilfully tardy class, those who might neglect to apply here within six months after obtaining patents abroad. And to these it did not give such a patent as it awarded to the first and diligent class; but abridged it by limiting its duration to the term of fourteen years from the date of the foreign patent.

(5) The condition of the law upon the point of the effect of a foreign patent after the act of 1839 was entirely clear. Those who applied for the American patent, within six months after obtaining a foreign patent, were entitled to receive one for the same period as patents ran in other cases. Those guilty of laches and not making application within this period, might still apply, provided their inventions had not got into "public and common use;" but, even when thus entitled to apply, the patent granted was to be limited to a period of fourteen years from the date of the foreign letters. The plan was to encourage patenting both here and abroad, and not to grudgingly permit it.

III. After this plan had stood without objection for more than thirty years, the commissioners appointed to revise the laws of the United States completed a revision of the laws

relating to patents. This was reported to Congress in 1870, with the explanation that it was a revision working no change in substance. It was enacted without any change affecting the present argument and became what is herein referred to as the act of 1870. It was reënacted in the general revision of 1873, without any change, save a slight and wholly unimportant one in mere phraseology. The provision contained in it relative to foreign patents is easily susceptible of an interpretation which makes it, what it was declared to be, a reënactment of the prior law without material change of plan or substance. It is our contention that it is such a reënactment. It is, nevertheless, insisted by the appellees that another interpretation must be put upon it, which reverses the just and reasonable policy of the prior law, and substitutes in place of it a plan repugnant to reason, unjust to inventors, and injurious to the public.

Such a proposition is erroneous upon its face, and is, besides, refuted by a great number of separate, but concurring, reasons:

(1) Because it wholly ignores a settled rule of law relating to the interpretation of revising statutes. This consideration has been already alluded to; but only for the purpose of showing that the statute is open to interpretation. It is equally pertinent upon the question of interpretation after that is declared to be open for debate.

(2) But in the present case we have not only the presumption above mentioned, that no change in the law was intended in the particular under notice, but the history of the statute of 1870, and the incidents attending its passage, demonstrate with a certainty which leaves no room for doubt that the words "first patented" mean, and only mean, patented "before application."

(3) Such a method of ascertaining the intent designed to be expressed by the language of § 25 of the act of 1870 is in accordance with the rules of legal interpretation. It is true we cannot ascertain the views of the body upon a question before it from the views which happen to have been expressed by individual members. Other members may have entertained quite different opinions. But we can, and must, avail

ourselves of authentic evidence to ascertain what the question before the body really was. The court must place itself, so far as possible in construing a statute, in the same position which the legislature occupied in enacting it. The bill itself does not always enable us to do this. In the case of revising statutes, particularly where the revision covers a large body of the law, legislatures habitually rely upon the assurances by committees of their own body, or commissioners appointed by them, as to the particulars, if any, in respect to which the law is changed, and give their attention to those alone. Such laws cannot be properly interpreted except upon the assumption that legislatures regard the statements of committees or commissioners whom they have appointed for the purpose of lightening their own labors. It is on this ground that the petition or other application upon which legislation is sometimes had may be properly resorted to for the purposes of interpretation. It is to enable the court to place itself in the situation of the legislature.

(4) It is for the advocates of that interpretation which introduces a change into the law, apparently so unreasonable, unintended, and unjust, to show that it really was intended, and to point out some probable motive which influenced Congress to make the change — some evil growing out of the pre-existing law, or which the pre-existing law was not calculated to reach. The notion mainly relied upon by them that the interpretation is so clear that it must be accepted without reference to reason, and even against reason, has already been shown to be erroneous.

IV. The interpretation asserted by the appellant is supported by every just consideration, and is in harmony with every rule of construction. It should be unhesitatingly accepted.

(1) It is an easily admissible interpretation. There is nothing in the language employed which excludes it. It is entirely consistent with the rule that to justify a particular interpretation of a statute it must be expressed. The event in reference to which an invention is said in § 25 of the act of 1870, and in § 4887 of the Revised Statutes, to be "first pat-

ented," and the event in reference to which an invention is said in the latter to be "previously patented," are not in terms expressed in those enactments. They are left to be supplied. There is no difficulty arising out of grammar, or otherwise, in making that event to be the application.

It is argued that this would be to read into the statute words not found there. Let it be so. Nothing is more common. There are thousands of instances where it is necessary. It is allowed and enjoined by a familiar rule of interpretation. The objection, if it were one, would equally apply to the interpretation of the appellees. They read into the statute an event, namely, that of the issue of the American patent. Words must be read in upon either view. The question is, what words a proper construction requires to be supposed, or supplied.

(2) It is in conformity with reason and justice. That an applicant for an American patent who has satisfied every requirement of diligence and promptitude in making his application, and thus entitled himself to a patent for his invention for the full term of seventeen years, should be subjected, in consequence of something thereafter happening over which he has no control, to the penalty of having his patent abridged for a period, it may be, of many years, and even, as is possible, of losing it altogether, is repugnant to every sentiment of justice.

(3) It is in conformity with the general rationale of the law. Whether a man has a right to a particular grant or legal remedy should depend, as it generally, if not always, is made to depend, upon the state of things existing at the time he applies for it. *Planing Machine Co.* v. *Keith*, 101 U. S. 479; *Root* v. *Ball*, 4 MacLean, 179.

(4) It is in conformity with the prior law established for more than thirty years prior to the time of the asserted change.

(5) It is in conformity with a wise and settled policy of the government, which seeks to encourage the taking out of foreign patents, both for the benefit of the inventor and of the public, in the only way in which that step can be promoted,

namely, by removing every disadvantage or obstruction which may deter the inventor from taking that course.

(6) It is the only interpretation consistent with the policy, real or supposed, to put foreign industries under royalties, because the opposite construction directly and strongly discourages Americans, who are the chief inventors, from ever patenting abroad.

(7) It provides a just discrimination against those who would seek to make an improper use of the privilege extended by wilful delay in accepting it; and in this respect it exactly copies and continues the sole purpose and policy of all previous legislation on the subject of curtailment.

(8) It is in conformity with the fundamental rule which governs the interpretation of revising statutes, and which enjoins that the prior law be deemed to have been continued by the revision, notwithstanding changes of language, unless it appear affirmatively that there was an intent to change it.

(9) It is in harmony with that prime rule of interpretation which enjoins us to assign a meaning, if it be possible, to all the language which a legislature employs. We may not in all instances be able to give effect to every clause; but we should be able to account for its introduction. Says Mr. Justice Harlan in *Montclair* v. *Ramsdell*, 107 U. S. 147, 152: "It is the duty of the court to give effect, if possible, to every clause and word of a statute." See also Endlich on Statutory Interpretation, § 23. The interpretation of the appellees is inconsistent with this rule.

V. The patent system creates or gives rise to contract relations between the government and the patentee, which are of its very gist and substance.

(1) The patent act offers a reward to those who will supply the public with new inventions. A patent is not intended as simply a recognition of merit or of virtue. It is the price which the public pays for the greater benefit it derives from the invention, in the belief that the price offered will induce the creation of what it is offered for.

The statute contains the offer which, when accepted by an inventor, constitutes the promisor's part of that well-known

kind of contract which arises from the offer of a reward, and the act defines the two terms which are essential, to wit: what the inventor is to do in order to become entitled to the reward, and what the exact measure of the reward is.

The Revised Statutes, §§ 4886, 4888, enact that whoever makes a new invention, and brings an intelligible description of it to the public at its patent office, claiming the reward, shall obtain a patent. Section 4884 defines what this reward is. It is "a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The bare assertion of the inventor that he has earned the reward, of course cannot be unreservedly accepted. So section 4893 provides that "on the filing" of the description and claim, the promising party, that is, the public, will make an examination through its special agent; "and if, on such examination, it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor."

In contracts of this character (those initiated by the offer of a reward) the acceptance of the offer is made by the performance by the offeree of the consideration. It is this performance which converts the offer into a binding contract. Langdell's Law of Contracts, § 4. And, under the patent law, this performance is fully effected by the filing of the application, accompanied with the required fee. This is a delivery to the party offering the reward of the thing desired. Nothing remains but the duty of payment.

The right of the one party and the obligation of the other are fixed and completed. The privilege reserved to the promisor of an examination for the purpose of identification neither weakens the right nor the obligation. Indeed, as it postpones the day of payment, it imposes an additional obligation to make it as soon as practicable, and to make it in such a way that the making of it shall not diminish the value of the reward to the receiver, nor lighten its burden to the payer. See *Grant* v. *Raymond*, 6 Pet. 218.

(2) Not only does our patent law, by the very nature of its fundamental provisions, initiate a contract, but it contains special provisions which affirm the existence of contract relations. It affords the remedy of specific performance.

This was done to a certain extent by the act of 1836, and the privilege was by the act of March 3, 1859, § 10, conferred in terms substantially the same with those now embodied in § 4915 of the Revised Statutes. These steps, taken long before the act establishing the Court of Claims, were the first recognition of the justice of compelling the government to perform its own obligations where they possessed all the substantial elements of a contract.

(3) In all cases of rights resting in contract, there must be a time when such rights must be viewed as ripening into completion. This time, in the case of the obligation to issue a patent, is left in no manner of doubt. The plain sense of justice tells us that a man to whom an offer of a reward is made for giving, or doing, a particular thing, is entitled to the reward the moment he has done it; and this, in the case of an inventor, is when he describes and discloses his secret to the government. Nothing remains but to pay him. Some time, indeed, may be requisite and some labor, perhaps much time and much labor, to identify the thing and make sure that it conforms to the terms of the offer; but, as already observed, this neither weakens nor postpones the obligation, but rather adds to it another, that it be done as speedily as possible.

VI. The whole argument in support of the interpretation of the defendants finally reduces itself to this, that at the first reading "first patented" and "previously patented" more naturally and logically relate to the time of the issue of the foreign patent. Let it be so. It is safe to say that this argument has never been allowed to prevail, particularly in the case of revising statutes, where either reason, or justice, or the policy of the law, or the history of prior legislation on the same subject, has justified a well-grounded doubt whether such *prima facie* interpretation was correct. To press such an interpretation when *all* these considerations concur in rejecting it is to set reason at defiance.

(1) Such a rule of construction would wipe out of existence nearly the whole of the law of interpretation. We should indeed have much less law to study, but both the laws which men pass and the agreements they make would become, in large measure, unintelligible absurdities. The principal mass of our rules of interpretation is framed upon a recognition of the fact that *prima facie*, first-blush interpretation would throw both the public and the private affairs of men into inextricable confusion.

(2) Such a rule has never been acted upon. Text writers and judges alike always enjoin in any doubtful case a resort to reason, to justice, to policy, to the antecedent, and surrounding circumstances. Human language, though the best, is by no means a perfect exponent of thought, even when used by the clearest and most skilful minds; as employed by ordinary men, it is full of imperfections. Mankind can never be taught to use language with perfect accuracy by simply subjecting them to inconveniences. That failures in clearness of expression will forever take place must be accepted as a fact, and it is one of the highest functions of the judicial office to ascertain the true meaning of the language actually employed by bringing to bear on it those *other* lights and guides which are to be found outside of the language. *United States* v. *Kirby*, 7 Wall. 482; *United States* v. *Babbit*, 1 Black, 55; *Wilson* v. *Rousseau*, 4 How. 646; *Bloomer* v. *McQuewan*, 14 How. 539; *Paper Bag Cases*, 105 U. S. 766; *Siemens* v. *Sellers*, 123 U. S. 276; *Nash* v. *Towne*, 5 Wall. 689; *Mobile & Montgomery Railway* v. *Jurey*, 111 U. S. 584; *Canal Co.* v. *Hill*, 15 Wall. 94.

(3) An acceptance by this court of the defendants' rule of interpretation would be a *reversal* of the method it has uniformly adopted in the construction and administration of the patent law from the time when it was first called upon to construe it to the present hour. The court has from the first proceeded upon the view that the main object of Congress was to promote the progress of the useful arts by promising a sure and certain reward to inventors, and in keeping that promise. The language which Congress has employed to carry out this

design has often been obscure, contradictory or otherwise ill-adapted. The court, without violating settled principles of interpretation, has construed the language employed very freely to the end that the object should be secured. Its successive interpretations have been followed and adopted by Congress by the introduction of amendments, and the system is thus in a large degree the creation of the court.

(4) But the most pointed support, both of the *rule* of interpretation insisted upon in this brief, and of its application to the precise case under discussion, is to be found in some recent English adjudications. *In re Johnson's Patent*, 13 Ch. D. 398; *Holste* v. *Robertson*, 4 Ch. D. 9.

VII. The appellees seek to show there is a large assent to their view among the officers of the Patent Office and Judges of the Circuit Courts. If this really existed it would go not very far to support their contention; but it does not. Instead of general concurrence, doubt and dissent are everywhere exhibited.

Mr. Justice Harlan delivered the opinion of the court.

This case is before us upon a certificate made under the sixth section of the act of March 3, 1891, 26 Stat. 826, c. 517, providing that a Circuit Court of Appeals may in any case of which it has appellate jurisdiction certify questions or propositions of law for the proper decision of which it desires the instruction of this court.

On the first day of December, 1876, John J. Bate made application to the United States for letters patent for an improvement in processes for preserving meats during storage and transportation.

Pending this application two foreign patents were granted for the Bate invention; one, for the term of fourteen years, by the British government to William Robert Blake, on a communication from Bate under date of January 29, 1877, which patent was sealed July 13, 1877, and the complete specifications of which were filed July 26, 1877; the other, for

the term of five years, by the government of the Dominion of Canada to Bate himself under date of January 9, 1877.

After these foreign patents were issued, namely, on the 20th day of November, 1877, Bate received a patent from the United States, expressed to be for the term of seventeen years, and assigned it to the Bate Refrigerating Company, the plaintiff in this suit.

The present suit was brought by that company, July 25, 1892, for an injunction against the infringement of the American patent, as well as for an accounting. It was heard in the Circuit Court on pleas to the bill, and a decree was passed dismissing the suit. From that decree an appeal was taken to the Circuit Court of Appeals.

Both foreign patents for the Bate invention having expired before the expiration of the seventeen years specified in the United States patent, the following questions arose in and have been certified by the Circuit Court of Appeals: Whether the invention for which the patent from the United States was issued had been "previously patented in a foreign country," within the meaning of those words in section 4887 of the Revised Statutes; and whether the American patent expired under the terms of that section before the expiration of seventeen years from its date.

The Revised Statutes of the United States provide that any person inventing or discovering any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, "not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned," may obtain a patent therefor, which shall contain a grant of the exclusive right for the term of seventeen years to make, use, and vend such invention or discovery throughout the United States and the Territories thereof, and bear date as of a day not later than six months from the time at which it was passed and allowed and notice thereof sent to the applicant or his agent. §§ 4884, 4885, 4886.

Opinion of the Court.

By section 4887 it is provided that "no person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been *first patented* or caused to be *patented* in a foreign country, unless the same has been introduced into public use in the United States more than two years prior to the application. But every patent granted for an invention which has been *previously patented* in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

Other sections prescribe what the application for a patent shall contain, the nature of the oath or affirmation to be made by the applicant, and the time within which an application shall be completed and prepared for examination. §§ 4888, 4892, 4894.

The plaintiff insists than an invention patented or caused to be patented in a foreign country, before being patented in this country, should not be deemed to have been "previously patented in a foreign country," within the meaning of section 4887, unless the foreign patent was granted *prior* to the *application* for the American patent.

The defendants contend that the respective dates of the American and foreign *patents*, and not the date of the American application, determine the question whether an invention, patented here, has been "previously patented in a foreign country."

Counsel for the respective parties have deemed it necessary to refer very fully to the principal statutes relating to patents for inventions. In our consideration of the case the same method will be pursued — reserving any observations we may make upon the words of particular acts until we shall have given an outline of the history of such legislation by Congress as is supposed to bear upon the questions certified.

The first act of Congress passed under the authority given by the Constitution to promote the progress of science and useful arts, by securing for limited times to authors and in-

ventors the exclusive right to their respective writings and discoveries, was approved April 10, 1790, c. 7, 1 Stat. 109. The persons to whom, under that act, patents could be issued, were those inventing or discovering any useful art, manufacture, engine, machine or device, or any improvement therein "not before known or used." The applicant was required, at the time the patent was granted, to deliver to the Secretary of State such specification in writing containing a description of the invention or discovery — accompanied, when necessary, with drafts or models, and explanations of the thing invented or discovered — as would distinguish the invention or discovery from other things "before known and used," and enable one skilled in the art or manufacture to make, construct, or use the same, "to the end that the public may have the full benefit thereof after the expiration of the patent term." §§ 1, 2.

The act of February 21, 1793, c. 11, which took the place of the act of 1790, made no material change except to restrict the right to a patent to citizens of the United States, and to provide that the invention or discovery sought to be patented should be one "not known or used before the application." 1 Stat. 318. In *Pennock* v. *Dialogue*, 2 Pet. 1, 19, 21, Mr. Justice Story, speaking for the court, said that the addition made by the act of 1793 of the words "before the application," after the words "not known or used" in the act of 1790, was made *ex industria* with the intention "to clear away a doubt, and fix the original and deliberate meaning of the legislature," which was that the invention should be one not known or used by the public before the application.

Then came the act of April 17, 1800, c. 25, which extended the provisions of the act of 1793 to all aliens residing for two years in the United States, and who should make oath or affirmation that the invention, art, or discovery for which a patent was asked, had not "been known or used either in this or any foreign country." That act further provided that any patent for an invention, art, or discovery, subsequently found to have been "known or used previous to such application for a patent," should be void. 2 Stat. 37.

Opinion of the Court.

The provisions of the act of 1800 were extended by the act of July 13, 1832, c. 203, to every alien who, at the time of petitioning for a patent, was a resident of this country and had declared his intention, according to law, of becoming a citizen of the United States. But every patent granted under the latter act was to become void if the patentee failed for one year after its date to introduce into public use in the United States the invention or improvement for which his patent was issued, or in case the invention or improvement should, for any period of six months after such introduction, not continue to be publicly used and applied in the United States, or in case of his failure to become a citizen of the United States at the earliest period within which he could become such citizen. 4 Stat. 577.

On the 4th day of July, 1836, Congress passed an act entitled "An act to promote the progress of useful arts, and to repeal all acts and parts of acts heretofore made for that purpose." 5 Stat. 117, c. 357.

By the fifth section of that act it was provided that every patent should be for a term of fourteen years.

The sixth section described those entitled to receive patents, namely, "any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement in any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer."

The seventh section prescribed an examination of the alleged new invention or discovery, and provided: "If, on any such examination, it shall not appear to the Commissioner that the same had been invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country, or had been in public use or on sale, with the applicant's consent or allowance prior to the application, if

the Commissioner shall deem it to be sufficiently useful and important, it shall be his duty to issue a patent therefor. But whenever, on such examination, it shall appear to the Commissioner that the applicant was not the original and first inventor or discoverer thereof, or that any part of that which is claimed as new had before been invented or discovered, or patented, or described in any printed publication in use in this or any foreign country, as aforesaid, or that the description is defective and insufficient, he shall notify the applicant thereof, giving him, briefly, such information and references as may be useful in judging of the propriety of renewing his application, or of altering his specification to embrace only that part of the invention or discovery which is new."

The eighth section, after providing for the hearing and decision of opposing claims of priority of right or invention, declared:

"But nothing in this act contained shall be construed to deprive an original and true inventor of the right to a patent for his invention by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published, at any time within six months next preceding the filing of his specification and drawings. And whenever the applicant shall request it, the patent shall take date from the time of the filing of the specification and drawings, not, however, exceeding six months prior to the actual issuing of the patent; and on like request, and the payment of the duty herein required, by any applicant, his specification and drawings shall be filed in the secret archives of the office until he shall furnish the model and the patent be issued, not exceeding the term of one year, the applicant being entitled to notice of interfering applications." 5 Stat. 120.

We come next to the act of March 3, 1839, c. 88, entitled "An act in addition to 'An act to promote the progress of the useful arts.'" 5 Stat. 353. By § 6 of that act, p. 354, it was declared —

"That no person shall be debarred from receiving a patent for any invention or discovery, as provided in the act approved on the fourth day of July, one thousand eight hundred and

thirty-six, to which this is additional, by reason of the same having been patented in a foreign country more than six months prior to his application: *Provided*, That the same shall not have been introduced into public and common use in the United States, prior to the application for such patent: *And provided, also*, That in all cases every such patent shall be limited to the term of fourteen years from the date or publication of such foreign letters patent."

By the act of March 2, 1861, c. 88, it was provided that all patents thereafter granted should remain in force "for the term of seventeen years from the date of issue," and all extensions of such patents were prohibited. 12 Stat. 246, c. 88, § 16.

By an act approved June 27, 1866, c. 140, 14 Stat. 74, provision was made for the appointment of three persons learned in the law as commissioners, "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature," which should be in force at the time of their final report. They were directed to "bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text; and they shall arrange the same under titles, chapters, and sections, or other suitable divisions and subdivisions, with head-notes briefly expressive of the matter contained in such divisions; also with side-notes, so drawn as to point to the contents of the text, and with references to the original text from which each section is compiled, and to the decisions of the Federal courts, explaining or expounding the same, and also to such decisions of the state courts as they may deem expedient; and they shall provide by a temporary index, or other expedient means, for an easy reference to every portion of their report." Upon the completion of their work they were to "cause a copy of the same, in print, to be submitted to Congress, that the statutes so revised and consolidated may be reënacted, if Congress shall so determine; and at the same time they shall also suggest to Congress such contradictions, omissions, and imperfec-

tions as may appear in the original text, with the mode in which they have reconciled, supplied, and amended the same; and they may also designate such statutes or parts of statutes as, in their judgment, ought to be repealed, with their reasons for such repeal." They were authorized to cause their work to be printed in parts as fast as it was ready for the press, and distribute the same to members of Congress and to such other persons in limited numbers as they saw fit, for the purpose of obtaining their suggestions. 14 Stat. 74, c. 140, §§ 1 to 4 inclusive.

One of the results of that statute was the passage by Congress of the act of July 8, 1870, c. 230, entitled "An act to revise, consolidate, and amend the statutes relating to patents and copyrights." 16 Stat. 198. The original bill, upon which that act was based, was the work of the revisers appointed under the above act of 1866.

The act of 1870 declared, among other things, that every patent should be expressed for the term of seventeen years, and should date as of a day not later than six months from the time at which it was passed and allowed. §§ 22, 23.

But the parts of that act which have most to do with the case before us are its 24th and 25th sections. The 24th section describes in the language of section 4886 of the Revised Statutes, as above quoted, those who are entitled to patents. The 25th section is in these words:

"§ 25. That no person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country: *provided*, the same shall not have been introduced into public use in the United States for more than two years prior to the application, and that the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years." 16 Stat. 198, 201, c. 230.

From this history of acts of Congress relating to patents for inventions, it appears —

1. That in all of them Congress had in mind the date of an

application for a patent, the date of the filing of specifications, and the date of the patent.

2. That, under the act of 1836, a patent could not be granted if it appeared that the applicant was not the original and first inventor or discoverer, or that any part of that which was claimed as new had before been invented or discovered, or patented or described in any foreign publication in use in this or any foreign country; yet, an original and true inventor was not to be deprived of a patent for his invention "by reason of his having previously taken out letters patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawings."

3. That, under the act of 1839, an inventor, whose invention had not been introduced into public and common use in the United States prior to the application for a patent, should not be debarred from receiving a patent, by reason of his invention "having been patented in a foreign country *more than six months prior to his application.*"

4. That, under the act of 1870, one whose invention had not been introduced into public use in the United States for more than two years prior to the application for an American patent, should not be debarred from receiving a patent by reason of his invention "having been first patented or caused to be patented in a foreign country" — those words not being qualified, as in the act of 1839, by any reference to the date of the application.

5. That when an American patent was granted, in conformity with the sixth section of the act of 1839, for an invention "patented in a foreign country more than six months prior to the American application," it expired, in every case, at the end of fourteen years "from the date or publication of such foreign letters patent;" and when, in conformity with the twenty-fifth section of the act of 1870, a patent was granted for an invention "first patented or caused to be patented in a foreign country," it expired "at the same time with the foreign patent," or, if there were more than one, "at the same time with the one having the shortest term."

6. That, under the Revised Statutes, while a patent could not be withheld nor deemed invalid by reason of the invention "having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States more than two years prior to the application," yet "every patent granted for an invention previously patented in a foreign country shall be so limited as to expire at the same time" with the one having the shortest term — in no case to remain in force longer than seventeen years.

Notwithstanding the difference in the wording of these statutes, the plaintiff contends that the words, in the act of 1870, "first patented or caused to be patented in a foreign country," and the same words, together with the words "previously patented in a foreign country" in the Revised Statutes, refer to a foreign patent issued prior to the application for the American patent, and do not embrace a foreign patent issued after such application although issued before the American patent was issued. In other words, the contention is that when the same invention is patented both in this country and abroad, the American patent remains in force for seventeen years from its date if the foreign patent was issued after the application for, although prior to the date of, the American patent.

What was the interpretation placed upon the act of 1870 by the executive branch of the government?

The objects and scope of that act were considered by Mr. Fisher, the Commissioner of Patents, in several cases within a few months after the passage of the act of 1870. The decisions of the Commissioner derive some importance from the fact that they were rendered while the changes made by the act of 1870 were fresh in the minds of those who, like himself, took special interest in legislation affecting patent rights.

In *Mushet's case*, decided September 19, 1870, the question was as to the extension of letters patent for an improvement in the manufacture of iron and steel, granted May 26, 1857, and antedated September 2, 1856. The Commissioner, referring to the twenty-fifth section of the act of 1870, said:

"When, therefore, the statute declares that the patent shall expire at the same time with the foreign patent, I am very clearly of the opinion, that if, at the expiration of the original term, it appears that the foreign patent has already expired, no prolongation of the term of the American patent can be permitted. This is in accordance with the letter and spirit of the enactment. The intention of Congress obviously was to obtain for this country the free use of the inventions of foreigners as soon as they became free abroad. This is indicated by the use of the phrase 'first patented or caused to be patented in a foreign country,' for it was presumable that American citizens would obtain their first patent here, while a foreigner would first patent his invention in his own country. The statute was designed to prevent a foreigner from spending his time and capital in the development of an invention in his own country, and then coming to this to enjoy a further monopoly when the invention had become free at home. The result of such a course would be, that, while the foreign country was developing the invention and enjoying its benefits, its use could be interdicted here, while if the term of the monopoly could be further extended here, the market could be controlled long after the foreign nation was prepared to flood this country with the unpatented products of the patented process. It appears in this case that under the Bessemer patents, assisted by the Mushet process, English manufacturers have been enabled to send to this country 100,000 tons of steel railroad iron, against 10,000 tons manufactured here. If, now, when both patents are free to all English manufacturers, the American manufacturer must pay a royalty for those inventions, he is immediately placed at a disadvantage as compared with his foreign competitor, and this by the act of the patentee, either in neglecting to obtain that extension abroad, for which he sues in this country, or by devoting his time during the original term to the development of the invention abroad to the neglect of the American field." Com. Dec. (1870) 106, 108.

A like ruling was made October 6, 1870, in the *case of Ward,* an American inventor. Com. Dec. (1870) 126.

In *Boyer's case*, decided October 25, 1870, which was an application for the extension of letters patent granted November 4, 1856, to one Evans, for an improvement in spading machines, it appears that Evans obtained letters patent in England, dated December 17, 1855, sealed May 27, 1856, and which expired December 17, 1869. The Commissioner, referring to section 25 of the act of 1870, said: "In the case of Mushet it was a foreign inventor, and in the case of Ward an American inventor, who were seeking the extension; but in both cases letters patent were first obtained in the foreign country. . . . I was, and am, of the opinion that the policy which Congress plainly declares in this section is that if a foreigner obtains a patent in his own country, and permits it to expire there, it shall also expire in this country, so that the right to use the invention without liability to the inventor shall be simultaneous in this and in the most favored foreign nation. Therefore, while I held that the section did not shorten the term of patents already granted, I also held that it did prevent the extension of such patents when the original term expired. It would, I conceive, be a manifest impropriety to grant to a patentee seven additional years of protection, when the fact has been brought home to me that he first patented his invention abroad, and that his foreign patent has expired. Whether the section in question does or does not actually forbid the extension, it so clearly declares that the American patent shall not survive the death of the prior foreign patent that a decent respect for the declared policy of the legislature would determine an officer, while exercising his discretion, to exercise it in accordance with that policy, and not in opposition to it. It is urged, however, that Congress intended only to reach the case of the foreign inventor who first patented his invention in his own country, and that they did not intend to put the American inventor, who obtained a patent abroad, in a worse position than if he had obtained no patent at all in a foreign country. It is said, with much force, that if the American patentee had not obtained an English or French patent the invention would be free in those countries, even during the lifetime of his original patent, and that the fact

that it was free there would be no bar to the grant of an extension. This may be true, but we have no means of judging of the intention of Congress in this case except by the language employed in the declaration of their will. The language of the statute is, 'first patented, or caused to be patented, in a foreign country.' This, by its terms, includes American citizens as well as foreigners who *first* take out a patent abroad. The term 'patented' may well be construed as applying to foreigners obtaining patents in their own country, and the phrase, 'caused to be patented,' to such persons, not citizens of the same country, including Americans, as should cause their inventions to be introduced or patented there. It does not include either foreigners or citizens who first obtain their patents in this country. It was supposed that American inventors would first obtain their patents here, in which case they would not have been within the terms of the section; but if, on the other hand, they choose to obtain patents abroad before doing so in their own country, they were to be placed upon the same platform as the foreign patentee. It is reasonable to suppose that the inventor will follow up his earliest patent with the greatest vigor, and that, other things being equal, he will protect his invention first in that country where he expects to make most use of it. If, therefore, the American inventor chooses to exhibit this preference for a foreign country and to give them the first information respecting his invention, and the earliest opportunity of using it, the law makes no distinction between him and the foreign inventor who obtains his first patent at home." Com. Dec. 1870, pp. 130, 131.

In the *case of Smith and Skinner*, decided October 26, 1870, the Commissioner said: "In the cases of Ward and Boyer I held that the grant of a foreign patent before the issue of an American patent was fatal to the application for the extension of the American patent if the foreign patent expired before the original term of the patent sought to be extended. It is immaterial whether the American patent was applied for before the foreign patent or not. This was important under the first laws, but no such distinction exists under the act of

1870. This invention was patented in England, France, and Belgium on October 17, 1856, prior to the grant of the American patent, and the English patent had already expired. This point is fatal to the present application." Com. Dec. 1870, p. 131.

We have not been referred to any ruling of the Patent Office, after the passage of the act of 1870, in conflict with or different from that of Commissioner Fisher, except one made by Commissioner Paine in 1880. But in reference to the latter ruling and the construction of the act of 1870 under which the Commissioner of Patents had uniformly proceeded, Commissioner Marble, in a letter to the Secretary of the Interior, under date of March 17, 1882, said: "As will be seen by Col. Mason's communication, the construction now put upon the statute is the construction which it has received since it was enacted, except during a short interval of the term of my predecessor, Mr. Commissioner Paine. I may state, however, that Mr. Commissioner Paine addressed to me a letter within one month after he had retired from office, stating that he believed his construction of section 4887 was erroneous."

It is appropriate now to inquire as to the course of judicial decision upon the question before this court.

That question was directly presented in *Bate Refrigerating Co.* v. *Gillett*, 13 Fed. Rep. 553, 555, which case related to the patent here involved. Bate's application in Canada having been made *after* his application in this country, and the Canadian patent having been issued before the American patent was issued, the principal question was whether the invention was *patented* in Canada previous to the issuing of the patent in the United States in the sense in which the words "previously patented" were used in section 4887 of the Revised Statutes.

Referring to that section, Judge Nixon said: "The phraseology here used materially differs from the previous legislation on the subject. The power of the Commissioner of Patents is defined and abridged. Where a foreign patent has been granted for the same subject-matter, he is expressly required to limit the term of the domestic patent to the period of time

that the foreign patent has to run; or, if there be more than one, then to make it expire at the same time with the one having the shortest term. We do not see how any language could have been employed that would more clearly express the legislative design that the life of the domestic patent should expire with the term of any outstanding foreign patent. But the counsel for the complainant contended on the argument that the present case did not fall within the limitation of the statute because the application for the United States patent was filed antecedent to the application for or the grant of the Canadian patent. We are at a loss to understand what the time of filing the application for the patent has to do with the matter. It is true that the eighth section of the act of 1836 and the sixth section of the act of 1839 made the date of filing the specifications and drawings in the one case and the date of the application for the home patent in the other the point of time from which to reckon the six months intervening between the issue of the foreign and domestic patent. It is also true that by section 4886, and the first clause of section 4887, of the Revised Statutes, an inventor is required to file an application for his patent within two years after his invention or discovery has been in public use or on sale, from all of which the late Commissioner of Patents (Paine) was led to the opinion that the word 'previously' used in the last clause of section 4887 had reference to the time prior to the filing of the application rather than to the time prior to the granting of the patent. See 17 O. G. 330. But this seems to be wresting the language of the section from its plain and obvious meaning, and we are not able to follow the reasoning by which such an interpretation is reached."

This decision was followed in *Gramme Electrical Co.* v. *Arnoux &c. Electric Co.*, (1883) 17 Fed. Rep. 838, 840, which turned upon the construction of section 25 of the act of 1870. One of the questions in that case was whether an American patent dated October 17, 1871, and the application for which was made August 17, 1870, was limited as to its term by the term of an Austrian patent issued *after* the American *application* was made, but before the American patent was issued.

Mr. Justice Blatchford, referring to section 25 of the act of 1870, said: "It is contended that under the foregoing provisions [patent] No. 120,057 expired either on December 30, 1871, or on December 30, 1880, the date of the expiration of the Austrian patent, accordingly as that patent is to be regarded as a patent for one year or for ten years. To this the plaintiff replies that the application for No. 120,057 was filed before the application for the Austrian patent was filed. But the date of the application for No. 120,057 cannot affect the question. Under the act of 1870 a patent takes effect from the time when it is granted and cannot be antedated. The meaning of section 25 of the act of 1870 is that the United States patent shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the United States patent was granted, and not that it shall expire at the same time with the foreign patent having the shortest time to run, which was granted before the time when the application for the United States patent was made. *Bate Refrigerating Co.* v. *Gillett*, 13 Fed. Rep. 553."

There is nothing in the opinion delivered by Mr. Justice Blatchford which, in our judgment, justifies the suggestion that he felt constrained by principles of comity to follow the decision of Judge Nixon without considering the question upon its merits. He seems to have expressed his mature judgment as to the scope and meaning of the act of 1870.

The case of *Bate* v. *Gillett* came before Mr. Justice Bradley at the circuit in 1887, and what he said is reported in 31 Fed. Rep. 809. Referring to the construction given by Judge Nixon to section 4887, he observed that if the question were an open one he would have some hesitation, as it was one of considerable doubt. Expressly stating that he had not come to any decided conclusion on the subject, he declined, while sitting at the circuit, to modify the decision of Judge Nixon, and gave to it full effect. This court would undoubtedly attach great value to the deliberate judgment of Mr. Justice Bradley upon the question now before it — indeed, upon any question.

In *Edison Electric Light Co.* v. *U. S. Electric Lighting Co.*, (1888) 35 Fed. Rep. 134, 137, 138, the subject was carefully considered by Judge Wallace. In that case, which was a suit for the infringement of a patent, he said, after quoting section 4887: "The real inquiry is whether the section limits the term of a domestic patent to the term of a foreign patent when the application for the foreign patent is not made until subsequent to the application in this country, but the foreign patent issues before the domestic patent. If it were proper to treat this question as an original one, it would be necessary first to inquire whether there is any ambiguity in the language of the statute. If there is not, the duty of the court is to give effect to its obvious meaning, notwithstanding it may be thought to make an unreasonable and harsh innovation upon the preëxisting privileges of our own inventors. It is not only the safer course to adhere to the words of a statute, construed in their ordinary import, instead of entering into any inquiry as to the supposed intention of Congress, but it is the imperative duty of the court to do so. Where the meaning of the Revised Statutes is plain the court cannot look to the sources of the revision to ascertain whether errors have or have not been committed by the revisers. *United States* v. *Bowen*, 100 U. S. 508. There is no practical difference in the phraseology of section 4887 and that of section 25 of the act of July 8, 1870, from which the section is reproduced." Referring to the above cases at the circuit, he remarked that the question should not be considered as an original one.

In *Bate Co.* v. *Hammond*, 35 Fed. Rep. 151, Judge Colt followed the decision in *Bate Co.* v. *Gillett.* And a like ruling was made by Judge Coxe in *Accumulator Co.* v. *Julien Electrical Co.*, 57 Fed. Rep. 605.

In view of this history of the question presented by the certificate of the Circuit Court of Appeals, what is the duty of this court? In *Andrews* v. *Hovey*, 124 U. S. 694, 717, it was said that the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass judgment upon the

question. "Nor," the court further said, "is this a case for the application of the doctrine that, in cases of ambiguity, the practice adopted by an executive department of the government in interpreting and administering a statute is to be taken as some evidence of its proper construction. The question before us as to the validity of a patent, by reason of pre-existing acts or omissions of the inventor, of the character of those involved in the present case, is not a question of executive administration, but is properly a judicial question. Although it may be a question which, to some extent, may come under the cognizance of the Commissioner of Patents, in granting a patent, yet, like all the questions passed upon by him in granting a patent which are similar in character to the question here involved, his determination thereof, in granting a particular patent, has never been looked upon as concluding the determination of the courts in regard to those questions respecting such particular patent, and, *a fortiori*, respecting other patents." The appellant, therefore, properly insists that the determination of the present question shall not be deemed absolutely concluded either by the practice that has obtained in the Patent Office since the passage of the act of 1870 nor by decisions in the inferior courts of the United States.

If section 4887 of the Revised Statutes is so worded as to express clearly the intention of Congress, the court must give effect to that intention. But even if the statute be not so explicit as to preclude construction; if upon applying to it the established rules of interpretation; if looking at it in the light of previous legislation on the subject; if there be reasonable ground for adopting either one of two constructions; this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of the government, and with the course of judicial decisions in the Circuit Courts of the United States; especially, if there be reason to suppose that vast interests may have grown up under that practice and under judicial decisions, which may be disturbed or destroyed by the announcement of a different rule.

Opinion of the Court.

Looking at the words of the statutes referred to, neither unduly enlarging nor unduly restricting their meaning, we are of opinion that Congress intended by the twenty-fifth section of the act of 1870, preserved in section 4887 of the Revised Statutes, to introduce a new test in respect of the term of an American patent where the same invention was the subject of a foreign patent previously issued. It has already been observed that the statutes relating to patents show upon their face that Congress always had in mind the difference between an application for a patent and the patent itself. And that difference is apparent in the act of 1870. We find there the words "application," "patent," "patented," "first patented," and "caused to be patented."

The inventor whom the act of 1839 was designed to protect was one whose invention had not been introduced into public and common use in the United States prior to his application for an American patent, and which had been "patented in a foreign country more than six months prior to his application." In reference to an American patent, granted under those circumstances, that act expressly declared that it should be limited to fourteen years — not, let it be observed, from the date of the American patent, but from the date or publication of the foreign letters patent.

The act of 1870 provided for the case of an inventor whose invention had not been introduced into public use in the United States for more than two years prior to his application, but which had been "*first patented* or caused to be *patented* in a foreign country." In such a case, that statute expressly provided that the American patent should expire with the foreign patent having the shortest term to run.

The case provided for by section 4887 of the Revised Statutes is the same as that provided for by the twenty-fifth section of the act of 1870, and the words "first patented or caused to be patented in a foreign country" in the first clause of that section are emphasized by the words in the succeeding clause, "previously patented" in a foreign country.

We cannot superadd, in section 4887 of the Revised Stat-

utes, the words "prior to the application" either after the words "first patented or caused to be patented in a foreign country," or after the words "previously patented in a foreign country," without defeating the intention of Congress as manifested by the language it selected to indicate its purpose. And the express command of the existing statute is that every American patent for an invention "previously patented in a foreign country," that is, "first patented or caused to be patented in a foreign country," shall expire at the same time with the foreign patent. No words are used that will justify the court in holding that an invention *patented* in a foreign country before being *patented* here, is to be exempt from the operation of the provision limiting the term of the American patent to expire with the foreign patent.

Was the Bate invention patented abroad before it was patented in this country? If so, the American patent expired with the foreign patent, and thereby the American public became entitled to use the invention from the time the foreign public were permitted to use it. Congress, in effect, by the existing law, says to an inventor seeking to enjoy the exclusive use in this country of his invention for the full term prescribed by law: "If your invention has not been introduced into public use in the United States for more than two years, you may, upon complying with the conditions prescribed, obtain an American patent, and you may, if you can, obtain a foreign patent. But the American patent will be granted on the condition that if you obtain the foreign patent first, your invention shall be free to the American people whenever by reason of the expiration of the foreign patent it becomes free to people abroad; but in no case shall the term of the American patent exceed seventeen years." This we deem to be a sound interpretation of the statute, giving to the words used the meaning required by their ordinary signification.

In our judgment the language used is so plain and unambiguous that a refusal to recognize its natural, obvious meaning would be justly regarded as indicating a purpose to change

the law by judicial action based upon some supposed policy of Congress. But, as declared in *Hadden* v. *Collector*, 5 Wall. 107, 111, "what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes." "Where the language of the act is explicit," this court has said, "there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. . . . It is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions." *Scott* v. *Reid*, 10 Pet. 524, 527.

Undoubtedly the court, when endeavoring to ascertain the intention of the legislature, may be justified, in some circumstances, in giving weight to considerations of injustice or inconvenience that may arise from a particular construction of a statute. *Wilson* v. *Rousseau*, 4 How. 646, 680; *Bloomer* v. *McQuewan*, 14 How. 539, 553; *Blake* v. *Nat. Banks*, 23 Wall. 307, 320; *United States* v. *Kirby*, 7 Wall. 482, 486. It is, therefore, said that the time ordinarily intervening in other countries between the filing of an application and the granting of a patent is very short in comparison with the time ordinarily consumed in this country in obtaining a patent after the inventor has filed his application in the Patent Office, and, consequently, the statute — if construed as we have indicated its words reasonably require — might operate to the injury of an American inventor in that he will be deprived of so much of the statutory term of his American patent as will be in excess of the term of any foreign patent previously obtained for the same invention. If the statute thus construed does not give to the inventor all the benefits he would like to have, the remedy is with another department of the government, and it is not for the courts to tamper with the words of a statute or, by a strained construction of

legislative enactments, the language of which is clear and explicit, to accomplish results not contemplated by Congress. This court, speaking by Chief Justice Marshall, in *United States* v. *Fisher*, 2 Cranch, 358, 385, said that where the meaning of the legislature was plain "it must be obeyed."

Besides, the principle that limits an American patent to expire with a previous foreign patent covering the same invention was not first introduced by the act of 1870. It appears in the act of 1839; for it is there expressly declared that the American patent which the inventor shall not be debarred from receiving by reason of the invention having been patented in a foreign country more than six months prior to his application in this country, "shall be limited to fourteen years from the date of publication of such foreign letters-patent." While that act was in force the term prescribed for an American patent was fourteen years. And yet, according to its provisions, that time — if the inventor had a foreign patent antedating his American application by more than six months — was to be computed, not from the date of the American patent, but *from the date or publication of the foreign patent.* That principle is preserved in the existing law; for, under the Revised Statutes, as under the act of 1870, if there be an American patent for an invention previously patented abroad, the former expires, not, it is true, at the expiration of any given number of years, as under the act of 1839, but at the time the foreign patent expires.

It is also said that the United States promised the inventor, when making his application, to give him a patent for the full term of seventeen years from the date of his patent, if, upon examination, it was found that he was entitled to one *at the time of such application;* and, consequently, that a curtailment of that term by reason of something occurring after the filing of the application, and for which he may not be responsible, is inconsistent with good faith upon the part of the government. Of course, this court would hesitate to accept any construction of an act of Congress that would imply bad faith upon the part of the government. But the contention just referred to assumes the very matter in dispute. It assumes

that the promise to the inventor was not accompanied by conditions authorizing the government to limit the term of its patent to some period less than seventeen years from its date. But if the promise to issue a patent is made with the reservation in the statute containing the promise that the patent, when issued, shall be limited to expire with any foreign patent previously issued for the same invention, then there is no basis for the suggestion that the enforcement of that condition violates any promise made to the inventor.

Another suggestion in behalf of the plaintiff is that in the case of a revision of statutes neither changes of phraseology nor a different arrangement of clauses in themselves show an intention to change or alter the existing law; that the new law should be held to mean what the prior law meant, unless a purpose to change or alter is manifested by clear, unambiguous language; and that, in the interpretation of any particular part of a revision, resort may be had to the previous law on the subject, whenever the revisers have not, in explicit language, disclosed their meaning. The circumstances under which the courts may look at prior laws, for which a revision has been substituted, are stated in *United States* v. *Bowen*, 100 U. S. 508, 513. That case depended upon the construction to be placed upon certain sections of the Revised Statutes. Mr. Justice Miller, speaking for the court, said: "The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." This principle was reaffirmed in *Vietor* v. *Arthur*, 104 U. S. 498; *Deffeback* v. *Hawke*, 115 U. S. 392, 402; *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54, 57; *United States* v. *Lacher*, 134 U. S. 624, 627. For the reasons already stated, the principle announced in the cases just cited cannot avail the plaintiff if the existing statute is interpreted to mean what its words import according to their natural signification; for, the words used in sec-

tion 4887 of the Revised Statutes, as well as those in section 25 of the act of 1870, clearly evince the purpose of Congress to so curtail the term of an American patent (where the same invention is previously patented abroad) that it will expire at the time the foreign patent expires, even if the latter was applied for and granted after the filing of the American application but before the American patent issues.

But it is confidently asserted that the proceedings in Congress, relating to the bill which after numerous amendments became the act of 1870, show that Congress did not contemplate any such change in the law as is involved in the construction we have placed on the 25th section of that act.

It appears that the revisal of the statutes relating to patent and copyrights was reported to the House of Representatives by the commissioners appointed under the act of 1866, and was referred first to the House Committee on Revision of the Laws of the United States, and afterwards to the House Committee on Patents, of which Mr. Jenckes was chairman.

The different forms in which the section now in controversy appeared prior to the passage of, as well as in, the act of 1870 are thus indicated:

As reported by the Commissioners of Revision.	*As reported by the Committee on Patents.*	*As finally adopted.*
§ 25. No person shall be debarred from receiving a patent for his invention or discovery by reason of his having first patented it in a foreign country; *provided*, the same shall not have been introduced into public and common use in the United States prior to the application, and that the patent shall be limited to seventeen years from the date or pub-	§ 25. No person shall be debarred from receiving a patent for his invention or discovery by reason of his having first patented it in a foreign country; *provided*, the same shall not have been introduced into public use in the United States prior to the application, and that the patent shall expire at the same time with the foreign patent, or if there be more than	§ 25. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country; *provided*, the same shall not have been introduced into public use in the United States for more than two years prior to the application, and that

lication of the foreign patent.	one, at the same time with the one having the shortest term, but in no case shall be in force more than seventeen years.	the patent shall expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term; but in no case shall it be in force more than seventeen years.

Now, it is true that, according to the report in the Congressional Globe of the proceedings in the House of Representatives, Mr. Jenckes said, when reporting that bill from the Committee on Patents, that the report of the revisers had been examined by the House Committee on Revision of the Laws of the United States, and "found to embody all the provisions of existing law, in brief, clear, and precise language." Congr. Globe 41st Congr. 2d Sess. Part 3, vol. 90, p. 2679. And it is claimed that other observations made by Mr. Jenckes on the same occasion tend to show that, in his opinion, the bill as reported by the revisers did not change the prior law.

These considerations, it is supposed, should have controlling weight in our interpretation of the act as it finally passed. We cannot assent to this view. If the act of 1870 was nothing more than a revision or consolidation of previous statutes on the same subject, there would be much greater force in the plaintiff's contention than there appears to be. But that act made numerous changes in the previous statutes, some of them of considerable importance. The Congress that passed the act of 1870 was not restricted to mere revision or consolidation, even if the act of 1866 be construed as contemplating only the revision and consolidation of previous statutes without material change. But whatever may have been the scope of the act of 1866, the purpose, in the act of 1870, to go beyond revision and to amend the existing statutes, is manifest from the title of that act, and from the bill that came from the House Committee on Patents. When that bill, as it passed the House, reached the Senate, various amendments were made in that body. And upon the face of the act, as it finally passed, there are such altera-

tions of the prior law as to impose upon this court the responsibility of determining the effect of such alterations. We cannot accept as controlling, much less conclusive, the opinion of the House Committee on the Revision of the Laws of the United States, as reported by Mr. Jenckes, that the bill it reported embodied only the existing law. Nor can we assume that the House of Representatives, much less the Senate, based their action upon the opinion of individual members of the House as to the scope and legal effect of the report of the revisers. Comparing the bill reported by the revisers and the bill reported by the House Committee on Patents, with the act as it passed, we find it impossible to sustain the view taken by the plaintiff.

It is quite true, as the plaintiff contends, that Congress did not intend by the act of 1870 to upturn the entire policy of the government in reference to patents; but, beyond all question, its final action shows that it made and intended to make important amendments of existing laws.

The revisers, as well as the House Committee on Patents, proposed that it should be a condition of the protection of an American patent, where the same invention had been first patented in a foreign country, that the invention should not have been introduced into public use in the United States "prior to the application." The bill as it passed Congress made it a condition that the invention should not have been introduced into public use in this country "for more than two years prior to the application."

The revisers proposed that the patent should run seventeen years from the date or publication of the foreign patent; whereas, the House Committee on Patents proposed, and it was so declared in the act as passed, that the American patent should in no case be in force beyond seventeen years, and should "expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term."

The revisers, the House Committee on Patents, and Congress, all had in view the rights of the inventor at the time when he was to receive or be debarred from receiving a patent for his invention, and not his apparent rights at the date of his

application. Hence the words "by reason of the same having been patented in a foreign country *more than six months prior to his application*," as found in the act of 1839, were changed in the report of the revisers and in the report of the original bill presented by the House Committee on Patents, so as to read "by reason of his having first patented it in a foreign country."

We cannot adjudge that the words "more than six months prior to his application," in the act of 1839, were carelessly dropped, or that Congress did not have in mind the difference between a clause declaring that an inventor should not be debarred from receiving a patent for his invention "by reason of the same having been patented in a foreign country more than six months prior to his application," and a clause declaring that he should not be so debarred "by reason of its [the invention] having been first patented or caused to be patented in a foreign country." We have no authority to add to the clause last quoted the words "prior to his application." To do so would be to legislate, and not to interpret and give effect to the statute as passed by Congress.

Much has been said about the intention of Congress, as manifested by its legislation, to deal liberally with inventors, especially those who were citizens of the United States. This is true. But it is for Congress to prescribe the conditions upon which it will secure to inventors the exclusive right to their inventions. What may be due to inventors is a matter about which there may well exist differences of opinion. It is the province of the legislative branch of the government to say when a patent to an inventor shall expire, and, therefore, when the public may enjoy, without charge, the benefit of the invention covered by it. We can very well understand how the existing statute may, in some circumstances, operate injuriously to an American inventor who, in addition to the exclusive rights granted to him in this country for the term of seventeen years, wishes to secure a monopoly for his invention in other countries; for, if he obtains foreign patents for his invention before obtaining one here, the American patent is limited by law, whether it is so expressed or not in the patent itself,

to expire with the foreign patent having the shortest term. This is the case as it appears from the standpoint of the patentee, without regard to the interests of the American public.

But it is to be remembered — at least it may be assumed that Congress was advised — that action by the Patent Office upon applications for patents was often unduly and purposely delayed by applicants until they could reap the full benefit of the monopoly obtained by them in foreign countries before taking out an American patent. "In the meantime," the Commissioner of Patents, in his annual report as late as 1887, said, "they [applicants for American patents] are engaged in manufacturing and putting upon the market the article or improvement, but warning the public that the patent is applied for, the effect of which is to give them the absolute control and monopoly of the invention and to deter all other inventors from entering upon the same field of invention and from manufacturing the article."

We need not say whether these considerations were or were not sufficient to induce the change first made by the twenty-fifth section of the act of 1870 and perpetuated in the existing statute. They are referred to only as showing what Congress may have had in view when it provided, as it did, that an invention covered by a foreign patent, obtained or caused to be obtained before an American patent is granted for the same invention, should be free to the American public as soon as it became by reason of the expiration of the foreign patent free to the people of other countries. If this principle operates harshly upon inventors in certain cases, it is for Congress, whose discretion is not subject to judicial control, to make provision for those cases, if it be possible to do so without such injury to the people of our country as ought not to be inflicted upon them.

And it may be stated, in this connection, that Congress allowed the twenty-fifth section of the act of 1870 to stand, although the Commissioner of Patents, immediately after the passage of that act, ruled that it had changed the prior law so as to limit an American patent to expire at the same time

with the foreign patent of the shortest term covering the same invention and issued before the American patent, although after the application therefor was made. If, as is insisted, the change was not intended, and was effected only by words incautiously used, or not used with any purpose to introduce a new rule for the limitation of the term of an American patent, some action upon the subject, it may well be assumed, would have been taken by Congress after the passage of the act of 1870.

The Revised Statutes of 1874 were adopted, it must be presumed, with the knowledge on the part of Congress of the construction previously placed by the Patent Office upon the twenty-fifth section of the act of 1870. This presumption is strengthened by an examination of the act approved February 18, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States." 18 Stat. 316, c. 80. That act, upon its face, shows that the entire revision of 1874, after it took effect, was carefully reexamined for the purpose of ascertaining whether there were errors or omissions in the work of revision. Now, it is inconceivable that the difference in the wording of the twenty-fifth section of the act of 1870 or of section 4887 of the Revised Statutes, when compared with the act of 1839, could have escaped the attention of Congress, especially as the act of 1870 had been interpreted as introducing a new rule in respect of the term of an American patent, where the same invention was covered by a foreign patent previously issued. The act of 1875, for the purpose of correcting errors and omissions, amended or repealed nearly seventy sections of the Revised Statutes. Still further — as an examination of the statutes will show — since the Revised Statutes went into operation nearly eight hundred sections, other than those referred to in the act of 1875, have been amended or repealed. But no amendment has ever been made of section 4887.

The rule prescribed by the twenty-fifth section of the act of 1870 having been reproduced in section 4887 of the Revised Statutes, and the latter section never having been amended, we ought not, after the lapse of nearly twenty-five years from

the passage of the act of 1870, place upon its twenty-fifth section, or upon section 4887 of the Revised Statutes which took its place, any interpretation other than that which the ordinary, natural meaning of their words import.

Our answers, therefore, to the questions certified are that —

Under the facts stated, the invention for which the United States patent to Bate was issued was "previously patented in a foreign country," within the meaning of those words in section 4887 of the Revised Statutes, and the United States patent expired, under the terms of that section, before the expiration of seventeen years from its date, and it is so certified to the Circuit Court of Appeals.

FROST *v.* WENIE.

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

No. 172. Argued January 24, 1895. — Decided March 4, 1895.

Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both.

In view of the treaties between the United States and the Osage Indians, and the laws affecting their lands enacted prior to December 15, 1880, it must be *held* that the lands which were, by the act of that date, 21 Stat. 311, directed to be opened for entry under the homestead laws, were lands within the abandoned Fort Dodge military reservation, subject to disposition under general laws relating to "other public lands," and not lands of an exceptional class, that were affected with a trust established for the benefit of Indians by treaty.

THE appellant, who was the plaintiff below, claimed to be possessed of the equitable title to certain lands, the legal title to which is in the appellee, Frederick T. M. Wenie, by virtue of a patent issued by the United States January 25, 1890.

Statement of the Case.

The relief sought by the bill is a decree declaring the legal title to be held in trust for the plaintiff, and requiring the defendant to convey such title to him.

The lands in dispute constitute a part of what are known as the Osage Indian trust and diminished reserve lands in Kansas, included within what was once the Fort Dodge military reservation, established June 22, 1868. They are lots 9, 10, 11, and 12 in section 25, township 26 south, of range 25 west, and lots 14 and 15 of section 30, township 26 south, range 25 west, in Ford County, Kansas.

The appellant made a homestead entry of these lands on the 1st day of October, 1881, at the Larned, Kansas, land office. This entry was made under the assumption that the lands had been restored to the public domain by the act of Congress approved December 15, 1880, c. 1, which declared that the Fort Dodge military reservation was no longer needed for military purposes, and authorized the Secretary of the Interior to dispose of a part of the lands within that reservation to actual settlers under the provisions of the homestead law. 21 Stat. 311.

The case turns on the construction of that act — the controlling question being whether Congress intended to open to actual settlers under the homestead laws such of the lands, within the limits of the abandoned military reservation, lying north of the railroad track, as were part of the Osage trust lands. The court below held that it did not.

The principal ground of the decision was that a different interpretation is not required by the terms of the statute, and would be inconsistent with the treaties between the United States and the Osage Indians and with the previously declared purpose of Congress in reference to the Osage lands.

Before looking at the language of the act of December 15, 1880, it will be well to recall the history of these lands, as well as the relations between the United States and the Osage Indians, as shown by treaties and by legislative enactments.

One of the articles of the treaty of June 2, 1825, between the United States and the Great and Little Osage tribes of Indians, established a reservation in what is now the southern

part of Kansas, which those Indians could occupy as long as they chose to do so. 7 Stat. 240.

By an act, approved January 9, 1837, c. 1, it was provided: "SEC. 1. All moneys received from the sales of lands, that have been, or may be hereafter, ceded to the United States by Indian tribes, by treaties providing for the investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded by them, respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein, shall be paid into the Treasury of the United States in the same manner that moneys received from the sales of public lands are paid into the Treasury. SEC. 2. All sums that are or may be required to be paid, and all moneys that are or may be required to be invested by said treaties, are hereby appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President." 5 Stat. 135.

In the act of July 22, 1854, c. 103, establishing the offices of surveyor general of New Mexico, Kansas, and Nebraska, is a provision "that all the lands to which the Indian title has been or shall be extinguished within said Territories of Nebraska and Kansas shall be subject to the operations of the preëmption act of fourth September, eighteen hundred and forty-one, and under the conditions, restrictions, and stipulations therein mentioned." 10 Stat. 308, 310.

By the act of May 20, 1862, c. 75, the object of which was to secure homesteads to actual settlers on the public domain, it was provided, among other things, that all lands subject to preëmption entry might be acquired by homesteaders without the payment of cash therefor. 12 Stat. 392.

And by the act of June 2, 1862, establishing a land office in the Territory of Colorado and for other purposes, it was declared "that all the lands belonging to the United States to which the Indian title has been or shall be extinguished shall be subject to the operation of the preëmption act of the fourth of September, eighteen hundred and forty-one, and

under the conditions, restrictions, and stipulations therein mentioned." 12 Stat. 413.

On the 26th day of September, 1865, another treaty was made between the United States and the Great and Little Osage Indians. It was amended in 1866, and proclaimed January 21, 1867. By its first article the Indians granted and sold to the United States the lands within the following boundary: "Beginning at the southeast corner of their present reservation, and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles, to the southern boundary of said reservation; and thence east with said southern boundary to the place of beginning: *Provided*, That the western boundary of said land herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris River crosses the southern boundary of the State of Kansas." The consideration for this sale was the agreement of the United States "to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct." By the same article of the treaty it was provided that "said land shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands, but no preëmption claim or homestead settlement shall be recognized: and after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the

direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States." 14 Stat. 687, 692.

The Indians by the second article of this treaty ceded to the United States other lands, constituting a tract of twenty miles in width from north to south, off the north side of the remainder "of their previous reservation," extending its entire length from east to west. As to this cession it is provided: "Which land is to be held *in trust* for said Indians, and to be surveyed and sold for their benefit *under the direction of the Commissioner of the General Land Office, at a price not less than one dollar and twenty-five cents per acre as other lands are surveyed and sold, under such rules and regulations as the Secretary of the Interior shall from time to time prescribe.* The proceeds of such sales, as they accrue, after deducting all expenses incident to the proper execution of the trust, shall be placed in the Treasury of the United States to the credit of the said tribe of Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended annually for building houses, purchasing agricultural implements and stock animals, and for the employment of a physican and mechanics, and for providing such other necessary aid as will enable said Indians to commence agricultural pursuits under favorable circumstances: *Provided*, That twenty-five per centum of the net proceeds arising from the sale of said trust lands, until said percentage shall amount to the sum of eighty thousand dollars, shall be placed to the credit of the school fund of said Indians; and the interest thereon, at the rate of five per centum per annum, shall be expended semi-annually for the boarding, clothing, and education of the children of said tribe." 14 Stat. 687, 692.

After this treaty and apparently for the purpose of protecting and fulfilling its provisions, various acts and joint resolutions were passed by Congress which are to be taken into consideration when disposing of this case.

A joint resolution was passed April 10, 1869, declaring: "That any *bona fide* settler residing upon any portion of the lands sold to the United States, by virtue of the first and

second articles of the treaty concluded between the United States and the Great and Little Osage tribe of Indians, September twenty-ninth, eighteen hundred and sixty-five, and proclaimed January twenty-first, eighteen hundred and sixty-seven, who is a citizen of the United States or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same in quantity not exceeding *one hundred and sixty acres*, at the price of one dollar and twenty-five cents per acre, within two years from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided, however*, That both the odd and even-numbered sections of said lands shall be subject to settlement and sale as above provided: *And provided, further*, That the sixteenth and thirty-sixth sections in each township of said lands shall be reserved for state school purposes in accordance with the provisions of the act of admission of the State of Kansas: *Provided, however*, That nothing in this act shall be construed in any manner affecting any legal rights heretofore vested in any other party or parties." 16 Stat. 55.

In the act of July 15, 1870, c. 296, making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, provision is made for the removal of the Great and Little Osage Indians whenever they agree thereto from their lands in Kansas "to lands provided or to be provided for them for a permanent home in the Indian Territory," the lands so to be provided "to be paid for out of the proceeds of the sales of their lands in Kansas." The sum of $50,000 was appropriated to meet the expenses of such removal and to aid in subsisting the Indians during the first year; "to be reimbursed to the United States from the proceeds of the sale of the lands of the said Indians in Kansas, including the trust lands north of their present diminished reservation, which lands shall be open to settlement after survey, excepting the sixteenth and thirty-sixth sections, which shall be reserved to the State of Kansas for school purposes, and shall be sold to *actual settlers* only, said settlers being heads of families, or over

twenty-one years of age, in quantities not exceeding one hundred and sixty acres, in square form, to each settler, at the price of one dollar and twenty-five cents per acre; payment to be made in cash within one year from the date of settlement or of the passage of this act; and the United States, in consideration of the relinquishment by said Indians of their lands in Kansas shall pay annually interest on the amount of money received as proceeds of sale of said lands at the rate of five per centum, to be expended by the President for the benefit of said Indians in such manner as he may deem proper." 16 Stat. 335, 362.

By an "act for the relief of settlers on the Osage lands in the State of Kansas," approved May 9, 1872, c. 149, it was provided: "That the Osage Indian trust and diminished reserve lands in the State of Kansas, excepting the sixteenth and thirty-sixth sections in each township, shall be subject to disposal, *for cash only*, to actual settlers, in quantities not exceeding one hundred and sixty acres, or one-quarter section to each, in compact form, in accordance with the general principles of the preëmption laws, under the direction of the Commissioner of the General Land Office: *Provided*, That claimants shall file their declaratory statements as prescribed in other cases upon unoffered lands, and shall pay for the tracts, respectively, settled upon within one year from date of settlement where the plat of survey is on file at that date, and within one year from the filing of the township plat in the district office where such plat is not on file at date of settlement." An actual settler upon those lands who had failed to pay for and enter the land settled upon by him under the act of July 15, 1870, was given three months in which to file his declaratory statement, and he was required to prove his claim and pay for the land before January 1, 1873, interest at the rate of 5 per cent to be paid from the day when payment should have been made under the act of 1870. 17 Stat. 90.

On the 23d day of June, 1874, Congress passed an act, (c. 488,) declaring "that all actual settlers upon the Osage Indian trust and diminished reserve lands in the State of Kansas

shall be allowed one year from the passage of this act in which to make proof and payment: *Provided*, That all purchasers who avail themselves of the provisions of this act shall pay interest on the purchase price of their lands at the rate of five per centum from the date when payment was required by previous laws to date of actual payment: *And provided further*, That no further extension of payment shall be granted than that provided for in this act, and that all occupants now upon said Osage lands shall file their application to purchase the lands occupied by them within three months after the passage of this act, or forfeit all right or claim to the same." 18 Stat. 283.

By an act approved August 11, 1876, c. 259, providing for the sale of Osage ceded lands in Kansas to actual settlers, the privilege was given to any *bona fide* settler, a citizen of the United States, or who had declared his intention of becoming such, and residing at the time of completing his or her entry, as in that act prescribed, upon any portion of the lands sold to the United States by the treaty of 1865–1867 with the Great and Little Osage tribes, to purchase the same, not exceeding 160 acres, at the price of $1.25 per acre, within one year from the passage of the act under such rules and regulations as may be prescribed by the Secretary of the Interior; the purchaser paying one-fourth of the price at the time of his entry and the remainder, with 5 per cent interest, in three annual payments, notes therefor to be given to the United States. 19 Stat. 127, 128, §§ 1, 3.

Then came the act of May 28, 1880, c. 107, "for the relief of settlers upon the Osage trust and diminished reserve lands in Kansas." The first section gives sixty days after a day to be fixed by public advertisement in the proper land districts, (not later than ninety days after the passage of the act,) within which actual settlers on such lands may prove their claims and pay the purchase price, one-fourth in cash, and the balance in three annual instalments. In case of default the lands were to be sold as provided in the act. By other sections it is provided: "SEC. 2. That all the said Indian lands remaining unsold and unappropriated and not embraced in the claims pro-

vided for in section one of this act, shall be subject to disposal to actual settlers only, having the qualifications of *preëmptors* on the public lands. Such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid; and, upon payment of not less than one-fourth the purchase price shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal instalments, with like penalties, liabilities and restrictions as to default and forfeiture as provided in section one of this act. SEC. 3. All lands upon which such default has continued for ninety days shall be placed upon a list, and the Secretary of the Interior shall cause the same to be duly proclaimed for sale in the manner prescribed for the offering of the public lands, . . . but such lands . . . *shall be sold for cash* to the highest bidder at not less than the price fixed by law; . . . and if any of said lands shall remain unsold after the offering as aforesaid, they shall be subject to private entry for cash in tracts not exceeding one quarter section by one purchaser." 21 Stat. 143.

In the same year an act was passed, June 16, 1880, c. 251, to carry into effect the second and sixteenth articles of the treaty of 1865, proclaimed January 21, 1867. The preamble of the act is as follows: "Whereas, by the act for the admission of the State of Kansas into the Union, approved January twenty-ninth, eighteen hundred and sixty-one, the United States granted to said State the sixteenth and thirty-sixth sections 'of every township of public lands in said State,' but especially provided that the lands embraced within the Indian reservations in said States should not be alienated for any purpose except with the consent of the Indians of such reservations, and in accordance with the conditions of the treaty authorizing such alienation; and whereas, by the treaty between the United States and the Great and Little Osage Indians, proclaimed January twenty-first, eighteen hundred and sixty-seven, a trust was created for the disposal of the lands of said Indians in the State of Kansas, the metes and bounds of which said lands are specifically set forth in said treaty, by which the United States bound itself to convey and sell any and all of such lands

'at a price not less than one dollar and twenty-five cents per acre, as other lands are surveyed and sold,' and to place 'the proceeds of such lands as they accrue, after deducting all expenses incident to the proper execution of the trust, . . . in the Treasury of the United States to the credit of said tribe of Indians;' and whereas it is claimed that under the operation of the treaty herein referred to there are moneys due, both on account of grants and sales of lands which have not been placed to the credit of said Indians, as provided for in said treaty."

The act provided: "That the Secretary of the Interior is hereby authorized and directed to cause an account to be stated of the number of acres of the Osage lands in the State of Kansas that have in any way been alienated by the United States, either by the act of January twenty-ninth, eighteen hundred and sixty-one, entitled 'An act for the admission of Kansas into the Union,' or since the creation of the trust for the sale of these lands by the treaty between the United States and the Great and Little Osage Indians, proclaimed January twenty-first, eighteen hundred and sixty-seven, and of the money received by the United States on account of the sales of such lands, and to certify the difference between the sum so received and the sum that would be due said trust at the date of the account herein provided for, had all of said lands so alienated been disposed of as provided for by said treaty. That a sum of money equal to the amount certified by the Secretary of the Interior, in pursuance of the foregoing section, to the Secretary of the Treasury, is hereby appropriated out of any money in the Treasury not otherwise appropriated, which the Secretary of the Treasury is directed to place to the credit of the Secretary of the Interior, as custodian of said trust funds, and, after defraying the cost of survey and sale of said lands and other expenses contracted by the United States or the Osage Nation in the execution of said trust, the balance of said funds shall be placed in the Treasury of the United States, to the credit of said Indians, to be invested and distributed in accordance with existing treaties: *Provided*, That a like settlement shall be made with the Indian-civilization fund for the sixteenth and thirty-sixth sections, given by the

United States to the State of Kansas, within the limits of the Osage lands ceded by the first article of the treaty aforesaid." 21 Stat. 291.

This brings us to the act approved December 15, 1880, c. 1, the preamble of which declares that the Fort Dodge military reservation was no longer needed for military purposes. That act made it "the duty of the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation, in the State of Kansas, being and lying north of the land owned and occupied by the Atchison, Topeka and Santa Fé Railroad Company for right of way for its railroad; (and to cause the same) to be surveyed, sectionized, and subdivided as other public lands, and after said survey to offer the said lands to actual settlers only, under and in accordance with the homestead laws of the United States: *Provided*, That the said Atchison, Topeka and Santa Fé Railroad Company shall have the right to purchase such portion of said reservation as it may need for its use adjoining that now owned by it, not exceeding 160 acres, by paying therefor the price at which the same may be appraised under the direction of the Secretary of the Interior." 21 Stat. 311.

The lands here in dispute are within the overlapping limits of the Osage trust and diminished reserve lands and of the Fort Dodge military reservation, and lie north of the land owned and occupied by the Atchison, Topeka and Santa Fé Railroad Company for right of way for its railroad.

As already stated, Frost had in view, when making his entry, the provisions of the act of Congress of December 15, 1880. He immediately settled on the land and within six months built a house and moved his family into it. One Boyd filed a preëmption statement for the lots applied for by Frost as well as for other lots. He subsequently relinquished all claim to so much of the land as conflicted with Frost's claim.

On the 5th day of November, 1881, Wenie, the appellee, filed his preëmption declaratory statement for the land embraced in Frost's entry. He proceeded under the act of May 28, 1880. Wenie's, as well as Boyd's, application was rejected by the local land officers, and that ruling was sustained by the Com-

missioner of the General Land Office and by the Secretary of the Interior. Frost then proceeded to make his final proofs and they were accepted by the local land officers. He paid $110.80 for the land, taking the benefit of section 2301 of the Revised Statutes, which allowed payment of the minimum price for land entered at any time before the expiration of five years.

Wenie appealed, but his appeal was dismissed by the Commissioner of the General Land Office. He then appealed to the Secretary of the Interior, and on the 5th day of October, 1887, Acting Secretary Muldrow reversed the ruling of the Commissioner. 6 L. D. 175. Thereupon the homestead entry of Frost was cancelled and Wenie was permitted to perfect his preëmption filing of November 5, 1881. Upon a review of the decision of Acting Secretary Muldrow it was affirmed by Secretary Vilas. *Wenie* v. *Frost*, 6 L. D. 539. This decision was followed by one rendered by Secretary Noble, recognizing the previous ruling by his predecessor. *Frost* v. *Wenie*, 9 L. D. 588. On the 20th day of January, 1890, a patent was duly issued to Wenie.

It was admitted that Frost had previously exercised his right under the law, as a preëmptor, to purchase Osage lands.

The decree below sustained the action of the Interior Department, and the bill being held insufficient upon demurrer, was dismissed with costs to the defendant.

Mr. W. T. S. Curtis and *Mr. Samuel Shellabarger* for appellant. *Mr. A. A. Hoehling, Jr.*, was on their brief.

Mr. Frederic D. McKenney for appellees. *Mr. S. F. Phillips* and *Mr. William H. Lamar* were on his brief.

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

The act of May 28, 1880, for the relief of settlers upon the Osage trust and diminished reserve lands in Kansas, provided that all of those Indian lands remaining unsold and unappropriated (and not embraced in certain claims which it is unnec-

essary here to mention) shall be subject to disposal to actual settlers only, "having the qualifications of preëmptors on the public lands" — each settler being permitted "to enter not exceeding one quarter section each."

The act of December 15, 1880, directed the Secretary of the Interior to cause all that portion of the Fort Dodge military reservation lying north of the right of way of the Atchison, Topeka and Santa Fé Railroad to be surveyed, sectionized, and subdivided "as other public lands," and after survey "to offer the said lands to actual settlers only, under and in accordance with the homestead laws of the United States."

Only about one twenty-fifth part of the lands embraced in so much of the Fort Dodge military reservation as is described in the last-named act were Osage trust lands. 6 L. D. 541.

Did Congress intend, by the act of December 15, 1880, to open to entry by homesteaders lands of the class which, by the act of May 28, 1880, were opened to entry only by actual settlers having the qualifications of preëmptors?

It is to be observed that although the words of the act of December 15, 1880, are broad enough, if literally interpreted, to embrace *all* the lands within the abandoned Fort Dodge military reservation north of the Atchison railroad, there are no words in it of express repeal of any former statute. It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court — no purpose to repeal being clearly expressed or indicated — is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute. *McCool* v. *Smith*, 1 Black, 459, 468; *United States* v. *Tynen*, 11 Wall. 88, 93; *Red Rock* v. *Henry*, 106 U. S. 596, 601; *Henderson's Tobacco*, 11 Wall. 652; *King* v. *Cornell*, 106 U. S. 395, 396.

There is an interpretation of the act of December 15, 1880,

that will give effect to its provisions, and at the same time leave untouched the prior act as expressing the will of Congress in respect of the Osage trust and diminished reserve lands. That interpretation assumes that Congress did not intend by that act to prescribe for the Osage trust lands within the limits of the abandoned Fort Dodge military reservation, north of the Atchison railroad, any different rule or policy than had been prescribed by the act of May 28, 1880, for all such trust lands wherever situated. Excluding from the operation of the act of December 15, 1880, any lands affected with an express trust in favor of Indians, that is, construing it as applying only to public lands, strictly so called, which the United States could dispose of without any breach of good faith or violation of treaty obligations, there is no difficulty in giving effect to the provisions as well of that act as of the act of May 28, 1880, without infringing any established principle for the interpretation of statutes. No trace can be discovered in the various legislative enactments relating specifically to the Osage trust lands of any intention, upon the part of Congress, to disregard the terms of its treaties with the Osage Indians; and, consequently, the act of December 15, 1880, should not be construed as impairing the rights of the Indians, unless such a construction be unavoidable. It is not unavoidable. Looking at that act, in connection with prior statutes, particularly that of May 28, 1880, we are of opinion that the lands which the act of December 15, 1880, directed to be opened for entry under the homestead laws, were public lands that were within the abandoned military reservation, and subject to disposition under general laws relating to "other public lands," and not lands of an exceptional class that were affected with a trust established for the benefit of Indians by treaty. Acting Secretary of the Interior Muldrow said: "However we may construe the act of December 15, 1880, with reference to the disposal of the greater part of the reservation relinquished by said act lying north of the Osage lands, it should not be so construed as to impair or defeat the rights of the Indians guaranteed by the treaty of 1865." 6 L. D. 175.

Application having been made to Secretary Vilas for a review of that decision, that officer, among other things, said: "I am satisfied that Congress, by the act of December 15, 1880, had no intention of repealing the act of May 28, 1880, or any portion thereof, since such repeal would work an impairment of the rights guaranteed to the Indians by the treaty of 1865. Especially do I think this view is warranted in the absence of any express words of repeal; for, had Congress intended a repeal the effect of which would be to disregard treaty obligations, or to defeat or impair treaty rights, I feel certain it would have expressed that intention in plain words and not left it to implication. How, then, is the act of December, 1880, in so far as it is in apparent conflict with the act of May 28, 1880, (which is as to less than three sections of land,) to be construed? Manifestly, the intention of Congress can be ascertained only by a consideration of the treaty of 1865, and the two acts above mentioned *in pari materia;* and so considering them, I have no difficulty in arriving at the conclusion that the tract in question cannot be legally entered by Frost for the reason that having made one Osage entry he is not a qualified preëmptor." 6 L. D. 540.

We approve the construction placed upon the act of December 15, 1880, by the Interior Department, and the decree is

Affirmed.

THE LUDVIG HOLBERG.[1]

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

No. 136. Argued January 8, 1895. — Decided March 4, 1895.

A statement that a steamship, in the harbor of New York, with no fog, meeting a tug with a tow, starboards after receiving two whistles from the tug and subsequently ports and attempts to pass between the tug and her tow, is grossly improbable.

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[1] The docket title of this case is "The F. O. Matthiessen & Wiechers Sugar Refining Company *v.* The Steamship Ludvig Holberg &c., Christopher Kahrs *et al.*, claimants."

Statement of the Case.

A steamship, running in a fog at dead slow and coming in contact with a tug, cannot be held responsible simply because, a few minutes before the collision, she had been running full speed.

A steamer running in a fog is not obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger.

The remarks of the court in *The Colorado*, 91 U. S. 692, 698, held not to apply to this case.

The findings show that the tug was in fault in failing to send three blasts of whistle, in quick succession.

When, in a collision case, uncontradicted testimony establishes fault on the part of one vessel, the mere raising a doubt touching the conduct of the other will not overcome its effect.

For reasons stated in the opinion, the court regrets that the tug could not be brought into this case, and it affirms the decree of the court below.

This was a libel in admiralty for a collision which took place on May 27, 1887, in the lower bay of New York, between the barque Quickstep, then in tow of the tug Leonard Richards, and the Norwegian steamship Ludvig Holberg, outward bound and in ballast. The suit, which was promoted by the owner of the cargo of the barque, was originally begun against both the tug and the steamship, but no service appears to have been obtained upon the tug, as the steamship alone appeared and answered. The District Court dismissed the libel, and the libellant appealed to the Circuit Court, which affirmed the decree of the District Court and made the following findings of fact:

"(1) The libellant Stafford was the owner of the barque Quickstep before and at the time of her loss on the 24th of May, 1887. The libellant, the F. O. Matthiessen & Wiechers Sugar Refining Company, is a corporation and was the owner of a cargo of sugar laden on board said barque.

"(2) On the afternoon of the 24th day of May, 1887, the barque Quickstep, laden with a cargo of sugar, was being towed from sea into the port of New York by the tugboat Leonard Richards on a hawser eighty fathoms long. While proceeding up about in the middle of the main ship channel and when a little to the southward and eastward of buoy No. 11, at about 4.26 P.M., she was run into by the steamship Ludvig Holberg, the latter vessel striking the barque on her

port quarter about the mizzen-topmast backstay, cutting into her after companion door — a distance of about nine feet — cutting her open so that the cargo rolled out. Immediately after the collision said barque began to sink, and, while sinking, was towed by the tug on to the west bank, where she grounded in 25 feet of water about a quarter of a mile below buoy No. 11, and became a total loss, and her cargo was nearly all lost.

"(3) The barque was 170 feet long, 37 feet beam, 23 feet depth of hold, and was laden with 1024 tons of sugar, and drew 20 feet of water.

"(4) The Ludvig Holberg, which hails from Bergen, Norway, was an iron screw steamship of 687 tons register, 200 feet long. The claimants, Christopher Kahrs and others, were her owners. She was in ballast, drawing 13 feet aft and 9 feet forward, bound for Barracoa for fruit. She was tight, staunch, strong, and properly manned and officered, having a competent master and officers and a full complement of men. At and prior to the time of collision her master and pilot were on the bridge. She steers by hand, and there was at her wheel one ordinary seaman, steering the vessel as directed by the pilot. The first officer and second officer were on lookout on the port and starboard sides respectively of the forestay, which is fastened to the stem. Back of them, by the windlass, was the carpenter, also on lookout.

"(5) The steamship started from pier 15 East River some time between 3.05 and 3.15 P.M. She ran slow out of the East River, but soon increased to full speed, and continued to run at that rate until, fog having set in, she reduced to half speed, and later to dead slow. Her motion through the water was, while at full speed, about 9 to 9½ knots; while at half speed, about 6½ to 7 knots; while at dead slow, about 3½ knots an hour. She had been running at the latter rate for a few minutes only, probably not more than four or five, before the collision. The pitch of her screw was 14 feet 2 inches, and at full speed she made from 69 to 71 revolutions per minute; at half speed, from 40 to 45 to 50 revolutions per minute; and at slow speed from 20 to 25 to 26 revolutions per minute.

"(6) She was off Bedloe's Island between 3.27 and 3.32,

and it was nearly 4 o'clock when she reached Fort Lafayette. The distance from that point to the place of collision is a little over 3¼ knots. She carried the ebb tide with her from Bedloe's Island to a little below the forts. After a brief period of slack water and until the collision there was a flood tide. Its set was about S. W., which helped a vessel coming in about one knot an hour, and a vessel going out about half a knot an hour. The wind was southerly, blowing a stiff breeze.

"(7) At the time and place of collision there was so much fog as to prevent vessels from being visible to each other for more than a short distance, (estimated by the witnesses from the Holberg at between 200 and 300 feet,) and such as to require the sounding of fog signals under the rules. Such signals were sounded by the Ludvig Holberg. This fog had prevailed between the Narrows and buoy No. 11 during a period of at least 15 minutes before the collision.

"(8) The Ludvig Holberg ran into this fog about the time she passed the forts, and at that time began sounding fog signals, but did not reduce her speed until she had run some distance below the forts. Then she reduced to half speed only, and did not further reduce her speed until about buoy No. 13.

"(9) By the time she reached a point a little below buoy No. 13 she had slowed down to about four knots over the ground. From that point to the place of collision, a distance of about 4500 feet, she did not increase her speed, proceeding down the channel, keeping upon the starboard side, as near the channel buoys as she could safely go, and sounding fog signals from time to time.

"(10) While she was thus proceeding she heard one blast right ahead, then another a little more on the starboard bow. Both these were blown by the tug, which was not at that time visible, through the fog, to those on board the Holberg.

"(11) Almost immediately thereafter the tug came in sight only a few hundred feet off and a little on the steamer's starboard bow, and gave a signal of two blasts.

"(12) Neither the barque nor the hawser were then visible, and no signals indicated to the Ludvig Holberg that the tug had a tow nearly 500 feet behind her.

"(13) Upon receiving the whistle of two signals from the tug, the steamer starboarded and passed the tug starboard to starboard, clearing her about 30 feet.

"(14) Then, for the first time, the Ludvig Holberg became aware of the presence of the Quickstep, which was not following directly after the tug, but to starboard of her, and whose pilot at that time, by putting her wheel hard-a-port, threw her head somewhat more to starboard.

"(15) Thereupon the steamship ported in order to go between the tug and the barque, at the same time hailing the tug to cast off the hawser.

"(16) If the hawser had been cast off promptly the steamer would probably have gone safely between the tug and the barque.

"(17) The hawser was not cast off, and the steamer running against it with her starboard bow parted it, and at the same time her bow was swung to port, resulting in collision with the barque's port quarter.

"(18) The steamer stopped and reversed as soon as she saw the tug had a vessel in tow, but not before, and was nearly stopped at the time of collision.

"(19) Had the steamer been aware when she starboarded to pass the tug that the latter vessel had the Quickstep in tow on a hawser of 80 fathoms, she could and in all probability would have avoided the collision.

"*Conclusions of law.*

"(1) Said collision was not due to any fault or negligence of those in charge of the Ludvig Holberg.

"(2) The libels herein should be dismissed, as already decreed by the District Court, with costs to the claimants in both courts."

Claimants also put in evidence a duly certified copy of the following rule of the supervising inspectors:

"Rule X. Section 8. All steam vessels, (except upon the Red River of the North and rivers whose waters flow into the Gulf of Mexico,) when engaged in towing during fog or thick

weather, shall sound three distinct blasts of their steam whistles in quick succession, repeating at intervals not exceeding one minute."

From the decree of the Circuit Court libellant appealed to this court.

Mr. George A. Black for appellant.

Mr. Harrington Putnam for appellees.

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

This case turns almost altogether upon questions of fact, and particularly upon the existence and density of the fog at the time of, and immediately before, the collision. From the opinions both of the Circuit and District Courts it would appear that libellant took the ground in both courts that there was little or no fog prior to the collision, and no fog signals were given by the tug, while the steamship's witnesses claimed that the fog had set in from fifteen to thirty minutes before, and became so dense that neither the tug nor the barque could be seen over four hundred feet distant; and that the steamship was regularly sounding her steam whistle. If there were no fog, then the steamship was grossly and inexplicably in fault for starboarding, after receiving two whistles from the tug, and subsequently porting, and attempting to pass between the tug and her tow. Indeed, the very flagrancy of her fault in this particular was such as to lead to the belief that it is not likely to have been committed.

In this court, however, libellant takes the position that the steamship Holberg was in a dense fog from the time of passing the Narrows, at about four o'clock, up to the time of the collision, at 4.26; that the Quickstep was not, however, in this fog, and hence the witnesses on the steamer, looking from the fog into the clear weather, could see the tow farther than the witnesses on the tug, looking into the fog, could see the steamer. The difficulty with this assumption is that there is nothing in the facts to support it. The seventh finding is

that "at the time and place of collision there was so much fog as to prevent vessels from being visible to each other more than a short distance, (estimated by the witnesses from the Holberg at between 200 and 300 feet,) and such as to require the sounding of fog signals under the rules. Such signals were sounded by the Ludvig Holberg. This fog had prevailed between the Narrows and buoy No. 11 during a period of at least 15 minutes before the collision." Finding No. 10 is: "While she" (the steamship) "was thus proceeding she heard one blast right ahead, then another a little more on the starboard bow. Both these were blown by the tug, which was not at the time visible through the fog to those on board the Holberg." The opinion, too, of the District Judge is the direct converse of the respondent's argument in this particular, wherein he says "some further explanations of the discrepancies between the witnesses of the barque and of the Ludvig Holberg may be found in the fact, often testified to before me, that objects cannot be distinguished so easily or so far in looking toward the fog as in looking away from it. The barque's witnesses may, therefore, have been able to distinguish the steamer before the latter could distinguish the barque." There is a further finding, (No. 8,) that the Holberg "ran into this fog about the time she passed the forts," from which we infer, and such also is the testimony, that the fog was coming up the bay from the southward, whereas the theory of the libellant assumed that there was a bank of fog at and just below the Narrows, while the weather was comparatively clear where the Quickstep was.

The stress of the libellant's argument is that, considering the state of the weather, the steamer was not proceeding at the moderate rate of speed required by law in foggy weather, and did not take prompt measures by stopping and reversing to avoid a collision. The finding as to her general speed is (No. 5) that she "started from pier 15, East River, some time between 3.05 and 3.15 P.M. She ran slow out of East River, but soon increased to full speed, and continued to run at that rate until, fog having set in, she reduced to half speed, and later to dead slow. Her motion through the water was, while

at full speed, about 9 to 9½ knots; while at half speed, about 6½ to 7 knots; while at dead slow, about 3½ knots an hour. She had been running at the latter rate for a few minutes only, probably not more than four or five, before the collision." (6) "She was off Bedloe's Island between 3.27 and 3.32, and it was nearly four o'clock when she reached Fort Lafayette. The distance from that point to the place of collision is a little over 3⅛ knots." (8) "At that time" (as she passed the forts) "she began sounding fog signals, but did not reduce her speed until she had run some distance below the forts. Then she reduced to half speed only, and did not further reduce her speed until about buoy No. 13." (9) "By the time she reached a point a little below buoy No. 13, she had slowed down to about four knots over the ground. From that point to the place of collision, a distance of 4500 feet, she did not increase her speed."

We cannot say that these findings exhibit any fault on the part of the steamship in this particular. She was clearly not bound to stop solely on account of the fog, and if she had been running dead slow for four or five minutes before the collision, she cannot be held in fault for what her previous speed may have been. If she ran twenty miles an hour down to the Narrows, and was running dead slow at the time she first heard the tug's whistle, fault could not be imputed to her for her previous speed.

These findings, however, are attacked upon the ground that the testimony showed that the steamship passed Fort Lafayette at 4.05; that the collision occurred at 4.26, three and one-eighth knots, or 19,000 feet below the fort, thus implying that she must have covered that distance at the rate of over nine knots an hour. However persuasive this argument may have been when addressed to the District or Circuit Court, it is entitled to but little weight here, since the finding is that "it was nearly four o'clock when she reached Fort Lafayette," and that four or five minutes before the collision she had been running dead slow. The finding of the District Judge was also that at the time Holberg was sounding her signals, she was going "dead slow" — not over three and a half knots.

There is no such manifest inconsistency between the findings of the Circuit Court in this particular as to require us to reject either of them. Both of them may be true, and when it comes to fixing the time exactly to the minute, there is always a liability to error. The testimony of the officers and crew of the Holberg as to her speed is not only uniform, but is corroborated by that of the master of the steamboat St. Johns, which passed her abreast of buoy 13, while going herself at a speed not exceeding five miles an hour. It is sufficient to say in this connection that there is no such unanimity of testimony as to compel us to say that both courts were mistaken in finding that the steamer was proceeding dead slow at the time she heard the tug's whistle. There was some evidence to that effect, and that is sufficient to support the finding.

Did she act with sufficient promptness in stopping and reversing after she became aware of the proximity of the tug? The finding in that particular is, (10) "While she was thus proceeding she heard one blast right ahead; then another a little more on the starboard bow — both these were blown by the tug, which was not at that time visible through the fog to those on board the Holberg." (11) "Almost immediately thereafter the tug came in sight only a few hundred feet off and a little on the steamer's starboard bow, and gave a signal of two blasts." (12) "Neither the barque nor the hawser were then visible, and no signals indicated to the Ludvig Holberg that the tug had a tow nearly 500 feet behind her."

No case has ever held that a steamer was obliged to stop at the first signal heard by her, unless its proximity be such as to indicate immediate danger. The next signal denoted that the tug was coming down on the starboard bow of the steamer, and as she came in sight almost immediately thereafter, only a few hundred feet off, and there was nothing to indicate the presence of a tow, the steamer was in no fault for proceeding, and as a matter of fact she passed the tug in safety. Had she been aware of the presence of the tow a wholly different question would have been presented. The fact that the tug was under a rank sheer to port, as claimed by the barque, does not affect this question. Indeed, there is

nothing in the findings to show it, and if it were so, it indicated safety rather than danger, as such course would take her away from that of the steamer.

It is found (18) that "the steamer stopped and reversed as soon as she saw the tug had a vessel in tow, but not before, and was nearly stopped at the time of the collision." This finding is also attacked upon the ground that it is inconsistent with the second finding, that the steamship cut into the barque a distance of nine feet, cutting her open so that the cargo rolled out. There is no finding, however, as to the speed of the Quickstep at the time of the collision, and if the steamer had come to a standstill, a speed of five miles an hour on the part of the barque would have had the same effect in crushing her sides that the same speed would have had if she had been at rest and the steamer in motion. It was also the opinion of the District Judge that the force of the blow was mainly owing to the forward motion of the barque. Though the collision was conclusive evidence of speed on the part of one vessel or the other, it was not conclusive evidence of speed on the part of the steamship.

While it was held by this court in *The Colorado*, (91 U. S. 692, 698,) that a steamer of 1470 tons ought to have more than one wheelsman in a fog, it was not laid down as a general rule applicable to all steamers, but was based upon the size of the propeller in that case, and upon the fact that when the emergency came, the mate deemed it necessary to order the lookout to leave the place where he was stationed, and go to the wheel to help the wheelsman put the wheel over, leaving the propeller for the time being without any lookout. It was said that "steamers of such size, under such circumstances, ought never, in a dark night, to be without a watch on deck sufficiently effective to change the course of the vessel with celerity without withdrawing the lookout from his station and appropriate duties." These remarks have no necessary application to a steamer of 687 tons, which is found by the Circuit Court to have been "properly manned and officered, having a competent master and officers and a full complement of men." There seems to have been no fault on

the part of the steamship by reason of any inability of the wheelsman to turn the wheel with sufficient promptness.

Upon the findings in this case there can be no doubt of the fault of the tug in failing to conform to the rule of the supervising inspectors requiring steam vessels, when engaged in towing during a fog, to sound three distinct blasts of their steam whistles in quick succession, at intervals not exceeding one minute. In fact, the tug appears to have sounded no fog signals at all. The fault in this particular was aggravated by the great length of the tug's line, and it is by no means certain that she was not guilty of a distinct fault in failing to shorten the line as she came up the bay. Had the steamship been apprised of the fact that the tug was encumbered by a tow, there is no doubt that by putting her wheel hard-a-starboard, she could have avoided the barque; but seeing the tug alone, she was under no obligation to take further precautions than such as were necessary to avoid her. Her action after she became aware of the fact that a tow was behind the tug was probably the most prudent that was left to her under the circumstances. Whether she should put her wheel hard-a-starboard, and endeavor to pass the barque to port, or should port, in order to pass between the vessels, was, in the imminence of the collision, largely a matter of discretion with her master, and she should not be condemned for the result. The steamship had been brought into a perilous position by the conduct of the tug, and ought not to be criticised for the efforts she made to extricate herself. Her porting, if an error at all, was one committed *in extremis*.

Fault is imputed to the barque for failure to cast off her line promptly, and also for conflicting orders given to the wheel, but we are not disposed to scan her actions in the excitement of the moment too closely, although the court finds: (16) That "if the hawser had been cast off promptly the steamer would have probably gone safely between the tug and the barque." We do not find it necessary to express an opinion in this particular.

This is one of those cases where a clear fault has been found on the part of one of the vessels both by the District

and Circuit Courts, and the findings of fact are such as to render it incumbent upon us to affirm their decree. As we said in *The City of New York*, 147 U. S. 72, 85: "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." The usual effort is made in this case to impeach the findings of the Circuit Court, but libellant at best has only succeeded in raising a doubt, which is not sufficient. If there be any evidence to support the findings, as there undoubtedly is, they should not be disturbed.

We are by no means insensible of the fact that a practical injustice may have been done to the owners of the Quickstep and her cargo in the litigation which is closed by this decision, by reason of the inability of the libellants to obtain service in this suit upon the tug. It appears that a suit was subsequently begun against the tug in the District of New Jersey. This suit resulted in a decree of the District Court condemning her for the want of a proper lookout, and for failing to stop immediately after her first signal. *Kiernan* v. *The Leonard Richards*, 38 Fed. Rep. 767. No opinion was expressed as to the fault of the steamship. On appeal to the Circuit Court this decree was reversed, and the steamship held to have been wholly in fault for not complying with the signals agreed upon, and changing her signals at an inopportune moment, the court construing the fog signals of the steamship as signals to the tug to port. It was said by the District Judge that the barque was conceded to have been free from fault. A like assumption was made by the Circuit Judge, who also stated that, if the people in charge of the Holberg had been brought in to testify, the case might have had a different look. In that suit the steamship was not represented by witnesses. To this suit the tug was not a party, and was not represented by counsel, though two of her crew appear to have been sworn

on behalf of the libellant. The result is that, in the suit in which the steamship was not represented, she was found wholly in fault, and in the suit in which the tug was not represented, she is found in fault. The litigation is an apt illustration of the maxim, *les absents ont toujours tort.*

We regret that the tug could not have been brought into the case; but the District and Circuit Courts were bound by such testimony as was introduced, and we are bound by the record and the findings of the Circuit Court. Adjudging, as we do upon these findings, that no fault can be imputed to the steamship, we have no choice but to affirm the decree.

The decree of the Circuit Court is, therefore,

Affirmed.

BALTIMORE AND POTOMAC RAILROAD COMPANY *v.* MACKEY.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 84. Argued November 19, 20, 1894. — Decided March 4, 1895.

Where the evidence is conflicting, and no reasonable or proper inference can be drawn from it as matter of law, the case should be left to the jury.

Knowledge of a defect in a car brake cannot be imputed to the employé charged with keeping it in order, when he has had no opportunity to see it.

When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection.

Ambiguous or too forcible expressions in a charge may be explained or qualified by other parts of it, and if the charge does not, as a whole, work injustice to the party objecting, the use of such expressions will not be cause for granting a new trial.

A railroad company, receiving the cars of other companies to be hauled in its trains, is bound to inspect such cars before putting them in its trains, and is responsible to its employés for injuries inflicted upon them in consequence of defects in such cars which might have been discovered by a reasonable inspection before admitting them to a train.

In an action by an executor of a deceased person against a railroad company

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to recover damages for the killing of the intestate, an employé of the company, brought under the act of February 17, 1885, c. 126, 23 Stat. 307, which provides that "the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions," it is not error to charge the jury that in estimating damages they may take into consideration the age of the deceased, his health and strength, his capacity to earn money as disclosed by the evidence, his family, who they are and what they consist of, and from all the facts and all the circumstances make up their minds how much the family would probably lose by his death.

Pennsylvania Co. v. *Roy*, 102 U. S. 451, distinguished from this case.

The plaintiff's declaration claimed $10,000. He obtained a judgment in the trial court for $8000. The appellate court affirmed this judgment, and ordered that he recover "as in his declaration claimed." *Held*, that these words did not have the effect of increasing the sum actually recovered in the special term, and that the inaccuracy was not sufficient ground for reversal.

This action was instituted under the provisions of the act of February 17, 1885, c. 126, 23 Stat. 307, to recover damages from the Baltimore and Potomac Railroad Company, because of the death of Robert A. Brown, an inspector and repairer of cars in its employ, which resulted from injuries to him, caused by his having been crushed between two freight cars of the defendant in the city of Washington, on the night of March 17, 1887.

There was evidence before the jury tending to show the following facts:

For about five years prior to his death, Robert A. Brown, the intestate of the defendant in error, was in the employment of the Baltimore and Potomac Railroad Company as a car inspector. In the evening of March 17, 1887 — the night being dark and, in the language of a witness, a "fearful" one, "snowing and the wind blowing very hard" — he was on duty in what is called the Jersey Avenue freight yard, in company with his uncle, who was also a car inspector. A fast freight train came in from Baltimore, and upon examination he discovered a defective drawhead (called by railroad men a "bull-nose") on one of the cars. The cars were all coupled together and it was, therefore, impossible to repair

the defective drawhead without the assistance of yardmen. Brown thereupon requested the yardmen to "cut" the train so that the defective drawhead could be reached and repaired. He and his uncle asked the conductor, Phillips, who had control of the shifting engine, to have that done — saying to him that if he would give them from five to seven minutes they would repair the car, and that if not repaired it would be pulled to pieces. Thereupon the conductor ordered a brakeman, with the yard engine, "to cut the train, and give them a chance to fix it." As soon as the train was cut, Brown and his uncle went to work on the defective car, which was the fifth one from the tender. The cut was between the fourth and fifth car. The deceased took the drawhead out and repaired it. Just as his uncle was about to drop the key in, which holds it together, he felt the cars "going away from him." He immediately came out from under the car and Robert A. Brown was "crushed in between the cars."

When the train of cars was cut, those attached to the engine were pulled forward, leaving a gap in the train. Notice was not given of any purpose after cutting the train to detach the engine from the four cars it pulled away in order that Brown and his uncle might reach and repair the drawhead. The two cars next to the one to be repaired were heavily loaded with coal. The grade from South Capitol Street to New Jersey Avenue was quite steep. While deceased was engaged in the work of repairing — his back being towards the engine that had been used to draw some of the cars away so that the inspectors could do their work — the engine was detached from the cars attached to it, and sent off on other duty. The result was, that the cars that had been attached to the engine came back down the grade towards the defective car, and against Brown and the car he was repairing. An effort was made to stop them by the use of a brake on one of the cars — a "foreign" car — but the brake was insufficient for that purpose, and was itself out of order and defective.

There was evidence tending to show that car inspectors were not expected or required to repair foreign cars. A car inspector testified: "There are cars that come into our yards

which are out of repair, and there are cars that come in there from other companies. Our company don't hold us responsible for fixing those cars, because we don't get paid for it. We are instructed not to use our materials unless it was for a broken drawhead, and then we would have to put in another drawhead. Sometimes we do work and card it to go to other companies. There are a great many cars come in that way, marked 'defective brake.'"

This witness also testified upon the question of the defective brake as follows: "He was a car inspector in the employ of the Baltimore and Potomac Railroad Company; that Robert A. Brown, the deceased, was the chief car inspector in the Jersey yard; that he was acquainted with a man named Downs, who was supposed to be the chief car inspector; that on the next day after the accident, or on the evening of the next day after the accident, the witness went, in company with Mr. Downs, to examine this car with the defective brake; that he was not positive whether it was on the day after the accident, or the second day after the accident that they went to examine the said car with the defective brake; that he went with Downs to assist him to find the car; that they found it and made an examination of the brake, and that the result of the examination was that they found the brake was a defective one; that the car was marked 'defective brake' on the end of the car; that the witness got up on top of the car and tried both the top and end brake; that he first put the brake down, and then came down and examined it, and found that the bottom connection was too short, and that 'if it had been a long connection, or connected all along, it would have been a pretty sufficient brake;' that this car was brought up from the Jersey yard during the night, or in the morning, along with a draft of eighteen or twenty or twenty-five other cars; that he did not know whether this car with the defective brake was hauled by another engine or was shifted backwards and forwards after the time of the accident or not; that the car was still loaded with oil; that chalk marks 'defective brake' were on the car when it got into the Maryland Avenue yard; that he did not know how the car got there; that he went with

Mr. Downs to examine this car at about half-past six or seven o'clock in the evening; that he examined the car with the defective drawhead shortly after the accident; that he saw the tools lying around there which were used for the purpose of fixing cars, and that he examined the drawhead and saw what it needed; that he told the men to look out for him, and he got under the car and did the work; that it took him about three minutes." On cross-examination, he further said "that he did not know that the brake which he examined was the brake on the car connected with the accident, except that he was told that that car was the cause of the accident; that he did not know it as a fact; that Robert A. Brown was his superior officer — 'our leader' — or foreman in the yard; that he, witness, first discovered the chalk mark 'defective brake' when he went to examine the car; that it was marked on the end of the car, and on both sides."

After the train was cut, and space left between the cars that were pulled away and the defective car, Brown had no reason to believe that the former would be allowed to run back upon him. On the contrary, when the train was cut he had the assurance of the conductor that the cars pulled ahead would be left standing where they were after the cutting of the train had been accomplished.

The conductor, a witness for the defendant company, gave this account of the affair: "He was in the employ of the defendant, the Baltimore and Potomac Railroad Company, as a conductor in the freight yard in this city; had been so employed by the defendant in this freight yard for about twelve years; was there at the time of the accident, running with the shifting engine No. 327; that on the night of the 17th of March, 1887, the night of the accident, he was engaged in the 'Jersey yard' in shifting cars; that they got down to the Jersey yard about 9.55 o'clock in the evening, and took down with them about twenty-five cars, which they first shifted around where they belonged; that it took them about half an hour to dispose of those cars; that they went over on to the other side of the yard to shift the fast freight which was coming in from the North; that said train was brought in by engine No.

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307 and placed on No. 1 track; that said fast freight train arrived after they got down to the Jersey yard about ten or fifteen minutes; that they went to work upon said train to get out such cars as were to go South on the fast freight; that there were not over six cars in the said freight train to go South; that the cars which were for Washington were put over on another track; that then Robert A. Brown, the deceased, told them that they had a broken bull-nose down there which he wanted to fix; that he asked the witness to pull the cars apart, and witness told him that he would go down there and pull them apart; that he went down there and pulled the cars apart; that witness told deceased he was not going to shift any more of those cars; that said cars were pulled apart to a distance of about forty feet; that brakeman Hillary pulled the pin and uncoupled the cars in the first instance, and that the witness ordered the cars to be cut loose; that at that time he was talking to Robert A. Brown, who was standing right where the cut was made; that after the pin was pulled the witness (Phillips) gave the signal to pull ahead, and then went up towards the engine; that he stopped the engine when Robert A. Brown, the deceased, said, 'That will do,' by giving the engineer the shut-off signal with his lamp by swinging it; that thereupon the engineer (Smith) called to him, and he went up towards the engine; that the engineer then said he had no more water to do any shifting with, and I told him I hadn't anything to do, and they were not going to do any more shifting on that train, and I asked him to take a load of stock from the lower end up to the warehouse and stop at Sixth Street and get water. He said: 'Well, I will try it.' So I said to brakeman Teiling, when I stopped talking to the engineer, 'How is it?' He said, 'All O. K.' I said, 'Go up and set this brake.' He got up and put it on. I told Mr. Brown, after I pulled the cars apart, that I was going to leave them standing there."

There was evidence tending to show that a full crew, with a shifting engine, in a yard is six men, an engineer, a fireman, a conductor, and three brakemen; and that on the night Brown was killed there were only two brakemen on the train.

There was also evidence bearing upon the question whether the deceased was guilty of contributory negligence in not displaying a blue light while repairing the defective drawhead, in conformity, as the defendant claimed, with one of the printed rules of the company.

Mr. Enoch Totten for plaintiff in error.

I. The defendant was not guilty of negligence. If the brake was defective, which is not conceded, it was not the fault of the defendant. The defendant had employed a skilled and reliable man to inspect all cars and discover all defects, and this servant was on the ground at the proper time and actually inspected the train. So far as this case is concerned, this is all the law required the defendant to do.

A corporation must necessarily act through its agents. It was the duty of the plaintiff in error to employ a skilled man, or a man reputed to be skilful in the business, to inspect and repair its cars. When it had done this it had performed its whole duty as master.

II. The deceased was guilty of negligence.

The motion made by the counsel for the defendant at the close of the whole testimony should have been granted and a verdict directed in favor of the defendant, for the reason that the evidence plainly showed negligence on the part of the deceased.

The deceased himself had been directing the movements of the cars which afterwards struck him, and told the conductor of the switching engine to pull them away, and when this was done he immediately went between the two trains and proceeded to work on the stationary portion of the train with his back towards the cars which had been moved. The night was very dark, a snow-storm was raging with a violent wind blowing, and the three cars were on a steep grade. He knew that the cars were to be left where they had been stopped by his order, and that they were heavily laden. He must have known that there was great danger in the position in which he had placed himself. He neglected to display his blue

lights; this was gross carelessness and a plain violation of the rules and regulations of the company and of his special orders. If he had displayed a blue light, as he was bound to do, before beginning his work on the train, no injury could have occurred to him. The conductor undoubtedly supposed that the deceased would wait until the engineer had got away with his engine, and that he would then hang out his lights for his own protection. If he had displayed them at once, the conductor would have known he was at work and would have been guided in his movements by the rules and regulations. The deceased was thus doubly guilty of negligence. He carelessly placed himself in a place of danger, and the consequences cannot be charged to the defendant. *Southern Pacific Co.* v. *Seley*, 152 U. S. 145; *Elliott* v. *Chicago, Milwaukee &c. Railway*, 150 U. S. 245; *Tuttle* v. *Detroit &c. Railway*, 122 U. S. 189; *Railroad Co.* v. *Houston*, 95 U. S. 697; *St. Louis & San Francisco Railway* v. *Schumacher*, 152 U. S. 77.

There is another aspect of this case which was disregarded by the court on the trial. The plaintiff's intestate was employed, and it was his business, to deal with broken and disordered cars. He must, therefore, be held to have knowledge of the broken brake, whether he actually knew its condition or not. It appears that he did actually make at least a partial inspection, as he discovered the broken bull-nose, which he undertook to repair. He should have discovered the broken brake, if it was broken. The car with the alleged broken brake was within two car-lengths of the broken bull-nose. Although it is ordinarily the duty of railroad companies to furnish reasonably safe appliances, cars, and machinery for their employés, and in default thereof they are liable for injuries resulting from such default, yet this rule of law does not apply to cases where employés and servants of railroad companies are engaged in repairing damaged cars. By his employment to handle damaged cars the deceased assumed the risk incident to the enhanced danger of this service, and the law presumes that he was paid for it. *Yeaton* v. *Boston & Albany Railroad*, 135 Mass. 418; *Tuttle* v. *Detroit &c.*

Railway, supra; Chicago & Northwestern Railway v. *Ward*, 61 Illinois, 130; *Flannagan* v. *Chicago & Northwestern Railway*, 45 Wisconsin, 98.

In the next place, if this accident was caused by the carelessness of the trainmen in charge of the work of switching cars in the yard, then the plaintiff cannot recover, because such trainmen were *fellow-servants* of the deceased. This has been settled recently by this court in the case of *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349. See also *Randall* v. *B. & O. Railroad*, 109 U. S. 478; *B. & O. Railroad* v. *Baugh*, 149 U. S. 368; *Tuttle* v. *Detroit &c. Railway*, 122 U. S. 189; *Quebec Steamship Co.* v. *Merchant*, 133 U. S. 375; *Bunt* v. *Sierra Bate Co.*, 138 U. S. 483; *District of Columbia* v. *McElligott*, 117 U. S. 621; *Murphy* v. *N. Y. Cent. R. R. Co.*, 11 Daly, 122; *Baltimore Elevator Co.* v. *Neal*, 65 Maryland, 438; *Besel* v. *N. Y. C. & H. R. Railroad*, 70 N. Y. 171; *Smith* v. *Potter*, 46 Michigan, 258; *Columbia & Xenia Railroad* v. *Webb*, 12 Ohio St. 475; *Mackin* v. *Boston & Albany Railroad Co.*, 135 Mass. 201.

III. At the close of the evidence the plaintiff's counsel requested two instructions, which were objected to by the defendant's counsel; they were granted by the court. They constitute the errors claimed in the 5th and 6th bills of exception (33, 34).

The criticism on these declarations of the law of the case is (1) that it is not for the plaintiff to object (he being in the place of the deceased in this suit), that the defendant failed to exercise reasonable care in keeping the brake in repair. It employed Brown himself, who was a proper man for that duty, to examine this brake and to repair it if it was in bad order. Having employed a competent man for that purpose, it did its whole duty. If there was negligence as to this brake, the negligence was the negligence of Brown. (2) Each of these instructions wholly ignores the important question of contributory negligence.

IV. The plaintiff having failed to prove negligence on the part of the defendant's other servants, he could not, under the pleadings, recover on the ground that the accident was caused

by a defective brake. Mention of a defective brake will not be found in the declaration.

It was error to depart from the theory of the case set out in the declaration. The case was made to turn, on the trial, on the question as to whether or not the brake used to hold the three detached cars was defective or in bad order. This was not the case made by the plaintiff in his declaration; the pleadings exclude that view of the case.

Putting out of sight for the time the fact that the deceased was the person employed to discover and repair broken brakes, it will be observed that the court ignored the law as applicable to *foreign* cars. The evidence that this car with the alleged defective brake was a foreign car was very slight; but what there was, if any, went to the jury.

A different responsibility is connected with such a car. A railroad company receiving a loaded car from another company is entitled to presume that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when received. *Ballou* v. *Chicago, Milwaukee &c. Railway*, 54 Wisconsin, 267; *Mich. Cent. Railroad* v. *Smithson*, 45 Michigan, 212; *Smith* v. *Patten*, 46 Michigan, 258; *Baldwin* v. *R. R. Co.*, 50 Iowa, 680; *Davis* v. *Detroit & Milwaukee Railroad*, 20 Michigan, 105; *Mackin* v. *Boston & Albany Railroad Co.*, 135 Mass. 201.

V. The trial judge, in the oral instructions in reference to the duty of the corporation as to keeping brakes in good order, utterly ignored the distinction between *warranting* the good order and fitness of the brake for the service at all times, and exercising reasonable care and diligence in keeping it in good order.

It will be observed that the court impressed it upon the minds of the jury that the defendant was bound to see to it that this brake was in good working condition and sufficient to hold those three cars at the time. This was holding the defendant to a higher degree of care than the law requires. The rule is thus stated by this court in *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 570: "Neither individuals

nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter."

VI. The trial justice also erred by instructing the jury that they might consider the "strength" of the deceased, in reference to his capacity to earn money; there was nothing in the evidence to show whether he was a strong man or otherwise.

The court also erred in the oral instructions to the jury on the subject of damages. The learned judge told the jury that they should take into consideration in estimating damages "his family — who they were and what they consist of." This instruction directed the jury to consider, first, who were the family, or, which is the same thing, what was the condition in life of his family, and, second, of what age and sex were the children.

The court has recently passed upon this question, and condemned a like ruling. *Pennsylvania Company* v. *Roy*, 102 U. S. 451.

Mr. Franklin H. Mackey for defendant in error.

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

This suit was instituted under the act of Congress approved February 17, 1885, c. 126, 23 Stat. 307, providing:

"Sec. 1. That whenever, by an injury done or happening within the limits of the District of Columbia, the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or, if the person injured be a married woman, have

entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default, causing such death, to the widow and next of kin of such deceased person: *Provided*, That in no case shall the recovery under this act exceed the sum of ten thousand dollars: *And provided, further*, That no action shall be maintained under this act in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

"SEC. 2. That every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

"SEC. 3. That the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions in force in the said District of Columbia."

The assignments of error in the brief filed by the plaintiff in error are seven in number, and cover all the material points in the case. We assume that any exceptions taken at the trial and not embraced by those assignments have been abandoned.

1. The first assignment of error is that the court below erred in refusing at the close of all the evidence to direct a verdict in favor of the defendant. It need only be said that the case was one peculiarly for the jury under proper instructions as to the law of the case. There was no reasonable or proper inference from the evidence, as matter of law, that would have justified the withdrawal of the case from the jury. *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30, 32; *Del. & Lackawanna Railroad* v. *Converse*, 139 U. S. 469, 472; *Texas and Pacific Railway* v. *Cox*, 145 U. S. 594, 606.

2. The second assignment relates to the granting, on plaintiff's request, of the following instructions:

"The jury are instructed that the employés of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; if, therefore, the jury believe from the testimony that the brake set by the brakeman Teiling was defective at the time of the accident, and that by the exercise of reasonable care and caution the defendant could have known said brake to be defective, then it is liable, and their verdict must be for the plaintiff, provided they believe from the testimony that the accident was caused by reason of said defective brake.

"The jury are instructed that if they believe from the evidence the brakes set by brakeman Teiling as detailed in the evidence would, if then in good order, have prevented the cars from moving, or at least would have tended to retard such movement so as to have given sufficient time to notify Brown of his danger and to have enabled him to escape, then if the jury believe from the evidence that the brake was not in good order at the time of the accident, and, further, that the defendant by the exercise of reasonable care could have known of its defective condition, their verdict must be for the plaintiff."

Two objections have been made by counsel in this court to those instructions.

The first one is that the railroad company employed the deceased himself to examine the brake in question, and to repair it if it was not in proper condition; that if the defect was chargeable to the negligence of any one it was to his negligence; and that the above instructions ignored the questions of his contributory negligence.

There was no evidence whatever tending to show that Brown was guilty of negligence in not having discovered, immediately upon the arrival of the train, or before he was killed, that the brake was defective or insufficient. The proof did not show at what time it became defective, or that the

car on which it was placed had ever before been in Washington. As soon as he observed a defective drawhead in one of the cars — which was soon after the train arrived at the company's yard — he set about to repair it, and while engaged in that particular work was killed. He had, therefore, no opportunity, after the train reached the yard, to investigate the condition of the brakes, and, consequently, the issue as to the defectiveness of the brake in question was made by the court to depend upon the inquiry whether due care was taken by the railroad company, represented by agents or employés other than Brown, in providing proper appliances on its cars. And that was the theory upon which the company itself proceeded in its defence, as is apparent from one of the instructions asked by it in these words: "Unless the jury shall be satisfied from the evidence that a defect in the brake which was set by Feiling on the stock car just before the accident was the sole cause of the injury to Robert A. Brown, the plaintiff's intestate, and that said brake was in such defective condition at the time the said stock car was by the defendant put into its train, the plaintiff cannot recover, and the burden of proof is upon the plaintiff to show, by evidence satisfactory to the jury, that said brake was in such defective condition before said car was by the defendant put into the said train."

It is not an objection to the instructions given on motion of the plaintiff that they were silent on the question of contributory negligence. The defendant did not ask any specific instruction on that point. Nevertheless the court when it charged the jury, said, upon that subject, all that was necessary: "Make up your mind, first, within the instructions of the court, was this defendant negligent? was that a bad brake? if it had been a good one, would it have held this train? If you say the brake was all right, that ends the case. If you say that it was not all right, and that a good brake would have held the car, then the next question is, was the plaintiff's intestate himself negligent, imprudent, or careless, contributing to the injury directly? And if so, the plaintiff could not recover. If not, he could recover."

The next objection urged by the defendant, in support of its second assignment of error, is that the words "as far as possible," in the first of the above instructions, imposed upon the railroad company a higher degree of care in selecting and keeping in order its appliances and machinery than the law requires. It may be observed that the objection to the instruction containing the particular words complained of was general in its nature. The instruction embodied some propositions of law to which no objection could be properly made, and it was the duty of the defendant to point out, specifically, the part of the instruction which it regarded as announcing an erroneous principle of law. But we need not put our decision entirely upon this ground; for it is clear that the jury could not have been misled by the use of the words "as far as possible." The instruction in which those words are found distinctly informed the jury that the law imposed upon the company the duty of exercising "reasonable care and caution." And in its charge to the jury the court said: "Was that brake in proper reasonable condition? If it was not in a proper, reasonable condition, did the cars roll back in consequence of that infirmity? Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied, from the evidence in this case, that this brake was in a reasonably good condition, in good ordinary repair, and there was nothing wrong about it, then the plaintiff cannot recover, because that would end the case." Again: "So you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned, is, was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion, and if not, was such fact the cause of the accident, or did it materially or directly contribute to it?" Taking the instructions and the entire charge of the court together, it is manifest that the jury understood the words "as far as possible" — if they thought at all of mere words — to mean "as far as possible," *exercising reasonable care and caution.*

In *Rogers* v. *The Marshal*, 1 Wall. 644, 654, Mr. Justice Davis, speaking for the court, well observed that "a nice criti-

cism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury." And in *Evanston* v. *Gunn*, 99 U. S. 660, 668, Mr. Justice Strong said: "Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled." And so in *Tweed's case*, 16 Wall. 504, 516: "Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, while it appears that the complaining party made no effort at the trial to have the point explained." See also *The Sybil*, 4 Wheat. 98.

What the court said to the jury, in respect of the point now under consideration, was in harmony with the principles announced in *Hough* v. *Railway Co.*, 100 U. S. 213, 218, where it was said that a railroad corporation was under an obligation "to provide and maintain in suitable condition the machinery and apparatus to be used by its employés — an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered." Again, in the same case: "To guard against the misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its agents whose business it is to supply such instrumentalities exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés." See also *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642; *Washington & Georgetown Railroad* v. *McDade*, 135 U. S. 554, 569.

3. The third assignment of error is that the case was tried on the theory that the accident was attributable to a defective brake, contrary to the case made by the declaration. We do not find in the record any specific exception upon which

this assignment is based. But if there were one, it could not avail the defendant. It was alleged in the declaration that "by reason of the negligence and default of the defendant, its servants, agents, and employés," the car on which the deceased was working "was run into by another of the defendant's cars whereby the plaintiff's intestate, by collision of the said cars, was so crushed and injured that death immediately followed." Whether these allegations were or were not sufficient to allow proof that the collision was the result of a brake so defective that it could not control the cars which ran back against the deceased and killed him, we need not stop to consider, because both parties asked instructions upon the theory that the jury were to inquire as to the defectiveness of the brake. An instruction asked by the defendant, and which is given above, involved the inquiry by the jury whether the defectiveness of the brake, if it existed, was the sole cause of Brown's death. Another instruction asked by it assumed that the condition of the brake was a matter to be inquired of by the jury. That instruction was as follows: "If the jury shall find from the evidence that the injury to Robert A. Brown resulted solely in consequence of some defect in the brake set by Teiling on the open or stock car next to the engine and tender, and that said stock car was not the property of the defendant, but belonged to another railroad company, and had been, the same evening and a short time prior to the accident, brought to the defendant's yard, in Washington, in a freight train, with the brake in such defective condition, then the fact (if the jury shall so find the fact) that such injuries did so result cannot be considered as evidence to support the charge of negligence against the defendant, and the defendant is entitled to the verdict." So that no error was committed in submitting to the jury the question whether the brake was defective, and whether that defect, if found to be the cause of Brown's death, could have been discovered by the exercise of due care.

4. The fourth assignment of error was the refusal of the court "to give the two instructions asked by counsel for the defendant in respect to the degree of care required as to for-

eign cars." The instructions referred to are those above given.

The first of the two instructions asked by the defendant, so far as it related to this subject, was properly refused because it restricted all liability of the defendant for the defective brake to the time when the car on which it was placed was put into its train; in other words, as the court below well said, if the brake was plainly shown to have become broken while on the trip from Baltimore to Washington, there would, according to the defendant's instructions, be no liability whatever upon it for an injury arising from the use of the defective brake after the car reached its yard in the latter city. That view cannot be approved.

The question as to the duty of a railroad corporation to take due care that foreign cars hauled by them shall be in such condition as to be safely handled by its own employés, was carefully considered by the court below. Mr. Justice Hagner, after observing that the great through trains, especially of freight cars, are composed of cars belonging to different roads, the proportion of such cars belonging to the particular road over which they are passing being very small, said: "They come from all portions of our country, and often from Canada and Mexico. They are transported along each successive road for hire, and only for that consideration. The employés of such road are obliged to handle every car in the train in the same manner, without respect to its ownership, and are exposed to the same dangers from defects of construction or mechanical appliances that may attend the management of the cars belonging to the road that employs them. It would be most unreasonable and cruel to declare, that, while the faithful workman may obtain compensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company."

The same question arose in *Gottlieb* v. *N. Y. & Lake Erie Railroad*, 100 N. Y. 462, 467, 469, which was an action by a brakeman to recover for personal injuries received by him

while he endeavored, in obedience to orders, to couple two cars that had broken apart in the night time while under way. It appeared that the cars were not provided with proper bumpers, and the absence of such bumpers was the cause of the injuries inflicted upon the brakeman. The Court of Appeals of New York said: "The defect was an obvious one, easily discoverable by the most ordinary inspection, and it would seem to be the grossest negligence to put such cars into any train, and especially into a train consisting of cars of different gauge. But these two cars did not belong to the defendant. They belonged to other companies, and came to it loaded, and it was drawing them over its road to their destination. They were in good repair, and the defects were in their original construction, they being just as they were originally made. The defendant claims that it was bound to receive and transport these cars over its road, and was under no responsibility for any defects in their structure, and that the plaintiff, upon entering its employment, assumed all risks from such defects." After a review of some of the cases, the court proceeded: "It will thus be seen that the utterances of judges as to the responsibility of one company for the defective cars of another company drawn over its road are not entirely harmonious, and we think all the authorities hold that the company drawing the cars of another company over the road owes, in reference to such cars, some duty to its employés. It is not bound to take such cars if they are known to be defective and unsafe. Even if it is not bound to make tests to discover secret defects, and is not responsible for such defects, it is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master, and is at least responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employés. The employés can no more be said to assume the risks of such defects in foreign cars than in cars belonging to the company. . . . The rule

imposing this responsibility is not an onerous or inconvenient or impracticable one. It requires, before a train starts, and while it is upon its passage, the same inspection and care as to all the cars in the train."

In a later case — *Goodrich* v. *N. Y. Central & Hudson River Railroad*, 116 N. Y. 398, 401, — the same principle was announced, the court saying: "It was decided in *Gottlieb* v. *N. Y., L. E. & W. R. R. Co.*, 100 N. Y. 462, that a railroad company is bound to inspect the cars of another company used upon its road, just as it would inspect its own cars; that it owes this duty as master, and is responsible for the conquences of such defects as would be disclosed or discovered by ordinary inspection; that when cars come in from another road which have defects, visible or discernible by ordinary examination, it must either remedy such defects or refuse to take them. This duty of examining foreign cars must obviously be performed before such cars are placed in trains upon the defendant's road or furnished to its employés for transportation. When so furnished the employés whose duty it is to manage the trains have a right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances for the discharge of their duty, and that they are not to be exposed to risk or danger through the negligence of their employer."

The defendant, in one of its requests for instructions, assumed what the law will not sanction, that the defendant was under no duty to ascertain the condition of cars belonging to another company which constitute a part of its train, and which are to be handled by its employés.

We are of opinion that sound reason and public policy concur in sustaining the principle that a railroad company is under a legal duty not to expose its employés to dangers arising from such defects in foreign cars as may be discovered by reasonable inspection before such cars are admitted into its train.

5. The fifth assignment relates to so much of the charge of the court as is set forth in the thirteenth and fifteenth bills of exceptions. It is sufficient to say that the exception, in each instance, was in gross to a series of propositions, some of

which, at least, were clearly right. Neither exception can be regarded. *Beaver* v. *Taylor*, 1 Wall. 637; *Moulor* v. *Am. Life Ins. Co.*, 111 U. S. 335, 337; *Conn. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 261; *Burton* v. *West Jersey Ferry Co.*, 114 U. S. 474, 476.

6. The sixth assignment of error relates to the following part of the charge to the jury: "Now, manifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his capacity to earn money as you discover it from the evidence, his family — who they are and what they consist of — and then, gentlemen, from all the facts and all the circumstances, make up your mind how much this family, if anything, probably lose by his death, and that would be how much had this family a reasonable expectation of receiving; how much had they a reasonable expectation of receiving while he lived, if he had not been killed."

It is suggested by counsel that this charge was in conflict with the decision of this court in *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 459, which was an action to recover damages for personal injuries caused by the negligence of the defendant. It was there said: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children — a son ten years of age, and three daughters of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to

arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

The question of damages in the present case must be determined by the special statute under which the plaintiff sued and not by the general, recognized principles in the law of torts. In *Roy's case* the plaintiff himself was the party injured. He sued for compensation in damages for the personal injuries he received. Here, death ensued from the wrongful act of the defendant. So the jury found. And the plaintiff is the personal representative of the party injured. The statute giving the remedy expressly excludes the creditors of the deceased from any interest in the recovery, and declares not only that the judgment shall inure exclusively to the benefit of his family, but that the damages, not exceeding ten thousand dollars, shall be assessed "with reference to the injury" done "to the widow and next of kin of such deceased person." Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any "next of kin" able to maintain themselves and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance.

7. The seventh assignment of error is that the judgment of the general term, affirming the judgment of the special term, was erroneous in declaring that the plaintiff recover "as in his declaration claimed." The judgment in the special term was for eight thousand dollars. Although the amount claimed in the declaration was $10,000, the affirmance of the judgment

of the special term is necessarily limited to the amount of the judgment so affirmed; and the words "as in his declaration claimed," carelessly put into the final order of the general term, cannot have the effect to increase the sum actually recovered in the special term. If the attention of the general term had been called to the form of the judgment it would have been put in proper shape. Such an inaccuracy in form is not sufficient ground for reversal. The judgment to be enforced is the one rendered in the special term.

We perceive no error in the record to the prejudice of the defendant, and the judgment is

Affirmed.

PULLMAN'S PALACE CAR COMPANY *v.* METROPOLITAN STREET RAILWAY COMPANY.

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

No. 146. Argued January 11, 14, 1895. — Decided March 4, 1895.

In June, 1887, the Pullman Car Company of Chicago wrote to the Metropolitan Street Railway Company of Kansas City, proposing to build for it 25 cable cars according to specifications attached, and to deliver them free on board the Pullman Junction in Illinois, the cars to be inspected and accepted at the Pullman works, and to be paid for on delivery, the written acceptance of the railway company to constitute a contract mutually binding. Nothing was said about brakes except that they were to be operated by gripmen with lever, both trucks. The railway company accepted in writing. The details of construction were then considered and agreed upon between the two companies. Nothing further was said about brakes except that the railway company required them to be heavy and extra powerful. Brakes were then designed by the car company, but no designs of them were furnished to the railway company. When 12 cars were finished, but before any had been delivered, the agent of the railway company went, at the request of the car company, to the shops of the latter in Illinois, and there made a thorough examination of the 12 cars, working the brakes and carefully watching their operation. He expressed himself entirely satisfied with them, and ordered the others to be finished in the same way, and all to be forwarded. This

Statement of the Case.

was done in five shipments between February 24 and March 30, 1888. Before the last shipment was made the railway company, on the 23d of March, tried the cars and found that the brakes would not work satisfactorily. They notified the car company at once, and it sent its engineer to Kansas City. When he left Kansas City he claimed that he had remedied the trouble. On the 5th of April the car company presented its bill for payment. On the 11th the railway company declined to pay it unless the brakes were first made right, and asked the car company to send a man to make the necessary changes, adding that if this were not done it would make the changes itself and charge the car company with the expense of them. The car company did send a man, who worked upon the brakes for some time, but without remedying the difficulty. On the 12th of May the railway company declined to accept the cars, and so notified the car company. It stored the 25 cars in Kansas City, and ordered a supply of cars elsewhere. The car company thereupon sued the railway company, to recover the contract price for the cars. *Held*,

(1) That the title to the first 12 cars passed to the railway company when its agent inspected and accepted them at the shops of the car company;

(2) That the title to the remainder passed to the railway company when they were put on cars at Pullman Junction, to be forwarded to that company;

(3) That under the circumstances the most that the railway company could claim was the reasonable cost of obtaining new brakes adapted for use on the cars constructed under the contract.

THE case, as stated by the court, was as follows:

This action was brought by the Pullman Palace Car Company to recover from the Metropolitan Street Railway Company the sum of $54,219.70 with interest from March 14, 1888, alleged to be due to it under a certain contract for the construction of cars for the defendant company.

The principal defence was that the defendant rightfully rescinded the contract and tendered the cars back to the plaintiff, which refused to receive them, and that after such rescission and refusal the defendant company stored the cars in a proper place, subject to the order of the plaintiff. The defendant also, by way of counter-claim, sought damages against the plaintiff for failure to perform the contract.

The action arose out of certain facts set forth in a special finding by the court below. Those facts were substantially as follows:

Statement of the Case.

Prior to May 15, 1887, the Metropolitan Street Railway Company, a corporation of Missouri, was engaged in the construction of a double track railway on certain streets in Kansas City. The maximum grade of its line was thirteen and fourteen feet ascent in a distance of one hundred feet. There were a number of grades on the line running up to ten per cent and also numerous sharp curves.

On the 15th of May, 1887, the defendant's roadbed having been constructed and the tracks laid, its chief engineers wrote to Charles Pullman, the general agent of the Pullman Palace Car Company, at Pullman, Illinois: "We write to say that we are now ready to take cars for our Wyandotte and Twelfth-Street lines, and should be glad to have you call on us at your convenience." Upon receiving this letter Pullman, who had a general knowledge of the grades and curves of the defendant's line, went to Kansas City to discuss the proposed contract. From Kansas City he went to Chicago, and from the latter place, under date of June 21, 1887, sent to the president of the defendant company a letter written by the general manager of the plaintiff, under date of June 21, 1887, as follows: "I beg to enclose herewith contract with specifications attached, executed by me in duplicate, for the building of twenty-five combination closed and open street cars for your company. Kindly sign and return to me one copy of contract for our files. You will notice in the specifications that the space for the lettering has been left blank, and I would be glad if you would indicate on the specifications returned the lettering you desire applied to the cars."

The contract referred to in that letter was in these words: "Pullman's Palace Car Company will build for the Metropolitan Street Railway Company twenty-five combination closed and open cable cars, as per general specifications hereto attached and made a part of this agreement, and deliver the same f. o. b. [free on board] Pullman Junction, Kensington, Ill., on or before October 10, 1887, delays by fires, strikes, and unavoidable hindrances excepted, for the sum of two thousand dollars each. Terms, cash on deliveries. Cars to be inspected and accepted at our works. Your written acceptance hereof

will constitute a contract mutually binding upon both companies." To this contract were appended the above general specifications. These specifications called for cars in length 34′ 9″ "over all," in width 6′ 6″ or more over sides. They contained nothing relating to brakes except the following: "Brakes to be operated by gripmen, with lever, both trucks."

On the 27th of June, 1887, defendant's chief engineers wrote to the plaintiff as follows: "Your letter of the 21st, enclosing contracts and specifications in duplicate for the twenty-five combination cars for our Twelfth-Street line, addressed to our president, Morse, has been referred to us for attention in his absence, and we enclose you with this one copy duly executed by us on behalf of the company. Will you kindly advise about when we may expect to get the general plans which Mr. Pullman, when here, promised to let us have."

Between the 1st and 16th of July, 1887, the plaintiff's engineer, Twyman, visited Kansas City, stating that the general purpose of his visit was to determine upon the general features of the cars, the shortest curve and other physical conditions of the road, the radius of the shortest curve a car would have to go around, and to arrange with reference to the outside width and the extra length over all, the relative position of the trucks, the height of the wheels, the steps and the seats, and the distance between the seats, etc. He was at the office of the defendant for some time, had access to the plans and profiles of the road, and while in Kansas City certain specifications were approved by defendant's engineers and were submitted to him. These specifications increased the length of cars to 38 feet "over all," and prescribed their width, width of floor frame, height from top of track to top of floor, distance between centre of trucks, wheel base of truck, distance from front of car to centre of forward truck, length of close part of car, length of open portion, as well as of rear platform, size of wheels and sixteen cross-seats to be fixed as decided.

The plaintiff then proceeded with the work of construction. The defendant gave no direction in relation to the brakes on the cars otherwise than that they should be extra heavy and extra powerful; nor were any plans or specifications for brakes

furnished to the defendant during their construction. The brake put upon the cars was designed and constructed by Twyman, plaintiff's engineer.

In December, 1887, in response to plaintiff's request that defendant send one of its employés to Pullman to inspect the cars, Lawless, defendant's superintendent, went there for that purpose. Ten or twelve cars were then shown to him as completed and standing in the shops of plaintiff on the floor where they were run out. Lawless made a thorough examination of them, inside and out, and upon examining the brakes by having them worked from within, and observing their operation and application while under and at the side of the car, announced himself as satisfied with them, and requested the representative of the plaintiff present to finish the others up in the same way and forward them. No further request was made by Lawless for testing the cars, and no other facilities were offered by the plaintiff for making such test and examination.

The first five cars were shipped by plaintiff February 24, 1888. The next shipment, of eight cars, was on March 1, 1888; the next, of two cars, March 17, 1888. Five cars were shipped March 27, 1888, and the remainder on the 30th day of March, 1888.

When the cars reached Kansas City, they were stored in defendant's power-house, because the eastern extension of its line was not then in readiness for operation. They were taken into the house by passing them over a curved track from the street. This curve was 30-foot radius. When the first lot of cars were being passed around this curve it was found that the wheels "bound against the sills." Thereupon defendant's engineer telegraphed plaintiff as follows: "Forward truck of cars will not pass around 30-foot radius curve. Lengthen stay-chains and cut away lower corner of middle sills." To this telegram plaintiff answered: "Telegram received. Will make alterations requested."

On the 22d of March, 1888, before all the cars had been shipped, the east end of the Twelfth-Street line was completed so that a car could run over that part of the line. Defendant's

superintendent took out one of the cars for trial, when difficulty about the brakes manifested itself. The difficulty was that when the brakes were so adjusted that they could be used to stop the car on a straight level track, in passing around a curve or up a grade they would bind against the wheels, causing them to slip, and at times throwing the car from the track. If the brakes were so adjusted that they would not bind on the curves or grades, then they would not work on a straight, level track so as to stop the cars.

On the 23d of March the defendant, by its superintendent, wrote to the general manager of the plaintiff: "We tried one of your cars over the line yesterday and found that the brakes would not work satisfactorily; in fact, were perfectly useless. I think the reasons for this are: There being so many connections, and consequently so much lost motion, that before the shoes hug the wheels the break-lever comes to the limit of the quadrant. Before starting out with the car we adjusted the brakes so that the shoes touched the wheels, but notwithstanding this we could not lock the wheels, or even hold the cars on the lightest grades. As a perfect working brake is an imperative matter with us, I would like to hear from you on the subject and what remedy you propose."

In response to this letter Twyman, the plaintiff's engineer, came at once to Kansas City and attempted to remedy the trouble with the brake, and on leaving claimed that he had done so.

On the 5th of April, 1888, the manager of the plaintiff wrote to the defendant's president: "The entire lot of twenty-five cars have been delivered, thirteen of them having been shipped in February. Bills have been rendered your company for the amount of $50,000, being the original contract price without extras, bills for which will be sent your auditor in a few days. Will you kindly direct a prompt remittance for the bills already rendered?"

The defendant's whole line was ready to be opened on or about the 7th or 10th day of April, 1888, when the cars for the first time were placed on its road. This was shortly after Mr. Twyman had left Kansas City.

PROPERTY OF UNITED STATES SENATE

Upon the recurrence of the trouble in operating the cars, the defendant, under date of April 11, 1888, wrote to plaintiff: "I have delayed answering your letter of April 5th for some days, as I wished to see your cars in practical operation before making a reply. The Twelfth-Street cable line has been running since Saturday, and we should now be operating with a full equipment if we had not been obliged to make constant repairs and changes to the car brakes. These are very unsatisfactory, and we have hardly been able to make a round trip with a car without stopping to make repairs, and on several occasions have been obliged to run over a considerable portion of the line with no power to set the brakes. I will make no attempt to go into this matter in detail, but wish to say that I shall insist on these cars being made right in this respect before I should be willing to approve your bills. If you will send a practical man here to take charge of these necessary changes it will be the best plan, *otherwise we shall be obliged to make them and charge you with the expense.* There are some other things about the cars which are not as they should be, *but which do not interfere with the operation of them.* Many of the panels are badly cracked, and the painting on part of the cars at least is very poorly done. The attention of your engineer was called to these points, and he admitted that the work was not as it should be. I have no desire to delay the settlement of your bills, and would gladly approve your vouchers for them to-day if we could use the cars, as it is costing the company a very large amount of money every day that we cannot operate with a full equipment. Let me hear from you in regard to what action you will take as to the brake repairs at your earliest convenience."

To this letter the plaintiff, under the date of April 13, 1888, replied: "Your favor of the 11th instant received and noted. I regret to hear that you are having any further trouble with the brakes on the combination cars, as our engineer reported on his return that the trial made on the brakes on one of the cars while he was there, after some slight changes had been made, proved entirely satisfactory, and there was every reason to suppose that with these little changes the brakes

would work well on the remaining cars. I regret that your engineer or superintendent did not wire us of the situation as indicated in your letter, as we would have sent our engineer over immediately. As it is, he will leave for Kansas City to-night, and I trust that, in conjunction with your people, the defects reported can be easily remedied. Our engineer did report on his return that the paint was acting badly on a portion of the new cars, and we are sending out two experienced men to attend to the paint work on such of the cars as require it. It is proper to explain just here that the defect seems to be with the middle panel, which is painted with what is called 'crimson lake,' and which is one of the most difficult colors to hold. We regret exceedingly that there has been any trouble in this regard, and you may rest assured that the defects will be remedied without expense to your company. Speaking of the paint reminds me that our people report that the alkali water is very severe on the finish of your cars, as we know from our own experience with sleeping cars where alkali water is used. Another suggestion in this connection I beg to make is that, if your people would take the new cars in shop within about four or five months after they are received and give the paint a thorough cleaning, and then two coats of varnish, they would run for at least a year without having to be varnished again, and it would also preserve the life of the paint."

Immediately thereafter the plaintiff's engineer, Twyman, came to Kansas City to look after the trouble in question, and did some work on the brakes while there, but, being called away by letter or telegram, he left for Chicago, stating that he would soon return and complete the work. Instead of so doing he wrote a letter, saying: "I am sorry not to be able to return to Kansas City as quickly as I anticipated. We have, however, arranged to send you a man immediately, *who will take charge of the necessary alterations of your cars.* There will be no necessity of his leaving Kansas City *until everything is arranged to your satisfaction*, and I will probably come out there again towards the end of the week."

Immediately following this letter the plaintiff's mechanic, one Overton, came with typewritten instructions from Twyman, and went to work to remedy the defect in the brakes. He went over the cars one by one and pronounced them ready for service. This mechanic stated that he had done all he could do to remedy the difficulty in question, and if it did not accomplish that end he did not know how to remedy it. Notwithstanding the work and effort of this mechanic the same difficulty thereafter continued to manifest itself in the operation of the cars as to the working of the brakes.

The defendant's president then wrote to the plaintiff under date of May, 12 1888: "I have delayed corresponding with you further in regard to the Twelfth-Street cars until your mechanic had finished his work. The result of this work has been very little material improvement in the action of the brakes, and the cars at no time during the progress of the repairs have been in a satisfactory condition to operate, and not in such condition now. This fact has been reported to the board of directors, which has to-day passed a resolution rejecting the twenty-five cars furnished by your company for Twelfth Street on account of the imperfect brakes and other seriously objectionable features, and has instructed me to notify you to this effect, and that the cars are subject to your order."

To this letter the plaintiff replied, under date of May 17, 1888: "Your letter of the 12th instant, relating to the twenty-five combination cars built by this company for your company, has been received and noted. You are cognizant of the fact that the cars were built according to plans approved by your chief engineer, the material used, as well as the workmanship, being first class in all respects. The cars before shipment were inspected and accepted by your general superintendent. The cars were then shipped to, received, and put in use by you. Subsequently you made complaint that the brakes did not in all respects work satisfactorily, and a competent mechanic was promptly sent to examine the brakes and make any adjustment found necessary. When the brakes were examined and adjusted on one car your officers pronounced them satisfactory; thereupon the brakes were in like manner

examined and adjusted on the remaining cars, all the cars then being in use by your company. In view of the facts your present statement to the effect that you reject the cars on account of 'imperfect brakes and other seriously objectionable features' is quite astonishing, and I must assume that you have been misinformed as to the condition of the cars, as I am unwilling to believe that you would knowingly allow yourself to be a party to such an unreasonable and unfounded claim. I have to request, therefore, that you will without further delay remit the amount due this company for said cars, as per bills heretofore rendered, and thus avoid the necessity of any action on our part to enforce the payment of the amount due us."

The following additional facts were found by the court:

"The cars could not be operated successfully on defendant's railroad track for which they were designed with this brake, nor upon similar lines, and this defect or inability in the brake was not apparent nor discoverable upon any reasonable inspection made at the place of their manufacture, and could not be discovered without a practical test on the defendant's railroad track or over a like track. The defect in the brake was a latent one, which did not and could not develop to the observation on inspection, and was only discoverable when put into use on the defendant's track or similar track.

"The defendant paid the freight and drayage on said cars from Chicago to Kansas City the sum of $1088.50, and paid for building house in which to store the rejected cars $1850.

"After the sending of the letter by defendant's president to the plaintiff informing it that the cars were rejected and were at plaintiff's disposal, the defendant built a car-house at or near Kansas City and stored therein these cars, where they have ever since remained.

"The defendant operated upon its said road combination cars of a similar character, weighing about six hundred pounds less than the cars in controversy, which were manufactured by the Laclede Car Company of St. Louis, Missouri, and were operated by a brake of a different pattern, costing from seventy-five to one hundred dollars apiece.

Counsel for Plaintiff in Error.

"The defendant did not use and operate the cars in question longer than was reasonably necessary to ascertain whether they could be successfully operated with the brake furnished therewith.

"During the time defendant run the cars on its road, during the tests made, as hereinbefore found, passengers were received thereon and fares collected from them by defendant. The successful running of the trains was frequently interrupted by breaking of the cable and the locking of the car wheels, in consequence of the defective construction of the brakes, and defendant so continued in the attempt to run said cars during the time of plaintiff's promises to repair the alleged defect, and on such trips received on board of said cars passengers, and collected from them the customary fare. On the trial defendant offered to prove that owing to the insufficiency of the brakes the cars were run at a loss, and that no profit resulted from collection of fares. On plaintiff's objection this testimony was by the court excluded.

"Defendant had in its employ during the time in question two engineers of skill and experience, one of whom, Mr. Lawless, the same person who went to Chicago to inspect the cars at plaintiff's yards, had experience in the construction and practical operation of cable cars in San Francisco, California, prior to the time of taking service from defendant."

Upon the foregoing facts the court on its own motion declared the law to be that the defendant had the legal right to rescind the contract for the purchase of said cars in the time and manner above set out, and that the defendant rescinded the contract in accordance with its legal right so to do, made a lawful tender of the cars to the plaintiff, and was not liable for the contract price of them, or any other sum, and that the defendant was entitled to recover from the said plaintiff the freight and drayage on said cars from Chicago to Kansas City, amounting to the sum of $1088.50, for which judgment was entered.

Mr. Gardiner Lathrop for plaintiff in error. *Mr. John S. Runnells* and *Mr. William Burry* were on his brief.

Argument for Defendant in Error.

Mr. Frank Hagerman and *Mr. Wallace Pratt* for defendant in error.

I. For all the purposes of review in this court the facts as found and stated by the court below are conclusive. Rev. Stat. § 649; *Boogher* v. *Ins. Co.*, 103 U. S. 90; *Dickinson* v. *Planters' Bank*, 16 Wall. 250; *Town of Ohio* v. *Marcy*, 18 Wall. 552; *Saulet* v. *Shepherd*, 4 Wall. 502; *Copelin* v. *Ins. Co.*, 9 Wall. 461; *Ins. Co.* v. *Folsom*, 18 Wall. 237; *Ins. Co.* v. *Sea*, 21 Wall. 158; *United States* v. *Dawson*, 101 U. S. 569; *Tyng* v. *Grinnell*, 92 U. S. 467; *Martinton* v. *Fairbanks*, 112 U. S. 670; *Fort Worth City Co.* v. *Smith Bridge Co.*, 151 U. S. 294.

II. No rulings having been made by the court below and excepted to upon objections to the admission or exclusion of evidence, the only question for review by this court is as to the sufficiency of the facts found to support the judgment. Rev. Stat. § 700; *Boogher* v. *Ins. Co.*, 103 U. S. 90.

III. There was an implied warranty on the part of the plaintiff that the cars, when manufactured and applied to the use contemplated by defendant and understood by plaintiff at the time of making the contract, should be reasonably fit for that use. *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, and cases cited; *Railroad Co.* v. *Smith*, 21 Wall. 255; *Reynolds* v. *Palmer*, 21 Fed. Rep. 433; *Craver* v. *Hornburg*, 26 Kansas, 94; *Curtis Mfg. Co.* v. *Williams*, 48 Arkansas, 325; *Rodgers* v. *Niles*, 11 Ohio St. 48; *S. C.* 78 Am. Dec. 290; *Best* v. *Flint*, 58 Vermont, 543; *Downing* v. *Dearborn*, 77 Maine, 457; *Brigg* v. *Hilton*, 99 N. Y. 517; *Hoult* v. *Baldwin*, 67 California, 440, 610; *Beals* v. *Olmstead*, 24 Vermont, 114; *S. C.* 58 Am. Dec. 170; *Correio* v. *Lynch*, 65 California, 273.

IV. The provision in the contract for an inspection and acceptance of the cars at works of the plaintiff does not apply to defects discoverable only by actual use. (*a*) It is the only just and reasonable construction that can be given to the contract. (*b*) It is the construction placed upon the contract by the parties themselves. *Chicago* v. *Sheldon*, 9 Wall. 50; *Foster* v. *Goldschmidt*, 21 Fed. Rep. 70.

V. Even if we are wrong in our construction of the contract,

yet the fact that the contract provided for an inspection at the works does not exclude the implied warranty of the manufacturer if the defect was only discoverable by use on the Twelfth-Street line. *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Bird* v. *Smith*, L. R. 12 Q. B. 786; *Craver* v. *Hornburg*, 26 Kansas, 94; *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108; *Boothby* v. *Scales*, 27 Wisconsin, 626; *Hudson* v. *Roos*, 72 Michigan, 363; *Gould* v. *Stein*, 149 Mass. 570.

VI. The fact that the work was done under specifications does not exclude the idea of an implied warranty.

VII. For a breach of the implied warranty the defendant, within a reasonable time, could elect to rescind the contract. *Craver* v. *Hornburg*, 26 Kansas, 94; *Weybrich* v. *Harris*, 31 Kansas, 92; *Branson* v. *Turner*, 77 Missouri, 489; *Howe Machine Co.* v. *Rosine*, 87 Illinois, 105; *Rogers* v. *Hanson*, 35 Iowa, 283; *Morse* v. *Brackett*, 98 Mass. 205; *Hyatt* v. *Boyle*, 5 Gill. & Johns. 110; *S. C.* 25 Am. Dec. 276; *Marston* v. *Knight*, 29 Maine, 341; *Dill* v. *O'Ferrell*, 45 Indiana, 268; *Butler* v. *Northumberland*, 50 N. H. 33; *Youghiogheny Iron Co.* v. *Smith*, 66 Penn. St. 340; *Jagers* v. *Guffin*, 43 Mississippi, 134; *Ralph* v. *Chicago & Northwestern Railway*, 32 Wisconsin, 177; *Curtis Mfg. Co.* v. *Williams*, 48 Arkansas, 325; *Hoult* v. *Baldwin*, 67 California, 610; *Polheumus* v. *Herman*, 45 California, 573; *Downing* v. *Dearborn*, 77 Maine, 457; *Correio* v. *Lynch*, 65 California, 273; *Mandel* v. *Buttles*, 21 Minnesota, 391; *Prickett* v. *McFadden*, 8 Ill. App. 197; *Matthews* v. *Fuller*, 8 Ill. App. 529; *Kent* v. *Bornstein*, 12 Allen, 342; *Culler* v. *Gilbreth*, 53 Maine, 176; *Jack* v. *R. R. Co.*, 53 Iowa, 399; *National Bank & Loan Co.* v. *Dunn*, 106 Indiana, 110; *Warder* v. *Fisher*, 48 Wisconsin, 338; *Scranton* v. *Tilley*, 16 Texas, 183; *Pope* v. *Allis*, 115 U. S. 363.

VIII. The non-compliance with a condition of a contract will always authorize a rescission. *Fogg* v. *Rodgers*, 84 Kentucky, 558; *Wolcott* v. *Mount*, 36 N. J. Law, 262; *Bagley* v. *Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Norrington* v. *Wright*, 115 U. S. 188; *Filley* v. *Pope*, 115 U. S. 213.

IX. Where an article is ordered from a manufacturer upon an executory contract, there is the implied warranty before

mentioned, and this is a condition of the contract which will warrant a rescission for a breach. *Howard* v. *Hoey*, 23 Wend. 350; *S. C.* 35 Am. Dec. 572; *Voorhees* v. *Earl*, 2 Hill, 288; *S. C.* 38 Am. Dec. 588; *Muller* v. *Eno*, 14 N. Y. 597; *Street* v. *Blay*, 2 B. & Ad. 456; *Heilbutt* v. *Hickson*, L. R. 7 C. P. 438; *Parks* v. *Morris Tool Co.*, 54 N. Y. 586; *Brigg* v. *Hilton*, 99 N. Y. 517; *Norton* v. *Dreyfuss*, 106 N. Y. 90. The distinction as to an implied warranty by a manufacturer upon an executory contract is too refined to be clearly drawn. *Bagley* v. *Cleveland Rolling Mill Co.*, 21 Fed. Rep. 159; *Wolcott* v. *Mount*, 36 N. J. Law, 262; *Pope* v. *Allis*, 115 U. S. 363.

X. The receipt of the cars does not prevent the return, whether considered as a rescission on account of the breach of the warranty, or a rejection on account of a breach of a condition. *Norrington* v. *Wright*, 115 U. S. 188; *Craver* v. *Hornburg*, 26 Kansas, 94; *Branson* v. *Turner*, 77 Missouri, 489; *Boughton* v. *Standish*, 48 Vermont, 594; *Knoblauch* v. *Kronschnabel*, 18 Minnesota, 300; *Simpson* v. *Krumdick*, 28 Minnesota, 352; *Doane* v. *Dunham*, 79 Illinois, 131; *Hoult* v. *Baldwin*, 67 California, 610; *Curtis Mfg. Co.* v. *Williams*, 48 Arkansas, 325; *Dawes* v. *Peebles*, 6 Fed. Rep. 856; *Bryant* v. *Isburgh*, 13 Gray, 607; *S. C.* 74 Am. Dec. 655. Especially is the right to rescind or reject not lost when the failure so to do comes from the assurances of the vendor. *Courtney* v. *Boswell*, 65 Missouri, 196; *Day* v. *Pool*, 52 N. Y. 416; *Matthews* v. *Fuller*, 8 Ill. App. 529.

XI. A mere offer to return is a sufficient rescission. *Howard* v. *Hoey*, 23 Wend. 350; *S. C.* 35 Am. Dec. 572; *Grimoldby* v. *Wells*, L. R. 10 C. P. 391; *Curtis Mfg. Co.* v. *Williams*, 48 Arkansas, 325; *Matthews* v. *Fuller*, 8 Ill. App. 529; *Padden* v. *Marsh*, 34 Iowa, 522. And the vendor will be put *in statu quo* if the chattel is returned injured, if not injured by the buyer's negligence. 2 Kent Com. 480, note (*c*).

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

The facts found by the court below, as above detailed, bring this case within a very narrow compass, and render it unneces-

sary to make an extended review of the very large number of adjudged cases, American and English, cited in argument.

The subject of implied warranty in sales of personal property was examined by this court in *Kellogg Bridge Company* v. *Hamilton*, 110 U. S. 108, 116, and, subsequently, in *Seitz* v. *Brewers' Refrigerating Co.*, 141 U. S. 510, 518. In the first of those cases it was said that "when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker, by his occupation, holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use." This principle was reaffirmed in the other case above cited and it was there said: "But it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer."

These cases were much commented on in argument, and, for that reason, we have deemed it proper to indicate the principal ground upon which each was determined.

The present case has some features that were not in either

of the others. By the written contract between the parties the cars that the plaintiff agreed to construct were to be inspected and accepted at the works of the plaintiff, after which they were to be delivered by the plaintiff, free on board the cars, at Pullman Junction, Kensington, Illinois. After ten or twelve cars were completed, and were inspected at the works of the plaintiff by the superintendent of the defendant, the latter expressed himself satisfied with them, and requested the plaintiff to finish the others in the same way and forward them. Clearly, upon such inspection and acceptance, the title as to those cars passed to the defendant company. There is no claim that the remainder of the cars were not finished in the same manner as the first lot inspected by Lawless. As to these, the title certainly passed to the defendant when they were put on the cars at Pullman Junction to be forwarded, if it did not pass before and as each lot was completed under the order to make them like those that had been personally inspected and accepted at the works of the plaintiff. *Halliday* v. *Hamilton*, 11 Wall. 560, 564, and authorities cited; *The Mary and Susan*, 1 Wheat. 25, 35; *Stack* v. *Inglis*, 12 Q. B. D. 564.

To what extent was the defendant concluded by the actual inspection and acceptance of the first lot of cars, and of the acceptance, in advance of their completion, of the remaining cars when finished or constructed in the same way?

The court below found that the cars could not be operated successfully with the brakes that were put upon them by the plaintiff, and that this fact was not apparent nor discoverable upon any reasonable inspection at the place of manufacture, and could not be discovered until after a practical test upon the road.

The contention, therefore, of the defendant is that the plaintiff, having knowledge that the cars were to be used on the defendant's road, impliedly warranted that the brakes placed on them would be sufficient for the purposes for which they were designed. The plaintiff insists that the provision in the contract for inspection and acceptance of the cars at the place of manufacture is inconsistent with any idea of implied

warranty upon its part of the sufficiency of the brakes to meet the peculiar difficulties on defendant's road arising from curves and grades; especially as one of the defendant's engineers had experience in the construction and operation of street cars, and was at least as well informed upon that subject as the plaintiff's officers could possibly have been.

If it be assumed that the plaintiff, notwithstanding the provision for inspection and acceptance of the cars before their delivery, impliedly warranted the sufficiency of any brakes placed by it on cars to be used on the defendant's road, and even if it be assumed that the defendant had the right, after title passed, to rescind the contract within a reasonable time after discovering the insufficiency of the brakes, the result for which the defendant contends will by no means follow.

The defendant became aware of insufficiency of the brakes as early as the 22d day of March, 1888, and notice of that fact was given to the plaintiff. The defendant did not then rescind the contract nor intimate any purpose of so doing. It sought to know what remedy the plaintiff would suggest to meet the difficulty, and demanded that the plaintiff should make the brakes sufficient. It warned the plaintiff that if it did not send a practical man to Kansas City to take charge of the necessary changes, such changes would be made by the defendant at the plaintiff's expense. The latter promptly replied that it would do what was necessary in order to make the brakes sufficient. But what it did failed to accomplish the desired result. The outcome of the matter was the refusal of the defendant to pay for the cars "on account of the imperfect brakes and other serious objectionable features." Notice of the determination not to retain the cars or pay for them was not given by the plaintiff to the defendant until the 12th of May, 1888. We dismiss any consideration of the "other serious objectionable features" referred to, because we are not informed by the record that any such existed. On the contrary, the defendant stated that the defects in the cars, independently of the brakes, did not interfere with their operation. The case is then to be disposed of upon the basis that the cars, apart from the brakes, were in every substantial respect what

the contract contemplated, and that the only ground upon which the defendant placed its refusal to pay for them was the insufficiency of the brakes.

We are of opinion that the demand of the defendant that plaintiff make the brakes sufficient, in connection with its expressed willingness prior to its notice of May 12, (no intimation being previously given of any desire or purpose to rescind the contract,) to approve the plaintiff's bill, as soon as the brakes were made sufficient for use on its road, and the expressed willingness of the plaintiff, after notice from the defendant that the brakes were insufficient, to put them in proper condition, (without claiming that it was under no legal obligation to incur expense to that end,) so far changed the relation of the parties to each other that the defendant lost the right, if it had such right, to rescind the contract and return the cars; and the plaintiff must be held to have admitted or recognized its obligation to put the brakes in such condition that they would be adequate for use on the defendant's road.

While it must be taken upon the record before us that the *brakes* in question were entirely useless for the defendant's road, it is not specifically found, nor do the facts found justify the conclusion, that other brakes could not have been supplied for use on the cars constructed by the defendant. If, at trifling expense or without unreasonable exertions, the defendant could have supplied the cars in question with other brakes that were sufficient, the utmost that under all the circumstances it could claim, in reduction of the amount it agreed to pay for the cars, would be the reasonable cost of obtaining new brakes adapted for use on such cars. *Stillwell & Bierce Manfg. Co.* v. *Phelps*, 130 U. S. 520, 527; *Miller* v. *Mariners' Church*, 7 Greenlf. 51; *Davis* v. *Fish*, 1 Iowa, 407; Sedgwick on Damages, (6th ed.,) 106, 107.

It is found that the defendant operated upon its road combination cars purchased from another company, of a similar character with those constructed by the plaintiff, weighing about six hundred pounds less, and used a brake of a different pattern, costing from seventy-five to one hundred dollars. It

may well be assumed from the findings that the cars in question can be successfully operated with proper brakes costing not more than the last-named sum. If brakes, adequate for use on the cars constructed by the plaintiff, could not be obtained for that amount, that fact is not shown. The ends of justice will be met by a judgment in favor of the plaintiff for the contract price of the cars constructed by it and now in the possession of the defendant, lessened by the sum of $2500, the amount which we must assume, under the findings, it would cost the defendant to replace the brakes furnished by plaintiff with other brakes sufficient for the cars in question.

The plaintiff included in its petition claims for different sums of money aggregating $4219.70, which are claimed to have been expended for the use of the defendant in connection with the contract for building the cars. But the allegations in respect to those claims are traversed by the answer and there is no finding in reference to them. Indeed, no finding in respect to them was asked. The judgment cannot therefore embrace them. We can only direct such judgment as is authorized by the facts specially found by the court below. Rev. Stat. § 701; *Fort Scott* v. *Hickman*, 112 U. S. 150, 164, and authorities cited.

The judgment is reversed with directions to enter judgment in favor of the plaintiff for the sum of $47,500, with interest thereon from the 30th day of March, 1888, at the rate allowed by the laws of Illinois. Reversed.

Mr. Justice Brewer took no part in the consideration or decision of this case.

Syllabus.

UNITED STATES *v.* PIATT AND SALISBURY.

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

No. 166. Submitted January 23, 1895. — Decided March 4, 1895.

In March, 1878, P. contracted to carry the mails three times a week for four years on route 36,107, commencing July 1, 1878, and entered on the performance of his contract. On the 5th day of the following December, in consequence of false and fraudulent sworn statements made by him concerning the number of horses and men that would be required to expedite the service by reducing the time, a large additional compensation was allowed him by the Postmaster General for that purpose. On the 13th of the same December he sublet his contract to S. with the consent of the Department, and the service was from that time performed by S. Further increased allowances, based on like fraudulent statements by P. were made in January and July, 1879, and assented to by P. and S. The amount so fraudulently received during the term of service was $99,556.20. The government sued P. and S. to recover back that sum. In the first count the above facts were set forth and it was alleged that the false statements were designed to mislead and did mislead the Post Office Department. A second count was for money had and received. A third count set forth the same facts and averred that the money had been paid in mistake of fact, and had been received contrary to the provisions of Rev. Stat. § 3961. No process was served upon P., and he did not appear. S. appeared and demurred, and the demurrer was sustained. Each was cited in the writ of error, and service acknowledged by the attorney for both. *Held*,

(1) That the statements regarding the "horses and men" required for the expedited service came within the statement as to "stock and carriers" required therefor, as provided in Rev. Stat. § 3961;

(2) That P. and S. were bound by these statements and were estopped from asserting that it was not intended thereby to bring the contract within the statute;

(3) That the demurrer admitted the fact that the increase had been allowed on the basis of the false representation;

(4) That the court below erred in sustaining the demurrer to the third count;

(5) That the defendants having each participated in the transaction, were properly sued jointly;

(6) That the demurrer should have been overruled.

THE case is stated in the opinion.

Mr. Solicitor General for the plaintiffs in error.

Mr. Monroe Salisbury in person for the defendant in error Salisbury.

No appearance for defendant in error Piatt.

Mr. Justice Harlan delivered the opinion of the court.

This action was instituted by the United States to recover from the defendants in error certain moneys claimed to have been paid to them for services in carrying the mail, in excess of the amount to which they were legally entitled.

The first count alleges in substance that on March 15, 1878, the defendant Piatt contracted in writing with the United States, through the Postmaster General, to carry the mail three times a week for four years from July 1, 1878, for a consideration of $16,500 per annum, on the route then known as No. 36,107, between Bozeman, Montana, by way of Shields River, Crow Agency, Stillwater, Head of Navigation, Pompey's Pillar, Fort Peace, and Big Horn City, to Tongue River and back. By power of attorney, dated August 15, 1878, Piatt authorized the defendant Salisbury to collect from the Auditor of the Treasury for the Post Office Department all pay to become due for carrying the mails upon that route; and subsequently, on December 13, 1878, with the permission of the Post Office Department, he sublet his contract to Salisbury. Piatt entered upon and continued the performance of this service from July 1, 1878, until December 13, 1878, from which date the service was performed by Salisbury.

For the purpose of expediting the service, the Post Office Department, by order dated December 5, 1878, on agreement with Piatt shortened the schedule of departures and arrivals on the above route after December 16, 1878, by reducing the time from 132 hours to 72 hours in summer and 96 hours in winter, allowing therefor additional compensation of $16,500 per annum, in supposed accordance with the provisions of section 3961 of the Revised Statutes of the United States. A

similar order was made January 17, 1879, allowing an additional annual sum of $3542.92 from January 25, 1879, for an increased distance on the route of 35 miles, such allowance being computed *pro rata* upon the basis of the compensation previously allowed. A further order dated July 15, 1879, increased the service to seven trips a week from August 1, 1879, for which the additional sum of $48,723.89 per annum was allowed upon the same basis of compensation. Both Piatt and Salisbury consented to the conditions of these orders.

Piatt procured the issuing of the above orders amending the original contract. They were issued solely upon the basis of certain representations made in his sworn statement dated August 16, 1878, to the effect that to carry the mail upon said route three times a week, on a schedule of 132 hours, required 26 men and 90 horses, while the proposed expedited schedule of 72 hours in summer and 96 hours in winter would require 48 men and 200 horses. This statement was wholly false and fraudulent in that it alleged an increase of 22 men and 110 horses necessary to perform the expedited schedule, whereas in fact neither Piatt nor Salisbury ever required or used in performing the mail service, three times a week or seven times a week, more than 34 men and 100 horses, being 14 men and 100 horses less than Piatt alleged in his sworn statement were necessary for performing said expedited service three times a week. By means of such fraudulent representations by Piatt, and by means of false vouchers presented to the Post Office Department, Piatt and Salisbury received from the plaintiff a larger sum of money than they were lawfully entitled to receive. The sum so received by them during the period of their service, by means of such false statements and fraudulent vouchers, was $261,016.50, being $99,556.20 in excess of the amount that could, after certain reductions and remissions, be lawfully paid to them. The false statements above referred to were designed to mislead and did mislead the Post Office Department of the United States, and the defendants were entitled to receive from the United States for such service the sum of $148,438.23 and no more.

Payment of such excess having been demanded and refused,

judgment was asked against the defendants for $99,556.20, with interest from August 21, 1882, and costs of suit.

The second count is the common law count for money had and received.

The third count sets forth the same facts as are embodied in the first count, and alleges that plaintiff's officers were induced to pay the $99,556.20 in mistake of fact, and that that sum was received by defendants contrary to section 3961 of the Revised Statutes of the United States.

The payments referred to are set out in full in an exhibit showing the amounts defendants were lawfully entitled to receive on the basis of the actual increase of stock and carriers consequent upon the reduction in running time as before mentioned.

Piatt was not served with process, nor did he appear or plead. Service of process was had upon Salisbury, who appeared and demurred both generally and specially to the complaint.

The court below sustained the demurrer and dismissed the complaint as to both defendants. Each defendant is cited in the writ of error upon which this action is before us, and service acknowledged by the attorney of both.

The plaintiff in error has assigned the following errors: 1. That the Circuit Court erred in sustaining Salisbury's demurrer to the complaint. 2. That judgment was wrongly given in favor of both defendants, Piatt not having appeared or pleaded.

By section 3961 of the Revised Statutes of the United States it is provided that "no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional *stock and carriers* is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

It is contended that as the statement of the contractor in every case merely stated the number of *men and horses* required to perform the service on the contract time, and also

how many men and horses, in his opinion, it would require to perform the service on the proposed expedited schedule, and as it merely alleged that the subcontractor or person who performed the service did not use the men and horses stated to be necessary, the complaint is insufficient to maintain this action, for the reason that section 3961 of the Revised Statutes, under which the action is brought, provides nothing as to men and horses, but does provide that the allowance for expedition shall be based upon the additional *stock and carriers* made necessary by the expedited schedule. And, it is said, "there is not a word in the complaint that charges that the defendants did not employ additional stock and carriers on the expedited schedule in exact proportion to the expedition allowance." It is also said that the words "stock and carriers" in section 3961 are not synonymous with the words "men and horses;" that the word "stock" does not mean simply live stock, nor does the word "carriers" mean either horses or men, but rather includes all the equipment of the route, whether horses, wagons, harness, stage stations, fuel, food, stables, in fact everything needed to carry on the service, such being the popular sense in which these words are used.

There is nothing of substance in these contentions. Whatever may be comprehended by the term "stock and carriers" in section 3961, it certainly includes within it "men and horses;" and as the Postmaster General could allow an increased compensation only in conformity with that statute, it must be assumed that he did so upon the basis of the sworn statement alleging an increase of "men and horses" necessary for the performance of the expedited schedule. The defendants in error are bound by this sworn statement, and as the increased compensation was ordered only upon the assumption of the truth of its allegations and in conformity with the statute, and as they agreed to the amendment of the original contract in this regard, they are estopped from asserting that this sworn statement was not intended to bring the contract within the statute.

If the term "stock and carriers" does not include "men and

horses," then the Postmaster General had no right to make the increased allowance mentioned, and if this be true, such additional allowances exceeded the "sum which, according to law, might rightfully have been allowed therefor," and by the provisions of section 4057 of the Revised Statutes the Postmaster General "shall cause suit to be brought to recover such wrong . . . payment, or excess, with interest thereon." But, as by the provisions of section 3961, "no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary," and as the Postmaster General, upon the defendant Piatt's sworn statement that certain increases of men and horses were necessary to perform the service upon the proposed expedited schedule, made the said allowance of increased compensation, the conclusion must be that the plaintiff made and the defendants accepted the amended contract, with the understanding that it was within the provisions of the statute.

The defendants in error further contend that the increased allowances in question were not made by the Postmaster General solely upon the basis of the sworn statement designating the additional number of men and horses necessary to perform the service upon the proposed expedited schedule, but that it was merely for the information of the Postmaster General in making the new schedules. But whether it be true or not that he acted solely upon such representations, it is sufficient that they constituted a substantial part of the information from which he made the new schedules allowing increased compensation. The complaint, however, alleges that the Postmaster General did allow the increased compensation solely upon the basis of these false representations. The allegations of the complaint must be taken to be true for the purposes of this demurrer. The question is whether the facts as stated, if true, constitute a sufficient cause of action. We think they do.

The third count alleges that the excessive payments in question were made by the plaintiff in *mistake of fact*. We do not doubt the plaintiff's right to recover the amount of

such excessive payments in case of fraud in the transaction leading to their disbursement. But if there were no actual fraud in these proceedings, it is clear from the allegations of the complaint that the defendants received the moneys in question without consideration, for, whatever may be the meaning of the term "stock and carriers," the original contract itself and the sworn statement on the basis of which it was amended mention only "men and horses" as the means of performing the service of carrying the mail, and it is shown by the allegations of the complaint that to perform the expedited schedule either three times per week or seven times per week there were never required nor used "more than 34 men and 100 horses, being 14 men and 100 horses less than the said Piatt alleged in his said sworn statement were necessary for performing said expedited service three times per week." The provisions of section 4057 of the Revised Statutes are applicable to this very state of case. That section provides that "in all cases where money has been paid out of the funds of the Post Office Department under the pretence that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

We are of opinion that the court below erred in sustaining the demurrer to the third count.

Very little need be said upon the question of misjoinder, constituting the second ground of demurrer.

Section 3963 of the Revised Statutes provides that "no contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be

null and void." If the alleged subletting of the contract to Salisbury be regarded merely as an arrangement between the defendants, still Piatt was liable for the performance of both the original and the amended contract, during the whole period of service. The claim of the plaintiff is confined to the period between December 16, 1878, and August 21, 1882, during which time the expedited schedule was in force. So there is nothing in the contention of improper joinder in reference to matters previous to December 13, 1878. As to matters subsequent thereto, the joinder was proper, for both defendants were parties to the fraudulent transaction whereby the plaintiff was induced to make the increased allowance of compensation referred to; and it is specifically alleged in the third count of the complaint that the sworn statement of Piatt was presented "by and on behalf of both the said defendants, Piatt and Salisbury, to the Postmaster General." The complaint further alleges that by means of these false representations and "by means of false and fraudulent vouchers presented to the said Post Office Department of the United States, the said defendants, George H. Piatt and Monroe Salisbury, were paid by and received from this plaintiff a larger sum of money than they were entitled to receive." It thus appears that each of the defendants participated in this transaction, and it was proper to sue them as jointly and severally liable.

There is but one cause of action, and that for the excessive payments made between December 16, 1878, and August 21, 1882. Piatt was contractor during this period, and the service was performed for him by Salisbury, to whom was paid the compensation agreed upon in the amended contract. The single cause of action then is for the recovery of such amount as was in excess of the sum allowed by law. Piatt and Salisbury according to the facts admitted by the demurrer, are equally concerned in the fraud perpetrated upon the government, one by presenting in behalf of both a sworn statement containing false and fraudulent allegations whereby the Postmaster General was induced to amend the original contract, allowing increased compensation, the other by present-

ing for payment false and fraudulent vouchers comporting therewith, upon the faith of which the money was paid. They are then jointly and severally bound to refund the sum so paid and received in violation of section 3961 of the Revised Statutes.

Assuming, as we must, on this hearing, the truth of the facts set forth in the complaint, we are of opinion that the demurrer should have been overruled.

As Piatt was not in the court below, it was error to have sustained the demurrer and dismissed the action as to him.

The judgment is reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

UNITED STATES *v.* SALISBURY.

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

No. 167. Submitted January 23, 1895. — Decided March 4, 1895.

United States v. *Piatt and Salisbury, ante*, p. 113, followed.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

Mr. Monroe Salisbury in person for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case differs very little from the one just determined. The complaint is in three counts. The first count alleges in substance that on March 15, 1878, one Thomas A. McDevitt contracted in writing with the United States, through the Postmaster General, to carry the mail on the route then known as No. 36,115, six times a week for the period of four years from July 1, 1878, for a consideration of $6425, per

annum, between Helena, Montana, by way of Hot Springs and Black Foot City, Toll Gate, Deer Lodge, Yamhill, Pioneer, New Chicago, and Bear's Mouth and Missoula and back. In pursuance of this contract McDevitt entered upon and continued the performance of the service until October 1, 1878, at which date he sublet his contract to Monroe Salisbury, the defendant, who performed the service during the remainder of the said contract term, to wit, until June 30, 1882. On July 1, 1879, the subcontract was duly recognized by the Postmaster General, and thenceforth such sums as were due and payable by virtue of the original contract, as afterwards amended and changed in the manner hereinafter set forth, were paid to said Salisbury.

For the purpose of expediting the service between Helena and Missoula and the intermediate places mentioned, the Postmaster General and McDevitt agreed, on December 24, 1878, to shorten the schedule of departures and arrivals on said route from January 1, 1879, and to increase the service. Accordingly, by order of the Postmaster General, the running time upon the route was reduced from 36 hours in summer and 59 in winter to 30 hours in summer and 45 hours in winter, in consideration of which an additional sum was allowed of $9637.50 per annum, in supposed accordance with the provisions of section 3961 of the Revised Statutes of the United States. By said order the service was also increased one trip per week from January 1, 1879, for which an additional annual allowance of $2671.08 was made — such allowance being computed *pro rata* upon the basis of the compensation in the original contract as increased by the additional allowance for increase of speed. These changes were agreed to by McDevitt.

After the execution of the subcontract between McDevitt and Salisbury, whereby all moneys thereafter due the former under the original contract were to be paid to the latter, McDevitt, in his own name, but in the interest and at the instigation of Salisbury, did, by means of certain false and fraudulent representations set forth in a sworn statement dated December 18, 1878, represent to the Postmaster General that, in order to perform the service upon the then existing schedule

it required 6 men and 24 horses, and to perform the proposed expedited service would require 15 men and 60 horses, which representations were wholly false and fraudulent in that neither McDevitt nor Salisbury ever required or used in carrying the mail upon the expedited schedule any greater number of men or horses than McDevitt alleged in his sworn statement were required for or actually used in performing the service upon the original schedule. And those false representations were designed to mislead and did mislead the Postmaster General.

By means of such fraudulent statements by McDevitt, and by means of fraudulent vouchers presented to the Post Office Department, Salisbury was paid by and received from the United States a larger sum of money than he was entitled to for the performance of such mail service under the amended contract. The sum so received by him in excess of what he was legally entitled to receive between July 1, 1879, (the date on which the subcontract was first recognized by the Post Office Department,) and July 1, 1882, was $30,690.16. The original contract between the plaintiff and McDevitt and the subcontract between McDevitt and Salisbury were exhibited with the complaint and made part thereof.

Judgment was demanded for this sum with interest from July 31, 1882, and costs.

The second count is the common law count for money had and received.

The third count sets forth the same facts as in the first count, and alleges that by reason thereof the plaintiff's officers were induced to pay the moneys aforesaid from July 1, 1879, to July 31, 1882, amounting in the aggregate to $30,690.16, which sum was paid by the plaintiff's officers as above set forth, in mistake of fact, and was received by said defendant contrary to the provisions of section 3961 of the Revised Statutes of the United States.

In this case the subcontractor only was sued, while in the former case both the principal contractor and the subcontractor were sued.

The present case is controlled by the decision just rendered in *United States* v. *Piatt, ante,* 113.

Syllabus.

The judgment is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings in conformity with this opinion.

The decision in this and the preceding case control cases 168, 169, 170, 171, the title of each of those cases being *United States* v. *Salisbury*. The judgment in each case is reversed and the cause remanded with directions to overrule the demurrer and put the defendant to his answer.

Reversed.

THE CALEDONIA.[1]

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

No. 107. Argued December 12, 13, 1894. — Decided March 11, 1895.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy; and this being so, his undertaking is not discharged because the want of fitness is the result of latent defects.

A bill of lading whereby a steamship owner undertakes to deliver live cattle at a foreign port, loss or damage from delays, steam boilers and machinery or defects therein excepted, does not exempt him from liability under such warranty for injury happening to the cattle through an unexpected prolongation of the voyage, in consequence of a breaking of the shaft caused by a latent defect in it, which existed before and at the commencement of the voyage.

Exceptions in a bill of lading are to be construed most strongly against the shipowner; and when they form, in the contract, part of long enumerations of excepted causes of damage, all the rest of which relate to matters subsequent to the beginning of the voyage, they must be treated as equally limited in their scope.

As between the shipper and the shipowner, the bill of lading only can be considered as the contract.

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[1] The docket title of this case is "James Henderson *et al.*, Claimants of the Steamship Caledonia, *v.* Goldsmith."

Statement of the Case.

This was a libel in admiralty by a shipper of cattle against the steamship Caledonia to recover damages caused by the breaking of her shaft. The District Court decreed in favor of libellant, 50 Fed. Rep. 567, and claimants appealed. The Circuit Court found the following facts and conclusions of law:

"This was a libel in admiralty, in a cause of contract, civil and maritime, by a shipper of cattle against the steamship Caledonia, to recover damages caused by the breaking of her shaft.

"The Caledonia was one of the Anchor line of transatlantic steamships, owned and employed by the claimants, Henderson Brothers, as common carriers. The plaintiff was a dealer in and exporter of cattle.

"The terms of the contract between the parties were as expressed in the following memorandum of agreement, made before the shipment of the cattle, and in the following bill of lading signed at the time of shipment, and afterwards accepted by the libellant:

"'*Memorandum of Agreement.*

"'Concluded at New York, the twenty-fifth day of May, 1885, between Messrs. Henderson Brothers, 7 Bowling Green, New York, agents of the steamer Caledonia, hereinafter described as the party of the first part, and Mr. M. Goldsmith of New York, hereinafter described as the shipper of the second part.

"'The agents of the steamer agree to let to said shipper suitable space, as under noted, for the transportation of live cattle, that is to say: On the steamship Caledonia, for about two hundred and seventy-five to three hundred head of cattle on and under decks. Steamer expected to sail from Boston for London about eleventh of June. The agents agree to fit the stalls in the style customary at the port of Boston, to the satisfaction of inspectors of Boston insurance companies, and the shipper, who will assume all responsibility for same, and for various appliances of ventilation, after shipment of the cattle; and the steamer Caledonia undertakes to supply sufficient good condensed water for the use of the animals during

the voyage. All water casks, buckets, hose and similar appliances must be put on board by shipper of the cattle.

"'A reasonable supply of fodder for the animals will be carried by the steamship Caledonia, free of freight: but freight if demanded shall be payable on any unusual excess of fodder landed at port of destination. Hay and straw to be in compressed bales.

"'The steamer Caledonia will also furnish free steerage passage for attendants (not exceeding one man to every thirty cattle) over, and return, providing them with the necessary utensils for the voyage.

"'The agents of the steamer agree to notify the said shipper, at least six days in advance, of the intended departure of the steamship, and, twelve hours prior to sailing, of the day and hour. In event of shipper failing to deliver the cattle to steamship within twenty-four hours after expiry of due notice, as aforementioned, steamer is to have liberty to sail, and freight is to be paid in full by the party of the second part.

"'The steamer Caledonia agrees to deliver the cattle at Deptford, and the shipper agrees to bear tonnage, dock or shed dues when incurred. The cattle are to be delivered and received from steamship's decks immediately on arrival at the port of destination.

"'The shipper agrees to ship all the cattle the steamship can carry as above mentioned, paying freight on same at the rate of forty-five shillings British sterling per bullock, for all cattle shipped.

"'The shipper agrees to prepay freight on the above-mentioned shipments in current funds at first-class bankers, selling rate for sight exchange, on the number of cattle shipped at Boston, vessel lost or not lost, and irrespective of the number landed at the port of destination; and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

"'The shipper agrees to deliver the cattle on the date and hour ordered by the agents of the steamer, or pay demurrage of the steamship for all, or any detention incurred by his failure to do so.

Statement of the Case.

"'In case of non-arrival of vessel in time to sail from Boston, on or before 18th June, shipper has option of cancellation. Any dispute arising on this contract to be settled by arbitration in the usual way in Boston.

"'HENDERSON BROTHERS.'

"'*Cattle Bill of Lading.*

"'Shipped alive, by M. Goldsmith, and at shipper's risk, in and upon the steamship called the Caledonia, now lying in the port of Boston and bound for London, two hundred and seventy-four head live cattle, to be delivered from the ship's deck at the aforesaid port of London; the act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, steam boilers and machinery or defects therein, transshipment, escape, accidents, suffocation, mortality, disease or deterioration in value, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents, excepted; with liberty to sail with or without pilots, to tow and assist vessels in all situations, to call at any port or ports to receive fuel, load or discharge cargo, or for any other purpose; and in the event of the steamship's putting back to Boston or into any other port, or being prevented from any cause from proceeding in the ordinary course of her voyage, to transship by any other steamer unto order or to his or their assigns.

"'Freight for the said stock to be paid without any allowance of credit or discount, at the rate of £2. 5. 0. sterling for each animal shipped on deck, and £2. 5. 0. sterling for each animal shipped under deck, whether delivered or not, vessel lost or not lost, cattle jettisoned in all or in part, or otherwise lost, with average accustomed. In the event of the loss of the vessel, of her not arriving at the said port, or of the consignee neglecting to pay the freight upon the arrival of the vessel, or neglecting to pay the charges and expenses herein men-

tioned, the shipper, in consideration of the waiving of the payment of the freight in advance, hereby binds and obligates himself to pay the freight above expressed, and such charges and expenses upon demand.

"'It is also stipulated and agreed by the shipper, as a condition of the shipment, that he will take charge of the stock during the voyage, the vessel furnishing water only; that he has examined the condition of the steamer, the construction of the stalls and the means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom; that any mortality, sickness or deterioration in the condition of the stock shall be presumed to arise from the condition of the animals when shipped, or from natural causes.

"'Consignees to enter the property at the custom-house within twenty-four hours after the ship is reported there, and to remove the same immediately upon being landed, otherwise the property may be discharged by the agents of the ship at the expense and risk of the shipper or consignee of cargo. Porterage of the delivery of the cargo to be done by agents of the ship, at the expense and risk of the receivers. Lighterage, tonnage and shed dues payable by the receivers. This bill of lading, duly endorsed, to be given up to the ship agents, in exchange for delivery order.

"'In witness whereof, the master, purser, or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

"'In accepting this bill of lading, the shipper, as owner, or agent of the owner of the property shipped, expressly accepts and agrees to all its stipulations, exceptions, and conditions, whether written or printed.

"'Dated in Boston, Mass., 15th June, 1885.

"'J. Miller Stewart,

"'*For the Agents.*'

"On Monday, June 15, 1885, the libellant shipped on board the Caledonia at Boston, to be delivered at Deptford, two

hundred and seventy-four head of cattle in good order and condition; and put on board fodder sufficient for a voyage of fifteen days (a day or two more than the usual length of voyage), being all the fodder that by the usage of the business he was bound to provide. On the morning of June 24, the ninth day out from Boston, in smooth weather, the propeller shaft of the Caledonia broke straight across in the stem tube. There had been no heavy weather on this voyage, and the propeller did not strike against any rock or derelict or other object. The cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages. At the time of leaving Boston on June 15, the shaft was in fact unfit for the voyage, and by reason of its unfitness the vessel was unseaworthy. No defect in the shaft was visible or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined. No negligence on the part of the owners of the steamship was proved.

"By reason of the breaking of the shaft, the voyage lasted twenty-five days, and the cattle were put on short allowance of food, and in consequence thereof were landed at Deptford in the afternoon of Monday, July 20, in an emaciated condition.

"The market days in London were Mondays and Thursdays. By the usual course of the business of shipping live cattle from Boston to Deptford for the London market, and, in accordance with the knowledge and contemplation of both parties at the time of the execution of the memorandum of agreement and the bill of lading, the cattle were not to be sold before arrival, and were sold at the first market after their arrival.

"The amount of the damages suffered by the libellant was as stated in the following agreement, signed and filed by the counsel of the parties:

"'It is hereby agreed that the whole amount of damages suffered by the libellant (exclusive of interest) arose from two sources of loss: shrinkage in the weight of cattle from the protracted voyage, and fall in the market value of the cattle during the delay in arrival; and that these two causes together made the loss seven thousand eight hundred and fifty dollars,

and that one half thereof, to wit, three thousand nine hundred and twenty-five dollars, was and is to be attributed to each cause.'

"*Conclusions of Law.*

"There was a warranty that the vessel was seaworthy at the time of sailing from Boston. This warranty was not affected by the exceptions in the bill of lading. The breach of the warranty was the cause of all the damage claimed. The libellant is entitled to recover $7850 and interest."

The Circuit Court thereupon entered a final decree for the sum so found, together with interest and costs. The opinion is reported in 43 Fed. Rep. 681. Claimants appealed to this court.

Mr. George Putnam for appellants.

Mr. Henry M. Rogers for appellee.

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

In *The Edwin I. Morrison*, 153 U. S. 199, 210, the language of Mr. Justice Gray, delivering the opinion of the Circuit Court in the present case, was quoted with approval, to this effect: "In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated.

The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage, we do not

understand to be denied; but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be, not that the ship should be fit, but, that he had honestly done his best to make her so. We cannot concur in this view.

In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage; and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.

The necessity of this conclusion is made obvious when we consider the settled rule in respect of insurance, for it is clear that the undertaking as to seaworthiness of the shipowner to the shipper is coextensive with that of the shipper to his insurer.

That rule is thus given by Parsons (1 Marine Insurance, 367): "Every person who proposes to any insurers to insure his ship against sea perils, during a certain voyage, impliedly warrants that his ship is, in every respect, in a suitable condition to proceed and continue on that voyage, and to encounter all common perils and dangers with safety. . . . This warranty is strictly a condition precedent to the obligation of insurance; if it be not performed, the policy does not attach; and, if this condition be broken, at the inception of the risk in any way whatever and from any cause whatever, there is no contract of insurance, the policy being wholly void."

In *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, 379, 381, although, as there was no necessity to consider the law as to latent defects, whether such defects would constitute an exception cannot be said to have been passed on, the general rule was laid down as we have stated it, and the existence of the warranty in question on the part of a shipowner was asserted with reference to his character as such, and not as existing only in those cases in which he is also acting as a carrier. That was an action in which the plaintiff sought to recover damages for the loss of a

large number of weighty iron armor plates and bolts, one of the plates having broken loose and gone through the side of the ship, which, in consequence, went down in deep water and was totally lost with all her cargo. The case was tried before Blackburn, J., who told the jury as matter of law that the shipowner warranted the fitness of his ship when she sailed, and not merely that he had honestly and in good faith endeavored to make her fit, and left the following questions to the jury: "Was the vessel at the time of her sailing in a state, as regards the stowing and receiving of these plates, reasonably fit to encounter the ordinary perils that might be expected on a voyage at that season from Hull to Cronstadt? Second. If she was not in a fit state, was the loss that happened caused by that unfitness?" The rule for new trial was discharged in view of the warranty by implication that the ship was in a condition to perform the voyage then about to be undertaken, and Field, J., among other things, said: "It appears to us, also, that there are good grounds in reason and common sense for holding such to be the law. It is well and firmly established that in every marine policy the assured comes under an implied warranty of seaworthiness to his assurer, and if we were to hold that he has not the benefit of a similar implication in a contract which he makes with a shipowner for the carriage of his goods, the consequence would be that he would lose that complete indemnity against risk and loss, which it is the object and purpose to give him by the two contracts taken together. Holding as we now do, the result is, that the merchant, by his contract with the shipowner, having become entitled to have a ship to carry his goods warranted fit for that purpose, and to meet and struggle against the perils of the sea, is, by his contract of assurance, protected against the damage arising from such perils acting upon a seaworthy ship."

This was the view expressed by Mr. Justice Brown, then District Judge, in *The Eugene Vesta*, 28 Fed. Rep. 762, 763, in which he said: "There can be no doubt that there is an implied warranty on the part of the carrier that his vessel shall be seaworthy, not only when she begins to take cargo

on board, but when she breaks ground for the voyage. The theory of the law is that the implied warranty of seaworthiness shall protect the owner of the cargo until his policy of insurance commences to run; and, as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends." And the case of *Cohn* v. *Davidson*, 2 Q. B. D. 455, 461, was cited, where it appeared that the ship was not in fact seaworthy at the time she set sail, but that as she was found to be seaworthy at the time she commenced to take cargo, she must have received the damage in the course of loading; and Field, J., observed that "no degree of seaworthiness for the voyage at any time anterior to the commencement of the risk will be of any avail to the assured, unless that seaworthiness existed at the time of sailing from the port of loading. As, therefore, the merchant in a case like the present would not be entitled to recover against his underwriter by reason of the breach of warranty in sailing in an unseaworthy ship, it would follow that, if the warranty to be implied on the part of the shipowner is to be exhausted by his having the ship seaworthy at an anterior period, the merchant would lose that complete indemnity, by means of the two contracts taken together, which it is the universal habit and practice of mercantile men to endeavor to secure."

The reasons for the strict enforcement of the warranty, in insurance, have frequently been commented on.

In *Douglass* v. *Scougall*, 4 Dow, 269, 276, Lord Eldon said: "I have often had occasion to observe here, that there is nothing in matters of insurance of more importance than the implied warranty that a ship is seaworthy when she sails on the voyage insured; and I have endeavored, both with a view to the benefit of commerce and the preservation of human life, to enforce that doctrine as far as, in the exercise of sound discretion, I have been enabled to do so. It is not necessary to inquire, whether the owners acted honestly and fairly in the transaction; for it is clear law that, however just and honest the intentions and conduct of the owner may be, if he is mis-

taken in the fact, and the vessel is in fact not seaworthy, the underwriter is not liable."

Similarly, Mr. Justice Curtis, in *Bullard* v. *Roger Williams Insurance Company*, 1 Curtis, 148, 155, stated in his charge to the jury: "There is an implied warranty connected with marine policies that the vessel, at the outset of her voyage, is seaworthy for the voyage in which she is insured. This obligation is imposed, by law, on the insured for sound reasons. It takes away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them. It is not a contract that the owner will use diligence to make his vessel seaworthy, but an absolute warranty that she is seaworthy, and if broken the policy is made void." And Mr. Justice Story, in *The Schooner Reeside*, 2 Sumner, 567, 575, declared "every relaxation of the common law in relation to the duties and responsibilities of the owners of carrier ships to be founded in bad policy and detrimental to the general interests of commerce."

As the same warranty implied in respect of policies of insurance exists in respect of contracts of affreightment, that warranty is necessarily as absolute in the one instance as in the other.

In *Putnam* v. *Wood*, 3 Mass. 481, 485, the Supreme Judicial Court of Massachusetts, speaking through Parker, J., said: "It is the duty of the owner of a ship, when he charters her or puts her up for freight, to see that she is in a suitable condition to transport her cargo in safety; and he is to keep her in that condition, unless prevented by perils of the sea or unavoidable accident. If the goods are lost by reason of any defect in the vessel, whether latent or visible, known or unknown, the owner is answerable to the freighter, upon the principle that he tacitly contracts that his vessel shall be fit for the use for which he thus employs her. This principle governs, not only in charter parties and in policies of insurance; but it is equally applicable in contracts of affreightment."

This early case is cited by Chancellor Kent, who affirms the doctrine in these words: "The ship must be fit and competent for the sort of cargo and the particular service in which she is engaged. If there should be a latent defect in the vessel, un-

known to the owner and not discoverable upon examination, yet, the better opinion is that the owner must answer for the damage caused by the defect. It is an implied warranty in the contract, that the ship be sound for the voyage, and the owner, like a common carrier, is an insurer against everything but the excepted perils." 3 Kent, *205.

The high authority of Lord Tenderden, (Abbott on Shipping, 1st ed. 146,) Lord Ellenborough, (*Lyon* v. *Mells*, 5 East, 428,) Mr. Baron Parke, (*Gibson* v. *Small*, 4 H. L. C. 353, 404,) and Lord Blackburn (*Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, 86) may be invoked in support of this view, and it is sustained by decisions of this court; *The Northern Belle*, 9 Wall. 526; *Work* v. *Leathers*, 97 U. S. 579; preceding that of *The Edwin I. Morrison*, *supra*, which in terms adopts it. The point was distinctly ruled in *The Glenfruin*, 10 P. D. 103. There a steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. It was held that under his implied warranty of seaworthiness a shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage, and that as, when the Glenfruin started, the shaft was not reasonably fit for the voyage, she was unseaworthy and the owner was liable; and *Lyon* v. *Mells*, 5 East, 428; *Kopitoff* v. *Wilson*, 1 Q. B. D. 177; *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, were referred to.

Again, in *The cargo ex Laertes*, 12 P. D. 187, a steamship became disabled at sea owing to the breaking of her flywheel shaft through a flaw in the welding existing at the commencement of the voyage, but not discoverable by the exercise of any reasonable care, and it was held that she was not seaworthy for the voyage, and that but for a limitation, on the implied warranty, in the bills of lading, there would have been a breach.

The point is thus put by Judge Brown, of the Southern District of New York, in *The Rover*, 33 Fed. Rep. 515, 516: "This warranty extends to latent defects not discoverable by

prior examination. Either the ship or the freighter must bear such risks; under the warranty of seaworthiness the law places this risk upon the ship and her owner." And see *The Lizzie W. Virden*, 19 Blatchford, 340, Blatchford, J.; *The Carib Prince*, 63 Fed. Rep. 266, Benedict, J.; *Whitall* v. *Brig William Henry*, 4 Louisiana, 223; *Talcot* v. *Commercial Ins. Co.*, 2 Johns. 124, 128.

It is urged that doubt is thrown upon the doctrine by the reasoning in *Readhead* v. *Midland Railway Co.*, L. R. 4 Q. B. 39; L. R. 2 Q. B. 412. There a passenger sought to charge a common carrier for an injury occasioned by the breaking of an axle by reason of a hidden flaw; and the Court of Exchequer Chamber held that a contract made by a general carrier of passengers for hire with a passenger is to take due care (including in that term the use of skill and foresight) to carry the passenger safely, and is not a warranty that the carriage in which he travels shall be free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence. But the court was careful to point out the broad distinction between the liabilities of common carriers of goods and of passengers, and in the case at bar the shipowner was not only liable as such, but as a common carrier, and subject to the responsibilities of that relation.

The case was decided in 1869, and those of *The Glenfruin* and *The Laertes* in 1885 and 1887, yet the latter rulings seem to have been accepted without question, and were certainly unaffected by any attempt to apply a rule in respect of roadworthiness in the carriage of passengers by a railroad to the warranty of seaworthiness in the carriage of goods by a ship.

In our judgment the Circuit Court rightly held that the warranty was absolute; that the Caledonia was unseaworthy when she left port; and that that was the cause of the damage to libellant's cattle.

This brings us to the inquiry whether the claimants can escape from the liability which the law imposed upon them by reason of the exceptions in the bill of lading.

These exceptions were: "The act of God, the Queen's

enemies, pirates, restraint of princes and rulers, perils of the sea, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collisions, straining, explosion, heat, fire, steam boilers and machinery or defects therein, transshipment, escape, accidents, suffocation, mortality, disease or deterioration in value, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents."

It is claimed that the Caledonia was exempted from the losses caused by her unseaworthiness from the defective shaft at the commencement of the voyage by the exception of "loss or damage from delays, . . . steam boilers and machinery or defects therein."

As is well said by counsel for appellee, the exceptions in a contract of carriage limit the liability but not the duty of the owner, and do not, in the absence of an express provision, protect the shipowner against the consequences of furnishing an unseaworthy vessel. *Steel* v. *State Line Steamship Company*, 3 App. Cas. 72; *Gilroy* v. *Price*, App. Cas. (1893) 56; *The Glenfruin*, 10 P. D. 103; *Kopitoff* v. *Wilson*, 1 Q. B. D. 377; *Tattersall* v. *National Steamship Company*, 12 Q. B. D. 297; *Thames & Mersey Ins. Company* v. *Hamilton*, 12 App. Cas. 484, 490. If the exceptions are capable of, they ought to receive, to use the language of Lord Selborne in *Steel* v. *Steamship Company*, "a construction not nullifying and destroying the implied obligation of the shipowner to provide a ship proper for the performance of the duty which he has undertaken."

There was no exception in this bill of lading which in express words exempted the shipowner from furnishing a seaworthy vessel at the commencement of the voyage. As the exceptions were introduced by the shipowners themselves in their own favor, they are to be construed most strongly against them, and we perceive no reason why the obligation to furnish a seaworthy vessel should be held to have been contracted away by implication. Their meaning ought not to be extended to give the shipowner a protection, which, if intended, should have been expressed in clear terms.

Moreover, the words "delays," "steam boilers and machinery or defects therein," formed part of a long enumeration of the causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, and, by another familiar rule of construction, they should be treated as equally limited in their scope.

In *Tattersall* v. *Steamship Company*, cattle had been shipped under a bill of lading, by which it was provided that the defendants were to be "in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than £5 for each of the animals." The ship, after carrying a cargo of cattle on a previous voyage, was improperly cleaned, and those on this voyage took the foot and mouth disease. It was held that the liability of the defendants was not limited to £5 for each of the cattle, for the stipulations of the bill of lading related to the carriage of the goods on the voyage, and did not affect the obligation to have the ship fit for the reception of the cattle.

In *The cargo ex Laertes*, 12 P. D. 187, cargo was shipped under three different forms of bills of lading, the exceptions in which, so far as material, were respectively as follows: "Warranted seaworthy only so far as ordinary care can provide;" "warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can insure it;" "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency." These exceptions were held to limit the implied warranty of seaworthiness in accordance with the expressed intention of the parties to that precise effect, and for that reason only to take the case out of the general rule.

We are not dealing with the question of how far exceptions may be given effect in particular cases, but whether by those under consideration claimants were exempted from liability

for unseaworthiness, and we are clearly of opinion that they were not.

Something was said as to protection from liability by reason of the words in the original memorandum of agreement that "the shipper assumes all risk of mortality or accident, however caused, throughout the voyage." We agree with the Circuit Court that the bill of lading can alone be considered as the contract between the parties, the memorandum being preliminary merely; but we are also of opinion that the same rule of construction would apply to the memorandum as to the bill of lading, and that the assumption of the risk of mortality or accident throughout the voyage did not constitute an exemption of the shipowner from his obligation to furnish a seaworthy vessel at its commencement.

By reason of the unseaworthiness of the Caledonia the cattle were not delivered at the time and place, when and where they should have been, and loss was incurred through shrinkage in weight from the protracted voyage and through fall in market value during the delay in arrival.

It is argued that a common carrier is not liable for mere delay and its consequences unless he has been at fault, and that claimants were in this case free from blame because the defect was a secret one. This contention, however, begs the question, for the conclusion upon this record is that claimants are responsible for breach of warranty notwithstanding the shaft was defective through hidden weakness. No question can be made that the shrinkage was a direct result of that breach, but it is further insisted that changes in market value were too speculative to furnish just basis for recovery. But as it is found as a fact that these parties, at the time of contracting together, knew and contemplated that the cattle were not to be sold before arrival, but were to be sold at the first possible market day after arrival, it follows that the damages by reason of the fall in price were not remote, but flowed naturally from the breach of warranty. *Howard* v. *Stillwell Mfg. Co.*, 139 U. S. 199; *Cincinnati Gas Co.* v. *Western Siemens Co.*, 152 U. S. 200; *King* v. *Woodbridge*, 34 Vermont, 565; *Laurent* v. *Vaughn*, 30 Vermont, 90; *Ayres* v. *Chicago & Northwestern*

Railway, 75 Wisconsin, 215; *Deming* v. *Grand Trunk Railroad Co.*, 48 N. H. 455; *Wilson* v. *Lancashire and Yorkshire Railway*, 9 C. B. (N. S.) 632; *Collard* v. *Southeastern Railway*, 7 H. & N. 79; *The City of Para*, 44 Fed. Rep. 689; and cases cited by the Circuit Court.

Decree affirmed.

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

1. Conceding, for the purposes of this case, that under the stringent rule laid down by this court in *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 428, and *The E. I. Morrison*, 153 U. S. 199, the carrier is bound to respond for any loss of, or direct damage to, goods in consequence of a breach of his implied warranty of seaworthiness, whether such unseaworthiness were known or unknown, discoverable or undiscoverable, it does not necessarily follow that he is subject to the same measure of liability for damages occasioned by mere delay in making the voyage within the usual time.

All the cases cited in the opinion of the court are those wherein either the ship or the cargo has suffered loss or direct damage, by reason of her unseaworthiness at the commencement of the voyage. Both in this court and in the court below the case is treated as one involving the liability of the carrier as an insurer of the goods in question. The authorities, however, make a clear distinction between the loss of or direct damage to goods on account of unseaworthiness, and the consequences of mere delay. In the one case the contract is to deliver the goods at all events, the acts of God and the perils of the sea alone excepted. In the other, it is to use all reasonable exertions to carry the goods to the port of destination within the usual time.

The distinction is nowhere better or more concisely stated than in *Parsons* v. *Hardy*, 14 Wend. 215, 217, which was an action to recover the price for the transportation of a quantity of merchandise from Albany to Ithaca. Plaintiff received the goods at Albany on board a canal boat, consigned to Ithaca.

He was forced to stop at an intermediate point in consequence of ice in the canal, the defendant receiving the goods and transporting them to Ithaca. Defendant said that plaintiff was not entitled to recover because he had failed to deliver the goods as agreed. Plaintiff offered to prove that he was delayed in the canal in consequence of a collision with a scow, by which his boat was injured; and that he was obliged to stop and repair it. The court charged the jury that the accident to the boat, though caused by misfortune and without fault of the plaintiff, was no cause for his delay, which nothing could excuse but the act of God or the enemies of the country. This instruction was held to be erroneous, Mr. Justice Sutherland observing: "Plaintiff, as a common carrier, was responsible at all events for the final safety and delivery of the defendants' goods to them at Ithaca. Nothing could exonerate him from that responsibility but the act of God, or a public enemy. But in respect to the *time of delivery*, he was responsible only for the exertion of due diligence. In this respect, common carriers stand upon the same ground with other bailees. They may excuse delay in the delivery of goods by accident or misfortune, although not inevitable, or produced by the act of God. It is sufficient, if they exert due care and diligence to guard against delay, if the goods are finally delivered in safety. The principle upon which the extraordinary responsibility of common carriers is founded does not require that that responsibility should be extended to the time occupied in the transportation."

The principle of this case was affirmed in *Wibert* v. *New York & Erie Railroad*, 12 N. Y. 245, 251, which was an action to recover damages for the negligence of the defendant in not transporting to and delivering at New York a quantity of butter within a reasonable time. The defence was that there was an unusual quantity of merchandise delivered to defendant to be transported to New York; that its road was in good order, properly equipped, and that as many trains were run as could be with safety; but that the quantity of merchandise exceeded the capacity of the road to transport the same immediately, and that it accumulated in the depots.

The delay was held to be excused. Said the court: "The law, upon well-known motives of policy, has determined that a carrier shall be responsible for the loss of property entrusted to him for transportation, though no actual negligence exist, unless it happen in consequence of the act of God, or the public enemy; but when the goods are actually delivered at the place of destination, and the complaint is only of a late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse him, unless he have expressly contracted to deliver the goods within a limited time."

In *Thayer* v. *Burchard*, 99 Mass. 508, it was also held that the fact that there was a great accumulation of freight for transportation over a railroad was sufficient to relieve the corporation from liability for the consequences of delay in transportation. "For losses, expenses, or other damage arising from mere delay, occasioned by a temporary excess of business, and without fault, the carrier is not responsible." To the same effect are *Galena & Chicago Railroad* v. *Rae*, 18 Illinois, 488; *Helliwell* v. *Grand Trunk Railway*, 10 Bissell, 170. In *Geismer* v. *Lake Shore Railway*, 102 N. Y. 563, and *Lake Shore Railway* v. *Bennett*, 89 Indiana, 457, it was held that a railroad was not liable where a mob of strikers impeded or interrupted the carriage of the goods in question. In the following cases it was also held that the carrier was responsible only for the consequences of unreasonable delay: *The Success*, 7 Blatchford, 551; *Page* v. *Munro*, 1 Holmes, 232; *Ward* v. *N. Y. Central Railroad*, 47 N. Y. 29; *Hand* v. *Baynes*, 4 Wharton, 204; *Kinnick* v. *Chicago, Rock Island &c. Railway*, 69 Iowa, 665; *Boner* v. *Merchants' Steamboat Co.*, 1 Jones Law, (N. C.) 211; *Conger* v. *Hudson River Railroad*, 6 Duer, 375; *Pittsburg, Fort Wayne &c. Railroad* v. *Hazen*, 84 Illinois, 36.

The English cases are even more explicit than our own, in treating the contract of the carrier as demanding only the exercise of due diligence with respect to the time of delivery. A leading case is that of *Briddon* v. *Great Northern Railway*, 28 L. J. Exch. 51; *S. C.* 4 H. & N. 847 (Am. ed.), which was an action against a railway company for a failure to deliver

certain beasts within a reasonable time, whereby the beasts were deteriorated in condition, and a market lost (precisely the damages which are claimed in this case). Transportation was delayed by a heavy snow storm, by which the market day at Nottingham was lost. It was claimed that, under the circumstances, the road was bound to obtain additional engines, and use extraordinary efforts to send on the cattle-trucks. But the court held that the contract entered into was to carry the cattle without delay, and in a reasonable time under *ordinary circumstances*. That, if a snow storm occurred which made it impossible to carry the cattle, except by extraordinary effort, involving additional expense, the company was not bound to use such means and to incur such expense. In *Hales* v. *London & Northwestern Railway*, 4 B. & S. 66, 71, a jury found that the goods were not delivered within a reasonable time. Lord Chief Justice Cockburn said: "Where no time is mentioned for delivering goods carried, the obligation of the carrier is to deliver them within a reasonable time; and that is a question of fact. The person who sends goods is not entitled to call upon the carrier to go out of his accustomed course, or to use extraordinary means of conveyance; but the carrier must do that which is within his power, and which it is reasonable to expect that he should do for delivering the goods."

The case of *Taylor* v. *Great Northern Railway*, L. R. 1 C. P. 385, 387, 388, was an action for damages sustained in consequence of a delay in the delivery of three hampers of poultry, sent by the railway for the early London market. The delay was occasioned by an accident which occurred on defendant's line to a train of another railway company, which had running powers over that portion of the line. The accident resulted solely from the negligence of the servants of the other corporation. It was held that the railway was not responsible, Erle, C. J., observing: "I think a common carrier's duty to deliver safely has nothing to do with the time of delivery; that is a matter of contract, and when, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time, and that I take to mean a

time within which the carrier can deliver, using all reasonable exertions." Said Montague Smith, J.: "Common carriers do indeed insure to this extent, that they will safely and securely carry the goods, but not to the extent of guaranteeing their arrival at any particular time." The maritime cases in England nearly all turn upon the question of reasonable time for the delivery of the goods after the ship arrives at her port of destination.

Counsel for the appellee has failed to cite an authority which lends countenance to the theory of the opinion in this case, that the liability of the carrier for the consequences of delay is coextensive with his liability for the loss of the goods carried. Not only do the general principles of law hold him liable simply for the exercise of diligence, but the bill of lading in this case expressly exonerates him for "loss or damage from delays." From reasons of public policy, and from the fact that the carrier and his servants are solely entrusted with the custody of goods carried, and the owner has no means of protecting himself against their embezzlement or negligence, the law has imposed upon the carrier the stringent liability of an insurer. As was said by Lord Holt in *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 918: "This is a politic establishment contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity for undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."

These reasons, however, have no application to his carrying within a reasonable time. As to such contract, the law imposes upon him no extraordinary liability.

As it is admitted in this case that the delay was occasioned by a defect in the ship, which could not have been discovered by the ordinary methods of inspection, it seems to me clear that the carrier should not be held responsible. If it be said

that the damages in this case were the direct consequences of the breach of warranty of seaworthiness, the reply is that for *such damages* the ship is not responsible, provided her owner has used due diligence to make her seaworthy, although if the goods had been lost or destroyed, he would have been liable as insurer. In the cases above cited, if the merchandise had been *lost* in consequence of the collision in the canal, the extraordinary accumulation of freight, the violence of the mob, or the accident upon the railway, there could have been no doubt whatever that the carrier would have been liable; but as the consequence of the accidents in each case was a mere delay in the delivery of the goods, the carrier was exonerated. I find it impossible to distinguish these cases in principle from the one under consideration.

2. There is also a further exception in the bill of lading in this case of "loss or damage from . . . machinery, or defects therein." This exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. It evidently was not intended to apply to mere breakages of machinery, which should occur after the voyage began, since the breaking of sound machinery through stress of weather is treated as an inevitable accident or peril of the sea, for which the ship would not be liable, whether there were an exception or not. *The Virgo*, 3 Asp. Mar. Law Cas. 285; *The William Lindsay*, L. R. 5 P. C. 338.

The exception, then, must be referable to latent defects in the machinery, existing at the time the voyage began. Of course, it does not apply to negligent defects or to those which might have been discovered by the exercise of ordinary care, but as to any latent defects I regard this exception as exonerating the carrier. There are but few cases, either in this country or in England, where the direct question has been presented, but in all those to which our attention has been called similar exceptions are treated as valid and binding. Thus in *The Miranda*, L. R. 3 Ad. & Ec. 561, a steam vessel became disabled at sea, in consequence of her machinery breaking down. Her cargo had been shipped under bills of

lading, which contained "accidents from machinery" among the excepted perils. Another steamship, belonging to the same owners, fell in with the disabled vessel, towed her into port, and took proceedings against the cargo to recover salvage. The defence was that the Miranda was unseaworthy. The court held, first, that there was no sufficient evidence to find that she was unseaworthy at the time the cargo was shipped, and even if there were, that the exception of "accidents from machinery" exonerated the vessel from the consequence of such breakage, and rendered the cargo liable for its proportion of salvage. The *Cargo ex Laertes*, 12 P. D. 187, was a similar case, wherein the cargo was proceeded against for salvage. The bills of lading under which the cargo was shipped contained, among other excepted perils, the clauses: "Warranted seaworthy only so far as ordinary care can provide," and "owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery," etc. The Laertes broke down from a latent defect, which could not have been discovered by the exercise of reasonable care, and it was held that the exception of latent defects, if it did not abrogate, at all events limited, the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage. This case is directly in point. In *The Curlew*, 51 Fed. Rep. 246, affirmed by the Court of Appeals, 8 U. S. App. 405, the breaking of a junk ring on the engine cylinder was held to be an accident of the sea and of the machinery, within the meaning of a charter party exempting the party from liability for loss of cargo caused by such accident. And in *The Carib Prince*, 63 Fed. Rep. 266, a similar exemption of latent defects was held to cover damages from a defective rivet in the bulkhead side of a water tank where, the ship being a new one, the tank had been tested by hammer and water pressure and no defect had been disclosed.

The cases cited in the opinion of the court do not seem to me to support its conclusion. In *Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72, the cargo was damaged by sea water getting into a port hole which had been negligently fastened.

Dissenting Opinion: Brown, Harlan, Brewer, JJ.

There was no doubt that the loss was due to the negligence of the ship. In *Gilroy* v. *Price*, App. Cas. (1893), 56, there was an exception of liability for neglect in the navigation of the ship in the ordinary course of the voyage, and it was held, very properly, that this did not apply to the warranty of seaworthiness, that the loss occurred from unseaworthiness at the time the vessel started on her voyage, and that the owners of the ship were liable. In *The Glenfruin*, 10 P. D. 103, there was an exception of "all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind," and this was held not to exonerate the vessel from the consequence of the breaking of her crank shaft from a defect in the welding which made her unseaworthy. In *Tattersall* v. *National Steamship Co.*, 12 Q. B. D. 297, there was clear proof of negligence in not cleansing and disinfecting the ship, in consequence of which plaintiff's cattle contracted a disease, for which the ship was, of course, held liable. In *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, there was a failure to stow certain iron plates in a proper manner, so that one of them broke loose and went through the side of the ship. But there was in that case no exception in the bill of lading. The case of the *Insurance Co.* v. *Hamilton*, 12 App. Cas. 484, is equally inapplicable.

If, under the circumstances of the present case, the vessel be not exonerated by the exception in the bill of lading of "loss or damage from machinery or defects therein," I am wholly unable to conceive what defects the exception was intended to cover. I am not aware that there is any magic in the words "implied warranty of seaworthiness," which enables them to override all the other general principles of law applicable to the responsibility of the carrier, as well as the express terms of his contract with the shipper.

I am, therefore, constrained to dissent from the opinion of the court, and am authorized to state that Mr. Justice Harlan and Mr. Justice Brewer concur in this opinion.

COOPER *v.* DOBSON.

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

No. 179. Argued January 24, 25, 1895. — Decided March 11, 1895.

Under Schedule K, clause 2, of the tariff act of March 3, 1883, c. 120, all hair of the alpaca, goat, and other like animals, is subjected to a uniform duty of ten cents a pound; and goat's hair is not comprehended in the clause relating to hair "not specially provided for."

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Richard P. White for defendants in error. *Mr. Thomas Earle White* and *Mr. Joseph P. McCullen* were on his brief.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was an action brought in the Circuit Court of the United States for the Eastern District of Pennsylvania by the firm of John and James Dobson against the collector of customs, to recover an alleged excess of tariff duties paid under protest.

The controversy was over the character of merchandise imported by the plaintiffs and claimed by them to be free from duty, but which was appraised by the officers of the government as subject to duty at the rate of ten cents a pound.

The question involves a construction of the tariff act of March 3, 1883, c. 120, 22 Stat. 487. The importers claim that the article imported by them was hair within the meaning of paragraph 717, page 519, which is in the following terms: "Hair, horse or cattle, and hair of all kinds, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially enumerated or provided for in this act," to be free.

Opinion of the Court.

The collector classified the importation as goat hair under Schedule K, some of the terms of which were as follows:

"All wools, hair of the alpaca, goat, and other like animals, shall be divided, for the purpose of fixing the duties to be charged thereon, into the three following classes:

"Class one, clothing wools. — That is to say, merino, mestiza, metz, or metis wools, or other wools of merino blood, etc. . . .

"Class two, combing wools. — That is to say, Leicester, Cotswold, Lincolnshire, down combing wools, Canada long wools, or other like combing wools of English blood, and usually known by the terms herein used, and also all hair of the alpaca, goat, and other like animals.

"Class three, carpet wools and other similar wools. — Such as Donskoi, native South America, Cordova, Valparaiso, native Smyrna, and including all wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria and elsewhere."

The schedule further provides that wools of the first class shall pay a duty of ten cents per pound; wools of the second class, and "all hair of the alpaca, goat, and other like animals," ten cents per pound; wools of the third class, two and a half cents per pound.

A duty was exacted against the importation in question under class two at the rate of ten cents per pound.

The case resulted in a verdict and judgment in favor of the importers.

At the trial there was evidence on both sides as to the true character of the hair. It appears that the goods were invoiced as white cattle hair, but were described in the protest as common goat hair. Samples were exhibited to the jury of various forms of wools under class two, including a sample of the goods in dispute. The witnesses on behalf of the importers did not all agree, but the most of them said that the goods were goat hair, or common goat hair.

James Dobson, one of the plaintiffs, testified, that he had been engaged for more than twenty years in handling and manufacturing wool and hair, and that the goods in question,

in the present case, as shown by the sample, were common goat hair.

Assuming, then, as we have a right to do, that these goods were common goat hair, the problem is, under what clause of the act of 1883 is common goat hair to be classified.

The answer would be readily made if it is to be found in the terms of the statute: "Class two, combing wools. — That is to say, . . . all hair of the alpaca, goat, and other like animals;" and, in the taxing clause, "all hair of the alpaca, goat, and other like animals," ten cents per pound.

But it is contended that, in designating what should be included in class two, Congress specified, not wools generally, but combing wools, and that the evidence shows that the article in question was not combing wool, nor was it anything that could be used for combing purposes; and of that view was the learned judge who tried the case below. He refused to charge as requested, that, if the jury found that the article in dispute was hair of the goat and under 30 cents per pound, their verdict should be for defendant, but charged that if the jury were satisfied that the article is what is called common goat hair, they should find for the plaintiffs, because if it were such, it is not to be classified under the section applied to it by the appraiser; and again, he charged that if the jury were not satisfied that the article was such as is known to the trade as common goat hair, they should inquire whether it was known to commerce as combing hair, and if not such, they should find for the plaintiffs.

It is, therefore, evident that the court below construed the statute as meaning that class two should consist wholly of articles that could be used for combing purposes, that is, as well hair of the goat as wools that were susceptible of treatment by combing. To reach that construction the court was obliged to lose sight of some of the words in the statute. Thus in the leading clause of Schedule K: "*All* wools, hair of the alpaca, goat, and other like animals, shall be divided, for the purpose of fixing the duties to be charged thereon, into the three following classes," and in class two, "Combing wools. — That is to say, Leicester, Cotswold, down combing wools,

or other like combing wools of English blood, and usually known by the terms herein used, and *also all* hair of the alpaca, goat, and other like animals." So, in the taxing clause, "*Wools of the second class*, and *all hair* of the alpaca, goat, and other like animals." Instead of reading the statute in the language in which it is written, viz., *combing wools* and *all hair of the goat*, the court below reads it thus: All combing wools and combing hairs, or combing wools and such hair of the alpaca, goat, etc., as are capable of being combed.

There is no apparent reason why Congress might not have thought fit to classify combing wools under the same head with all hair of the alpaca, goat, and other like animals. Such is the natural meaning of the language used, and no necessity is shown why it should be departed from.

In the tariff act of 1890 we find the leading clause thus expressed: "All wools, hair of the camel, goat, alpaca, and other like animals, shall be divided, for the purpose of fixing the duties to be charged thereon, into the three following classes;" and the second clause of classification is thus expressed: "Class two. That is to say, Leicester, Cotswold, Lincolnshire, down combing wools, Canada long wools, or other like combing wools of English blood, and usually known by the terms herein used, and also hair of the camel, goat, alpaca, and other like animals."

This language of the act of 1890 has recently been construed by the Circuit Court of Appeals of the First Circuit in the case of *United States* v. *Hopewell*, 5 U. S. App. 137. The case arose on a decision of the board of general appraisers, affirming the collector of the port of Boston in assessing on two bales of goat's hair a duty at the rate of 12 cents a pound, under Schedule K of the tariff act of 1890, imposing such a duty on hair of the camel, goat, alpaca, and other like animals. The importers contended that their goods should have been admitted under that paragraph of the free list which provided that hair of horse, cattle, or other animals not specially provided for in the act should be free.

The Circuit Court, 48 Fed. Rep. 630, ruled, with the contention of the importers, and adjudged that the decision of the

board of general appraisers should be reversed. On appeal, the judgment of the Circuit Court was reversed, and the Court of Appeals held, per Mr. Justice Gray, sitting with Putnam, Circuit Judge, and Nelson, District Judge, as follows:

"The facts found in the record, and on which this case must be decided, are that the wools specified in class 2, as well as the hair of the camel and of the alpaca, are all fit, adapted, and used for combing purposes; that there are breeds of goats, such as the Cashmere and the Angora, which produce hair for combing purposes; but that the goat hair in this case is common goat hair, unfit for combing purposes, and similar in its adaptability and use to the hair of horses and cattle. Upon the face of the act of 1890, and according to the clear and unambiguous meaning of its words, no wools, indeed, are included in class 2, except combing wools, or wools fit for combing; but there is no such restriction with regard to hair; and 'hair of the camel, goat, alpaca, and other animals' is subjected to a duty of 12 cents a pound, to whatever uses or purposes it is or may be adapted; and goat's hair, being thus specified as subject to a particular rate of duty, is not comprehended in the clause relating to hair not specially provided for in this act."

The court proceeded to consider arguments based upon the previous acts and decisions thereunder, and particularly the act of 1883, and the ruling in this very case, *Dobson* v. *Cooper*, 46 Fed. Rep. 184, but was of opinion that there had been no clear or well-settled construction arrived at under the previous laws.

The phraseology of the act of 1890 relieved that case from the perplexity that was occasioned by the suggestion that the words "alpaca, goat," in the act of 1883, were intended to describe, not two animals, but one only, an "alpaca goat," thus affording a basis for the contention that the whole clause included only animals producing hair or wool like said "alpaca goat." As the order of the words in the act of 1890 is "camel, goat, alpaca," it is obvious that Congress, in that act, did not have in view the existence of such an animal as an "alpaca goat," and it is fair to presume that the animals enumerated in the act of 1883 were the same with those named in the subsequent act.

Statement of the Case.

Adopting the reasoning and the language of the opinion of the Circuit Court of Appeals above referred to, we hold that, upon the face of the act of 1883, and according to the clear and unambiguous meaning of its words, no wools, indeed, are included in class 2, except combing wools or wools fit for combing; but that there is no such restriction with regard to hair, and that "all hair of the alpaca, goat, and other like animals" is subjected to a uniform duty of ten cents a pound, to whatever uses or purposes it is or may be adapted; and that goat's hair, being thus specified as subject to a particular rate of duty, is not comprehended in the clause relating to hair "not specially provided for in this act."

The judgment of the Circuit Court

Is reversed, and the case remanded with directions to award a new trial.

NEEL *v.* PENNSYLVANIA COMPANY.

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

No. 188. Submitted January 28, 1895.—Decided March 11, 1895.

When a defendant in a state court removes the cause to a Circuit Court of the United States on the ground of diverse citizenship, and the Circuit Court gives judgment for the defendant, and the plaintiff below brings the case here, and it appears, on examining the record, that the pleadings do not disclose of what State the plaintiff was a citizen, this court will of its own motion reverse the judgment, remand the cause to the Circuit Court with costs against the defendant in error, and further adjudge that defendant must also pay costs in this court.

This action was brought in the Court of Common Pleas of Richland County, Ohio, and removed into the Circuit Court by the defendant. The petition for removal stated: "First. The plaintiff was at the time of the commencement of this action and still is a resident of the State of Ohio, in the county of Richland. Second. The Pennsylvania Company, the de-

fendant herein, is a corporation duly incorporated under and by virtue of the laws of the State of Pennsylvania, and was at the commencement of this action and still is a citizen of that State, and was not then, nor has it ever been, a citizen of the State of Ohio. Third. The matters in controversy in this suit are wholly between citizens of different States, and the amount in dispute, exclusive of costs, exceeds the sum of two thousand dollars, and is to recover the sum of ten thousand ($10,000) dollars."

The record failed to show of what State plaintiff was a citizen.

Mr. Darius Dirlam for plaintiff in error.

No appearance for defendant in error.

THE CHIEF JUSTICE stated the case, and said: On the authority of *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283, 284; *Continental Insurance Co.* v. *Rhoads*, 119 U. S. 237; and *Mansfield, Coldwater & Lake Michigan Railway* v. *Swan*, 111 U. S. 379, 388, the judgment of the Circuit Court will be reversed, with instructions to remand the case to the state court with costs against defendant in error, which must also pay the costs in this court. *Hanrick* v. *Hanrick*, 153 U. S. 192, 198.

Judgment reversed accordingly.

BEUTTELL *v.* MAGONE.

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

No. 118. Argued December 19, 1895. — Decided March 11, 1895.

A request made to the court by each party to instruct the jury to render a verdict in his favor, is not equivalent to the submission of the case to the court without the intervention of a jury, within the intent of Rev. Stat. §§ 649, 700.

Statement of the Case.

When each party asks the court to instruct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the jury to find a verdict for one of them, both are concluded on the finding of facts.

Under the tariff act of March 3, 1883, c. 120, rugs made as rugs, and distinguishable as such by reason of their process of manufacture, size, shape, pattern, etc., were subject to the duty imposed upon rugs; and rugs made from pieces of carpets or carpetings, to the rate imposed upon the carpet from which they were made.

In March, 1887, the plaintiff in error imported a lot of rugs. They were classed by the custom authorities as "Tournay velvet carpets," and, as such, held subject to a duty of forty-five cents per square yard and 30 per cent *ad valorem*. The importer protested against this levy, and claimed that the merchandise was only dutiable at 40 per cent *ad valorem*. The collector refusing to entertain the protest, appeal was in due time prosecuted to the Secretary of the Treasury, and upon adverse decision suit was brought to recover the difference between the duty enforced by the collector and that which the importer conceded to be due. The controversy depends on the proper construction of parts of the tariff act of March 3, 1883, c. 120, 22 Stat. 487, which was in force at the time of importation.

On the trial of the case two witnesses were examined, one the importer, in his own behalf, the other a witness on behalf of the government. The testimony of the importer was, substantially, to the effect that the rugs in question were not pieces of carpet or rugs made from pieces of carpet, but were rugs woven as such; that they were of various sizes, viz., thirty-six inches long by eighteen wide, thirty-six inches long by thirty-six inches wide, fifty-four inches long by twenty-seven inches wide, sixty-three inches long by thirty-six inches wide, or seventy-two inches long by forty-four inches wide. The differences between Wilton carpet and the rugs, as to mode of manufacture, as to material used, and when completed, were stated thus: The rugs were made upon a loom of six frames, whilst Wilton carpet was made upon one of five or less, so that looms fitted for making the rugs were unsuited for making Wilton carpet. The material used in the weft of the rugs was

different from that which was used in a Wilton carpet, and the worsted in one was also of a different quality from that used in the other. The rugs in question, he said, were woven with cotton backs, in order to make them soft, whilst Wilton carpet was woven with a jute and linen back. The design of Wilton carpet and that of the rugs were also stated to be entirely different, the one being made to match various lengths, the other being one pattern for the entire rug. He testified that the rugs were sold by the rug, and not by the yard, and were called Wilton-Daghestan rugs, because they were "a plush fabric." He described a plush fabric as one wherein the worsted in weaving was cut with a knife, so as to leave a plush surface, and declared that Saxony, Axminster, Moquette velvet, and tapestry velvet carpets were also plush fabrics, because their threads were cut so as to make the surfaces like plush. In this sense there was a similarity between the rugs in question and Wilton carpet, that is, they were both plush fabrics, although in other respects there existed the differences already recited. The witness, moreover, said that the name given to the articles "Wilton-Daghestan rugs," in no way indicated that they were made from Wilton carpet, but simply signified that they were a plush fabric. There were two exhibits in the case which were shown the witness, one a sample of the rugs in question, and the other a rug or "bedside," made from a piece of Wilton carpet; he indicated in these the differences above pointed out, and also stated the general similarity which they bore to each other by reason of their being both "plush fabrics."

The witness for the government, after giving his experience in the carpet trade, stated that articles like those imported were known to the trade as "Wilton rugs." He added: "A Wilton is a Brussels carpet cut. It is a plush carpet more correctly speaking."

On the close of the testimony, counsel for plaintiff moved the court to direct a verdict in his favor, "there seeming to be no material dispute on any point in the case." Counsel for defendant also asked the court "to direct a verdict for defendant on the whole case." The court thereupon directed

the jury to find a verdict for defendant. To this instruction exception was taken and allowed, and the case was thereupon brought here by error. The bill of exceptions contains all the evidence. The opinion of the court below is reported in 48 Fed. Rep. 147.

Mr. Edwin B. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendant in error.

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

The contention is advanced that as each party below requested the court to instruct the jury to return a verdict in his favor, this was equivalent to a stipulation waiving a jury and submitting the case to decision of the court. From this premise two conclusions are deduced; first, that, there being no written stipulation, the decision below cannot be reviewed upon writ of error; second, that, even if the request in open court, made by both parties, be treated as a written stipulation, the correctness of the decision below cannot be examined, because it is in the form of a general finding on the whole case, and findings of the court upon the evidence are reviewable only when they are special.

The request, made to the court by each party to instruct the jury to render a verdict in his favor, was not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of Rev. Stat. §§ 649, 700. As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if

there be any evidence in support thereof. *Lehnen* v. *Dickson*, 148 U. S. 71; *Runkle* v. *Burnham*, 153 U. S. 216.

There was obviously no disputed question of fact. The plaintiff introduced proof tending to show that the rugs had been woven as rugs on a loom prepared for that purpose, and which was therefore not suitable for weaving carpeting; that they contained materials used in making rugs which were not the kind or quality of materials used in making carpets; that their size, shape, pattern, back, and other qualities made them distinctly rugs *eo nomine* as distinguished from rugs made "from portions of carpet or carpeting." From this evidence was deduced the conclusion of law that they were dutiable as rugs at 40 per cent *ad valorem*. Defendant's testimony tended to show that the rugs were called Wilton rugs, were a plush fabric, (which was not traversed by the plaintiff's testimony,) and hence were of a "like character and description" with Wilton carpet. Upon these facts the defendant based his claim that as matter of law they were dutiable at the rate imposed on such carpets. From this undisputed evidence, then, arose the legal question whether rugs of the kind stated, not being "portions of carpet or carpeting," were taxable as Wilton carpets, because they were of like character or description, that is, because they were plush fabrics. Wilton carpets were also a plush fabric. The correctness of the ruling below depends upon an interpretation of the language of the statute which we quote:

"Saxony, Wilton, and Tournay velvet carpets forty-five cents a square yard, and in addition thereto 30 per centum *ad valorem*. . . . Carpets and carpetings of wool, flax, or cotton, or parts of either, or other material not otherwise herein specified, 40 per centum *ad valorem;* and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets and carpetings shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description; and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and rugs shall be forty per centum *ad valorem*." 22 Stat. 509, 510.

It is clear that rugs in the generic sense are specifically

dutiable as such under the foregoing provisions. The imposition of a different duty on rugs of a particular kind is an exception to the general rule established by the statute. The exception is as "to rugs, screens, covers, hassocks, bedsides, and other portions of carpets and carpetings," which are made to pay the duty imposed on "carpets and carpetings of like character and description." The obvious construction of this language is that which makes the words "other portions of carpets and carpetings" qualify the enumerated articles, and of course if they be thus construed, only rugs made from "portions of carpets and carpetings" would be subject to the exceptional classification.

It is urged that this interpretation is erroneous, because the limiting words "other portions of carpets and carpetings" simply qualify the last of the enumerated articles, that is, the word "bedside," and none other. It is self-evident that the qualifying words must be held to relate to some of the items embraced in the enumeration which they qualify. To hold otherwise would be to read them out of the statute. Do they qualify all or one is the question. To hold that they qualify only one of the items of the enumeration is to make that item an exception, and therefore make the statute operate an absurdity. If the qualifying words only apply to "bedsides," then all the other items enumerated, viz., "mats, rugs, screens, covers, and hassocks," are dutiable at the rate imposed on "carpets and carpetings of like character and description," although they be not made from "other portions of carpets and carpetings," whilst "bedsides," whatever may be their similarity to "carpets or carpetings," will only be dutiable at the rate of carpets and carpetings if made from pieces of carpets. It cannot be supposed the intention of the statute was to operate this inequality or to work out this unjust result. The articles are all enumerated together, and the manifest purpose is that all of them shall pay a like duty under similar conditions. We cannot violate the express language in order to dissociate things classed together by the law, and thus make one of the class subject to a higher duty than the others, although they be of like character and description.

Syllabus.

We think the purpose of the statute, plainly conveyed by its text, was to tax carpets as enumerated therein. That the effect of its language and its intent were also to tax rugs, made as rugs, and clearly distinguishable as such, by reason of their process of manufacture, size, shape, pattern, etc., at the duty imposed on rugs, but to tax rugs made from pieces of carpets or carpetings at the rate imposed on the carpet from which they were made, since, although answering the purpose of a rug, they were really carpeting itself, being made from parts or portions thereof. A construction contrary to that which we thus reach having been adopted by the court below, its judgment is

Reversed, and the case remanded with directions to grant a new trial.

FRISBIE *v.* UNITED STATES.

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

No. 811. Argued and submitted March 4, 1895.— Decided March 18, 1895.

The omission of the formal indorsement of an indictment as "a true bill," signed by the foreman of the grand jury, is not necessarily and under all circumstances fatal, although it is advisable that the indictment should be endorsed.

Such a defect is waived if the objection be not made in the first instance and before trial.

Pleading to an indictment admits its genuineness as a record.

The provision in the act of June 27, 1890, c. 634, 26 Stat. 182, forbidding an agent, attorney, or other person engaged in preparing, presenting, or prosecuting a claim for a pension under that act from demanding or receiving a greater fee than ten dollars for his services is constitutional.

An indictment for violating that provision which describes the defendant as a "lawyer" is sufficient.

The offence against that act is committed when a sum greater than ten dollars has been taken, without regard to the fact whether the pension money has or has not been received.

When the amount of the excess so taken is unknown to the grand jury, it is proper to allege that fact in the indictment.

Statement of the Case.

It is unnecessary to aver a demand for the return of the money wrongfully taken.

The omission to charge that the offence was "contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States" is immaterial.

On June 27, 1890, Congress passed an act, 26 Stat. 182, c. 634, the fourth section of which is as follows:

"That no agent, attorney, or other person engaged in preparing, presenting, or prosecuting any claim under the provisions of this act shall, directly or indirectly, contract for, demand, receive, or retain for such services in preparing, presenting, or prosecuting such claim a sum greater than ten dollars, which sum shall be payable only upon the order of the Commissioner of Pensions, by the pension agent making payment of the pension allowed, and any person who shall violate any of the provisions of this section, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of a pension or claim allowed or due such pensioner or claimant under this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall, for each and every such offence, be fined not exceeding five hundred dollars, or be imprisoned at hard labor not exceeding two years, or both, in the discretion of the court."

Under this statute an indictment was returned to the Circuit Court of the United States for the Eastern District of Louisiana, the first count of which was as follows:

"The grand jurors of the United States of America, duly empannelled and sworn, in and for the Eastern District of Louisiana, in the said Circuit Court, on their oath present that Henry N. Frisbie, late of the Eastern District of Louisiana, lawyer, on the third day of January, A.D. eighteen hundred and ninety-four, at the city of New Orleans, in the Eastern District of Louisiana, and within the jurisdiction of this court, then and there being a person engaged in preparing, presenting, and prosecuting a claim for pension upon the said United States —— entitled 'An act granting pensions to soldiers and sailors who are incapacitated for the performance of manual labor, and providing for pensions to widows, minor

children, and dependent parents,' approved June 27, 1890, to wit, a claim made by and on behalf of one Julia Johnson, under the said act of Congress, as the widow of Lewis Johnson, deceased, late a soldier in the military service of the United States during the war of the rebellion, to wit, a private in Co. C, 87 Reg., Co. B, 84 U. S. C. Vol. Inf., feloniously and wrongfully did violate the provisions of the fourth section of the said act of Congress, in that he did then and there feloniously and wrongfully demand, receive, and retain of and from the said claimant, Julia Johnson, for his said services in preparing, presenting, and prosecuting her said claim for pension aforesaid a sum of money greater than ten dollars, the exact amount thereof being to the jurors aforesaid unknown."

To this indictment the defendant demurred "on the ground that the law under which said indictment was found is unconstitutional and void, for the reason that Congress has no power to regulate the price of labor nor impair the obligation of contracts. 2. That only the pensioner can make complaint. No case can be maintained unless affidavit is made by pensioner. 3. Charge is not sustained by the claim set out." The demurrer having been overruled he entered a plea of not guilty; a trial was had which resulted in a verdict of guilty. A motion for a new trial having been overruled, the defendant was sentenced to imprisonment for three months. To reverse such judgment he sued out this writ of error.

Mr. O. B. Sansum for plaintiff in error submitted on his brief.

Mr. Assistant Attorney General Whitney for defendants in error.

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

Neither the testimony nor the instructions are preserved in the record, and the only questions presented for our consideration arise on the indictment.

Opinion of the Court.

It is objected, in the first place, that the indictment lacks the indorsement, "a true bill" as well as the signature of the foreman of the grand jury. No objection was made on this ground in the Circuit Court, either before or after the trial. There is in the Federal statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly at least, such indorsement and authentication were essential. "The indorsement is parcel of the indictment and the perfection of it." *King* v. *Ford*, Yelv. 99. But this grew out of the practice which there obtained. The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the indorsement, "a true bill" or "ignoramus," or sometimes, in lieu of the latter, "not found," and all the bills thus acted upon were returned by the grand jury to the court. In this way the indorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indorsement loses its essential character. This matter is fully discussed by Beasley, C. J., in *State* v. *Magrath*, 44 N. J. Law, 227, 228; by Moncure, President of the Court of Appeals, in *Price* v. *Commonwealth*, 21 Grat. 846, 856; and by Merrick, J., in *Commonwealth* v. *Smyth*, 11 Cush. 473, 474, the latter saying, "this omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant." In each of these cases it was held by the court that the lack of the indorsement was not necessarily and under all circumstances fatal to the indictment. In

1 Bish. Crim. Proc. sec. 700, it is said: "In the absence of a mandatory statute, it is the better view that both the words 'a true bill' and the signature of the foreman may be dispensed with, if the fact of the jury's finding appears in any other form in the record." See also *State* v. *Creighton*, 1 Nott & McC. 256; *State* v. *Cox*, 6 Ired. (Law) 440. In *Gardner* v. *People*, 3 Scammon, 83, 87, the court held that the signature of the foreman, though a statutory requirement, would be presumed if the indictment was recorded.

Nevertheless, as it is not an unvarying rule for the grand jury to return into court only the indictments which they have found, it is advisable, at least, that the indictment be endorsed according to the ancient practice, for such indorsement is a short, convenient, and certain method of informing the court of their action.

The defect, however, is waived if objection is not made in the first instance and before trial, for it does not go to the substance of the charge, but only to the form in which it is presented. There is a general unanimity of the authorities to this effect. In *State* v. *Agnew*, 52 Arkansas, 275, it was held that a statute requiring an indorsement of "a true bill" signed by the foreman was directory; that objection to a lack of such indorsement was waived unless made before pleading. In *McGuffie* v. *State*, 17 Georgia, 497, while holding that the usual practice of indorsement was advisable, the court said that the objection on account thereof was "an exception which goes rather to the form than to the merits of the proceeding," and too late after trial. See also *State* v. *Mertens*, 14 Missouri, 94; *State* v. *Murphy*, 47 Missouri, 274; *State* v. *Shippey*, 10 Minnesota, 223; *People* v. *Johnston*, 48 California, 549; and *Wau-kon-chaw-neek-law* v. *United States*, Morris, (Iowa), 332.

In this connection reference may be made to section 1025, Rev. Stat., which reads:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or im-

perfection in matter of form only, which shall not tend to the prejudice of the defendant."

The indorsement was no part of the charge against the defendant. If no indictment had in fact been found by the grand jury — in other words, if there was no legal accusation against him — the defendant should have objected on this ground when the court called upon him to plead to this which it assumed to have been properly presented to it. "The very fact of pleading to it admits its genuineness as a record." *State* v. *Clarkson*, 3 Alabama, 378, 383. Instead of denying the existence of any legal accusation, the defendant demurred to it on the ground of insufficiency, thus abandoning all question of form and challenging only the substance. When the demurrer was overruled he entered a plea of not guilty, and that being determined against him by the verdict of the jury, he interposed a motion for a new trial and one in arrest of judgment, without ever suggesting to the court that there was before it no indictment returned by the grand jury of the district. The objection, now for the first time made, comes too late. Whatever action the Circuit Court might have been compelled to take if the matter had been called to its attention in the first instance, the defect is not one which goes to the substance of the accusation, and will not now avail.

A second objection, insisted upon now as it was by demurrer to the indictment, is that the act under which the indictment was found is unconstitutional, because interfering with the price of labor and the freedom of contract. This objection also is untenable. While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any

contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.

The pension granted by the government is a matter of bounty. "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion. *Walton* v. *Cotton*, 19 How. 355." *United States* v. *Teller*, 107 U. S. 64, 68.

Congress being at liberty to give or withhold a pension, may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of Congressional power. *United States* v. *Hall*, 98 U. S. 343. Having power to legislate on this whole matter, to prescribe the conditions under which parties may assist in procuring pensions, it has the equal power to enforce by penal provisions compliance with its requirements. There can be no reasonable question of the constitutionality of this statute.

Again, it is claimed that the indictment is defective in that it describes the defendant as a lawyer and not as an agent or attorney. Of course, the use of the word "lawyer" is not significant; it is a mere *descriptio personæ*. The language of the statute is "no agent, attorney, or other person engaged in preparing," etc. The indictment charges that "defendant then and there being a person engaged in preparing, presenting, and prosecuting a claim for pension upon the said United States . . . by and on behalf of one Julia Johnson." It is immaterial what was his regular profession or avocation. It is sufficient that if even temporarily he engaged in the work of preparing, presenting, and prosecuting a claim for a pension. Doing that he brings himself within the requirements of the statute, and it is enough to charge that he was so engaged,

and that whilst so engaged he did demand, receive, and retain more than the sum which by the statute he was permitted to do.

It is further objected that there is no averment that Julia Johnson, named in the indictment, was a pensioner of the United States, or that any money of any kind or character was ever paid to defendant for her, or that any money was ever paid to any person for her. It is insisted that the purpose of the statute is to protect pension money only, and that until pension money is received the agent or attorney is not within the reach of the statute. We do not so understand it. The guilt or innocence of the defendant does not turn on the question whether he is or is not successful in obtaining the pension which he is applying for, nor whether he takes the sum in excess of ten dollars out of the particular pension money received by the applicant. The scope of the statute and the evident purpose of Congress are to prevent an applicant for pension from being mulcted any sum above ten dollars by any one assisting in the matter. Language expressing such intention cannot be clearer than that used.

To the objection that the amount of the excess over ten dollars demanded, received, and retained by the defendant is not stated, and that any sum, even one cent, would satisfy the averment, it is sufficient to reply that if the amount of the excess was unknown it was proper to allege that fact in the indictment, and, in the absence of any testimony to the contrary, it will be presumed that the amount of the excess was, in fact, unknown to the grand jury. *Coffin* v. *United States*, 156 U. S. 432. The question of the guilt of the defendant does not depend on the amount of the excess. The rule *de minimis non curat lex* has no such application in criminal cases. The stealing of one cent is larceny as truly as the stealing of a thousand dollars. The amount may vary the degree, but it does not change the character of the crime.

It is further urged that the indictment nowhere alleges that any demand was made upon the defendant for the return of the money wrongfully received and retained by him. No such demand need be averred. The case of *United States* v.

Irvine, 98 U. S. 450, is not in point. There the charge was of wrongfully withholding pension money, and it was in reference to such charge that the court said: "In short, there must be such unreasonable delay, some refusal to pay on demand, or some such intent to keep the money wrongfully from the pensioner, as would constitute an unlawful withholding in the meaning of the law."

The charge of wrongfully withholding implies the possibility, at least, of a rightful receipt, and the offence consists in failing to turn over to the proper party that which has been thus received. But the charge here is of demanding, receiving, and retaining. It implies that there was wrong in the original exaction, and it is unnecessary to aver a demand upon the defendant to undo such wrong. If he wrongfully demanded and received and still retains the sum so demanded and received, the offence is complete.

So far as respects the objection that the count does not conclude that the offence charged was "contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the United States," it is sufficient to say that such allegation, which is one of a mere conclusion of law, is not of the substance of the charge, and the omission is of a matter of form, which does not tend to the prejudice of the defendant, and is, therefore, within the rule of section 1025 Rev. Stat., to be disregarded.

These are the only matters of objection to this indictment. No one of them is tenable, and, therefore, the judgment is

Affirmed.

SHIELDS *v.* COLEMAN.

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

No. 793. Submitted January 7, 1895. — Decided March 18, 1895.

The court below, in its order granting the appeal, said: "This appeal is granted solely upon the question of jurisdiction" and made further pro-

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visions for determining what parts of the record should be certified to this court under the appeal, under which it subsequently directed the portions of the record to be certified to this court, and the record was prepared accordingly. *Held,* that this was a sufficient certificate of a question of jurisdiction under the provisions of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 827.

A Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court.

The mere forcible continuance of possession wrongfully acquired by the Federal court does not transform that which was in the first instance wrongful, into a rightful possession.

THE facts in this case are as follows: On June 6, 1892, in a suit in the Circuit Court of the United States for the Eastern District of Tennessee, brought by John Coleman against the Morristown and Cumberland Gap Railroad Company and Allison, Shafer & Company, an order was entered appointing Frank J. Hoyle receiver of all the property of the railroad company. The bill upon which this order was made alleged that in 1890 the defendant railroad company had contracted with its co-defendants, Allison, Shafer & Company, for the construction of its line of railroad from Morristown to Corryton, a distance of about forty miles, which work was partially completed in February or March, 1892; that there was yet due from the railroad company to Allison, Shafer & Company more than $50,000; that Allison, Shafer & Company were indebted to the complainant for work and labor done in the construction of such railroad; that notice, claiming a lien, had been duly given the railroad company, and that it was insolvent, as were also Allison, Shafer & Company. The prayer was for judgment against Allison, Shafer & Company, that the amount thereof be declared a lien upon the railroad property, and for the appointment of a receiver pending the suit.

In pursuance of this order the receiver took possession of the railroad. On June 8, 1892, the railroad company appeared and filed a petition for leave to execute a bond for whatever sum might be decreed in favor of the complainant and that the order appointing the receiver be vacated. This petition was sustained, the bond given and approved, and an order

entered discharging the receiver. Thereupon the receiver turned the property over to the railroad company, receiving the receipt of its general manager therefor.

On June 20, 1892, T. H. McKoy, Jr., filed his petition in the same case setting up a claim against the railroad company for services rendered as an employé and vice-president of the railroad company, and for expenses incurred on its behalf. On July 4 and July 7, 1892, other petitions were filed setting up further claims against the railroad company.

On July 27, 1892, each of the defendants filed a separate answer to the complainant's bill. No further order was made by the Circuit Court until November 12, 1892, when, as the record shows, a demurrer of the railroad company to the petitions filed on July 4 and July 7 was argued and overruled, and leave given to answer on or before December rules. The record of proceedings on that day contains this further recital:

"On motion of complainant, and it appearing that the bill in this cause is properly filed as a general creditor's bill to wind up the affairs of an insolvent corporation, it is ordered by the court that the bill be sustained as such, and that all creditors of said Morristown and Cumberland Gap Railroad Company and all other persons interested therein come forward and exhibit their demands and have themselves made parties to this bill on or before the 2d Monday of January next and show in their petitions the nature and extent of their claims and whether they have security or lien therefor; and, if so, the nature thereof and the property upon which their liens rest. But parties having suits now pending in other courts against said Morristown and Cumberland Gap Railroad Company for rights of way or other claims or demands may prosecute the same to judgment and file their judgments in this court as evidence of the amount and character of their demands. And the clerk of this court will make publication, notifying all creditors of said Morristown and Cumberland Gap Railroad Company of the contents of this order, which publication will be inserted at least twice a week for the next four weeks in the Knoxville Daily Tribune. And thereupon complainant moved the court for the restoration of the

receivership in this case and the appointment of a receiver to take possession and custody of all the property of said Morristown and Cumberland Gap Railroad Company, and W. S. Whitney is appointed temporary receiver of the railroad and its property, and ordered to take custody and control of said railroad, its operations, and all other property of said railroad company."

On November 29, 1892, an amended and supplemental bill was filed, naming as complainants not merely the original complainant John Coleman, but also the various subsequent intervening petitioners. It is enough to say of this amended and supplemental bill that it stated facts sufficient to justify the appointment of a receiver.

On October 28, 1892, a bill was prepared addressed "to the Honorable John P. Smith, chancellor, etc., presiding in the chancery court at Morristown, Tennessee." This bill was in the name of sundry creditors of the railroad company against it, and other parties, setting forth certain judgments in favor of the complainants against the railroad company; its insolvency as well as that of the firm of Allison, Shafer & Company; the existence of a multitude of unpaid claims, and prayed the appointment of a receiver. This bill having been presented to the Honorable Joseph W. Sneed, one of the judges of the State of Tennessee, he signed the following fiat, as it is called in the practice of that State:

"STATE OF TENNESSEE:

"*To the clerk and master of the chancery court at Morristown:*

"Upon the presentation of the foregoing bill and on consideration of its averments it is ordered:

"1. That the temporary restraining order prayed for be granted upon complainants executing bond to be approved by the clerk, conditional, as in ordinary injunction cases, in the penalty of ten thousand dollars ($10,000.00).

"2. That the prayer for a temporary receiver of the Morristown and Cumberland Gap Railroad Company be granted, and James T. Shields, Jr., is hereby appointed such temporary receiver, and he shall, before entering upon the discharge of

his duties, file with the clerk and master a good and sufficient bond, to be approved by the master, in the penalty of twenty thousand dollars ($20,000.00).

"3. Immediately after his qualification said receiver is directed to take possession of said railroad and all other property belonging thereto or in possession of said company by lease or otherwise, and shall accurately inventory same and file a copy of said inventory with the master. Said receiver is directed to operate said road and to take charge of its tolls and incomes and to continue and preserve the same in like condition as at present, if practicable; and to that end he is directed to employ or continue the employment, as justice may demand, all necessary agents and employés whose services are essential to the continued operation of the road or the preservation of its property; and to that end he is authorized to contract, in his official capacity as receiver, for the payment of such reasonable sums as may be necessary to defray the expenses of such services.

"4. It is further ordered that a copy of this order be served upon the defendant, the M. & C. G. R. R. Company, along with other process, and that said company be and appear before the Hon. John P. Smith, presiding chancellor of said division, on the second Thursday, being the 10th day of November, 1892, at 10 o'clock A.M., at chambers, at the courthouse, in Rutledge, Tenn., and then and there show any reason which may be made to appear to the court why a permanent receiver shall not be appointed of said railroad company in this cause, and why the temporary restraining order granted herein shall not be made permanent.

"5. In the event that it shall become necessary to issue a writ of possession to put said receiver in the quiet and peaceable possession of all the property of said corporation, it is ordered that the master issue writs of possession, directed to the sheriffs of Hamblen, Grainger, and Knox Counties, for that purpose, commanding said sheriffs to place said receiver in the possession of that portion of said company's property which may be in their several counties.

"Given under my hand this October 28, 1892.

"Jos. W. Sneed, *Judge.*"

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This fiat was on the same day filed in the office of the clerk of the chancery court, and the receiver therein named, immediately took possession of the railroad property and commenced the operation of the road. His possession continued until November 14, 1892, when the receiver appointed by the Circuit Court of the United States took the property out of his hands.

Notice was thereafter given that on January 7, 1893, an application would be made to the chancellor for the appointment of a permanent receiver, and on that day this order was entered by the chancellor:

"In the Chancery Court of Hamblen County, Tennessee.

"Thomas B. Crosby et al.
vs.
"The Morristown & Cumberland Gap Railroad Company et al.

"Be it remembered that this cause came on for hearing on this January 7, 1893, before the Hon. John P. Smith, chancellor, at 2 o'clock P.M., at chambers, at Jonesboro, upon the motion of the complainants for the appointment of a permanent receiver of the defendant, the Morristown and Cumberland Gap Railroad Company, and notice thereof.

"And it appearing to the court that on October 28, 1892, under the order and fiat of Hon. Joseph W. Sneed, one of the judges of this State, James T. Shields, Jr., was appointed, at the suit of complainants in this cause, temporary receiver of Morristown and Cumberland Gap Railroad Company and all the property of said company or in its possession, by lease or otherwise, and that said receiver so appointed proceeded forthwith to qualify and took possession of the property of said corporation and everything of which it had possession; and it further appearing to the court by an order made thereafter in the United States Circuit Court at Knoxville for the Northern Division of the Eastern District of Tennessee, in the cause of John Coleman *v.* Morristown and Cumberland Gap Railroad Company et al., W. S. Whitney was appointed

receiver of said railway company, and that under orders made by said court in said cause the property of the said railway company was taken from the possession of the receiver of this court and placed in the possession of the receiver of that court; and the court, being of the opinion that to appoint a permanent receiver in advance of a determination of the question of superior jurisdiction would be unseemly and not in conformity with that spirit of comity which exists between the state and Federal courts of concurrent jurisdiction, doth order that said motion for a permanent receiver be entered and continued, with leave to call the same up upon notice at any time after said question of jurisdiction is settled.

"It is further ordered that James T. Shields, Jr., the temporary receiver of said corporation and its property under the order of appointment in this case, intervene in said cause of John Coleman *v.* The Morristown and Cumberland Gap Railroad Company et al. and there test and contest the question of jurisdiction in such manner and form as he may be advised by counsel, and on application of said James T. Shields, Jr., John K. Shields and Tully R. Cornick are appointed his counsel for that purpose.

"Done at chambers, at Jonesboro, this January 7th, 1893.

"John P. Smith,

"*Chancellor 1st Div., Tenn.*"

On January 24, 1893, the receiver J. T. Shields, Jr., in obedience to the direction of the chancellor, filed his motion in the Circuit Court of the United States, setting forth the facts herein stated, and praying that court to vacate its order appointing W. S. Whitney receiver of the road, and for an order restoring the possession to him. This motion was on January 30, 1893, overruled, and exception duly taken. Subsequent proceedings were had in the Circuit Court culminating on January 31, 1894, in a final decree, which decree established certain liens, and ordered the property to be sold.

Thereafter an appeal to this court was prayed for and allowed in behalf of the receiver appointed by the state court,

the petition and the order allowing the appeal being in these words:

"Your petitioner, James T. Shields, Jr., suing as receiver of the Morristown and Cumberland Gap Railroad Company, respectfully represents that there is manifest error committed, to the injury of the petitioner, by the final decree pronounced in this cause on the 31st day of January, 1894, and by the interlocutory orders and decrees theretofore pronounced in these ——, in and by which said interlocutory orders and final decrees this court assumed and asserted jurisdiction of the property and effects belonging and constituting the estate of the defendant Morristown and Cumberland Gap Railroad Company as against the lawful custody and possession of this petitioner under orders and decrees theretofore pronounced by the chancery court of Hamblen County, Tennessee, in the cause pending in said chancery court entitled '*Thomas B. Crosby et al.* v. *Morristown and Cumberland Gap Railroad Company et al.*,' under jurisdiction theretofore lawfully exercised and assumed, said chancery court being a court of equity of concurrent jurisdiction with this court, and which said chancery court of Hamblen County, Tennessee, was thereby ousted of the lawful jurisdiction, and this petitioner, as such receiver, became deprived of the lawful custody of the property and estate of said Morristown and Cumberland Gap Railroad Company, the subject-matter of controversy in the cause then and there pending in said court.

"Wherefore petitioner, James T. Shields, Jr., receiver, etc., considering himself aggrieved, prays an order granting an appeal from said final decree and interlocutory orders, taking and exercising jurisdiction as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the act of Congress of the United States, approved March 3, 1891, and petitioner herewith files his bond in the penal sum of five hundred dollars, which bond is approved by the Honorable D. M. Key, one of the judges of this court.

"Upon consideration of the petition for appeal to the Supreme Court of the United States filed herein by James T. Shields, Jr., as receiver of the M. & C. G. R. R. Co. under ap-

pointment by the chancery court of Hamblen County, Tennessee, it is ordered that said appeal be granted, bond therefor in the penalty of five hundred dollars having been executed and approved by the court.

"It is further ordered that the petition for supersedeas be denied.

"This appeal is granted solely upon the question of jurisdiction, and unless counsel shall agree by stipulation, filed with the clerk, in respect to the portions of the record to be transcribed and filed in said United States Supreme Court under said appeal as prayed and granted, the appellant has leave to present the record to the court on Saturday, the 29th of July inst., for the determination of what portion of the record shall be certified to said Supreme Court under said appeal."

Subsequently the court made the entry suggested in the latter part of this order, and directed the portions of the record to be certified to this court, and under that direction the record was prepared.

Mr. Heber J. May, *Mr. John K. Shields*, and *Mr. Tully R. Cornick* for appellant.

Mr. Henry H. Ingersoll for appellees.

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

The single question presented by this appeal is that of the jurisdiction of the Federal court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the state court. In such cases, as was held in *Maynard* v. *Hecht*, 151 U. S. 324, it is essential that the question of jurisdiction alone should be certified to this court from the trial court. But under the authority of *United States* v. *Jahn*, 155 U. S. 109, and *In re Lehigh Company*, 156 U. S. 322, the statement in the last order quoted from the record taken in connection with the petition upon which it was founded must be held to be a sufficient certificate. It is not necessary that the word "certify" be formally used. It is sufficient if

there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction. And that is here shown. The petition for an appeal is upon the single ground that the court wrongfully took jurisdiction of the property, because it was then in the possession of the state court, and in the order allowing the appeal it is explicitly stated that "this appeal is granted solely upon the question of jurisdiction," and the court at the same time reserved to itself the right, which it subsequently exercised, of determining what portions of the proceedings should be incorporated into the record sent here for the purpose of presenting this question.

Had the Circuit Court of the United States, when this property was in the possession of the receiver appointed by the state court, the power to appoint another receiver and take the property out of the former's hands? We are of opinion that it had not. For the purposes of this case it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. *Gaylord* v. *Fort Wayne &c. Railroad*, 6 Bissell, 286–291, cited in *Moran* v. *Sturges*, 154 U. S. 256–270; High on Receivers, 3d ed. sec. 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express

object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that, in the progress of an attachment or other like action, an exigency may arise, which calls for the appointment of a receiver, does not make the jurisdiction of the court, in that respect, relate back to the commencement of the action.

In *Heidritter* v. *Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 301, a question was presented as to the time that jurisdiction attaches. Mr. Justice Matthews, after quoting from *Cooper* v. *Reynolds*, 10 Wall. 308, and *Boswell's Lessee* v. *Otis*, 9 How. 336, observed: "But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

Undoubtedly the Circuit Court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction. The purpose of the bill — the relief sought —was, among other things, the possession of the property by a receiver to be appointed by the court, and when the court adjudged the bill sufficient, and made the appointment, that appointment could not be questioned by another court, or the possession of the receiver thus appointed disturbed. The bill was clearly sufficient to uphold the action then taken.

While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property,

discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property.

It is true that the Circuit Court had the power to thereafter set aside its order accepting security in place of the property and enter a new order for taking possession by a receiver, yet such new order would not relate back to the original filing of the bill so as to invalidate action taken by other courts in the meantime. Accepting a bond and directing the receiver to return the property to the owner was not simply the transfer of the possession from one officer of the court to another. The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was, therefore, in no sense of the term a forthcoming bond. The property ceased to be *in custodia legis*. It was subject to any rightful disposition by the owner or to seizure under process of any court of competent jurisdiction.

The intervening petitions filed on June 20, July 4, and July 7 are not copied in the record, having been omitted therefrom by direction of the Circuit Court. Evidently, therefore, there was nothing in them which bears upon the question before us, and doubtless they were simply intervening petitions, claiming so much money of the railroad company and containing no reference to the appointment of a receiver.

But it is said that the receiver has no such interest in the property as will give him a standing in the Circuit Court to petition for the restoration of the property to his possession, or to maintain an appeal to this court from an order refusing to restore such possession. This is a mistake. He was the officer in possession by appointment of the state court, the

proper one to maintain possession and to take all proper steps under the direction of the court to obtain the restoration of the possession wrongfully taken from him. It is a matter of every-day occurrence for a receiver to take legal proceedings, under the direction of the court appointing him, to acquire possession of property or for the collection of debts due to the estate of which he is receiver.

With reference to the contention that all of the parties plaintiffs in the suit in the state court have come into the Federal court, so that in fact the receiver appointed by the state court no longer represents any one — *stat nominis umbra* — it is sufficient to say that it is not borne out by the record. It is true that the plaintiffs in this case filed a petition in the Federal court in which it was alleged that all the parties plaintiffs in the state court had appeared in the Federal court, and that all the claims of these parties except one of Mellon & Sons, who had two claims, had been presented and allowed, and that Mellon & Sons in their intervening petition had set up one of their claims for allowance, and averred that they were prosecuting the other to judgment in the state court, and that they would, when judgment was obtained thereon, also file that for allowance. But the record shows that the order prayed for in this petition was denied by the Circuit Court without any finding as to the truth of the facts therein alleged. We cannot assume, therefore, as against the application of the state receiver, that the allegations in that petition are true. Further than that, the Circuit Court, in directing what should be incorporated into the record to be sent up on this appeal, directed that there should be inserted a "memorandum of all petitions and pleadings filed, giving dates of petitions without setting out same, down to the final decree, except in cases where directed to be copied in full." In pursuance of that order the clerk incorporated in this record a memorandum of the intervening petitions, and in that memorandum there is no mention of any petition on the part of any of the plaintiffs in the state court except Mellon & Sons. It thus affirmatively appears that up to the date of the final decree only one of the several plaintiffs in the state court

had come into the Federal court. While it is true that in the final decree there is an entry of allowances in favor of these parties, yet there is nothing to show that these allowances were made upon the application of such plaintiffs, or that the amounts allowed to them were the amounts which they claimed, unless this can be implied from the order therein declaring a lien upon the allowances in favor of the counsel of such parties for their services in obtaining the several recoveries. Conceding all that may be inferred from this order, or from anything else that appears in the record, it remains beyond dispute that one claim of Mellon & Sons, for $84,000, is still pending and undetermined in the suit in the state court. But further, the question of right on the part of the petitioner antedates the final decree, and he stands in the Federal court backed by the order of the state court appointing him receiver, and directing him to press this application. If it were true that all the plaintiffs in the state court had abandoned their suit in that court, the remedy was to call the attention of that court to the fact and have an order entered setting aside the appointment of a receiver, or directing the discontinuance of this application. We cannot, in this indirect way, pass judgment upon the action of that court.

It is objected that Judge Sneed had no authority to make the appointment of a receiver, and that the appointment was not made by the chancery court, nor by the chancellor at chambers, nor by any other chancellor or Circuit Court judge of the State of Tennessee. The record does not disclose of what court Judge Sneed was a judge. But we find in 91 Tenn. v, a list of the judges of that State in the year 1892, and the courts of which they were judges. In that list is the name of J. W. Sneed as judge of the Criminal Court of Knox County. That court has, as appears from the statutes, exclusive criminal jurisdiction in that county. It also has common law jurisdiction, and the practice and pleadings in all civil actions are the same as prescribed for the Circuit Courts of the State. It is held by one judge, who takes the same oath of office as other judges. He is paid out of the state treasury, as they are paid, and has power to interchange with

them in official work. (Secs. 163, 164, 165, 166, Milliken and Vertrees' Code of Tenn. 1884.)

In the same code sections 4714 and 4715 read as follows:

"4714. The judges and chancellors shall have interchangeable and concurrent jurisdiction to grant injunctions, attachments, and all other extraordinary process, issuable out of and returnable to any of the circuit or chancery courts of this State.

"4715. Upon making the requisite fiats for, and granting such extraordinary process, it shall be the duty of the judge or chancellor to enclose the papers accompanying the application and the order made, in a sealed envelope, directed to the clerk of the court to which the fiat is directed, which envelope shall be opened only by the clerk or his deputy."

Obviously the action taken by Judge Sneed was under the authority of these two sections, and they seem broad enough to sustain it. No decision of the Supreme Court of the State has been called to our attention bearing upon this question, or construing "judges" to mean only "Circuit Court judges." At any rate, the validity of his action was recognized by the chancellor, who treated his fiat as one made by proper authority; and as the chancery court had unquestioned jurisdiction over all proceedings in equity, including bills for receivers, we must assume that Judge Sneed's order was valid, and the appointment of a temporary receiver by him authorized by the laws and practice of the State.

It is further objected that the proceedings in the Federal court have moved on to a final decree by which various liens have been determined, and that it would be a great hardship to now declare the order appointing the receiver, and assuming possession of this property, beyond the jurisdiction of the Federal court. It is a sufficient reply to this that all the parties who sought to enforce their rights in the state court have not come into the Federal court, and submitted their claims to its jurisdiction. Some are still pursuing their remedy in the forum which they selected, and whatever of hardship there may be, whatever of expense may result, must fall upon the parties who have thus wrongfully secured the taking away of the possession of this property from the custodian rightfully

appointed by the state court. The mere forcible continuance of possession by the Federal court does transform that which was in the first instance wrongful into a rightful possession.

The case, therefore, must be remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

SEEBERGER *v.* WRIGHT AND LAWTHER OIL AND LEAD MANUFACTURING COMPANY.

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

No. 219. Argued and submitted January 31, 1895. — Decided March 18, 1895.

An importer of flaxseed, containing an ascertainable percentage of impurities, composed of clay, sand, and gravel, is entitled to an allowance of that percentage in assessing duties upon the gross weight of the goods.

This was an action against the collector of customs for the port and district of Chicago, to recover certain duties paid under protest, upon an importation of flaxseed, which contained four per cent of impurities. The only question in the case was whether the importers were entitled to an allowance from the gross weight of the goods, of a percentage for impurities.

The case was tried without a jury under a stipulation, and the following facts found by the court:

"Plaintiff imported a quantity of flaxseed from Liverpool, which had been brought from Calcutta. The invoices show the gross weight and a tare of five pounds per bag, and a deduction of 'four per cent for impurities.' The collector, in assessing the duties, deducted the tare, which was the weight of the bags, but refused to allow anything for impurities, assessing a duty of twenty cents per bushel of fifty pounds upon the gross weight, less the tare. Plaintiff paid the duties so assessed under protest, appealed to the Secretary of the Treasury, by whom the action of the collector was affirmed,

and brought this suit in apt time to recover the excess of duties paid by reason of the refusal to make any deduction for impurities.

"The proof in this case shows without dispute that the seed contained dust, composed of clay, sand, and gravel to an average of four per cent."

Upon this finding of facts, the court entered judgment for the plaintiff, assessing its damages at $670.29, with interest. Defendant sued out this writ of error.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Percy L. Shuman for defendant in error submitted on his brief.

Mr. C. B. Alexander by leave of court filed a brief on behalf of the National Lead Company in the interest of the defendant in error.

Mr. Justice Brown delivered the opinion of the court.

By Rev. Stat. § 2898: "In estimating the allowance for tare on all chests, boxes, cases, casks, bags, or other envelope or covering of all articles imported liable to pay any duty, where the original invoice is produced at the time of making entry thereof, and the tare shall be specified therein, the collector, if he sees fit, or the collector and naval officer, if any, if they see fit, may, with the consent of the consignees, estimate the tare according to such invoice; but in all other cases the real tare shall be allowed, . . . but in no case shall there be any allowance for draught."

This case turns really upon the meaning of the word "draught," the government claiming that it is a misspelling of the word "draff," which is defined as waste matter, sweepings, refuse, lees, or dregs.

The word first made its appearance in the thirty-fifth section of the tariff act of August 4, 1790, c. 35, 1 Stat. 145, 166, wherein an allowance was made for "the drafts and tare of

the articles subject to duty by weight." In this section it is spelled both "draft" and "draught." This provision was reënacted in the tariff act of March 2, 1799, c. 22, § 58, 1 Stat. 627, 671, the word being spelt "draft."

A judicial interpretation of the word is suggested in a dictum in the opinion of Mr. Justice Woodbury in *Marriott* v. *Brune*, 9 How. 619, 633, in which he says: "Another reduction is made in weight for tare and draft. This last should be *draff*, meaning dust and dirt, and not what is generally meant by 'draught' or 'draft.'" The case, however, did not call for a definition of the word.

There has been a peculiar use of the word "draught" in England, and perhaps also in this country, in connection with commercial transactions, in which it is defined as an arbitrary deduction from gross weight made by custom, to assure the buyer or importer, as the case may be, that there is no discrimination against him from difference in scales. In Webster's Dictionary of 1890 "draught" is defined as "an allowance on weighable goods;" and "draft" as "an allowance or deduction made from the gross weight of goods." In the Century and the Imperial, "draft" and "draught" are spoken of as an allowance made for waste in goods sold by weight, or the allowance made by the custom-house on excisable goods. The two words are in reality different spellings of the same word.

In *Napier* v. *Barney*, 5 Blatchford, 191, both draft and tare were allowed on sugar imported in bags, Mr. Justice Nelson observing: "Draft and tare, in a commercial sense and usage, have a separate and distinct meaning and application. The former is an allowance to the merchant when the duty is ascertained by weight, as in the present instance to insure good weight to him. . . . It is to compensate for any loss that may occur from the handling of the scales, in the weighing, so that, when weighed the second time, the article will hold out good weight."

As the word "draught" or "draft" has a particular and uniform meaning given to it by the lexicographers, and such definition seems to be a reasonable one as applied to the statute in

question, we see no good reason for saying that it is a mere mis-spelling for "draff," especially in view of the fact that this is an unusual word, with a totally different meaning, and not found elsewhere in any tariff acts to which our attention has been called. The enactment in question seems to have been intended to prohibit a custom, which had grown up under the tariff act of 1790, and was probably inherited from the tariff laws of England, of making an arbitrary deduction from the gross weight, to which the importer was really not entitled.

Assuming, then, that the word "draught" refers to this arbitrary deduction and not to impurities, we think the court below was correct in assuming that the flaxseed in question, which is made dutiable by the act of 1883 at "twenty cents per bushel of fifty-six pounds," less the tare, means 56 pounds of clean seed, or at least seed freed from any accidental impurities, such as the clay, sand, and gravel in question. If this seed had been washed or otherwise cleansed of these impurities, it certainly will not be contended that they would be subject to an increased duty by means of such cleansing, or that a bushel of 56 pounds of such seed would be anything more or less than a statutory bushel. So if, without such cleansing, the amount of such impurities can be fixed at a certain percentage, as the findings in this case assume, we see no objection to the allowance being made, though the seed be not in fact cleansed.

The case is readily distinguished from *Earnshaw* v. *Cadwallader*, 145 U. S. 247, in which the question was whether, as a matter of fact, the term "iron ore," as known to persons familiar with the commerce respecting it, meant ore which had or had not been dried, and thus freed of the water which is naturally found in it. And as it appeared that dried ore was not known to commerce, that the allowance between dealers for the moisture that would be expelled by heating the ore had been based upon express contract or stipulation, and that no custom existed authorizing such allowance, except by contract, it was held that the tariff act referred to ore in its natural state. It was said, however, in the opinion of Mr. Justice Blatchford, that the principle of that case was different from that in regard

to dirt clinging to the skin of a potato, or clay, sand, or gravel mixed with flaxseed, such impurities being plainly discoverable and readily eliminated.

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

Affirmed.

STOKES *v.* UNITED STATES.

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

No. 746. Submitted March 4, 1895. — Decided March 18, 1895.

In an indictment and prosecution under Rev. Stat. § 5480, as amended by the act of March 2, 1889, c. 393, for a conspiracy to defraud by means of the post office, three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged devised a scheme to defraud; (2) that they intended to effect this scheme by opening or intending to open correspondence with some other person through the post office establishment or by inciting such other person to open communication with them; (3) and that in carrying out such scheme such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.

An objection to the admissibility of an envelope against the defendant in such a case upon the ground that it was not shown to be in his handwriting is not sustained, as the bill of exceptions did not purport to contain all the evidence.

Other objections to the admissibility of evidence considered and held to be without merit.

When a paper admitted to be in the handwriting of a defendant in a criminal prosecution is admitted in evidence for another purpose, it is competent for the jury to compare it with the handwriting of a letter which he is accused of, and indicted for, writing, for the purpose of drawing their own conclusions respecting the latter.

This was an indictment against the defendant Stokes and thirteen others for a conspiracy to commit the offence described in Rev. Stat. § 5480, of using the post office establishment of the United States for fraudulent purposes.

The artifice was described as one wherein each of the defendants represented himself as a dealer in various kinds of

merchandise, certifying each other to be financially responsible, and ordering merchandise from various parties, having no intention of paying for the same.

Upon the trial Stokes and eight others were found guilty, and subsequently sentenced to fines and imprisonment.

Defendants thereupon sued out this writ of error.

Mr. John D. Burnett for plaintiffs in error.

Mr. Solicitor General for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

Error is assigned to the action of the court in overruling a demurrer to the indictment, and to the introduction of certain testimony.

1. The indictment is claimed to be defective in failing to set out with sufficient certainty the agreement showing the conspiracy. The indictment is for a conspiracy, Rev. Stat. § 5440, to commit an offence described in section 5480, as amended by the act of March 2, 1889, c. 393, 25 Stat. 873, which reads as follows: "If any person having devised or intending to devise any scheme or artifice to defraud . . . to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter . . . in any post office . . . of the United States, . . . or shall take or receive any such therefrom, such person so misusing the Post Office Establishment shall, upon conviction, be punishable," etc.

We agree with the defendant that three matters of fact must be charged in the indictment and established by the evidence. (1) That the persons charged must have devised a scheme or artifice to defraud. (2) That they must have

intended to effect this scheme, by opening or intending to open correspondence with some other persons through the post office establishment, or by inciting such other person to open communication with them. (3) And that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom.

So also a conspiracy to commit such offence must state a combination between the defendants to do the three things requisite to constitute the offence. In this particular the indictment charges that the defendants "did then and there conspire, combine, confederate, and agree together to commit the act made an offence and crime by section 5480 . . . that is to say, the said defendants conspired . . . and agreed together in devising, and intending to devise, a scheme and artifice to defraud various persons, firms, and companies out of their property, goods, and chattels, and particularly to defraud, (here follows the names of certain individuals and firms,) and other persons, firms, and companies to the grand jury unknown, of their goods and chattels."

Defendants' argument assumes that these are all the allegations of the agreement constituting the conspiracy, but the indictment continues as follows: "The scheme and artifice to defraud as aforesaid was *to be carried out* by each of said defendants representing himself to be engaged as a dealer in various kinds of merchandise and goods, and to have an office, and to use in correspondence sheets of paper with his pretended business printed thereon; and the said defendants were *mutually to represent each other* to the said persons, firms, and companies, and others unknown to the grand jurors, intended to be defrauded as aforesaid, as financially responsible and entitled to receive various kinds of merchandise and goods on credit, and the said scheme and artifice to defraud as aforesaid was *to be further effected* by ordering merchandise and goods from the persons, firms, and companies as aforesaid, and from other persons, firms, and companies to the grand jurors unknown, having no intention, then and there, to pay for such merchandise and goods so ordered as aforesaid,

but to convert the said goods and merchandise to the use of each and of each other."

We think this states with sufficient clearness the first requisite of an indictment, under section 5480, of a scheme or artifice to defraud. The allegation is not of what was actually done, but of what the defendants conspired and intended to do. The indictment continues: "That the post office establishment of the United States was *to be used* for the purpose of executing such scheme and artifice to defraud, as aforesaid, pursuant to said conspiracy, by opening correspondence with the said persons, firms, and companies, and other persons, firms, and companies unknown to the grand jurors, and by inciting said persons, firms, and companies and others as aforesaid to open correspondence with the said defendants by means of the post office establishment of the United States." This is a sufficient allegation of the second requisite of the offence. "And that, for the further purpose of executing said conspiracy to defraud as aforesaid, the said J. T. Stokes *did* wrongfully and unlawfully *deposit* in a certain post office of the United States, to wit, the post office at Olivia, Conecuh County, Alabama, in the Southern District of Alabama, on or about the thirtieth day of November, eighteen hundred and ninety-one, a letter addressed to Bion F. Reynolds, Brockton, Massachusetts, which said letter was substantially in words and figures as follows, to wit:" (Here follows a copy of a letter ordering samples of shoes.) "And which said letter was then and there enclosed in a sealed envelope, deposited in the post office at Olivia as aforesaid, to be conveyed by the post office establishment of the United States to the said Bion F. Reynolds, and the said letter contained a check on Morris & Company, bankers, Montgomery, Alabama, for eight and $\frac{80}{100}$ dollars, payable to the order of the said Reynolds, and the amount of the said check was equal to the amount of merchandise and goods ordered by the said Stokes in the said letter from (to) said Reynolds; the said Stokes had no money on deposit with the said Morris & Company, bankers, as aforesaid, when he drew the enclosed said check; nor had he funds deposited with said bankers at any time, but the send-

ing of the said check was pursuant to the conspiracy aforesaid, a scheme and artifice to defraud the said Bion F. Reynolds of his goods and merchandise by not paying, and intending, then and there, not to pay for the merchandise so ordered, but to convert the same to the use of the said J. F. Stokes and other defendants named as aforesaid."

The defendants are evidently in error in claiming that the allegations of the conspiracy terminated with the first sentence of the indictment, since the following sentence sets forth details of such conspiracy and what was further agreed to be done, while the count terminates with the means actually used to carry out the scheme. We think this count sufficiently charges the offence, and as the residue of the indictment merely sets forth other and similar fraudulent correspondence by Stokes and other defendants, with other parties, by ordering goods with no intention of paying for them, and referring the parties addressed to others of the defendants for their financial responsibility, the court did not err in overruling the demurrer. Indeed, it is difficult to see, nor do the defendants suggest, what other allegations were necessary to define the offence with greater clearness or certainty; and it is impossible that they could have been misled as to the nature of the charge against them. The rules of criminal pleading do not require the indictment to set forth the evidence, or to negative every possible theory of the defence. *Evans* v. *United States*, 153 U. S. 584.

2. The second assignment alleges error in allowing the postal agent of the United States in service on a postal car in Alabama to testify as to certain envelopes found by him addressed to various parties, and allowing such envelopes, with the indorsements and writings thereon, to go to the jury as evidence. It appeared that all these envelopes were stamped "Olivia, Jan. 7, 1892, Ala.;" that each one contained a printed request to return to Stokes, to J. Pinkerton & Co., or to A. J. Kendrick, the last two of whom were defendants in the case, and charged as co-conspirators with Stokes.

These envelopes were objected to upon the ground that the handwriting of the address was not shown to be that of either

of the defendants. But the bill of exceptions does not purport to contain all the evidence that was offered to the jury, but only such as was objected to; and for all that appears, the letters that were contained in these envelopes were proven to be in the handwriting of the defendants, or to have emanated from them. These letters were the material facts to be proved, and we are bound to assume that their authorship was in some way or other traced to the defendants. If that were so, the jury would be authorized to assume that the envelopes also emanated from them. There is nothing to indicate that the letters contained in these envelopes were objected to, or were inadmissible; and if these letters were written by the defendants and found their way into the mail, the jury would be authorized to infer that they were deposited in the mail by the defendants, which would be enough to entitle the envelopes themselves to admission.

3. That the court erred in allowing the order of T. B. Brown, dated 12–6–91, to the freight agent at Greenville, Alabama, to deliver freight to Mr. Kirkpatrick, and the paper thereto attached, to be introduced in evidence to the jury. Brown testified that E. H. Cook, one of the defendants, ordered a box of shoes for him from W. L. Douglas & Co., Brockton, Massachusetts, and stated to the witness at the time he made the order "Let's beat them," and soon after said order was made, Cook informed the witness that the goods had come and were in the warehouse at Greenville, Alabama. Soon after this he got a message from Cook that the shoes were in Cook's store at Garland. Witness never gave Cook any order; (for the goods?) but there was other evidence that witness did give Cook an order on the freight agent at Greenville, to "deliver my freight to Mr. Kirkpatrick." This order was admitted, together with the receipt of the railroad company for a box of merchandise, in the name of T. B. Brown, signed by E. H. Cook, Garland, Alabama, a bill of lading showing that W. L. Douglas had shipped a case of merchandise to Brown at Greenville; and local freight way bills showing the shipment of the goods by Douglas, and their consignment to E. H. Cook & Co.

As the indictment charges, as one of the acts in furtherance of the conspiracy, that Brown deposited in the post office a letter addressed to the Douglas Company, containing an application for an agency, and an order for shoes, which letter purported to be signed by T. B. Brown, we see no objection to the introduction of the order and the way bills of the railroads, as tending to show that the scheme was carried out as charged in the indictment, and proven by the testimony of Brown. They all relate to the facts alleged, and show that the order to the Douglas Company was carried out by the receipt of the goods, and their subsequent delivery to Cook.

4. The court erred in allowing a certain credit statement, dated January 17, 1891, and signed "A. J. Kendrick," to go to the jury as evidence; and (5) in allowing the district attorney to state in his argument to the jury "to take the letters offered in evidence signed A. J. Kendrick, and the credit statement, signed A. J. Kendrick, when they retired to make up their verdict, and compare the two, and say whether one and the same man wrote both papers." As these two assignments of error relate to the same item of testimony, they may be properly considered together.

The bill of exceptions showed that Kendrick, one of the defendants, went on the stand as a witness in his own behalf, and was handed a credit statement purporting to have been signed by him, and proved to have been received through the post office by one of the parties to whom one of Kendrick's letters was addressed. The statement purported to have been made to the W. L. Douglas Shoe Company by A. J. Kendrick, for the purpose of satisfying the company of his ability to pay, and with a view of opening and establishing a line of credit with them and purchasing goods of them. This statement showed assets to the value of $5800 and liabilities to the amount of $930, leaving a surplus of $4870. The district attorney asked Kendrick whether he wrote the same, or had it written, to which he replied that he did not write the same or have it written. The district attorney thereupon offered the statement in evidence, and it was admitted under the objection of the defendants.

As this statement was proved to have been received through the post office by the parties to whom one of Kendrick's letters was addressed, and was taken from the post office, we think it was competent for the jury to compare the handwriting of the letters, several of which were offered in evidence and admitted by Kendrick to have been written and signed by him, with the handwriting of the statement itself, and say whether they both emanated from him.

In the case of *Moore* v. *United States*, 91 U. S. 270, the question was whether the Court of Claims could compare a document purporting to have been executed by the claimant with his signature to another paper in evidence for another purpose in the case, respecting which there seems to have been no question, and from that comparison adjudge that the signature was his. In delivering the opinion Mr. Justice Bradley observed: "The question is whether they" (the Court of Claims) "may determine the genuineness of a signature by comparing it with other handwriting of the party. By the general rule of the common law this cannot be done either by the court or a jury, and that is the general rule of this country. . . . But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally as well settled as the rule itself. One of these exceptions is, that if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the case, the signature or paper in question may be compared with it by the jury." This case is cited with approval in *Williams* v. *Conger*, 125 U. S. 397, 414, in which it was held, that, while papers not otherwise competent cannot be introduced for the mere purpose of enabling the jury to institute a comparison of handwriting, yet where other writings, admitted or proved to be genuine, are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury with that of the instrument or signature in question, and its genuineness inferred from such comparison. To the same effect is *Hickory* v. *United States*, 151 U. S. 303. As the letters with which the comparison was made were admitted by

Kendrick to have been written by him and were properly in evidence, it was competent for the court to submit to the jury the disputed statement, and to permit them to make a comparison and say whether the same man wrote both papers. The statement itself was clearly competent as bearing upon the intent to defraud.

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

Affirmed.

MORGAN v. POTTER.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 690. Submitted November 19, 1894. — Decided March 18, 1895.

A guardian of an infant, appointed in one State, cannot maintain a suit in the Circuit Court of the United States held within another State, to set aside the appointment or to compel an account of a guardian previously appointed in the latter State, except so far as authorized to do so by its laws.

In a suit by an infant, by his next friend, the infant, and not the next friend, must be made the plaintiff.

THE case is stated in the opinion.

Mr. T. F. Garver for appellants.

Mr. W. H. Rossington, *Mr. B. F. Proctor*, and *Mr. Charles Blood Smith* for appellees.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed in the Circuit Court of the United States for the District of Kansas, by "J. E. Potter, guardian of Robert Morgan, a resident and citizen of the State of Kentucky and county of Warren, and Sarah Lee Williams, as next friend of said Robert, a resident and citizen of the same county and State," "against Henry Morgan, guardian of

said Robert, and Jacob Campbell and M. A. Arnott, all of whom are residents and citizens of the county of Ottawa and State of Kansas," to set aside the appointment, by a court of the county of Ottawa and State of Kansas, of Henry Morgan as guardian of the estate of Robert, as having been obtained by false and fraudulent representations that Robert's residence was in that county and that his mother consented to the appointment; and to require him to account for the property of his ward, fraudulently omitted in the inventory and accounts filed by him in that court, and to turn over all the ward's property to Potter as his guardian appointed in the county of Warren and State of Kentucky; and to obtain judgment against him, and against Campbell and Arnott as sureties upon his guardianship bond, for the sums found due; and for further relief.

Robert Morgan, described in the bill as "a non-resident of" the State of Kansas, was the minor son of Joseph Morgan and Sarah Lee Morgan, his wife, who, as the bill alleged, after the father's death in Texas in 1883, moved with her infant son to the State of Kansas, and thence, in October, 1886, to Warren County in the State of Kentucky, and since continually resided there with him, and in February, 1887, was there married to one Williams, a resident of that county.

The principal defendant, Henry Morgan, was appointed February 14, 1887, by the probate court of the county of Ottawa in the State of Kansas, guardian of the estate of Robert Morgan, and took an oath and gave bond as such, and afterwards filed in that court an inventory and annual accounts, which he claimed to be true, and which were not excepted to in that court, nor their correctness otherwise challenged by the ward or by any one acting in his behalf; he was not shown to have failed or refused to comply with any order of that court in relation to his guardianship; and, when this bill was filed, the minor's estate was undergoing administration in that court, and no final settlement or accounting had been had there between the guardian and the ward. The other defendants were the sureties on the guardianship bond.

The plaintiffs were Potter, and the mother of Robert Mor-

gan. Potter sued as his guardian, appointed, as the bill alleged, by a court of the county of Warren in the State of Kentucky, having jurisdiction of his person and estate, with the consent of his mother and her husband. His mother sued as his next friend.

The case was heard in the Circuit Court of the United States for the District of Kansas upon pleadings and proofs, and a decree entered for the plaintiff. The defendants appealed to the Circuit Court of Appeals, which made a certificate to this court, setting forth the above facts, and others not material to be here stated, and requesting the instruction of this court upon several questions.

The first question certified is, "Does the foregoing bill of complaint state a case entitling the complainants named therein, or either of them, to any form of relief in the Circuit Court of the United States for the District of Kansas?"

The authority of a guardian, like that of an executor or administrator, appointed by a court of one State, is limited to that State, and he cannot sue in a court, even of the United States, held within any other State, except so far as authorized to do so by its laws. *Hoyt* v. *Sprague*, 103 U. S. 613, 631; *Lamar* v. *Micou*, 112 U. S. 452, 470. The statutes of Kansas do authorize executors or administrators appointed in another State to sue and be sued as such in Kansas. Gen. Stat. of 1889, § 2989. But they confer no such general authority upon guardians appointed in another State; and, as to them, provide only that when, as in the present case, a minor, for whom a guardian has been appointed in this State, removes to another State, and a guardian of the minor is there appointed, the guardian appointed in this State may be discharged and required to account; but only upon application made by the foreign guardian to the court in this State which appointed the first guardian; and not then, unless that court is satisfied that his discharge would be to the interest of the ward. §§ 3248, 3249. The necessary consequence is that this bill

[1] Sec. 3248. When a minor for whom a guardian has been appointed in this State shall remove to another State or Territory, and a guardian of such infant shall be there appointed, the guardian appointed in this State

states no case entitling the plaintiff Potter, who sues only as a guardian appointed in Kentucky, to any form of relief.

It is equally clear that the other plaintiff, the minor's mother, suing as his next friend, cannot maintain this bill. As said by Lord Somers, "An infant may by his *prochein ami* call his guardian to an account." *Falkland* v. *Bertie*, 2 Vernon, 333, 342. It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem*, by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend. *Crandall* v. *Slaid*, 11 Met. 288; *Guild* v. *Cranston*, 8 Cush. 506.

As upon this record, in the condition in which it has been sent up, neither of the plaintiffs is entitled to maintain this suit, the first question certified must be answered in the negative, and it becomes unnecessary to answer any of the other questions certified.

Ordered accordingly.

MICHELS *v.* OLMSTEAD.

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

No. 100. Submitted December 4, 1894. — Decided March 18, 1895.

If, in an action at law upon a written contract, oral evidence offered by the defendant that the writing signed by the parties was not intended as a contract, nor understood by either party to be binding as such, is ex-

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may be discharged, and required to settle his account, as hereinafter provided.

SEC. 3249. Such discharge shall not be made, unless the guardian appointed in another State or Territory shall apply to the probate court in this State which made the former appointment, and file therein an exemplification of the record of the court making the foreign appointment containing all the entries and proceedings in relation to his appointment and his giving of bond, with a copy thereof and of the letters of guardianship, all authenticated as required by the act of Congress in that behalf; and

cluded by the court, upon the plaintiff's objection, as incompetent to control the written contract, he is estopped, at the hearing of a bill in equity thereupon filed by the defendant for an injunction against the prosecution of the action at law, to object that the evidence was admissible at law only.

THE case is stated in the opinion.

Mr. John D. Conely for appellant.

Mr. John L. Peak, *Mr. R. E. Ball*, *Mr. R. L. Yeager*, and *Mr. A. R. Strother* for appellee.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed in the Circuit Court of the United States for the Western District of Missouri by Olmstead, a citizen of Missouri, against Michels, a citizen of Michigan, for an injunction against the prosecution of an action at law brought in the same court by Michels against Olmstead to recover damages for the breach of a contract in writing, by which Michels agreed to furnish, and to put into a building to be erected by Olmstead at Kansas City, in the State of Missouri, the machinery necessary for manufacturing corn into a syrup, commonly called glucose, by the so-called dry process, and of sufficient capacity to manufacture 2000 bushels of Indian corn into such syrup every twenty-four hours; and Michels guaranteed the machinery to be of that capacity, and to produce a yield of a certain amount and quality of syrup; and Olmstead agreed to pay Michels therefor the sum of $81,160.

The bill, among other things, alleged that, before the contract was signed, Olmstead informed Michels that he did not desire to engage in the business of manufacturing syrup indi-

before such application shall be heard, or any action taken therein by the court, at least thirty days' written notice shall be served on the guardian appointed in this State, specifying the object of the application, and the time when the same will be heard: Provided further, that the court may in any case deny the application, unless satisfied that the discharge of the guardian appointed in this State would be to the interest of the ward.

vidually, but only as a member of a corporation which he and others contemplated forming, and as agent for whom he was negotiating; and Michels promised him that, if he would sign the contract, he would permit him to see the operation of manufacturing syrup from corn by the dry process in the works of Michels at Detroit in the State of Michigan, and then return and report to his associates, and if he should be satisfied and report that the process was in successful operation, and should accomplish the organization of the corporation, the terms of the contract might be taken as the basis of a proposition by Michels, which the corporation might adopt, but that in no event should the contract bind Olmstead individually.

The bill further alleged that, after the signing of the contract, the plaintiff and his associates discovered that the pretended dry process was worthless, and was so known to be to all persons skilled in the manufacture of syrup from corn, and that the price of machinery mentioned in the contract was extortionate and excessive; and that the plaintiff and his associates therefore did not accept Michels's proposition, nor organize a corporation; and that he was advised that his defence against the enforcement of the contract could not be made in an action at law, and he could only have relief in a court of equity.

At the first trial of the action at law brought by Michels against Olmstead, oral evidence of the facts alleged in the bill, as above stated, was offered by Olmstead, and was submitted to the jury. 4 McCrary, 549. The jury failed to agree, and (as both parties admit) upon a second trial of that action, like evidence was offered by Olmstead, and, upon the objection of Michels, was excluded by the court, as incompetent to control the written contract.

Olmstead thereupon brought this suit in equity, which was heard upon pleadings and proofs, and a final decree entered therein for him. 36 Fed. Rep. 455. Michels appealed to this court.

Upon the evidence, the fact that the writing signed by the parties, and apparently a contract between them, was not

intended as a contract, nor understood by either party to be binding as such, is so conclusively established, that a discussion of the question of fact could serve no useful purpose.

It is suggested, in the brief for the appellant, that if such was the fact, it should be set up in an action at law, and be tried by a jury. But the conclusive answer to the suggestion is, that evidence of this very fact was offered in the action at law, and excluded, upon his objection, as incompetent in that action; and that he is thereby estopped now to assert that it could or should be availed of at law. *Philadelphia Railroad* v. *Howard*, 13 How. 307; *Davis* v. *Wakelee*, 156 U. S. 680. If the evidence was inadmissible at law, which he is estopped to deny, it was certainly admissible in equity to prevent the accomplishment of what any court of chancery must consider and treat as a fraud. *Burnes* v. *Scott*, 117 U. S. 582, 588; *Burke* v. *Dulaney*, 153 U. S. 228; *Davis* v. *Wakelee*, above cited.

Decree affirmed.

MEXICAN NATIONAL RAILROAD COMPANY *v.* DAVIDSON.

DAVIDSON *v.* MEXICAN NATIONAL RAILROAD COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 880, 876. — Submitted February 4, 1895. — Decided March 18, 1895.

Under § 2 of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the jurisdiction of a Circuit Court of the United States, on removal by the defendant of an action from a state court, is limited to such suits as might have been brought in that court under the first section.

A question of jurisdiction cannot be waived.

THE Mexican National Construction Company, a citizen of Colorado, assigned certain causes of action against the Mex-

ican National Railroad Company, also a citizen of Colorado, to Davidson, a citizen of New York, September 11, 1891, and, on the same day, Davidson began his action of attachment in the Supreme Court of the State of New York, against the railroad company, which in due season removed the cause into the United States Circuit Court for the Eastern District of New York. Davidson, the plaintiff, recovered judgment for $151,832.41, upon a trial before the court without a jury. From this judgment the railroad company sued out its writ of error to the Circuit Court of Appeals of the United States for the Second Circuit, and Davidson also sued out a writ of error on the ground that he should have had judgment for a larger amount.

The Circuit Court of Appeals certified to this court in each case the following questions:

"First. Whether or not the United States Circuit Court of the Eastern District of New York had jurisdiction to hear and determine the first cause of action.

"Second. Whether or not the United States Circuit Court of the Eastern District of New York had jurisdiction to hear and determine the second cause of action."

These questions were preceded by a statement of facts by that court setting forth, among other things, that plaintiff sought to recover upon two causes of action:

"1st. To recover, with interest from the 15th of October, 1886, the amount of a debt owing the construction company by the Mexican National Railroad Company on the 15th October, 1886, which the defendant, in consideration of the transfer to it of certain railroad property, agreed to pay with other debts up to the extent of a certain fund which was put into its hands and which was sufficient in amount for that purpose. The other debts had been fully paid before suit brought.

"2d. To recover $1731, damages sustained by the construction company (being its payment of the reasonable fees of an umpire and stenographer) through the breach by the defendant of an agreement between it and the construction company to adjust by arbitration the controversy over the claim first mentioned."

Statement of the Case.

And that among the assignments of error duly filed in that court by the Mexican National Railroad Company were these: "That the court upon the trial entertained jurisdiction of this cause. That the court upon the trial entertained jurisdiction of the first alleged cause of action set forth in the complaint. That the court upon the trial entertained jurisdiction of the second alleged cause of action set forth in the complaint." But that the record showed that no question as to the jurisdiction of the Circuit Court was raised upon the trial, and no such question was referred to in the findings or opinion of the Circuit Court.

The portions of sections one and two of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, defining the jurisdiction of District and Circuit Courts of the United States, bearing upon the questions involved, are as follows:

"SEC. 1. That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, . . . in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, . . . and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; . . .

"SEC. 2. . . . Any other suit of a civil nature, at law

or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. . . ."

Mr. Treadwell Cleveland for the railroad company.

Mr. Frederic D. McKenney and *Mr. Edward M. Shepard* for Davidson.

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

This action was based as to its first cause upon an alleged indebtedness of $104,244.10 existing October 1, 1886, in favor of the construction company and against the railway company, with interest. The obligation to pay the indebtedness devolved upon the railroad company by reason of an agreement, annexed to the complaint, between the persons to whom the construction company had disposed of the first mortgage bonds of the railroad company and the construction company. This agreement provided for the foreclosure of the mortgage upon the property of the railway company and the formation of a new railroad company under the laws of Colorado; the conveyance of the property bid in at foreclosure sale to the new company; the issue of new first mortgage bonds by the latter company; the sale of these to a certain amount and from the proceeds of such sale the deposit with the new railroad company of a sum not exceeding $217,000 to be applied to liquidate the indebtedness of the railway company. The complaint set forth the agreement and the proceedings thereunder resulting in the deposit of the sum of $217,000, and alleged that of that sum "there remains to liquidate the indebtedness of the railway company" a sum exceeding that for which the complaint demanded judgment. The issue on the merits was therefore whether the construction company was entitled to recover this

claim against the railroad company out of the fund of $217,000. Was the action brought, as to its first cause, "to recover the contents of a chose in action," and could it have been originally brought in the Circuit Court of the United States? If not, could the jurisdiction be sustained on removal?

The language of section 11 of the judiciary act of 1789, c. 20, was as follows: "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made." 1 Stat. 78.

In *Serè* v. *Pitot*, 6 Cranch, 332, 335, an action was commenced in the District Court for the District of New Orleans to foreclose a mortgage given by a citizen of Louisiana to another citizen of the same State. The plaintiff was the general assignee in insolvency of the mortgagor and was an alien, and Chief Justice Marshall delivering the opinion of the court said: "Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the Federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the Federal courts, as to exclude the same person, when the assignee of a particular note. The term 'other chose in action' is broad enough to comprehend either case; and the word 'contents' is too ambiguous in its import to restrain that general term. The contents of a note are the sum it shows to be due; and the same may, without much violence to language, be said of an account."

In *Sheldon* v. *Sill*, 8 How. 441, 449, a bill in equity had been filed in the Circuit Court of the United States by the

assignee of a bond and mortgage for a decree of sale of the mortgaged premises. The mortgagor and mortgagee were both citizens of Michigan and the assignee was a citizen of New York. It was held that the court had no jurisdiction, Mr. Justice Grier saying: "The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises, which confer on one party a right to recover a personal chattel or a sum of money from another, by action."

In *Corbin* v. *County of Blackhawk*, 105 U. S. 659, it was decided that a suit to compel the specific performance of a contract or to enforce its other stipulations was a suit to recover the contents of a chose in action, and not maintainable under section 11 of the act of 1789, as reënacted in section 629 of the Revised Statutes, in the Circuit Court by an assignee if it could not have been prosecuted by the assignor had no assignment been made. And this was reaffirmed in *Shoecraft* v. *Bloxham*, 124 U. S. 730. But while the exception extended to all actions *ex contractu*, it has been held not applicable to a tortious taking or wrongful detention of a chose in action against the right or title of the assignee where the injury is one to the right of property in the thing and the derivation of title unimportant. *Deshler* v. *Dodge*, 16 How. 622, 631; *Ambler* v. *Eppinger*, 137 U. S. 480.

In the acts of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433, the provision is couched in these words: "Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." The act of 1875 referred to suits "founded on contract," but the act of 1887 restored the words of the act of 1789, "to recover the contents of any promissory note or other chose in action," and we do not think that the words, "if such instrument be payable to bearer and be not

made by any corporation," limit the comprehensiveness of "chose in action," as construed under the act of 1789; and as this cause of action is based on contract we are of opinion that it is within the definition heretofore ascribed to the words "to recover the contents of a chose in action." This being so, it follows that the action could not have originally been brought in the Circuit Court of the United States by Davidson, the assignee of a Colorado corporation, against a Colorado corporation.

We inquire then whether the first cause of action was one of which a Circuit Court of the United States could take cognizance through removal from a state court.

By the 12th section of the judiciary act of 1789 it was provided: "That if a suit be commenced in any state court against an alien, or by a citizen of the State in which the suit is brought against a citizen of another State, . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next Circuit Court, . . . it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, . . . and the cause shall there proceed in the same manner as if it had been brought there by original process." And it was held in *Green* v. *Custard*, 23 How. 484, and *Bushnell* v. *Kennedy*, 9 Wall. 387, that the restriction of the original jurisdiction of the Circuit Courts in respect of suits by an assignee, whose assignor could not be sued in that court, did not apply to a suit removed from a state court under the 12th section.

By the second section of the act of March 3, 1875, c. 137, 18 Stat. 470, the exception out of the original jurisdiction as to assignees of choses in action occupied the same relative position as in the act of 1789, and the same conclusion was reached in regard to it, namely, that the restriction upon the commencement of suits contained in section 1 did not apply to the removal of suits under section 2. *Claflin* v. *Commonwealth Insurance Co.*, 110 U. S. 81; *Delaware County* v. *Diebold Safe Co.*, 133 U. S. 473. And see *Goldey* v. *Morning News*, 156 U. S. 518.

But the second section of the act of 1887 (as corrected in 1888) contained a radical difference from section 12 of the act of 1789 and section 2 of the act of 1875 in confining the suits which might be removed to those "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section." As already stated, the last part of the preceding section provides that no Circuit or District Court shall have cognizance to recover the contents of a chose in action in favor of an assignee, unless such suit might have been prosecuted therein to recover such contents if no assignment had been made, while the second section provides for the removal of suits now pending, or which may be hereafter brought in any state court, of which the Circuit Courts of the United States were given jurisdiction by the first section. This change was made in accordance with that intention to restrict the jurisdiction of the Circuit Courts, which has been so often recognized by this court. *Smith* v. *Lyon*, 133 U. S. 315, 319; *In re Pennsylvania Company*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467; *Shaw* v. *Quincy Mining Company*, 145 U. S. 444; *Hanrick* v. *Hanrick*, 153 U. S. 192.

We must hold, therefore, as has indeed already been ruled, *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 461, that the jurisdiction of the Circuit Courts on removal by the defendant, under this section, is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and cannot be waived. *Capron* v. *Van Noorden*, 2 Cranch, 126; *Mansfield Railway Co.* v. *Swan*, 111 U. S. 379; *Metcalf* v. *Watertown*, 128 U. S. 586. It is true that by the first section, where the jurisdiction is founded on diversity of citizenship, suit is to be brought "only in the district of the residence of the plaintiff or the defendant," and this restriction is a personal privilege of the defendant, and may be waived by him. *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127. Section two, however, refers to the first part of section one by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. *McCormick Machine Co.* v. *Walthers*, 134 U. S. 41.

Statement of the Case.

As to the second cause of action, the sum sued for was under the jurisdictional amount.

The result is that, in each case, both questions certified must be answered in the negative.

CHICAGO, KANSAS AND WESTERN RAILROAD COMPANY *v.* PONTIUS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 716. Submitted March 4, 1895.— Decided March 18, 1895.

A bridge carpenter, employed by a railroad company who is injured through the negligence of employés of the company while assisting in unloading lumber, taken from an old bridge, on a car for transportation over the road, is an employé of the company within the meaning of § 93, c. 23, of the General Statutes of Kansas which makes railroad companies in that State liable to its employés for damage done them through the negligence of its agents or the mismanagement of its employés.

Motion to dismiss or affirm.

Pontius brought an action against the railroad company in the District Court of Dickinson County, Kansas, to recover for injuries sustained by him while in the employment of the company, and obtained judgment for $2000. The case was taken on error to the Supreme Court of the State and the judgment affirmed, whereupon a writ of error was allowed from this court, and, the cause having been docketed, a motion to dismiss the writ or affirm the judgment was submitted.

In the opinion of the Supreme Court of Kansas, reported 52 Kansas, 264, the case is stated thus: "Clifford R. Pontius was employed by the defendant company as a bridge carpenter and worked in that capacity at various points on the line of defendant's road. A bridge was constructed across the Verdigris River, in Greenwood County. The false work used for support in its construction was taken down, and the timbers of which it was composed were hoisted and loaded into cars on the bridge to be transported to some other point on defendant's

road. The timbers were muddy and slippery. The mode of hoisting them was to attach a rope or chain to the timbers, and to raise them by means of a pile driver. When a stick was raised to a sufficient height, a rope was thrown around the lower end of it, and a number of men, of whom plaintiff was one, would pull it out on the car. A chain had been used on the end of the rope to hold timbers which were being hoisted, and several pieces had been raised in that way. The chain, however, was thrown aside, and one piece was raised with the rope. When the men undertook to pull it back on the car, the rope slipped off, the timber fell and caused the injury, for which the plaintiff sues."

Mr. John H. Mahan for the motion to dismiss or affirm.

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

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

Section 93, chapter 23, of the General Statutes of Kansas, (Gen. Stat. Kas. 1889, vol. 1, p. 415,) provides: "Every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any persons sustaining such damage."

In *Mo. Pac. Railway Co.* v. *Mackey*, 33 Kansas, 298, the validity of this law was drawn in question on the ground of repugnancy to the Constitution of the United States and its validity sustained. The case was brought here on error and the judgment of the state court affirmed. *Mo. Pac. Railway Co.* v. *Mackey*, 127 U. S. 205. As to the objection that the law deprived railroad companies of the equal protection of the laws, and so infringed the Fourteenth Amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition, if the same rule was applied under the same circumstances and conditions;

that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employés, and that such legislation could not be objected to on the ground of making an unjust discrimination since it met a particular necessity and all railroad corporations were, without distinction, made subject to the same liabilities.

It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employés exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employés who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employés when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation irrespective of the character of the employment, in contravention of the Fourteenth Amendment.

But the difficulty with this argument is that the state Supreme Court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road; and *Missouri Pacific Co.* v. *Haley*, 25 Kansas, 35; *Union Pacific Railway* v. *Harris*, 33 Kansas, 416; and *Atchison, Topeka &c. Railroad Co.* v. *Koehler*, 37 Kansas, 463, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car; a section man employed by a railroad company to repair its roadbed and to take up old rails out of its track and put in new ones;

and a person injured while loading rails on a car to be taken to other portions of the company's road, were all within the provisions of the act in question; and the court said: "In this case the plaintiff was injured while on a car assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies even though it should be given the construction counsel places on it." And see *Chicago, Rock Island & Pacific Railway Co.* v. *Stahley*, 62 Fed. Rep. 363.

We concur in this view and the judgment is accordingly

Affirmed.

BAKER *v.* WOOD.

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

No. 162. Argued January 21, 1895. — Decided March 18, 1895.

In determining whether the judgment plaintiff and real owner of an assigned judgment is estopped to assert his ownership as against a second assignee, on the ground that the second assignee occupies the position of a purchaser for value in good faith and without notice and in reliance on the apparent ownership, the amount of the consideration paid by him is an important fact.

When such amount is greatly disproportionate to the true value of the judgment, that fact may authorize the inference that the claim to have paid value is a pretence; and it is further important, as bearing on the questions of notice and of good faith.

In such case the interest of the second assignee of the judgment, if recognized, should be limited to the amount he actually paid and the measure of the estoppel also limited accordingly.

THIS was a bill filed in the Circuit Court of the United States for the District of Colorado on October 23, 1886, by Lucien Baker against E. M. Hulburd, Daniel E. Parks, N. P. Seeley, and Samuel N. Wood, praying that defendants Seeley,

Wood, and Parks be restrained from in any manner selling, transferring, or disposing of a certain judgment recovered by Baker against the board of county commissioners of Lake County, Colorado, and from demanding payment of the same from the board until the final hearing of the cause; and that, upon final hearing, an assignment of the judgment by Hulburd to Wood, and also an assignment by Baker to Hulburd, be cancelled; and for general relief. It appeared that on November 12, 1883, Baker recovered a judgment in the Circuit Court of the United States for the District of Colorado against the county of Lake for the sum of $16,054.27. In this suit Hulburd was attorney for plaintiff and Parks attorney for the county of Lake. Some time thereafter Baker instituted proceedings in the Circuit Court to compel payment of the judgment, but on account of the amount of taxes that had already been levied in that county, the court refused to order the county to levy a tax, and the judgment stood unsatisfied and in full force and effect against the county of Lake until about May 20, 1886. It is charged in the bill that defendants Parks and Hulburd, about this time, combined to procure the assignment of the judgment to some other person who, it was contended by them, could effect a settlement and collection thereof. Hulburd thereupon applied to one Higginbotham, residing in Colorado, who was then, and at all times had been, the agent of Baker in the prosecution of the suit, to obtain an assignment by Baker to Hulburd, on the theory that Hulburd with the aid of Parks could procure the levy of a tax to pay the judgment. And Baker, on the recommendation of Higginbotham, executed an assignment of the judgment to Hulburd, couched in the following terms:

"LEAVENWORTH, KANSAS, *May 25th*, 1886.

"For value received I hereby sell, assign, transfer, and set over to E. M. Hulburd all my right, title, interest, claim, and demand of, in, and to the within-described judgment and the money due and to become due thereon, and authorize him to sue for and collect the same at his own proper cost and expense.

"LUCIEN BAKER."

This Baker forwarded to Higginbotham, with a declaration of trust to be executed and delivered by Hulburd to Higginbotham for Baker on the delivery to him of the assignment, which declaration was in the words and figures following:

"Whereas Lucien Baker has this 25th day of May, 1886, executed and acknowledged and delivered to me an assignment of his judgment against Lake county board of county commissioners, Colorado, Gen. No. 1279, which said judgment was rendered and recovered against the said board of county commissioners of the county of Lake in the State of Colorado, in the Circuit Court of the United States for the District of Colorado, on the 12th day of November, 1883, for $16,054.00; and whereas such assignment is so made to me for convenience in the collection of the same; and whereas said Lucien Baker still retains as heretofore the ownership and control of said judgment: Now, therefore, in consideration of the premises, I do hereby acknowledge the receipt of such judgment as aforesaid this 28th day of May, 1886."

Hulburd executed and delivered this instrument, and Higginbotham delivered Baker's assignment to Hulburd. Thereupon Hulburd delivered the assignment to Parks, who procured the same to be filed with the papers in Baker's suit in the Circuit Court on June 11, 1886, and the assignment was noted upon the judgment docket of the court. About June 19, defendant Seeley, acting for himself and defendant Wood, obtained from Hulburd an assignment of the judgment from Hulburd to Wood for the sum of $2500 then paid therefor. Hulburd took the money and within a few days disappeared from the State. The assignment was as follows:

"For value received I do hereby sell, assign, transfer, and set over unto S. N. Wood, of Denver, Colorado, all of the right, title, interest, claim, and demand which the plaintiff, Lucien Baker, or I have of, in, and to the said judgment above described, a transcript of which is hereto annexed, and authorize and empower him, the said assignee, to collect the same at his own proper cost and expense.

"E. M. Hulburd."

At the same time Hulburd executed and delivered to Seeley a receipt in these words:

"LEADVILLE, COLO., *June 19th*, 1886.

"Received of N. P. Seeley, for S. N. Wood, twenty-five hundred dollars in full payment of sum paid for judgment of Lucien Baker against county of Lake, which judgment I hold and own under an assignment from said Baker to me.

"E. M. HULBURD."

It was conceded that the sale of the judgment by Hulburd to Seeley and Wood was a fraud upon Baker, and Baker contended that Wood and Seeley had notice of the fraud and were, in fact, parties to the transaction.

When Baker was informed of the alleged sale of the judgment, and about August 5, he called upon Wood and told him that Hulburd had no right to sell the judgment; that it was not his, and was only in his hands for collection. Wood refused to talk with him about it, saying that he had bought the judgment after having taken legal advice; that it was his; that plaintiff could not get it without a law suit, and that if he wanted a law suit to pitch in. On October 22, 1886, the board of county commissioners passed an order accepting the offer of Wood, assignee of the judgment, to discount from the face of the same twenty-five per cent, in consideration that the county should levy an annual tax of two mills on the dollar to apply on account until the judgment was paid; and directing the levy and collection of such tax and the payment of the judgment to the extent of seventy-five per cent thereof. Before this date the board had been notified by Baker that the judgment still belonged to him.

The bill charged a combination between Wood, Seeley, Parks, and Hulburd to defraud Baker of his judgment.

On hearing the Circuit Court dismissed the bill on the ground, as is stated, that Baker, having clothed Hulburd with the apparent ownership of the judgment, was estopped from asserting any interest therein as against Wood and Seeley, who

occupied the position of *bona fide* purchasers for value without notice.

Mr. Henry M. Teller, (with whom was *Mr. Clinton Reed* on the brief,) for appellant.

Mr. Edward O. Wolcott, (with whom were *Mr. Joel F. Vaile* and *Mr. William W. Field* on the brief,) for appellees Wood and Taylor.

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

In *King* v. *Doane*, 139 U. S. 166, 173, it was stated as the general rule that "if in an action by an indorsee against the maker, a negotiable note is shown to have been obtained by fraud, the presumption, arising merely from the possession of the instrument, that the holder in good faith paid value is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he in fact purchased for value," while if the fact is established that he did so, "he will be entitled to recover unless it is proved that he purchased with actual notice of defect in the title, or in bad faith, implying guilty knowledge or wilful ignorance."

But in respect of the assignment of choses in action, not negotiable, the assignee takes subject to the equities between the debtor and the original creditor subsisting at the time of the assignment, or when notice is received thereof. Where, however, equities between the original assignor and a subsequent assignee, or entirely in favor of third persons are involved, and the unconditional power of disposition has been entrusted by such assignor to his assignee, the principle of estoppel applies in favor of purchasers in good faith, and without notice. *Judson* v. *Corcoran*, 17 How. 612, 615.

The effect of the assignment of a judgment at common law was merely to transfer an equitable title, and the assignee was not authorized to bring an action thereon in his own

name. We are aware of no statute of Colorado permitting the assignment of a judgment so as to vest title in the assignee, but there is a provision in the Code of that State, (Code Civ. Proc. § 3,) that suit should be brought in the name of the real party in interest, and it is contended that the effect of this is to unite the legal title with the equitable ownership in the instance of such an assignment. Nevertheless, the question in this case is, whether the real owner of a judgment, the plaintiff therein, must fail of relief as against an assignee of that judgment, to whose assignor plaintiff had in form assigned it, thereby furnishing him with the indicia of title, because estopped to assert his ownership on the ground that such second assignee occupies the position of a purchaser for value in good faith and without notice, in reliance on the apparent ownership. The fraud committed on complainant by Hulburd is conceded, and the inquiry relates to the defence of a valuable consideration, paid in good faith, and without notice.

The amount of the consideration is under some circumstances important in determining whether within the rule on the subject the purchaser paid value, for the amount paid may be so disproportionate to the real value of the security purchased that the claim to have paid value will be treated as a pretence and the security as having been obtained without paying anything for it; and it is also, and more commonly, important as bearing upon the question of notice and good faith. *King* v. *Doane*, *supra*. Here the judgment was for $16,054, with interest at ten per cent from November 12, 1883, and the amount paid was $2500. While there was evidence tending to show that the judgment was not worth its face, nevertheless the disproportion is so great as to form a significant element in the transaction. Moreover, it must be remembered that Hulburd was Baker's attorney, and had recovered the judgment in question as such. When, therefore, the attorney of record entertained, as his client's assignee, the offer of such a sum, the law imposed upon the proposed purchasers the burden of inquiry, and their conduct is to be tested accordingly.

Without attempting to recapitulate the evidence a brief reference will suffice to indicate the ground for the conclusion at which we have arrived. Seeley testified that Hulburd had previously offered him the judgment for fifty or sixty cents on the dollar; that he so informed Wood, and Wood suggested its purchase, but he told Wood that Hulburd talked too much; that he was absent from the State for a time, and, on his return, Wood told him that he had just closed the trade for the judgment, but that he had taken time to look the matter up; and that he asked Seeley to investigate, and, if he found there was nothing wrong, to pay $2500 and take the judgment. The result of Wood's testimony is that the only person who acted as his agent in buying the judgment was Seeley, who was buying it for himself and Wood. But Seeley also testified that before the purchase was made: "I asked Hulburd, in so many words, before witnesses, 'Now, you know you are a little uncertain, and I want you to tell me if there is any reason on the face of the earth why you have not full power to dispose of this judgment and whether it is not yours?' He said it was his, and went on to explain why it was and how it came to be in his possession and all that. He said he had worked for Higginbotham and Barnes, had been in Barnes' litigation up there with —— and others, which I knew to be a fact, and that they had paid him but a very small sum; that for four years he had carried on their business, and that Barnes settled with him out of this, and the explanation looked as though there might be something in it. It was a good explanation to me. . . . He said he had attended to their litigation there, and had lived cheap, and had nothing and got along the best way he could, and that he had always promised him that out of this he should be paid."

Although the witness also claimed that he supposed Hulburd to be the absolute owner of the judgment, we think the reasonable conclusion is that Hulburd represented that he held it for the collection of fees, which the receipt of $2500 might be regarded as covering.

Granting, then, that Hulburd was clothed with apparent

ownership, yet that was qualified by the representation, and the measure of the operation of the estoppel was limited accordingly. The doctrine invoked is purely equitable and ought not to be extended, under circumstances like these, beyond permitting the person misled to recover indemnification. *Campbell* v. *Nichols*, 33 N. J. Law, 81, 88; *Grissler* v. *Powers*, 81 N. Y. 57. The extent of the loss which Seeley and Wood would sustain, if the truth of the representation were denied, would be the money they had paid, and to that it appears to us their interest in the judgment must be confined in the most favorable view that can be taken of the position they occupied. And, upon the whole, as Baker put it in the power of Hulburd to act as he did, that result probably best accords with the equities of the case. The assignments should be cancelled and Wood and Seeley's administrator decreed to account for the amounts received, less the amount paid, with interest.

Decree reversed and cause remanded with a direction to enter a decree for complainant in conformity with this opinion.

NEW ORLEANS CITY AND LAKE RAILROAD COMPANY *v.* LOUISIANA *ex rel.* CITY OF NEW ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 29. Submitted January 10, 1895. — Decided March 4, 1895.

The act of the legislature of Louisiana of July 12, 1888, No. 133, authorizing the enforcement by mandamus without a jury of contracts by corporations with municipal corporations in that State with reference to the paving, grading, repairing, etc., of streets, highways, bridges, etc., simply gives an additional remedy to the party entitled to the performance, without impairing any substantial right of the other party, does not impair the obligation of the contract sought to be enforced, and is not in conflict with the Constitution of the United States.

At October term, 1890, a motion was made by *Mr. Samuel L. Gilmore* on behalf of the defendant in error to dismiss the

writ of error in this case, then No. 1314 on the docket of that term, or to affirm the judgment of the court below. This motion was opposed by *Mr. Charles F. Buck* for the plaintiff in error, and was denied by the court April 6, 1891, without an opinion. The case now decided is stated in the opinion.

Mr. George Denègre and *Mr. Walter D. Denègre* for the plaintiff in error submitted on their brief.

Mr. E. A. O'Sullivan for the defendant in error submitted on his brief.

Mr. Justice Harlan delivered the opinion of the court.

By the first section of an act of the general assembly of Louisiana, approved July 12, 1888, No. 133, and entitled "An act providing a summary remedy against corporations to compel a compliance with certain obligations and contracts with municipal corporations, and providing ways and means to enforce said remedy," Laws of 1888, 191, it was provided that "in all cases where any corporation has heretofore contracted with, or may hereafter contract with, or shall be otherwise legally bound to any parish or municipal corporation in this State, with reference to the paving, grading, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, and shall fail or neglect to perform said contract or obligation, the said parish or municipal corporation, or any officer thereof, or any five taxpayers thereof, shall have the right to proceed by a writ of mandamus to compel the performance of said contract or obligation, or any part thereof, which writ of mandamus shall be made returnable in five days, shall be tried by preference over all other cases, without a jury, in vacation as well as in term time, and in case of appeal shall be tried by preference in the appellate court."

The second section provided that "in case any corporation shall fail or neglect to comply satisfactorily with any judgment against it in such a proceeding within the time therein

fixed, (which time shall be fixed by the court at such period within which the work can be reasonably done,) it shall be the duty of the court, on contradictory motion and proof taken in the same case, to issue a writ of distringas against said company, and to order the sheriff to do the work required to be done, and to apply the revenues and property of said company to defray the expenses incurred in executing the judgment of the court."

The third section repeals all laws and parts of laws contrary to the provisions of that act.

The State of Louisiana on the relation of the city of New Orleans — evidently proceeding under the above act — filed a petition in the Civil District Court, parish of Orleans, against the New Orleans City and Lake Railroad Company, in which it was alleged, among other things —

That under the terms of certain contracts and ordinances, whereby the defendant was operating the Levee and Barracks, Camp and Prytania, Camp and Magazine, Rampart and Dauphine, Canal Street, Metaric Road and Bayou St. John, the Esplanade and Bayou Bridge lines, and the steam railway to the Lake, the New Orleans City and Lake Railroad Company was "bound and obligated, among other things, to keep the paved and unpaved streets, through which its tracks pass, as well as all the bridges on said streets, in good repair and condition from curb to curb during the continuance of its franchise and right of way; to raise, repair, and repave any and all intersections of streets when required by relator upon lines and levels to be furnished by the city surveyor; to widen and deepen any and all culverts and sluices to such dimensions as may be required and directed by the city surveyor; to keep in repair all bridges, and to make new ones, when required by relator, on all streets through which its lines pass; to pave, on all unpaved streets through which its lines pass, the lines of said tracks within the rails with either round stones or with four by five inch scantling in the best workmanlike manner, and to plank the space between the lines of the track and the gutters of the streets with yellow pine planks three inches thick, laid on stringers

four inches thick by eight inches wide, and to use flat rails for its tracks, and to keep its tracks in repair and good condition; that by the terms of the said contracts, acts, and ordinances under which it is operating the extension of the Camp and Prytania line and the extension of the Camp and Magazine line, the said New Orleans City and Lake Railroad Company is bound and obligated, among other things, to construct all crossings, bridges, culverts, and wings of the same on the streets through which its tracks pass which, in the opinion of the commissioner of public works and the city surveyor, are at any time needed, and to keep the said streets between the banquette curb lines, including all plankings, crossings, bridges, culverts, and wings of the same, and also all the intersections of the streets of this route at all times, in good roadway order and condition; to use flat rails, five inches, resting on suitable change at their ends, as well spiked with six-inch wrought-iron spikes; to traversely plank the entire space between the rails and tracks with three by twelve inches milled pine, and to place along the two outer sides of the tramways throughout this route, close to the stringers and on a level with the top of the rail one plank not less than three by twelve inches in dimension, and to keep its tracks in good order and condition;" and

That "in violation of its said obligations, the said New Orleans City and Lake Railroad Company, although thereunto often requested, neglects and refuses to keep the streets through which its tracks pass in good order and condition; to repair and keep in good condition the bridges and intersections on said streets; to provide the proper drainage and to build and keep in repair the proper culverts; to use the flat rails; to plank upon unpaved streets referred to in said contracts the space between the lines of the tracks and the gutters of the streets as required by said contracts, and to place the 3 by 12 inches plank level with the top of the rails on the streets referred to in said contracts where there are double tracks, or to keep in repair such planking where it has been placed on the streets referred to in said contracts where there are single tracks, and has in many other divers ways

violated its contracts with relator and the law, all of which will more fully and at large appear from the report of the city surveyor and the further bill of particulars which is hereunto annexed and made part hereof."

The relief asked was a writ of mandamus to compel the defendant to perform all the above matters and things which under said contracts and by law it was obligated to do and perform.

An exception and answer was filed, one of the grounds of exception and of defence being that the above act of 1888 was in violation of the contract clause of the Constitution of the United States.

By the final judgment of the court of original jurisdiction the mandamus was made peremptory, and the defendant was required to commence and to complete within three months from the date of the rendition of the judgment certain described work and repairs on streets and roads specified in the petition.

Upon writ of error to the Supreme Court of Louisiana the judgment was amended by striking out that portion which imposed on the defendant company the obligation of keeping in good order and condition the streets or roadways on the sides of the middle or neutral grounds on Canal, Rampart, and Esplanade Streets, in New Orleans, and by rejecting the demands in that respect. Thus amended, the judgment was affirmed at the cost of the railroad company.

The only Federal question presented upon this writ of error is whether the act of 1888 is repugnant to the clause of the Constitution forbidding States from passing a law impairing the obligation of contracts.

That statute does not embrace contracts between private individuals nor contracts of every description, but only those by or under which private corporations, parties to such contracts, become legally bound to a parish or to a municipal corporation in reference to the paving, repairing, reconstructing, or care of any street, highway, bridge, culvert, levee, canal, ditch, or crossing, belonging to or under the control of such municipal corporation. The prompt discharge of the duties

imposed by contracts of that character is of importance to the public. Indeed, the refusal to meet the obligations imposed by such contracts often endangers both the health and safety of the people. Delay in such matters may seriously imperil the interests of an entire community. An action at law to recover damages for a failure or refusal of the defaulting corporation to do what its contract obliges it to do might prove to be inadequate for the protection of those interests.

What the act of 1888 does is to give a parish or municipal corporation an additional and more summary remedy for the enforcement of the obligation of any contract relating to the paving, repairing, reconstructing, or care of its streets, highways, bridges, culverts, levees, canals, ditches, or crossings. It does not enlarge the obligation assumed by the defaulting corporation, nor impose new burdens upon such corporation, but only enables the other party to the contract, the public, as represented by the parish or municipality, to compel the performance of that obligation. Modes of procedure in the courts of a State are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. *Bronson* v. *Kenzie*, 1 How. 311, 315; *Von Hoffman* v. *Quincy*, 4 Wall. 535, 552; *Conn. Life Ins. Co.* v. *Cushman*, 108 U. S. 51, 64; *McGahey* v. *Virginia*, 135 U. S. 662, 693. Much more may the State give an additional and more efficacious remedy for the enforcement of contracts in the performance of which the public health and the public safety are involved; provided always, that the new remedy is consistent with the nature of the obligation to be enforced, and does not impair any substantial right given by the contract. One who engages by contract to do a certain thing cannot claim that the obligation he has assumed is impaired by legislation that is designed only to enforce performance of his obligation.

The plaintiff in error relies with confidence upon *State ex rel. New Orleans* v. *N. O. & Carrollton Railroad Com-*

pany, 37 La. Ann. 589, determined by the Supreme Court of Louisiana in 1885. That was an application for a writ of mandamus against a railroad company to compel it to perform the obligation it had assumed by what the court regarded as an express written contract with the city of New Orleans to repair certain streets in that municipality. The court held that the writ was properly refused, the principal reason being that, according to the principles of the law of mandamus, the remedy by mandamus cannot be invoked to enforce obligations arising simply from contract as distinguished from a duty imposed by law. It is said, and it is probably true, that the act of 1888 was passed in order to overcome the difficulties suggested by that decision. However this may be, it is clear that the question here is wholly different from that presented in the other case. That question, as we have seen, is whether a statute authorizing the enforcement, by writ of mandamus sued out by a parish or by a municipal corporation, of contracts such as are described in the act of 1888, is a law forbidden by the contract clause of the Constitution.

We hold, for the reasons we have stated, that such a law, simply giving an additional remedy to the party entitled to performance, without impairing any substantial right of the other party, does not impair the obligation of the contract sought to be enforced.

Judgment affirmed.

PENNSYLVANIA RAILROAD COMPANY *v.* WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY.

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

No. 158. Argued and submitted January 18, 1895. — Decided March 4, 1895.

The Pennsylvania Company notified the Wabash Company that after a date named no ticket sold by that company would be recognized as entitling the holder to pass over the Pennsylvania road. The Wabash Company after that date sold a ticket for a passage over the Pennsylvania road. When the purchaser reached that road he offered his ticket to the conductor. The conductor refused to take it, and, when the holder of it

declined to pay his fare, caused him to be put off the train. *Held*, That the refusal to recognize the ticket was within the right of the Pennsylvania Company, and that that closed the matter, as between the two companies in respect of the unauthorized sale; but that the ejection from the train was done by the Pennsylvania Company on its own responsibility, and was not made legally necessary by any thing done by the Wabash Company which the Pennsylvania Company was bound to recognize or respect.

The case is stated in the opinion.

Mr. George Hoadly for appellant.

Mr. George Willard for appellant submitted on his brief.

Mr. Wells H. Blodgett for appellee submitted on his brief.

Mr. Justice Harlan delivered the opinion of the court.

On the 7th day of December, 1880, the Wabash, St. Louis and Pacific Railway Company, by its agent at Omaha, Nebraska, sold to one W. J. Connell a railroad coupon ticket purporting to be good to the holder for passage over certain railroads extending from Omaha to the city of New York — one of which was the road belonging to the Pennsylvania Railroad Company, and extending from Philadelphia to New York.

It is to be taken upon this record that the Wabash Company had no authority to sell a ticket entitling the holder to passage over the appellant's road between Philadelphia and New York. Indeed, the Wabash Company had notice that the Pennsylvania Company would not recognize any tickets sold by it.

In the course of his journey to the East, Connell took passage at Philadelphia on one of the appellant's trains for New York. Being asked by the conductor for his ticket, he presented the Philadelphia-New York coupon of the ticket purchased at Omaha. The conductor, in conformity with instructions from appellant, refused to accept that coupon in payment of fare. Connell refused to make payment otherwise than with the coupon so tendered by him, and, because

of such refusal, was ejected by appellant's conductor from the train, and left at a way-station.

Connell subsequently sued the Pennsylvania Railroad Company in the Superior Court of Cook County to recover damages on account of his expulsion from the train of that company.

The Pennsylvania Railroad Company thereupon, May 13, 1882, gave the following notice to the Wabash, St. Louis and Pacific Railway Company:

"W. J. Connell has brought suit against the Pennsylvania Railroad Company in the Superior Court of Cook County, Illinois, February term, 1882, to recover damages from the said company in the sum of $15,000 for an alleged breach of contract for declining to accept from him, December 16, 1880, in payment of passage fare from Philadelphia to New York, a ticket alleged to have been sold to him at Omaha, December 7, 1880, by Frank E. Moores, agent, reading via Wabash, St. Louis and Pacific Railway, Baltimore and Ohio Railroad and Pennsylvania Railroad, Council Bluffs to New York, for O. 145, No. 5. As under the notice given by the Pennsylvania Railroad Company to the Wabash, St. Louis and Pacific Railroad Company, December 2, 1880, the latter had no authority whatever to sell the ticket referred to, the Pennsylvania Railroad Company will look to the Wabash, St. Louis and Pacific Railway Company for reimbursement of any amount the former may be compelled to pay as damages or otherwise in consequence of the sale of such ticket to said Connell as alleged. Having this interest in the suit, your company will probably desire to join the Pennsylvania Railroad Company in conducting the defence, and you are hereby invited to do so."

There was a first and second trial of the action brought by Connell. The second trial resulted in a verdict and judgment in his favor for $15,000. That judgment was affirmed in the appellate court of Illinois. But on appeal to the Supreme Court of Illinois the judgment was reversed. *Pennsylvania Railroad* v. *Connell*, 112 Illinois, 295. Upon the final trial one of the questions passed upon by the jury was whether

the ejectment of Connell from the train was accompanied by "unjustifiably violent and excessive" force, and whether the injuries he sustained were wantonly and maliciously inflicted. There was a verdict and judgment against the Pennsylvania Railroad Company for $7000. That judgment was affirmed in the appellate court, and also in the Supreme Court of Illinois. *Pennsylvania Railroad* v. *Connell*, 127 Illinois, 419.

The amount expended by the Pennsylvania Company in and about the defence of the action brought by Connell was $13,328.94.

In a suit brought in the Circuit Court of the United States for the Northern District of Illinois by the Wabash, St. Louis and Pacific Railway Company against the Central Trust Company of New York and others — in which case all the property and assets of the Wabash Company in Illinois were in course of administration, and were in the possession of receivers appointed by that court — the Pennsylvania Railroad Company filed intervening petitions and asked an order directing the receivers to pay the sums reasonably expended by it in and about the defence of the action brought by Connell.

The case made by the intervening petitions was heard upon demurrers interposed by the receivers, and the petitions were dismissed without prejudice at the cost of the petitioner. From that order the present appeal was prosecuted.

The record does not disclose the specific grounds upon which the Circuit Court dismissed the appellant's intervening petitions without prejudice.

If the Circuit Court was of opinion that the appellant should first have obtained a verdict and judgment at law, and, upon that ground, declined to consider appellant's claim upon its merits, the judgment should not be reversed if — assuming all the facts set out in the intervening petitions to be true — there was no liability upon the part of the Wabash, St. Louis and Pacific Railway Company for the amount expended by the Pennsylvania Railroad Company in defending the action brought by Connell.

We are clearly of opinion that no such liability existed. The Pennsylvania Company had in its hands a simple rem-

edy for the wrongful sale by the Wabash Company of a ticket over its road from Philadelphia to New York, namely, to refuse to recognize that ticket by whomsoever presented. It applied that remedy; for it declined to accept the coupon tendered by Connell and stood upon its undoubted right to demand money for his fare. As between the two railroad companies, this closed the matter in respect to the unauthorized sale by the Wabash Company of a ticket for passage over the Pennsylvania road. The ejection of Connell by the Pennsylvania Company from the train — particularly if such ejection was accompanied by unnecessary force — was upon its own responsibility, and was not made legally necessary by anything done by the Wabash Company which the other company was bound to recognize or respect. It had no direct connection with the wrong of the Wabash Company in selling a ticket over the road of the Pennsylvania Company.

It results that the court below would not have erred if the intervening petitions had been dismissed upon their merits.

The judgment dismissing them without prejudice is therefore not one of which it can complain, and it is

Affirmed.

CALIFORNIA *v.* SOUTHERN PACIFIC COMPANY.

ORIGINAL.

No. 7. Original. Argued December 19, 20, 21, 1894. — Decided March 18, 1895.

This court has no original jurisdiction of a suit between a State on the one side, and citizens of another State and citizens of the same State on the other side.

When an original cause is pending in this court, to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and the finality which should characterize such an adjudication, to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigations in some other tribunal.

The city of Oakland and the Oakland Water Front Company are so situated in respect of this litigation, that the court ought not to proceed in their

absence; and as, if they were brought in, the case would then be between the State of California, on the one hand, and a citizen of another State and citizens of California on the other, this court cannot, under such circumstances, take original jurisdiction of it.

THE State of California by its attorney general, by leave of court, exhibited its bill in equity in this court against the Southern Pacific Company, a corporation and citizen of Kentucky, on November 6, 1893, and an amended bill of complaint was filed on like leave and with the consent of the defendant, March 5, 1894. The amended bill averred that the State of California was admitted into the Union under an act of Congress approved September 9, 1850, with certain specified boundaries, and it was alleged that said boundaries embraced all the soil of the beds of the bay of San Francisco, and all the arms of that bay, including what was known as San Antonio Creek, sometimes called San Antonio estuary; that the State upon its admission into the Union acquired and continued to retain jurisdiction over the soil of the beds of said bay, including San Antonio Creek, and absolute title to the same, subject only to the right of the United States of supervision over the navigable waters of the bay so far as necessary in exercising its right to regulate commerce with foreign nations and among the several States, and that the State thus possessing the sovereign power over the bay of San Francisco and the San Antonio Creek and the beds thereof had the right to protect and defend the same from infringement and to sue for relief in respect of encroachment or infringement of its sovereign or proprietary rights therein.

The bill further alleged that certain lands, described by metes and bounds and designated as tracts numbered first, second, third, fourth, fifth, sixth, and seventh, were situated in that part of the bay of San Francisco which, together with San Antonio Creek, constituted the harbor of the city of Oakland, in the county of Alameda; that the city of Oakland was situated upon that part of the bay which included said lands and upon San Antonio Creek; that all the lands numbered first, second, third, fourth, fifth, and sixth were situated within the limits of the city of Oakland, and were formerly

situated within the limits of what was the town of Oakland; that that portion of the tract of land numbered seventh, which was situated within the limits of the city of Oakland, was situated within the limits of the town of Oakland; that the lands at the time the State was admitted into the Union extended and now continued to extend (except so far as the defendant or parties under whom it claimed had filled in portions of said land) to a considerable distance under the navigable waters of the bay of San Francisco and of San Antonio Creek to ship channel in said navigable waters and to a depth at ordinary low tide of twenty-four feet; that a large portion of the lands had always been constantly covered by said waters; that the residue of the lands had at all times been covered with navigable waters at ordinary high tide except so far as the defendant and those under whom it claimed had filled in the same; that San Antonio Creek was and always had been navigable, and the government had been and was expending large sums of money in improving the navigation of the creek and bay as a harbor for the city of Oakland; and that the bay of San Francisco was a tidal bay and a large body of navigable water connected with the Pacific Ocean.

It was further averred that the city of Oakland contained a population exceeding sixty thousand inhabitants, which was constantly increasing; that said city fronted upon the tidal waters of the bay and of San Antonio Creek and the lands embraced a large portion of the shore of the bay and of the shores of the creek within the city, and embraced a large portion of the water front of the city upon which landings, wharves, docks, piers, and other structures for the landing, loading, and unloading of vessels at said city could be constructed and maintained; that a large part of the water front of the lands was now required for the erection of wharves, docks, and piers for the use of vessels landing at the city, and the necessity for the use of additional portions of these shores and lands for the purpose aforesaid was constantly on the increase; that there were large portions of the lands and shores that were required for the termini of railroads hereafter seeking to enter the city

of Oakland and to obtain access to said navigable waters for the purpose of connecting with vessels navigating those waters, and of bringing ship and car together. The bill also stated that the city of San Francisco contained a population of three hundred and fifty thousand, and was the largest city on the eastern side of the Pacific Ocean, lying across the bay of San Francisco and opposite the city of Oakland, about a distance of four miles; that the interest of the cities of San Francisco and Oakland and the general public, and the convenience and necessities of commerce, both foreign and domestic, required that the control of the State over these lands and its ownership thereof should be enforced and maintained; that all the commodities and passengers transported between the city of San Francisco and other parts of California and the eastern and other portions of the United States were carried over these lands; that they were situated so as to practically control the harbor of the city of Oakland, and especially that part thereof used in forming a connection between the city of Oakland, by boats on the bay of San Francisco and of San Antonio Creek, with railroads extending eastward; and that the exclusive use and occupation of such land created a monopoly of transportation from the city of San Francisco to other parts of the State of California and the eastern portions of the United States.

The bill further averred that defendant claimed as owner in fee title and right adverse to the State in and to all the tracts of land described and numbered in the bill, and without the consent of the State, and without any right whatever, defendant and those under whom it claimed had taken possession of portions of said tracts numbered 1 and 5, and had filled in parts thereof, and had driven piles in other parts thereof, and had placed on said portions of land railroad tracks and buildings which greatly obstructed the navigation of said waters; that all of said tracts, buildings, and other structures were now being unlawfully maintained by defendant under its claim; that defendant claimed and asserted exclusive control over the lands described in the bill and prohibited all vessels excepting its own and such vessels as carried freight from the railroad of defendant, from landing upon any part of the shore embraced

by these lands; that defendant denied the right of the State to exercise any control over any of these lands, or to authorize the construction of wharves or landings of any kind upon any part of them, or to regulate any wharf built upon said premises, and to collect tolls or wharfage for the use of any part of said premises; that but a small portion of these tracts of land were in the actual occupation or use of defendant, and no part of the tracts numbered 3, 6, and 7 was being occupied or used by defendant.

The bill alleged that the ground on which defendant based its claim was that under and by virtue of an act of the legislature of California, entitled "An act to incorporate the town of Oakland and to provide for the erection of wharves thereat," approved May 4, 1852, (a copy of which act was annexed to the amended bill and marked Exhibit A,) the State granted to the town of Oakland the title to the whole water front of that town, that is to say, all the land lying within its corporate limits between high tide and ship channel, including the lands described in the bill; that the town of Oakland under said act had authority to grant and convey, and did grant and convey, by conveyance absolute and in fee, in 1852, to Horace W. Carpentier all of the said water front of the town of Oakland; that by mesne conveyances from him defendant had become and was the owner in fee simple of the tracts numbered two and four, and that by leases made and delivered to it by persons claiming in fee under and by virtue of mesne conveyances from Carpentier, defendant had acquired and now held an estate for the term of ninety-nine years from the 17th of February, 1885, in all the remaining lands and premises thereinbefore described. And it was further averred that the State did not by the act approved May 4, 1852, or otherwise, convey the water front, or any part thereof, to the town of Oakland, nor place the control of the same in the town, nor divest the State of its control over the water front, nor had the legislature of the State any power or authority to grant the lands to the town or any one, or to divest the State of its control thereof, and that the town did not grant or convey to Carpentier, and had no power or

authority under the act of May 4, 1852, or otherwise, to grant or convey to him any part of the water front of the town of Oakland, and that the said lands at all times since the creation of the State of California had been and now were held in trust by the State for the benefit of the State, and at all times had been and now were incapable of alienation to any person or of being reduced to private ownership.

The bill then proceeded to set forth a number of other claims of defendant in and to the premises adverse to the title of the State, such as decrees to quiet title, conveyances under judgment sales, and sales for taxes, all of which were alleged on various grounds to be of no force or effect as against the State; and it was averred that defendant had not and never had any estate, right, title, or interest in or to the lands or premises, or any part thereof, or any right to the possession of any part thereof; and that the entry upon and use and occupation of the public domain, as set forth, was a purpresture and a public nuisance, and interfered with the control and development of the harbor of Oakland.

It was also alleged that the act entitled "An act to incorporate the town of Oakland, and to provide for the construction of wharves thereat," approved May 4, 1852, c. 107, Sess. Laws 1852, 180, was repealed by an act entitled "An act to incorporate the city of Oakland," passed March 25, 1854, c. 73, Sess. Laws 1854, 183.

The prayer of the amended bill was that "said defendant, the Southern Pacific Company, be required to set forth in its answer the nature of its claim or claims, and that all adverse claims of said defendant to said premises be determined by a decree of this honorable court, and that in and by said decree it be adjudged that your orator is the owner of the whole of said premises and has lawful right to control the same, and that said defendant, Southern Pacific Company, has no estate or interest whatever in or to said premises as against your orator, and no right to the possession of any part thereof, and that the clouds and doubts cast thereby on the title of your orator be removed; that the structures so as aforesaid unlawfully placed upon said premises by said de-

fendant be abated, and that the writ of injunction issue out of this honorable court, and under the seal thereof, commanding the removal thereof, and that said defendant, and all persons claiming or to claim by or under it, be perpetually enjoined, restrained, and debarred from asserting any claim of, interest in, or title to or control over said lands, or any part thereof, adverse to your orator. That your orator be declared to have the sole and exclusive right to develop and control the said harbor of said city of Oakland, and to dispose of such rights at its pleasure for the interests of the public, and that it be adjudged by said decree that said town of Oakland did not grant or convey, and had no authority to grant or convey, to said Carpentier all the water front of said town, to wit: All the land lying within the corporate limits of said town situated between ordinary high tide and ship channel, or any part thereof, and that by said decree it be further adjudged that the State of California did not and could not grant or convey the said water front, or any part thereof, to the said town of Oakland, and that any control over said water front, if any, that was conferred on said town of Oakland by said act approved May 4, 1852, was revoked and annulled by said act passed March 25, 1854."

On March 6, 1894, the defendant filed its answer, claiming title in fee simple to tracts numbered three and four; a leasehold estate under the Central Pacific Railroad Company, in tracts numbered one, two, six, and seven; and under the South Pacific Coast Railroad Company, in tract numbered five. The answer admitted that, by virtue of its sovereignty, the State of California became the owner and proprietor of the beds of the bay of San Francisco and San Antonio estuary, but averred that by the grant thereinafter set forth the State lost the proprietary right and title over the described property situated between high-water mark and ship channel in the city of Oakland. It admitted that the lands were ordinarily below the line of ordinary high tide, but denied that they all continued to lie below that line, and averred that a portion of the land which formerly formed a part of the bay and estuary was now above the high-tide line, having been

filled in and reclaimed by defendant and its grantors and lessors; that at least one-half of tracts one, five, six, and seven, and nearly all of tracts two, three, and four, were entirely bare at low tide. It denied that any portion of the lands claimed by defendant interfered with the harbor of Oakland or of the city of San Francisco, or hindered or obstructed commerce, or infringed upon or obstructed the practicable navigable waters constituting the harbors of either of those cities; and averred that all the lands described in the bill except parcel numbered six were occupied by wharves, warehouses, depots, and other structures necessary for the convenience of commerce and navigation, and that all of said structures were used in the interest of the same, and were lawfully erected and maintained.

The answer admitted that the defendant claimed the title and right adverse to the State in and to all the premises particularly described except that portion which was included within the harbor lines of the creek of San Antonio as established by authority of the United States; and that defendant asserted exclusive control over all of the lands except those outside of the pierhead lines of the harbor, but denied that it prohibited all vessels except its own from landing or excluded any person from using said wharves, although it admitted that it would prohibit any one from using any part of the shores or buildings without defendant's consent or unless compensation was made therefor.

The answer denied the right of the State to exercise any control over any of the lands not covered by navigable waters except governmental, and while admitting that the State had the right to regulate wharves built upon said premises, denied that it had any power to collect wharfage or dockage from the use of any part thereof. The answer denied that the only ground on which defendant based its claim was that by virtue of the act of the legislature of May 4, 1852, the State granted to the town of Oakland the title to the whole of the water front of that town, that is to say, of the land lying within the then corporate limits of the town of Oakland, situated between high tide and ship channel, and which in-

cluded the lands hereinbefore described; but admitted that it was one of the grounds, and insisted that by said act the town of Oakland was vested with the absolute control and ownership of the water front with power to dispose of and convey the same absolutely and in fee simple to any person, and that thereby the State divested itself of all control and supervision over the land as proprietor thereof, and could only control the same politically. And defendant claimed that the town of Oakland under said act had lawful authority to grant and convey and had granted and conveyed, both by ordinances and by a deed of conveyance, the land absolutely in fee to H. W. Carpentier in 1852, and that by mesne conveyances from said Carpentier, defendant became and was the owner in fee simple of the tracts of land described in the bill and numbered third and fourth; that by mesne conveyances from said Carpentier, the Central Pacific Railroad Company became and was the owner in fee simple of the tracts of land described as first, second, sixth, and seventh, and that defendant had a leasehold interest therein; that the South Pacific Coast Railway Company by mesne conveyances from said Carpentier became and was the owner in fee simple of the tract of land numbered fifth in said amended bill of complaint, and that the defendant had a leasehold interest therein. The answer set forth minutely and in detail all the grounds on which defendant rested its claim, and which need not be repeated here.

Replication was filed March 12, 1894, and on the same day the court denied a motion of the city of Oakland for leave to be joined by intervention as co-complainant in the bill, but granted leave to the city to file briefs, accompanied by such documents and maps, illustrative of its alleged title, as it might be advised. On April 30, 1894, an order was made by the court in reference to depositions theretofore placed in the custody of the clerk of the court, together with maps and exhibits, and appointing a commissioner to take testimony herein, instructing him to take and return such testimony as might be offered by either of the parties, and to receive and return such documents and maps illustrative of the alleged title of the city of Oakland as it might deem proper to offer, pursuant to the order of March 12, 1894.

The depositions and exhibits referred to in this order were thereupon opened and filed, and subsequently the evidence adduced before the commissioner and transmitted with his report to the court. This embraced many depositions on both sides and a large number of maps, papers, and documents. The cause was heard upon pleadings and proofs, December, 19, 20, and 21, 1894.

The record is voluminous, but only so much of the matters disclosed as will tend to explain the nature and scope of the case, chiefly as presented by defendant, need be stated.

The legislature of California on May 4, 1852, c. 107, Sess. Laws 1852, 180, passed an act entitled "An act to incorporate the town of Oakland and to provide for the construction of wharves thereat," the boundaries of the town embracing some 7840 acres of land between high tide and ship channel, 1549 acres of upland, and 493 acres of salt marsh. The corporate duties and powers of the town were vested in a board of trustees, including the usual powers of such municipalities in regard to streets, roads, bridges, wharves, ferries, docks, piers, etc., and the act also provided that "with a view to facilitate the construction of wharves and other improvements, the lands lying within the limits aforesaid, between high tide and ship channel, are hereby granted and released to said town: *Provided*, That said lands shall be retained by said town as common property, or disposed of for the purposes aforesaid." The trustees were chosen as prescribed by the act in May, 1852, and organized as a board thereunder. On the eighteenth of May the board of trustees passed an ordinance entitled "An ordinance for the disposal of the water front belonging to the town of Oakland, and to provide for the construction of wharves," which was engrossed and signed by the president and clerk of the board on May 27, 1852. This ordinance granted in its first section to Horace W. Carpentier and his legal representatives for the period of thirty-seven years the exclusive right and privilege of constructing wharves, piers, and docks at any points within the corporate limits of the town, with the right of collecting wharfage and dockage at such rates as he might deem reasonable, subject to a proviso for the erection of these wharves

within a specified time and at particular locations, and the payment to the town of a certain percentage of the receipts for wharfage; and by its second section granted to him and to his assigns or legal representatives, with the view as expressed therein to more speedily carry out the intentions and purposes of the act of incorporation, and in consideration of the premises and of a contract on Carpentier's part to build for the town a public school-house, "the water front of said town, that is to say, all the land lying within the limits of the town of Oakland between high tide and ship channel, as described in said act, together with all the right, title and interest of the town of Oakland therein;" and by the third section the president of the board of trustees was "charged with the duty of executing, on behalf of the town of Oakland, a grant and conveyance in accordance with the provisions of this ordinance." On May 31, 1852, the president of the board executed and delivered to Carpentier a deed of conveyance, which declared that the president, in conformity to the provisions of the ordinance of May 27, 1852, and in virtue of the authority vested in him by the constitution and laws of California, and especially by the act of May 4, 1852, in his official capacity "as said president and in view of the public convenience," granted to Carpentier the exclusive right and privilege of constructing wharves, etc., with the right of collecting wharfage and dockage for thirty-seven years; and "in consideration of the covenants hereinafter mentioned and of five dollars paid to the town," in obedience to the ordinance aforesaid and by virtue of the authority as aforesaid vested in him as president of the board of trustees, and by virtue of said office, sold, transferred, granted, and released to Carpentier and his legal representatives "all the right, title, and interest of the said town of Oakland in and to the water front of said town, that is to say, all the land lying within the now corporate limits of the town of Oakland and situated between high tide and ship channel as granted to said town by and as described in said above-entitled act," provided that Carpentier or his legal representatives should construct certain wharves within times specified, and also that two per cent of the receipts for wharfage should

be payable to the town of Oakland. Upon this deed an agreement by Carpentier, under seal, was endorsed, bearing the same date, covenanting and agreeing to carry out the objects and purposes of the grant and conveyance, to construct the wharves as provided for in the deed, and to build for the town a public school-house, agreeably to the terms of an earlier obligation in reference thereto. This conveyance and contract were filed for record January 12, 1853. Thereupon Carpentier built one of the wharves, upon the completion of which the board of trustees on January 1, 1853, passed a further ordinance entitled "An ordinance to approve the wharf at the foot of Main Street, and to extend the time for the construction of the other wharves," which declared that the wharf at the foot of Main Street had been built and completed to the entire satisfaction of the board of trustees and according to the terms and within the time specified in the ordinance of May 18, 1852, accepted the same and extended the time for the completion of the other two wharves. Carpentier constructed a second wharf, and built and delivered to the town a public school-house conformably to his contract, and thereafter, and on August 27, 1853, the town passed another ordinance, ratifying and confirming the original ordinance of May 18, 27, 1852, and granting, selling, and conveying the water front of the town of Oakland "unto the said Carpentier and his legal representatives, in fee simple forever, with the right to erect wharves, piers, docks, and buildings at any and all points thereon, not obstructing navigation, and to freely use and occupy the lands herein conveyed." This ordinance approved of the second wharf as built within the time and in accordance with the provisions of the preceding ordinances, and accepted and approved of the school-house as completed to the satisfaction of the board and according to the terms of the ordinance and contract, and provided that the third wharf might be built at the foot of another street than that originally mentioned, which third wharf the evidence tended to show was subsequently constructed.

On March 25, 1854, c. 73, Sess. Laws 1854, 183, an act of the legislature of California was approved, entitled "An act to incorporate the city of Oakland," which provided in its first sec-

tion that "the corporation or body corporate now existing and known as the town of Oakland, shall remain and continue to be a body politic and corporate by the name of the city of Oakland," and that "the boundaries of said city shall be the same as the boundaries of the present town of Oakland." Section 12 of this act provided: "The corporation created by this act shall succeed to all the legal and equitable rights, claims, and privileges, and be subject to all the legal liabilities and obligations made *bona fide* of the town of Oakland; and the common council shall have full power to maintain suits in the proper courts to recover any right, or interest, or property which may have accrued to the town of Oakland." Section 19 was as follows: "The act entitled 'An act to incorporate the town of Oakland, and to provide for the construction of wharves thereat,' is hereby repealed; and any ordinance of said 'town of Oakland,' providing for the levying and collection of taxes, and directing or authorizing the expenditure of money, or the assumption of any debts or liabilities, are hereby suspended until the organization of the government created by this act." By the fifth section of an act of the legislature of California, approved May 14, 1861, c. 360, Sess. Laws 1861, 367, "amendatory and supplementary to" the act of March 25, 1854, it was provided: "The common council of the city of Oakland is hereby authorized and empowered to ratify and confirm any ordinance or resolution of the board of trustees of the late town of Oakland." On May 15, 1861, c. 377, Sess. Laws 1861, 384, the legislature of the State passed another act to amend the act of March 25, 1854, reincorporating the city of Oakland, the twelfth section of which read as follows: "The corporation created by this act shall succeed to all the legal and equitable rights, claims, and privileges, and be subject to all the legal or equitable liabilities and obligations of the town of Oakland; and the ordinances of the board of trustees of said town are hereby ratified and confirmed, and the common council shall have power to maintain suits in the proper courts to recover any right or interest or property which may have accrued to the town of Oakland."

On March 21, 1868, c. 230, Sess. Laws 1868, 222, the legis-

lature of California passed an act authorizing and empowering the council of the city of Oakland, the mayor concurring, "to compromise, settle, and adjust any and all claims, demands, controversies, and causes of action in which the said city is interested." On March 27, 1868, the Oakland Water Front Company was organized under an act of the legislature of April 14, 1853, having the objects, among others, "to acquire, build, construct, own, hold, manage, use, and control wharves, docks, basins, dry docks, piers, and warehouses in the city of Oakland and in the vicinity thereof in the State of California, and to lease, sell, convey, grant, mortgage, hypothecate, alienate or otherwise dispose of the same." The council of the city of Oakland on April 1, 1868, passed an ordinance "for the settlement of controversies and disputes concerning the water front of the city of Oakland, the franchises thereof and other matters relating thereto," which ordained that "the claims, demands, controversies, disputes, litigations, and causes of action, heretofore existing between the city of Oakland on the one part, and Horace W. Carpentier and his assigns on the other part, relating to the force, validity, and effect of the ordinance of May 18, 27, 1852, and of the conveyance to Carpentier by the president of the board of trustees, dated May 31, 1852; and of the ordinance of the town of January 1, 1853; and of the ordinance of August 27, 1853, "are hereby compromised, settled, and adjusted, and the said above-mentioned ordinances and conveyances are made valid, binding, and ratified and confirmed, and all disputes, litigations, controversies, and claims in and to the franchises and property described in said ordinances and deed of conveyance, and every part thereof, are abandoned and released by the said city of Oakland to the said Carpentier and his assigns, upon the following conditions, to wit, that the said Carpentier and his assigns shall convey by proper and sufficient deeds of conveyance all the property and franchises mentioned and described in said ordinances and deeds of conveyance hereinbefore referred to, to the Oakland Water Front Company, to be used and applied in accordance with the terms, conditions, stipulations, and agreement contained in certain contracts between

the said Oakland Water Front Company and the Western Pacific Railroad Company and other parties, bearing even date herewith, with the exceptions in the said agreement specified."

On April 2, 1868, the council passed another ordinance entitled "An ordinance finally settling, adjusting, and compromising the question of the water front," reciting that it appearing that all the terms and conditions of the previous ordinances had been fully satisfied and complied with by Carpentier and his assigns, all the ordinances and deed therein mentioned and described were finally ratified and confirmed, and all disputes, controversies, causes of action, between the city and Carpentier and his assignees, were released to the said Carpentier and his assigns, "provided, that nothing herein contained shall release the right of the city of Oakland to the reversion of the property, franchises, and rights released, as provided in the contract between the Western Pacific Railroad Company and the Oakland Water Front Company, in case said city of Oakland shall become entitled to the same under said contract." The contracts mentioned in the first ordinance were a contract between the Oakland Water Front Company, the Western Pacific Railroad Company, the city of Oakland, Horace W. Carpentier, John B. Felton, and Leland Stanford, not in fact executed by the city of Oakland; and a contract between the Western Pacific Railroad Company, Stanford, and the Oakland Water Front Company. The first contract recited the deed, dated March 31, 1868, acknowledged April 1, 1868, of Horace W. Carpentier to the Oakland Water Front Company for the water front property, and that "the said deed was executed to the Oakland Water Front Company, upon the express trusts, and subject to the covenants and agreements herein set forth." By this contract it was provided that the Western Pacific Railroad Company should select from and locate upon the premises described in the deed from Horace W. Carpentier to the Oakland Water Front Company five hundred acres of land in one or two parcels; that it should have frontage on ship channel not exceeding one-half mile in length; and also select and locate within said time, over the

remainder of said premises, certain right of way; and the Oakland Water Front Company, on its part, covenanted, that it would at any time after such selection and location, upon demand, convey by proper conveyances the said five hundred acres and the right of way aforesaid, and that such conveyance or conveyances should contain a covenant that if the parcels, or either of them, should be located out to a westerly water front of twenty-four feet of depth of water at low tide, no lands should be sold westerly therefrom, and no obstruction or impediment should ever be placed or put in front or westerly of the same, or anything be done to prevent the free and unobstructed approach of vessels to said parcels. It was further covenanted on the part of the Oakland Water Front Company that it would, upon demand, convey to the city of Oakland a certain described part of the premises; and that it would, within a reasonable time, designate and dedicate as a navigable water front for public use the channel of San Antonio Creek from ship channel to the town of San Antonio, stating the width. In the contract between the Western Pacific Railroad Company, Stanford, and the Oakland Water Front Company, the Western Pacific Railroad Company covenanted that, upon conveyance being made to it, so as to vest a good title in fee simple in said company, and upon the performance and execution by the municipal authorities of the city of Oakland of all instruments, ordinances, acts and proceedings necessary to perfect, complete, and make good the title to said premises described in said deed from said Carpentier to said Oakland Water Front Company, within a reasonable time and with reasonable dispatch, it would proceed and construct, or purchase and complete, a railroad connection from its main line to the said parcels thus selected by it, or one of them, and would, within said time, complete such connecting railroad thereto, and would construct on said parcels, or one of them, the necessary buildings and structures for a passenger and freight depot, and would expend, within three years, not less than five hundred thousand dollars upon said premises, and if it should fail, or neglect or refuse to do the same within three years, that the five hundred acres of land, thus conveyed,

should be forfeited and should be conveyed by the company to the city of Oakland.

By deed dated March 31, 1868, and acknowledged April 1, 1868, Horace W. Carpentier conveyed to the Oakland Water Front Company, its successors or assigns, the water front to the city of Oakland, and the rights and franchises therein mentioned. The Oakland Water Front Company by deed dated January 12, 1869, conveyed to the city of Oakland the land agreed to be conveyed in the above contract. The Oakland Water Front Company, July 12, 1879, dedicated for the purposes of a harbor and navigable water course nearly the whole of the estuary of San Antonio and to the fullest extent all the land in the estuary set aside by the government for harbor purposes. On July 27, 1870, the Oakland Water Front Company conveyed to the Western Pacific Railroad Company the tract of land on the water front selected and located by it for railroad purposes under the terms of the contract of April 1, 1868, as desired and required by the city of Oakland, and these are tracts one and six and a portion of five. The Western Pacific Railroad Company in 1868 or 1869 established its terminus on tract first, built a long wharf and station at the end of it with buildings, docks, wharves, and depot for passengers and freight by vessels and ferryboats. Tract second was conveyed by the Oakland Water Front Company to the Central Pacific Railroad Company on May 3, 1878. The greater portion of this tract is occupied by a slip for freight steamers, and the tracts and appurtenances necessary in handling freight cars. Large sums of money were expended by the railroad companies, and the fulfilment of conditions on their part may be assumed. The area of the seven tracts embraced 838 acres. It was stipulated that the Central Pacific Railroad Company since the year 1870 had been, and still was, a corporation organized and existing under the laws of the State of California, by the consolidation and amalgamation of the Central Pacific Railroad Company, of California, the Western Pacific Railroad Company, San Francisco and Oakland Railroad Company, San Francisco and Alameda Railroad Company, and other railroad companies, all theretofore organized and doing business under

the laws of the State of California; that the South Pacific Coast Railway Company since the year 1887 had been, and still was, a corporation organized and existing under the laws of the State of California; that the Oakland Water Front Company was organized as a corporation under and in pursuance of its articles of incorporation set forth in the record, and was created for the purposes therein specified as such corporation and none other, and had ever since existed, and still existed, under such articles, and none other, under the laws of the State of California; that the defendant, Southern Pacific Company, was a corporation, citizen, and resident, as set forth in the original and amended bills of complaint; that the different pieces or parcels of land described were parts and portions of the bay of San Francisco and of San Antonio estuary, and in their natural state were covered by their waters at ordinary high tide, and were so at the time California was admitted into the Union; that tracts first, second, third, fourth, fifth, sixth and seventh were separated from the upland by the patent line of the Mexican grant known as the Peralta grant, confirmed by the United States to the heirs of Peralta, which line was designed as meandering along the line of ordinary high tide; that the Central Pacific Railroad Company was the owner of the upland down to the Peralta grant line in front of tracts first, second, and seventh, and was the owner of an undivided one-half interest in the upland down to the Peralta line fronting upon tract sixth; that the Central Pacific Railroad Company leased all of said tracts of land, both upland and tide water, to defendant, Southern Pacific Company, on February 17, 1885, for a period of ninety-nine years, and the Southern Pacific Company ever since that time had been in the actual occupancy of tracts first and second; that the Southern Pacific Company was the owner of the upland in front of and bounded by tract third and in the actual occupation thereof; that said company was not the owner of any upland adjoining tract fourth, but was in the actual occupancy of that tract; that the South Pacific Coast Railway Company was the owner of at least an undivided one-half interest in the upland down to the Peralta grant line in front of tract fifth, and that

company, on July 1, 1887, leased that tract together with the upland, to defendant, Southern Pacific Company, for a term of ninety-nine years, and ever since that time said Southern Pacific Company had been occupying and using said tract; that defendant, Southern Pacific Company, acquired by mesne conveyances, from Horace W. Carpentier, all the right, title, and interest of Carpentier, if any he had, in and to tracts third and fourth; that the South Pacific Coast Railway Company acquired by like conveyances, such interest, if any there were, to tract fifth; and that the Central Pacific Railroad Company had acquired, by like conveyances, such interest, if any, to tracts first, second, sixth and seventh. Certain proceedings and decree in a suit in 1857, between the city of Oakland and Carpentier, were also put in evidence; also a sheriff's deed to one Watson dated April 24, 1856, purporting to convey the water front; also tax deed dated October 14, 1871, to Thomas Lemon, on judgment for taxes against the Oakland Water Front Company and the water front of the city of Oakland; also tax deed dated May 14, 1880, of the water front to Watson. It was agreed that whatever right, title, or interest was acquired through these deeds, or either of them, became vested by mesne conveyances in the Central Pacific Railroad Company, as to tracts first, second, sixth, and seventh; in defendant, Southern Pacific Company, as to tracts third and fourth; and in the South Pacific Coast Railway Company as to tract fifth.

On July 12, 1882, the council of the city of Oakland passed an ordinance directing the withdrawal of defences in certain cases and the filing of a disclaimer of any interest or estate in the property described therein, and the discontinuance of an action in which the city of Oakland was plaintiff and the Oakland Water Front Company and others were defendants, with a stipulation that the Oakland Water Front Company might have a final judgment and decree quieting its title to the land described in its cross-bill of complaint, provided that the reversion of the city to collect wharfage, tolls, and dockage at the expiration of the original grant to Carpentier should not be affected; and further providing that all claims, demands, controversies, actions, and causes of action against

the Central Pacific Railroad Company and the Oakland Water Front Company, or against either of them, in which the city of Oakland was interested, were thereby released, compromised, settled, and adjusted forever. Certain decrees in the suits referred to in the ordinance, quieting title to the tracts in the Central Pacific, the Oakland Water Front Company, and Huntington, as against the city of Oakland, are in the record.

Mr. W. H. H. Hart, Attorney General of the State of California, opened for plaintiff. *Mr. Aylett R. Cotton* was on his brief.

Mr. William M. Stewart for defendant.

Mr. J. Hubley Ashton for defendant.

Mr. John S. Miller and *Mr. William R. Davis* as *amici curiæ*, and as counsel for the city of Oakland. *Mr. James A. Johnson*, *Mr. William Lair Hill*, *Mr. Edward J. Pringle*, and *Mr. H. A. Powell* were on their brief.

Mr. Harvey S. Brown filed a brief for defendant.

Mr. John K. Cowen for defendant. *Mr. Hugh L. Bond, Jr.*, was on his brief.

Mr. William H. H. Hart, Attorney General of the State of California, closed for plaintiff.

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

By the third of our general rules it is provided: "This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary." 108 U. S 574. This rule is, with the exception of some slight verbal alterations and the addition of the word "former" before

the word "practice" in the first line, the same as original general rule seven, adopted August 8, 1791. 1 Cranch, xvii; 2 Dall. 411. And in cases of original jurisdiction it has been determined that this court will frame its proceedings according to those which had been adopted in the English courts in analogous cases, and that the rules of court in chancery should govern in conducting the case to a final issue, *Rhode Island* v. *Massachusetts*, 12 Pet. 657; 13 Pet. 23; 14 Pet. 210; 15 Pet. 233; *Georgia* v. *Grant*, 6 Wall. 241; although the court is not bound to follow this practice when it would embarrass the case by unnecessary technicalities or defeat the purposes of justice. *Florida* v. *Georgia*, 17 How. 478.

It was held in *Mallow* v. *Hinde*, 12 Wheat. 193, 198, that where an equity cause may be finally decided between the parties litigant without bringing others before the court who would, generally speaking, be necessary parties, such parties may be dispensed with in the Circuit Court if its process cannot reach them or if they are citizens of another State; but if the rights of those not before the court are inseparably connected with the claim of the parties litigant so that a final decision cannot be made between them without affecting the rights of the absent parties, the peculiar constitution of the Circuit Court forms no ground for dispensing with such parties. And the court remarked: "We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity whatever may be their structure as to jurisdiction. We put it upon the ground that no court can adjudicate directly upon a person's right, without the party being actually or constructively before the court."

In *Shields* v. *Barrow*, 17 How. 130, the subject is fully considered by Mr. Justice Curtis speaking for the court. The case of *Russell* v. *Clarke's Executors*, 7 Cranch, 98, is there referred to as pointing out three classes of parties to a bill in equity: "1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do com-

plete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." Reference is made to the act of Congress of February 28, 1839, c. 36, 5 Stat. 321, and the 47th rule of equity practice. The first section of the statute, carried forward into section 738 of the Revised Statutes, enacted: "That where, in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer; and the non-joinder of parties who are not so inhabitants, or found within the district, shall constitute no matter of abatement, or other objection to said suit." But Mr. Justice Curtis remarked that while the act removed any difficulty as to jurisdiction between competent parties regularly served with process, it did not attempt to displace that principle of jurisprudence on which the court rested *Mallow* v. *Hinde*, and so far as the 47th rule was concerned, that was only a declaration for the government of practitioners and courts of the effect of the act of Congress and of the previous decisions of the court on the subject of that rule. And Mr. Justice Curtis added: "It remains true, notwithstanding the act of Congress and the 47th rule, that a Circuit Court can make no decree affecting

the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights. To use the language of this court, in *Elmendorf* v. *Taylor*, 10 Wheat. 167: 'If the case may be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, whom the process of the court cannot reach, as if such party be a resident of another State, ought not to prevent a decree upon its merits.' But if the case cannot be thus completely decided, the court should make no decree."

Mr. Daniell thus lays down the general rule: "It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, or notice of the decree to have an opportunity afforded of making themselves active parties in the cause, if they should think fit." 1 Dan. Ch. Pl. and Pr. 4th Am. ed. 190.

The rule, under some circumstances, not important to be considered here, may be dispensed with when its application becomes extremely difficult or inconvenient. Equity Rule 48.

Sitting as a court of equity we cannot, in the light of these well-settled principles, escape the consideration of the question whether other persons who have an immediate interest in resisting the demand of complainant are not indispensable parties or, at least, so far necessary that the cause should not go on in their absence. Can the court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice, without affecting other persons not before the court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience?

Opinion of the Court.

The boundaries of the State of California, as defined and established in the constitution under which the State was admitted into the Union, by the act of Congress approved September 9, 1850, embraced all the soil of the beds of the bay of San Francisco and the arms of the bay, including what was and is known as San Antonio estuary or San Antonio Creek, on the eastern side of the bay opposite to San Francisco. The tide ebbs and flows naturally in the estuary, which contains a natural tidal basin, and the bay and estuary are connected with the waters of the Pacific Ocean by the Golden Gate.

The contention of the State was that the legislature did not have the power to grant the water front to the town of Oakland, nor to any one, so as to create any title or interest in the grantee; nor to authorize the town to grant the entire water front to any person to be held and owned as his private property; that the act of May 4, 1852, did not authorize the town to grant its water front, namely, the lands lying within the limits of that town between high tide and ship channel, to Carpentier, nor to any one to be held as private property; that the ordinance of May 27, 1852, was not designed to confer on Carpentier an interest in the Oakland water front beyond thirty-seven years; that the ordinance was against public policy and void; that the deed of the president of the board of trustees was his individual deed, and, if valid, only conveyed for the life of Carpentier, because it did not run to him and his heirs; that the alleged grant was not consistent with the policy of the State; that the grant was revoked by the act of March 25, 1854, and was not confirmed by the act of May 15, 1861; that the act of March 21, 1868, did not authorize the city of Oakland to convey away the water front or to settle existing controversies in that way; that such a settlement would be contrary to public policy and contrary to the charter of the city.

The defendant contended that it is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters 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 interests of the public in such waters, and subject to the paramount right of Congress to control their navigation so far as might be necessary for the regulation of commerce; that the State of California, in and by the act of May 4, 1852, made an irrevocable grant *in præsenti* to the town of Oakland of the title and property in all the lands lying within the corporate limits of the town between high tide and ship channel, with the power and right to alien and convey the lands or any part of them for the purposes contemplated by the act; that the act of March 25, 1854, did not, by its own terms or otherwise, operate as a repeal of that grant; that the grant was confirmed and ratified by the legislature of California by the act of May 15, 1861, and by the council of the city of Oakland by and under the authority of the act of March 21, 1868; that the grant was made in pursuance of the settled policy of the State, and created no interference with or impairment to the bay of San Francisco, nor impaired or interfered with the interests of the public in the waters of that bay or any part thereof, or with the legislative power of the State to regulate or use all the waters in behalf of the public for the purposes of navigation. It was further contended that the State was estopped from denying the effect of the act of May 4, 1852, to convey and pass a valid title to the lands embraced by it to the town of Oakland, and estopped by the acts of May 15, 1861, and of March 25, 1868, respectively, to deny the validity of the title of Carpentier and those claiming under him; and that the city of Oakland was also estopped to deny the effect of the ordinances of the town of Oakland of May 27, 1852; January 1, 1853; August 27, 1853; and of the deed of conveyance by the president of the board of trustees of the town, to grant and convey a valid title in fee simple in the lands in controversy to Carpentier by the operation of the ordinances of the city of April 1 and 2, 1868, under the act of the legislature of March 21, 1868, authorizing the city to settle its controversies with Carpentier. And further, that the confirmation of the ordinances and deed of the town of Oakland by the ordi-

nances of the city of Oakland under the act of 1868, besides again validating the ordinances and the deed of conveyance of the town, operated as a grant by the city of Oakland and the State of California of the land in fee simple absolute to the Oakland Water Front Company as grantee or alienee of Carpentier.

On behalf of the city of Oakland, which was permitted to be heard at the bar by counsel as *amici curiæ*, it was insisted that the original grant of the water front to the town of Oakland had never been revoked; that the city was simply the town's successor in that regard; and that its rights thereunder, of whatever nature, had in no manner been affected by any exertion of the legislative power of the State. Admitting that a municipal corporation as such has no proprietary interest or riparian rights in tide lands situated within its corporate limits, the city claimed that title had passed to it from the State; that, regarded as holding in trust as a governmental agency, nevertheless it had an interest in the grant of individual advantage, and that, in any view, as an existing corporate entity clothed with powers to be locally exercised, though for the general public good, it could not be divested thereof in the absence of legislation to that end by proceedings in which it was not allowed to participate as a litigant. But counsel for the State argued that whatever construction might be put upon the acts of the legislature relating to the city of Oakland, in connection with the water front, the State retained its sovereign power to preserve it for the use of the public free from obstruction, and could alone, by its attorney general, maintain the action; that the city was no more interested in the suit directly or collaterally than any administrative agency would be; that the grant by the act of May 4, 1852, was not in absolute ownership, but in trust for improvement; and that the grant was revoked by the repeal of the act of May 4, 1852, by section 19 of the act of March 25, 1854.

The prayer of the bill was, among other things, for a decree adjudging that the State could not make such a grant to the town; that the town of Oakland had no authority to grant or convey all its water front or any part thereof; and that any

control conferred on the town by the act of 1852 was annulled by the act of 1854.

But it was said that, notwithstanding the breadth of the prayer, relief, if accorded, would be confined to the seven specified parcels, and that the decree would not bind those claiming interests in other parts of the water front, although as to the particular parcels, defendant's lessors, the Central Pacific Railroad Company and the South Pacific Coast Railway Company and its grantor, the Oakland Water Front Company, all corporations and citizens of California, would be bound. Considered, however, in reference to the main contention of the State, namely, the want of power to make the grant of the entire water front at all, the argument treated the water front as one and indivisible for the purposes of the case. Indeed, it was insisted that even if it were conceded that the legislature could empower a municipality to deal with parts of its water front in the interest of the public by authorizing the construction of improvements to a certain extent, creating so far a proprietary interest in those thus authorized, yet that such action as to portions of the grant, though sustainable if independent thereof, must be regarded as involved in the invalidity of the entire grant. Irrespective, then, of the extent, technically speaking, of the effect and operation of a decree as to the seven parcels, based on that ground, as *res adjudicata*, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected and the controversy so left open to future litigation as would be inconsistent with equity and good conscience.

Without questioning in any way the authority of the attorney general of the State of California to institute this suit, it is admitted that it was not directed to be commenced by any act of the legislature of that State. If this court were of opinion that the city of Oakland occupied the position of the successor merely of the town of Oakland; that the grant of the water front to the town was as comprehensive as is claimed by defendant, and that it had not been annulled by any act of the legislature, but also held that the State had no power to make such grant, then the city of Oakland would be deprived

of the rights it claims under the grant, not by the exercise of the legislative power of the State as between it and its municipality, but by a judicial decree in a suit to which the city was not a party.

And if the proceedings which purported to vest title in the Oakland Water Front Company were held ineffectual for the same reason, then the latter company would find the foundation of its title swept away in a suit to which it also was not a party.

This is not an action of ejectment or of trespass *quare clausum*, but a bill in equity, and the familiar rule in equity, as we have seen, is the doing of complete justice by deciding upon and settling the rights of all persons materially interested in the subject of the suit, to which end such persons should be made parties.

We are constrained to conclude that the city of Oakland and the Oakland Water Front Company are so situated in respect of this litigation that we ought not to proceed in their absence.

When, heretofore, the city of Oakland applied to be made a co-complainant herein, the question of parties was necessarily suggested, although that application was such, and presented at such a stage of the case, that the court was neither called on to, nor could properly, deal with the general subject. As original jurisdiction only subsisted in that the State was party, and the moving party, (Eleventh Amendment; *Hans* v. *Louisiana*, 134 U. S. 1,) the motion of the city was denied. But we at the same time granted leave to the city to file briefs, accompanied by such maps and documents illustrative of its alleged title as it might be advised. The matter was thus left to the consideration of counsel as to whether indispensable or necessary parties had not been joined, while if the case was permitted to go to a hearing the court would then be able to dispose of it understandingly. We may add, that even if reference could be made to the 47th rule in equity by way of analogy, that rule does not apply when indispensable parties are lacking, and that in respect of necessary parties the cause may or may not be proceeded in without

them, as the court may determine in the exercise of sound discretion. We have no hesitation in holding that when an original cause is pending in this court to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and finality which should characterize such an adjudication to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigation in some other tribunal.

This brings us to consider what the effect would be if the Oakland Water Front Company and the city of Oakland were made parties defendant. The case would then be between the State of California on the one hand and a citizen of another State and citizens of California on the other. Could this court exercise original jurisdiction under such circumstances?

By the first paragraph of section two of article III of the Constitution it is provided that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; . . . to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States . . ." And by the second clause that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction . . ." The language, "in all cases in which a State shall be party," means in all the cases above enumerated in which a State shall be a party, and this is stated expressly when the clause speaks of the other cases where appellate jurisdiction is to be exercised. This second clause distributes the jurisdiction conferred in the previous one into original and appellate jurisdiction, but does not profess to confer any. The original jurisdiction depends solely on the character of

the parties, and is confined to the cases in which are those enumerated parties and those only. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. In one description of cases the character of the parties is everything, the nature of the case nothing. In the other description of cases the nature of the case is everything, the character of the parties nothing. *Cohens* v. *Virginia*, 6 Wheat. 264, 393.

By section 13 of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, it was provided "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States or aliens, in which latter case it shall have original but not exclusive jurisdiction. In all the other cases above mentioned the Supreme Court shall have appellate jurisdiction. . . ." This was carried forward into section 687 of the Revised Statutes. Under the Constitution the cases in which a State may be a party are those between two or more States; between a State and citizens of another State; between a State and foreign States, citizens, or subjects; and between the United States and a State, as held in *United States* v. *Texas*, 143 U. S. 621. By the Constitution and according to the statute this court has exclusive jurisdiction of all controversies of a civil nature where a State is a party, but not of controversies between a State and its own citizens, and original but not exclusive jurisdiction of controversies between a State and citizens of another State or aliens.

In *Pennsylvania* v. *Quicksilver Company*, 10 Wall. 553, it was ruled that a State might bring an original suit in this court against a citizen of another State, but not against one of its own, and it has never been held that the court could take original jurisdiction of controversies between a State and citizens of another State and its own citizens.

In *Georgia* v. *Brailsford*, 2 Dall. 402, the State of Georgia filed a bill in equity in this court against Brailsford and others, copartners, who were aliens, and Spalding, a citizen

of Georgia, against whom they had obtained judgment, to restrain payment thereof to Brailsford & Company, upon the ground that the bond on which judgment had been recovered belonged to the State, Spalding having refused to sue out a writ of error. The question of jurisdiction, as presented in the case at bar, does not appear to have been suggested. And the bill, without that question being considered, was finally dismissed, because the remedy of complainant was at law. 2 Dall. 415. An action at law was brought accordingly against Brailsford and others, but not against Spalding, and resulted in a verdict for the defendant. 3 Dall. 1.

In *Florida* v. *Anderson*, 91 U. S. 667, 676, a bill in equity was filed by Florida against citizens of Georgia, and the marshal of the United States for the Northern District of Florida was made a formal defendant by reason of having in his hands an execution at the suit of some of the other defendants. Jurisdiction was sustained on the ground that the marshal was merely a formal party against whom no relief was sought.

In *Wisconsin* v. *Duluth*, 96 U. S. 379, the bill was originally filed against the city of Duluth as a corporation of the State of Minnesota and the Northern Pacific Railroad Company, a corporation organized under an act of Congress, but was dismissed as to the latter before the final hearing, and no question of the jurisdiction of the court over the company was passed upon.

These and other cases were considered in *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265, in which it was held that this court had not original jurisdiction of an action by a State upon a judgment recovered by it in one of its own courts against a citizen or corporation of another State for a pecuniary penalty for a violation of its municipal law.

It was asserted in argument that in respect of the clause extending the judicial power "to controversies between citizens of different States," it had been decided that it is within the power of Congress to confer upon the Circuit Courts of the United States jurisdiction over controversies between a citizen of one State and a citizen of another State joined with a citizen of the plaintiff's State, and that the same rule of construc-

tion must be applied to controversies between "a State and citizens of another State."

But the decisions referred to relate to the removal of cases from state courts and, prior to the act of March 3, 1875, c. 137, 18 Stat. 470, the uniform ruling was that all of the necessary parties on one side of the suit should be citizens of different States from those on the other; while under that act it has been always held that in order to justify the removal of a suit because of "a controversy which is wholly between citizens of different States," the whole subject-matter of the suit must be capable of being finally determined between them, and complete relief afforded as to the separate causes of action, without the presence of other persons originally made parties to the suit, and that when there was but one indivisible controversy between the plaintiff and the defendants the suit could not be removed by one of several plaintiffs or defendants. Whether the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 434, permits one of two or more defendants to remove any case which he could not have removed under earlier statutes is a question upon which no opinion has as yet been expressed by this court. *Hanrick* v. *Hanrick*, 153 U. S. 192; *Cotton Press Company* v. *Insurance Company*, 151 U. S. 368, 382; *Torrence* v. *Shedd*, 144 U. S. 527, 530.

It was also contended that the clause of the Constitution extending the judicial power to controversies "between citizens of different States" was intended to secure the citizen against local prejudice which might injure him if compelled to litigate his controversy with another in the tribunal of a State not his own, and that for the attainment of this object Congress could have vested the Circuit Court with original jurisdiction, although some of the defendants were citizens of the same State with the plaintiff; that a single Federal principle or ground of jurisdiction would be sufficient to the exercise of the power to confer such authority; and that the Federal ingredient existed here in the necessity for an impartial tribunal in suits to which a State is a party; and that, moreover, the jurisdiction in the case at bar did not rest exclusively on a con-

troversy between the State of California and a citizen of another State, but that it was one arising under the Constitution in that the effect claimed by the State for the act of March 25, 1854, involves the decision of the question whether that act was a law impairing the obligation of a contract and therefore invalid, and also that a question under the same constitutional prohibition arises in regard to ordinances of the city of Oakland repealing the settlement ordinances of 1868 and all others purporting to dispose of the land in question.

We are aware of no case in which this court has announced the conclusion that power is conferred on Congress to authorize suits against citizens of other States joined with citizens of the same State as that of which plaintiff is a citizen to be originally commenced in, or to be removed to, the Circuit Courts, as arising under the Constitution on the ground indicated, where there is no separable controversy or the citizens of plaintiff's State are indispensable parties, but we are not called on to consider that question, or whether any Federal question is involved, since the original jurisdiction of this court in cases between a State and citizens of another State rests upon the character of the parties and not at all upon the nature of the case.

If, by virtue of the subject-matter, a case comes within the judicial power of the United States, it does not follow that it comes within the original jurisdiction of this court. That jurisdiction does not obtain simply because a State is a party. Suits between a State and its own citizens are not included within it by the Constitution; nor are controversies between citizens of different States.

It was held at an early day that Congress could neither enlarge nor restrict the original jurisdiction of this court, *Marbury* v. *Madison*, 1 Cranch, 137, 173, 174, and no attempt to do so is suggested here. The jurisdiction is limited and manifestly intended to be sparingly exercised, and should not be expanded by construction. What Congress may have power to do in relation to the jurisdiction of Circuit Courts of the United States is not the question, but whether, where the Constitution provides that this court shall have original

jurisdiction in cases in which the State is plaintiff and citizens of another State defendants, that jurisdiction can be held to embrace a suit between a State and citizens of another State and of the same State. We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.

Bill dismissed.

Mr. Justice Field concurring. It is greatly to be regretted that the controversies between the State of California, the Southern Pacific Railway Company, and the city of Oakland cannot now, in view of the limited character of the original jurisdiction of the Supreme Court of the United States, be heard, determined, and settled by this court, for those controversies will be a fruitful source of disturbance and vexation to the interests of the State until they are thus determined and settled. But, from the views of the court expressed in its recent decision, proceedings for such determination and settlement must find their commencement in the courts of the State, and can only reach this court from their decision upon appeal or writ of error. And the sooner proceedings are taken to reach that disposition of the controversies the earlier will be their final settlement.

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

In my judgment it is competent for the court, in the exercise of its original jurisdiction, to proceed to a final decree in this cause that will determine the present controversy between the State of California and the Southern Pacific Company.

By the second section of the third article of the Constitution it is declared that the judicial power of the United States shall extend "to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls;

to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects." And it is provided in the same section that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

It is beyond dispute that the case before us presents a controversy between the State of California and a corporation created under the laws of the Commonwealth of Kentucky, and, therefore, a controversy between a State and a citizen of another State. And as the judicial power of the United States extends to such a controversy, and as this court is invested with original jurisdiction "in *all* cases," to which the judicial power of the United States extends, in which a State is a party, I do not see how we can escape the obligation imposed by the Constitution, to hear this cause upon its merits, and pass such decree as will determine at least the matters in dispute between California and this Kentucky corporation.

It is said that we cannot proceed further because it appears from the evidence that a municipal corporation of California asserts, and a private corporation of the same State may have, an interest in the subject-matter of the litigation, and could not be made parties *of record* without ousting our jurisdiction. Upon that ground alone, it is held that we are without jurisdiction to pass a final decree as between the State and the defendant corporation.

I submit that the same course should be pursued in this case that was pursued in *Florida* v. *Georgia*, 17 How. 478, 491, 493. The State of Florida invoked the original jurisdiction of this court to determine a question of boundary

between it and the State of Georgia. The latter State appeared and filed its answer. The jurisdiction of this court rested upon the constitutional provisions extending the judicial power of the United States "to controversies between two or more States," and giving this court original jurisdiction in all cases in which a State is a party.

The Attorney General of the United States appeared and filed an information in which he asked leave to intervene on behalf of the government, on the ground that it was interested in the settlement of the boundary in dispute. The application to intervene was resisted by the State of Georgia upon the ground that under the Constitution this court had not and could not have jurisdiction of the cause, *except as a controversy between States of the Union*, and that the appearance of any other party would determine the jurisdiction and put the cause out of court.

The court, speaking by Chief Justice Taney, said: "The Constitution confers on this court original jurisdiction in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party. And it is settled by repeated decisions, that a question of boundary between States is within the jurisdiction thus conferred. But the Constitution prescribes no particular mode of proceeding, nor is there any act of Congress upon the subject. And at a very early period of the government a doubt arose whether the court could exercise its original jurisdiction without a previous act of Congress regulating the process and mode of proceeding. But the court, upon much consideration, held that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases as fully as in any other court, yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred; that it was a duty imposed upon the court, and in the absence of any legislation by Congress, the court itself was authorized to prescribe its mode and form of proceeding, *so as to accomplish the ends for which the jurisdiction was given.*"

After observing that it was the duty of the court to mould its proceedings for itself, in a manner that would best attain

the ends of justice, and enable it to exercise conveniently the power conferred — disengaging such proceedings from all unnecessary technicalities and niceties, and conducting them in the simplest form — the Chief Justice proceeded:

"It is manifest, if the facts stated in the suggestion of the Attorney General are supported by testimony, that the United States must have a deep interest in the decision of this controversy. And if this case is decided adversely to their rights, they are without remedy, and there is no form of proceeding in which they could have that decision revised in this court or anywhere else. Justice, therefore, requires that they should be heard before their rights are concluded. And if this were a suit between individuals, in a court of equity, the ordinary practice of the court would require a person standing in the present position of the United States, to be made a party, and would not proceed to a final decree until he had an opportunity of being heard.

"But it is said that they cannot, by the terms of the Constitution, be made parties in an original proceeding in this court between States; that if they could, the Attorney General has no right to make them defendants without an act of Congress to authorize it.

"We do not, however, deem it necessary to examine or decide these questions. They presuppose that we are bound to follow the English chancery practice, and that the United States must be brought in as a party on the record, in the technical sense of the word, so that a judgment for or against them may be passed by the court. But, as we have already said, the court are not bound, in a case of this kind, to follow the rules and modes of proceeding in the English chancery, but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained.

"It is evident that this object can be more conveniently accomplished in the mode adopted by the Attorney General than by following the English practice in cases where the government have an interest in the issue of the suit. In a case like the one now before us, there is no necessity for a judg-

ment against the United States. For when the boundary in question shall be ascertained and determined by the judgment of the court, in the present suit, there is no possible mode by which that decision can be reviewed or reëxamined at the instance of the United States. They would therefore be as effectually concluded by the judgment as if they were parties on the record, and a judgment entered against them. The case then is this: Here is a suit between two States, in relation to the true position of the boundary line which divides them. But there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the court. For their interests may be different from those of either of the litigating States. And it would hardly become this tribunal, entrusted with jurisdiction where sovereignties are concerned, and with power to prescribe its own mode of proceeding, to do injustice rather than depart from English precedents. . . . And if, as has been urged in argument, the United States cannot, under the Constitution, become a party to this suit, in the legal sense of that term, and the English mode of proceeding in analogous cases is, therefore, impracticable, it furnishes a conclusive argument for the mode proposed, for otherwise there must be a failure of justice."

The mode adopted in *Florida* v. *Georgia* was to allow the United States to file its proofs without becoming a party in the technical sense of the term, but without right to interfere in the pleading or evidence or admissions of the States, or of either of them; the Attorney General of the United States to be heard in argument, and the court, in deciding upon the true boundary line, to take into consideration all the evidence offered by the United States and by the States.

Now, that is, substantially, the course pursued at the outset in this case. The city of Oakland, by leave of the court, has presented its proofs. It has been allowed to file briefs and such documents and maps as would illustrate its alleged title. It has participated in the taking of all the evidence in the

cause. The case has been fully heard upon its merits, as they involve the rights of California, the Southern Pacific Company, and the city of Oakland. All of those parties earnestly desire this court to proceed, as between them, to a final decree on the merits. If any other party is interested in the issues, we can hold the cause until that party, if it so wishes, can make proof of such interest and its nature, just as the city of Oakland has done.

As this court, having original jurisdiction of controversies between two or more States, would not refuse to determine the controversy between Florida and Georgia because other parties had an interest in the subject-matter of that controversy, and could not, as was claimed, be admitted as parties of record without defeating its jurisdiction, ought we to dismiss a suit between a State and a corporation or citizen of another State because other parties interested in the result of that suit cannot be admitted as parties of record, but may be admitted to occupy such position with reference to the case as will enable the court to attain the ends of justice as between all who assert any interest in the result of the litigation? The suggestion that the Oakland Water Front Company has such an interest as entitles it to be heard comes from the court, not from that company or from any of the parties before us. If it be deemed proper to give that company an opportunity to assert its claims, we could, as just suggested, direct notice to be given to it of the pendency of this litigation, so that it could, if so advised, appear in the same way in which the city of Oakland has been allowed to appear.

I have thus far considered the question upon the assumption that a decree as between California and the Southern Pacific Company might legally affect the claims of others who are not formal parties to the suit. The court does not say, in words, that such a decree could be pleaded in bar in any subsequent suit, or would affect in law the rights of the city of Oakland or the Water Front Company. And I take it that the court does not mean to be understood as attaching any such effect to a decree simply between the parties to the present bill. Now, if a decree between the parties to the bill

will not, in law, bar any claim of parties who are not admitted to be heard, in some form, it is difficult to understand why the court should not recognize its constitutional obligation to determine this controversy between a State and a corporation of another State. It is none the less a controversy between a State and a citizen of another State, because others, not parties of record, may have an interest in its determination. Let us suppose a decree was passed, only as between California and the Kentucky corporation, dismissing the suit for want of equity. That decree would be conclusive as between the State and that corporation. But it would not have any effect, as a bar, in a subsequent litigation, respecting the same or some of the same matters between the Southern Pacific Company and the city of Oakland, or between the Southern Pacific Company and the Water Front Company, or between the State and one or both of the corporations not parties of record. Undoubtedly any decree rendered by this court would be cited by the successful party, when involved in litigation with other parties, as evidence as to what the law is. But it would not be obligatory upon any court in other suits, between different parties. A suit upon coupons of bonds issued by a municipal corporation might be so framed as to involve the validity of the bonds themselves — a question in which every holder of such bonds would, in a sense, be interested. But a judgment in such a suit that the bonds were void for the want of power to issue them, while conclusive as between the parties to that suit, would not conclude the holders of bonds who were not before the court in some effective form. A suit to foreclose a second mortgage upon the property of a corporation might result in a decree declaring that the *corporation* was without power to give any mortgage whatever upon its property. But that decree would not conclude the parties interested in a first mortgage who were not in court, nor represented by the trustee named in the mortgage under which they claimed. So a decree as between California and the Southern Pacific Company would not conclude outside persons neither admitted as parties, nor permitted to appear and be heard in respect of their rights. In this view, this

court can decline to determine finally the rights of any except those who are parties of record, and as the controversy between those parties is one between a State and a corporation and a citizen of another State, it is one within our original jurisdiction.

It seems to me that according to both the letter and spirit of the Constitution this court cannot refuse to exercise its original jurisdiction over a controversy between a State and a citizen of another State, because a citizen of the plaintiff State has or may assert some interest in the subject-matter of that controversy; and that in such a case it is our duty either to permit the latter citizen to be heard without becoming a party of record if thereby our jurisdiction would be defeated, or proceed to a decree between the original parties to the controversy, leaving unaffected, in law, the rights of others.

Our constitutional duty is to determine the "case" in which the State is a party, taking care to give all who are interested in its determination a reasonable opportunity to produce evidence and to be heard in support of their rights. In this way only can we give full effect to the Constitution, and at the same time attain the ends of justice, unembarrassed by mere forms. We should not impose undue restrictions upon the right of the States to invoke our original jurisdiction. Jurisdiction to determine *all* cases to which the judicial power of the United States extends, in which a State is a party, gives authority to decide every controversy that arises in such cases, the determination of which is either necessary or proper in order to dispose of the case in which it arises.

If this be not a sound interpretation of the Constitution, the result will be that this court will not, in any case, exercise its original jurisdiction over a case "between two or more States," if it appears that individual citizens have an interest in its determination. A controversy capable of judicial solution may arise between two States, and it may be important to the peace of those States, indeed, of the whole country, that it should be determined by this court. But, under the interpretation of the Constitution adopted in this case, our

jurisdiction cannot be invoked in any mode for its final settlement if it appears in evidence that some individual or corporation is interested in that settlement. Still more, although this court is given original jurisdiction of a case between one of the States of the Union and a foreign State, it will not exercise it even in such a case if individual parties are interested in the controversy.

As the presence in a case arising under the Constitution, or the laws, or the treaties of the United States, of a question or controversy depending upon general principles of law, will not oust the jurisdiction of the courts as conferred by the Constitution, *Osborn* v. *Bank of the United States*, 9 Wheat. 738, so the presence, in a case brought by a State against a citizen of another State, of a question or controversy in which others, besides the parties of record, are interested, ought not to oust the jurisdiction of the court to determine the controversy between the original parties; especially where the decree between the parties of record will not, in law, conclude, or is so framed that it will not conclude, the rights of others who were not, in some form, before the court.

Under the ruling now made, how is the State of California to obtain a judicial determination of the controversy between it and this foreign corporation? It is said that a suit may be brought in one of its own courts against all persons asserting an interest in the property rights here in question. The effectiveness of such a suit would depend upon the ability of the State to bring the Kentucky corporation into court, so that it would be bound by the final decree. It may be that that corporation does business in California under the condition, among others, that it will have an agent there upon whom process can be served. But surely the duty of this court, under the Constitution, to exercise its original jurisdiction in respect to a controversy between a State and a corporation of another State cannot depend upon the question whether the plaintiff State can compel that corporation to answer in its own courts. Suppose the defendant is an individual citizen of another State who cannot be served with process in the State desiring to bring suit against him. In

such a case, the State must, under the principles now announced, be without a remedy for the protection of its rights, or it will be driven to sue its adversary in the courts of his own State, whose decision will be final, unless the controversy happens to involve some question of a Federal nature; and even then this court could only decide the Federal question presented, and must accept the decree of the state court as conclusive upon all other questions. The State could not sue in any Circuit Court of the United States, for that court has no jurisdiction under the acts of Congress of a suit brought by a State against a citizen of another State, unless perhaps such suit be one arising under the Constitution or laws or treaties of the United States. The framers of the Constitution did not intend to subject a State, under any circumstances, to the indignity of being compelled to submit its controversies with citizens of other States to the courts of such other States. They opened the doors of this court to every State having a cause of action against a citizen of another State. In my judgment, we have no right to refuse a hearing to a State having such a cause of action, because of the circumstance that one or more of its people assert an interest in the subject-matter of its controversy with the defendant citizen of another State.

For these reasons, I am constrained to dissent from the opinion and judgment of the court.

Mr. Justice Brewer authorizes me to say that he concurs in this opinion.

WAILES *v.* SMITH.

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

No. 872. Submitted March 4, 1895. — Decided March 25, 1895.

The finding of the Maryland Court of Appeals, that there was no fund in the state treasury upon which the Comptroller could lawfully draw his warrant, because there had been no appropriation made by the state legislature for the payment of the commissions here claimed, was decisive of this case, and involved no Federal question.

Statement of the Case.

MOTION to dismiss. In 1872 the General Assembly of Maryland passed an act to ratify and confirm the Governor's appointment of Daniel Clarke and Sidney I. Wailes, as commissioners on behalf of the State, to prosecute to settlement all her claims against the government of the United States under the act of Congress approved July 27, 1861, which provided for the payment by the Federal government to the Governor of any State, etc., of any expenses properly incurred by the State for enrolling, equipping, etc., and transporting its troops employed in aiding to suppress "the present insurrection against the United States, to be settled upon proper voucher," etc. Laws of 1872, c. 262, p. 434.

In 1878 the General Assembly repealed the act of 1872, and enacted as follows: "That Sidney I. Wailes, . . . the surviving commissioner of the State of Maryland under said act [the repealed act of 1872], be and he is hereby authorized to prosecute the settlement of all claims of the State against the government of the United States, and he is hereby allowed a commission of thirty per cent upon any sum that shall be recovered by him and paid by the government of the United States into the treasury of the State of Maryland, as full compensation for his services and expenses in the prosecution of said claims of said State against the United States, it being the intent and meaning of this General Assembly that said commissioner shall not claim or receive any other or further compensation for his services rendered or to be rendered and expenses incurred, or to be incurred in the prosecution of said claims, except the commission contingent upon his success, and hereinbefore allowed him on such amount as may be recovered by him as aforesaid, and paid into the treasury of said State." The third section of the act directed the Comptroller of the Treasury "to issue his warrant to pay said Wailes a commission of thirty per cent on such sum as shall be recovered by him and paid by the government of the United States into the treasury of said State upon said claims, and that said commissions shall be payable upon the several amounts received on said claims as they are paid into the treasury." Laws of Maryland, 1878, c. 224, p. 359.

Statement of the Case.

In 1891 the amounts which had been collected from the several States and Territories and the District of Columbia by the Federal government under what was known as "the Direct Tax Act of 1861" were refunded. The act of Congress authorizing this refunding contained the proviso "that no part of the money hereby appropriated shall be paid out by the government of any State or Territory, or any other person, to any attorney, or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and an attorney or agent." The act moreover provided that none of the moneys directed to be paid to any State or Territory should be so paid "until the legislature thereof shall have accepted by resolution the sum herein appropriated and the trusts imposed, in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the government to receive said money for the use and purposes aforesaid." Act of March 2, 1891, c. 496, 26 Stat. 822.

The General Assembly of Maryland accepted these terms and provisions, and $371,299.83 were paid to the State by the Federal government. Subsequently thereunder the General Assembly directed that $202,645.71 of the amount thus received should be applied to the payment of the state debt, and that the balance should be invested for the benefit of the sinking fund.

The plaintiff in error began proceedings by petition for mandamus against the defendant, Comptroller of the State, to compel him to draw a warrant on the Treasurer in his favor for the payment of $111,389.94, being 30 per cent on the $371,299.83, which had been paid to the State by the Federal government. The petition was dismissed, and an appeal was taken to the Court of Appeals of Maryland. In that court (at the October term, 1892) the judgment below was affirmed. *Wailes* v. *Smith*, 76 Maryland, 469, 475.

The Court of Appeals rested its conclusion upon the following grounds:

(1) That the duties imposed on the Comptroller by the act upon which the plaintiff relied involved discretion and judg-

ment, and, therefore, their performance could not be compelled by mandamus.

(2) That under the Constitution of the State no money could be drawn from the treasury without a specific appropriation, and the Comptroller could not be compelled by mandamus to draw a warrant on the Treasurer where, as in this case, there was no appropriation.

(3) That the act under which the plaintiff had been employed did not undertake to authorize the Comptroller to draw a warrant for the compensation therein provided for without a previous appropriation, and that no appropriation therefor was made by the act itself.

(4) That even if the contract provided for the deduction, without appropriation, of the stipulated compensation from the amount collected, the deduction could not have been made from the money refunded, as it had been appropriated by Congress and received by the State upon the express condition that no such deduction should be made.

(5) That the contract did not contemplate a commission on the amount of the direct tax refunded, but only on claims held by the State against the United States, which were specifically referred to in the contract of 1872. That inasmuch as the direct tax had been lawfully assessed and paid, the State had no claim against the United States for the amount collected, at the time when the contract was made, and therefore there could have been no reference to that amount in the contract.

The plaintiff brought the case here by writ of error. The defendant in error, by the Attorney General of the State, moved to dismiss, not only because of want of jurisdiction apparent on the face of the record, but also because of the following facts, which, it is asserted, have occurred since the writ of error was allowed: In 1894 the General Assembly of Maryland directed the Comptroller to draw his warrant or warrants upon the treasury for the sum of $20,000 in favor of plaintiff in error, "in compensation for effective services rendered by him in securing the refund by the United States of the sum of $371,299.83, that being the *quota* of this State for the direct tax paid by the State of Maryland, in pursuance

of the act of Congress approved August 5, 1861. Provided, however, that the sum of $20,000 hereby appropriated is paid by the State and received and accepted by the said Sidney I. Wailes, upon the express agreement and condition that the same shall be in full payment, discharge, and satisfaction of all claims and demands whatsoever of said Sidney I. Wailes against the State for compensation for services claimed to have been rendered by him under the act of 1878, c. 224, in connection with the recovery and payment of the direct tax by the United States under the act of Congress of March 2, 1891." Laws of Maryland, 1894, c. 233, p. 296; and the plaintiff in error has received the sum thus appropriated, and has given his receipt for the same as being "in payment of a special appropriation made by the General Assembly of 1894, in my favor in compensation," "for efficient services rendered by me in securing," etc.

These allegations are attested by the affidavit of the State Comptroller.

Mr. John Prentiss Poe, Attorney General of the State of Maryland, for the motion.

Mr. John T. Morgan opposing.

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

Without considering the effect of the act of the General Assembly of 1894, and of the receipt by the plaintiff in error of the money therein appropriated, we think it clear that the motion to dismiss must prevail. The judgment of the Court of Appeals of Maryland proceeded upon the theory that there was no ministerial duty resting on the Comptroller to draw a warrant in favor of the plaintiff in error, because no appropriation had been made by the General Assembly for the payment of his claim. This conclusion was clearly decisive of the whole controversy and involved no issue of which we have jurisdiction. Even if the act of 1878, upon which the plain-

tiff in error relies, would, under ordinary circumstances, have authorized the Comptroller to deduct from any sum paid to the State by the Federal government in consequence of his exertions the amount of the stipulated compensation, that authority would have had no application to the amount collected by the State as a repayment by the United States of the "Direct Tax." By the terms of the act of Congress the authority to do this was denied. The money therefore passed to the State with the express obligation not to make this deduction, and the State's acceptance clearly bound her to the condition imposed; she could not accept the gift, and at the same time repudiate the condition. Thus the act of acceptance abrogated whatever authority might have otherwise existed to deduct commissions. If the collection was not made by the plaintiff in error, of course he was entitled to no commission under his contract. If the collection was made by him under his contract, the conditions which were imposed by Congress, and by assent to which alone the money was collected, prevent his asserting any right to compensation out of the fund, or averring the existence of any contract requiring the State to deduct his commission from the amount collected. As the State, when she took the money, was bound by the condition upon which the payment was made, so the plaintiff in error, if he made the collection, is equally bound thereby. This conclusion applies even if it be conceded that the State was under contract to pay from her treasury the amount of commission claimed. There being no substantial basis for the contention that the plaintiff has a contract right to be paid a commission out of the fund which the State has received from the Federal government, he is entitled to compensation, if so entitled at all, only out of the general funds of the State.

The finding of the Maryland Court of Appeals, that there was no fund in the state treasury upon which the Comptroller could lawfully draw his warrant, because there had been no appropriation made by the state legislature for the payment of the commissions here claimed, was decisive of the case and involved no Federal question. *Chouteau* v. *Gibson*, 111 U. S. 200; *Detroit City Railway Co.* v. *Guthard*, 114 U. S. 133.

Dismissed.

STATLER *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

No. 770. Argued March 7, 1895. — Decided March 25, 1895.

The first count in an indictment containing three counts charged the accused with "having counterfeit coin in his possession, with intent to defraud certain persons to this grand inquest unknown." The jury found him "guilty in the first count for having in possession counterfeit minor coin. Not guilty as to second and third counts." *Held*, that the verdict was a general verdict of guilty under the first count, and that the words attached did not qualify the conclusion of guilt.

THE case is stated in the opinion.

Mr. Thomas B. Alcorn for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error. *Mr. William H. Pope* was on his brief.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error was prosecuted for committing offences punishable under Rev. Stat. 5458. The indictment contained three counts. The first charged him with "having counterfeit coin in his possession with intent to defraud certain persons to this grand inquest unknown;" the second, with having with like intent attempted to pass such coin; and the third, with actually passing such coin with criminal intent. On being arraigned, the defendant pleaded not guilty, presenting a written plea to that effect, which was placed on the indictment as follows: "Defendant admits having the coins in his possession set forth in the indictment, and knowing that they were counterfeit, but pleads not guilty of the intent of passing or intending to pass same, or to defraud any person with the same."

On the trial the government abandoned the second and third counts. Under the first count, as the fact of possession

of the counterfeit coin was admitted, the only issue presented to the jury was whether the intention to defraud existed. The jury found a verdict on May 14, 1894, after the adjournment of the court, which was signed by all its members, and, being sealed, was opened by the court on the following day, May 15. It was as follows: "The jury finds the defendant guilty in the first count for having in possession counterfeit minor coin. Not guilty as to second and third counts."

The defendant moved in arrest of judgment for the following reasons: First, "the jury has not found the defendant guilty of any offence under the law; second, the verdict, to wit, the jury finds the defendant guilty for having in possession counterfeit minor coin; not guilty as to the second and third counts, clearly indicates that the jury did not intend to find the defendant guilty under the act of Congress of intending to defraud any person." The motion was overruled and sentence imposed. The defendant brought the case here by error.

In order to determine the effect of the words attached by the jury to the finding of "guilty in the first count," it is necessary to ascertain whether the verdict was special or general.

A special verdict is defined by Blackstone to be one "Where the jury state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that is, if upon the whole matter the court should be of the opinion that the plaintiff had cause of action, then they find for the plaintiff; if otherwise, for the defendant. . . . Another method of finding a species of special verdict is when the jury find generally for the plaintiff, but subject nevertheless to the opinion of the judge of the court on a special case stated by the counsel on both sides with regard to matter of law." 4 Bl. Com. 377, 378.

Under this definition, it is evident that the verdict here considered was not a special verdict. Indeed, it is settled beyond question that a verdict of guilty, without specifying any offence, is general, and is sufficient, and is to be understood as referring to the offence charged in the indictment. *St. Clair*

v. *United States*, 154 U. S. 154; *Bond* v. *The People*, 39 Illinois, 26; *State* v. *Jurche*, 17 La. Ann. 71; *State* v. *Curtis*, 6 Ired. (Law) 247; *State* v. *Tuller*, 34 Connecticut, 280; *State* v. *Morris*, 104 N. C. 837.

The verdict being general and not special, any words attached to the finding "guilty on the first count" are clearly superfluous and are to be so treated. In Trials per Pais (8th ed. 1766, p. 287) the rule is thus stated: "If the jury give a verdict of the whole issue and of more, . . . that which is more is surplusage and shall not stay judgment, for '*utile per inutile non vitiatur*.'" Bishop on Criminal Procedure, p. 623, section 1005 *a*, is, substantially, to the same effect: "The words being 'the finding of lay people,' need not be framed under the strict rules of pleading, or after any technical form. Any words which convey the idea to the common understanding will be adequate. And all fair intendments will be made to support it. To say, therefore, that the defendant is 'guilty,' or guilty of an offence named which is less than the whole alleged, is sufficient, without adding 'as charged in the indictment;' for the latter will be supplied by construction. So, likewise, a general finding of 'guilty' will be interpreted as guilty of all that the indictment well alleges. . . . Surplusage in a verdict may be rejected, being harmless, the same as in pleading. And the verdict must be construed as a whole, not in separate parts." In *Patterson* v. *United States*, 2 Wheat. 221, 225, this court, speaking through Mr. Justice Washington, said: "If the jury find the issue and something more, the latter part of the finding will be rejected as surplusage." *Commonwealth* v. *Judd*, 2 Mass. 329; *Armstrong* v. *The People*, 37 Illinois, 459; *State* v. *Yocum*, 117 Missouri, 622; *Arnold* v. *State*, 51 Georgia, 144; *Henry* v. *Raiman*, 25 Penn. St. 354.

Reading the verdict, here considered, by the light of these elementary principles, the words "for having in possession counterfeit minor coin," attached to the words "guilty in the first count," are obviously superfluous, and striking them from the verdict leaves it, in all respects, complete and responsive to the charge. The wisdom and justness of the rule is shown,

by applying it to the verdict rendered in this case. The plea made by the defendant having admitted the possession by him of the counterfeit coin, the only issue submitted to the jury was the intent to defraud. To presume that the verdict which found the defendant "guilty under the first count" was predicated on the mere possession without the intent, involves the conclusion that the jury found the defendant guilty, because of the existence of a fact from which it was admitted no guilt could result. To allow the superfluous words which were attached to the finding of guilty to have the effect here claimed for them, would compel us to read the verdict as saying, "We find the defendant guilty because he concedes that he possessed the counterfeit coin, although it is admitted he cannot be guilty from the fact of such possession alone," that is, "We find him guilty although he is not guilty." The record leaves no room for doubt that the words "for having in possession counterfeit minor coin," which were attached to the verdict, were merely words identifying the first count, and were not and could not have been intended to qualify the verdict of guilty. The indictment was endorsed as follows: "Indictment for having in possession counterfeit minor coin; second, attempting to pass same; third, passing the same." The words attached to the verdict are simply those found on the back of the indictment describing the first count, and this fact indicates that the jury affixed them simply as words of description of the first count, and therefore did not intend by their use to qualify in any way the conclusion of guilt expressed in their verdict.

Affirmed.

UNITED STATES *v.* SWEENY.[1]

APPEAL FROM THE COURT OF CLAIMS.

No. 889. Submitted March 5, 1895. — Decided March 25, 1895.

In computing the time of service which entitles an officer in the army to longevity pay, service in a volunteer regiment is not service "in the army of the United States" within the meaning of the 15th section of the act of July 5, 1838, c. 162, 5 Stat. 256.

THIS was a petition originally filed by Thomas W. Sweeny, brigadier-general on the retired list of the army, to recover the sum of $182.05, charged against him by the United States, as to which amount he was claimed to be in arrears, and paid by him under protest. The petitioner having died after the commencement of the action, the appellee was admitted to prosecute the claim, as administratrix.

The case was argued and submitted in May, 1893, and the petition dismissed. Claimant applied for a rehearing, which was granted, and the case again submitted and decided by a majority of the court in her favor. Judgment was thereupon entered in the sum of $182.05, and the court made a finding of facts, of which the following is a summary:

On December 3, 1846, Thomas W. Sweeny, appellee's intestate, being at that time a lieutenant in the Second New York Volunteers, was mustered into the military service of the United States, under the act of May 13, 1846, authorizing the President to accept the services of 50,000 volunteers for the prosecution of the existing war between the United States

[1] This case was commenced in the Court of Claims by a petition in which the plaintiff was styled "Sweeny." After his death his administratrix appeared under the same name. In the government's traverse the case was entitled *Sweeney* v. *United States*, and under that title went to judgment in the court below. The United States as appellants brought it here under the title of *United States* v. *Sweeney*, and under that title it went to judgment here. The name of the appellee is here restored to its original spelling.

Statement of the Case.

and Mexico. He served in this capacity until March 17, 1848, when, having received a commission as second lieutenant in the Second United States Infantry, he was mustered into the regular service of the United States. Some time after March 3, 1853, five years from the date of his commission in the regular army, he charged for and was paid his first longevity ration for five years' prior service, under the act of July 5, 1838. In September, 1855, he charged, in his voucher for pay, one longevity ration for the period from December 4, 1851, (five years from his muster into the service *as a volunteer*,) to March 3, 1853, and was paid this item by the paymaster, October 15, 1855. The disbursement of this longevity ration from December 4, 1851, to March 3, 1853, was never approved or allowed by the accounting officers, but was disallowed by them upon the first examination of the paymaster's voucher. The matter was reported by the Secretary of War to the Second Comptroller, who, on July 4, 1856, filed a written opinion to the effect that the time spent in the military service as a volunteer under the act of May 13, 1846, could not be counted in the longevity rations under the act of July 5, 1838. In accordance with this decision, the voucher was disapproved by the Second Auditor and by the Second Comptroller, and the amount charged against Lieutenant Sweeny.

On August 31, 1857, he was paid the amount of the second longevity ration from December 3, 1856, to August 31, 1857, and after that date he was successively paid his second ration for the respective months down to February, 1858. But these payments were disallowed in due course by the accounting officers, and the appellee's intestate was again required to refund.

In 1892, he was informed that he was in arrears to the United States in the sum of $182.05, which he paid under protest, and subsequently began this suit to recover the amount so paid, upon the ground that he ought to have been credited with longevity rations due on account of his service as a volunteer in the Mexican war, the first two of which rations he had been required to refund, while the last two had never been paid to him.

Opinion of the Court.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. Joseph W. Stryker for appellee.

Mr. Justice Brown delivered the opinion of the court.

This case involves the question whether, in computing the time of service which entitles an officer to longevity pay, service in a volunteer regiment is service "in the army of the United States," within the meaning of the act of July 5, 1838, c. 162, 5 Stat. 256, the fifteenth section of which (p. 258) enacts "that every commissioned officer of the line or staff, exclusive of general officers, shall be entitled to receive one additional ration per diem for every five years he may have served or shall serve in the army of the United States."

Claimant was an officer of a New York volunteer regiment, and was mustered into the service of the United States December 3, 1846, and so remained until March 17, 1848, during the Mexican war, when he accepted a commission as second lieutenant in the regular army. After serving in the army of the United States five years, he became entitled to the extra ration provided by the act of 1838; and the question is, whether that term of five years began to run from the day he was first mustered into the service as a volunteer, or from the day he received his commission as a lieutenant in the regular army.

That the act of 1838 was passed with special reference to the regular army is evident, not only from the fact that there were no volunteers at that time in the service of the United States, but from the title of the act, "To increase the present military establishment of the United States, and for other purposes," and from its numerous provisions, all of which bore upon its manifest purpose to increase and reorganize the regular army. By the act of May 13, 1846, c. 16, 9 Stat. 9, a state of war was recognized to exist between the United States and Mexico, and for the purpose of prosecuting such war to a successful termination, the President was authorized to call for and accept the services of any number of volunteers,

not exceeding fifty thousand, to serve twelve months, or until the end of the war; by section 4, they were declared to be subject to the rules and articles of war, and in all respects, except as to clothing and pay, placed on the same footing with similar corps of the United States army; and in section 9, there was a further provision that they should have the organization of the army of the United States and the same pay and allowances. This act undoubtedly entitled the claimant to the same pay as a volunteer during his term of actual service that he would have received if he had been in the regular army; but it does not follow that, after his service was concluded and he was mustered out, such past service was intended to be recognized as a service in the army of the United States. The act, so far from amalgamating the volunteers and the regular army, distinguishes the two, and limits their identity to the receipt of the same pay and allowance. This is the more obvious from the very next act, passed upon the same day, which authorizes an increase of the rank and file of "the army of the United States" by voluntary enlistments. The first act dealt exclusively with the militia and volunteers; the second with the regular army.

Very little light is thrown upon the question by prior legislation. It is true that the Constitution provides that "the President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." Nothing is said in this connection of volunteers; but the object of the provision is evidently to vest in the President the supreme command over all the military forces, — such supreme and undivided command as would be necessary to the prosecution of a successful war. The regular army dates its birth from the act of September 29, 1789, c. 25, 1 Stat. 95, which continued in the service of the United States a small military force, which had been held subject to the authority of Congress when the Constitution took effect. This act was superseded the following year by an act for regulating the military establishment, (act of April 30, 1790, c. 10, 1 Stat. 119,) but nothing was said with regard to volunteers until

May 28, 1798, when, in view of a possible war with France, the President was authorized to raise a provisional army of volunteers, who, when called into actual service, were to receive the same pay, rations, forage and emoluments of every kind, except bounty and clothing, as the other troops to be raised by the act. Act of May 28, 1798, c. 47, 1 Stat. 558. By subsequent acts, passed at different critical periods, the President was authorized to accept the services of volunteers, who, though treated while in actual service as a part of the army of the United States, were so considered only in a limited sense, and while in actual service.

Their time of service as such volunteers never seems to have been computed in estimating the five years, after which they were entitled to longevity rations, until the act of March 2, 1867, c. 159, 14 Stat. 434, entitled "An act declaring and fixing the rights of volunteers as a part of the army," the first section of which provided that "in computing the length of service of any officer of the army, in order to determine what allowance and payment of additional or longevity rations he is entitled to, . . . there shall be taken into account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the regular army, or since the nineteenth day of April, eighteen hundred and sixty-one, in the volunteer service, either under appointment or commission from the governor of a State, or from the President of the United States."

It seems to us this act is decisive of the question. It provides in substance that, in estimating the length of service for the payment of longevity rations, he shall be credited both for his service as an officer of the regular army, or, since the nineteenth day of April, eighteen hundred and sixty-one, as an officer in the volunteer service. The object of the act was evidently, first, to extend to such volunteer officers as had served in the army since the breaking out of the civil war, the same privilege with respect to longevity rations as had, by the act of 1838, been already secured to officers of the regular army; and second, to limit that privilege to those

who had served since that date. If those who served before that date had been treated as entitled to longevity pay, the act was wholly unnecessary, as there was no question that, under the act of 1838, the officers of the regular army were so entitled; and the extension of the same privilege to officers of the volunteer army was evidently a new provision, and to be restricted to those who had served as such since the breaking out of the war. It is a plain case for the application of the maxim: *Expressio unius est exclusio alterius.* Had it been shown that, prior to the passage of this act, the practice of the department had been to estimate the length of an officer's service as a volunteer, in making up the five years' service entitling him to longevity pay, the act might have been construed to be in affirmance of the previous law; but, so far as the record of this case shows, the practice appears to have been the other way, and the act must be treated as establishing a new rule for such officers in the volunteer service after April 19, 1861.

The judgment of the court below must, therefore, be

Reversed, and the case remanded to the Court of Claims with direction to dismiss the petition.

COCHRAN AND SAYRE *v.* UNITED STATES.

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

No. 815. Argued and submitted March 4, 1895. — Decided March 25, 1895.

In an indictment against the president and the assistant cashier of a national bank for making a false entry in a report, under Rev. Stat. § 5209, the report need not be described with technical accuracy; nor is it necessary to allege that the report in which the false entry was made was verified by the oath or affirmation of the president or cashier, or attested by the signature of the directors.

In such an indictment the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the

Statement of the Case.

offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Several objections to the admissibility of evidence considered and disposed of.

A note whose payment is guaranteed by a national bank is a liability of the bank which is required by law (Rev. Stat. § 5211) to be shown in the report to the Comptroller of the Currency.

Some objections to the charge considered and disposed of.

The defendants requested the court to charge the jury as follows: "You are further instructed that the defendants are presumed to be innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in their favor." The court refused to give this instruction, but instead thereof gave a carefully prepared definition of reasonable doubt, without referring to the presumption of innocence which attends an accused at every stage of the proceeding. *Held*, following *Coffin* v. *United States*, 156 U. S. 432, that this was error, as the defendants were entitled to an instruction upon the point of the presumption of innocence, if requested.

This was a writ of error to review a conviction of William H. Cochran, president, and Robert H. Sayre, assistant cashier, of the First National Bank of Del Norte, Colorado, for making a false entry in a report to the Comptroller of the Currency. On November 22, 1893, the grand jury presented three separate indictments against the plaintiffs in error, which were numbered 959, 960, and 992 respectively. These indictments were identical in language, except so far as it was necessary to change them, so that the plaintiffs in error could both be charged as principals, and as accessories of each other. In No. 959, both were charged as principals, for making false entries in their reports. In No. 960, Sayre was charged with making, and Cochran with aiding, abetting, and procuring Sayre to make such false entries; and in No. 992, Cochran was charged with making, and Sayre as an accessory.

Each indictment contained twelve counts, and on motion to quash, the tenth, eleventh, and twelfth counts of each indictment were held to be insufficient. On May 11, 1894, the three indictments were consolidated and tried as one, and on

June 6, 1894, the defendants were convicted upon the first count of the indictment originally numbered 960.

Whereupon defendants sued out this writ of error.

Mr. E. F. Richardson, (with whom was *Mr. Charles S. Thomas* on the brief,) for plaintiffs in error.

Mr. Solicitor General, for defendants in error, submitted on his brief.

Mr. Justice Brown delivered the opinion of the court.

As the defendants were convicted solely upon the first count in indictment No. 960, it is only necessary to consider the questions arising upon this count.

1. The first assignment of error relates to the sufficiency of this count, which charges that "Robert H. Sayre, . . . William H. Cochran being then and there president, the said Robert H. Sayre being then and there assistant cashier of the First National Bank of Del Norte, Colorado, . . . did make, in a certain report of the condition of the First National Bank, . . . at the close of business on the 30th of September, 1892, made to the Comptroller of the Currency in accordance with the provisions of section 5211 of the Revised Statutes of the United States, a certain entry."

The first objection to the indictment is that as section 5211, referred to in this count, provides that "every *association* shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors," the indictment should aver that the report was made by the *association*. The offence charged, however, is not the making or the failure to make the report under section 5211, the failure to make which report subjects such association to a penalty under section 5213, but the making of a false entry in a report, under section 5209, which provides that "every president, director, cashier, teller, clerk, or agent of any association,"

who makes any such false entry in any report, shall be guilty of a misdemeanor. Section 5209 is the statute violated, and the reference to section 5211 is merely for the purpose of identifying the report, as one required by law to be made. In addition to this, the indictment refers to the report as one made "in accordance with the provisions of section 5211," which would imply that it was made by the association, and was properly verified and attested, as required by that section. Had the indictment been against the association for a failure to make such reports, it would doubtless be necessary to aver that the report was required to be made by the association, but as the report is mentioned only for the purpose of showing that it was one required by law to be made, it need not be described with technical accuracy.

2. The second objection is that Sayre had no authority to make the report, being only an assistant cashier. While, under section 5211, the report in question ought to be made by the association, verified by the oath or affirmation of the president or cashier, and attested by the signature of three directors, it was no less an offence, under section 5209, for an assistant cashier to make a false entry in a report which was to be subsequently verified by the oath of the president or cashier in person, than it would have been if the entry had been made by the cashier who verified the report. As the language of section 5209 applies not only to the president and cashier, but to any director, teller, or agent of any such association, Sayre as assistant cashier certainly fell within the category of clerk or agent. If he made a false entry in a report required by section 5211, it made no difference whether the report was subsequently verified by him, or by the president or cashier in person. There is no penalty affixed by section 5211 to the false verification of the president or cashier. The offence is in making the false entry, with intent to injure or defraud the association, etc.

For the reason above given, we do not think it necessary to allege that the report in which the false entry was made was actually verified by the oath or affirmation of the president or cashier, or attested by the signature of the directors

— or at least that the fact that it is averred to have been made "in accordance with the provisions of section 5211" is a sufficient averment that it was properly verified and attested. If such report were not properly verified and attested, it would doubtless be competent for the Comptroller of the Currency to reject it, or to proceed against the association under section 5213 for failure to make and transmit a proper report. But, if an assistant cashier makes a false entry in a report, which is designed to be and is made use of as a report to the Comptroller of the Currency under section 5211, it is difficult to see why it is not equally an offence, if the Comptroller of the Currency chooses to accept such report without the proper attestation and verification.

These cover all the objections taken to the indictment in the brief of defendants' counsel.

Few indictments under the national banking law are so skilfully drawn as to be beyond the hypercriticism of astute counsel — few which might not be made more definite by additional allegations. But the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Evans* v. *United States*, 153 U. S. 584, 587, 588; *Batchelor* v. *United States*, 156 U. S. 426.

3. Error is assigned to the ruling of the court permitting the district attorney to ask of the witness Charles W. Thomas whether he had ever had any experience in a bank, or the business of a bank, before he came to Colorado. Thomas, who, it subsequently appears, was made cashier of the bank, gave evidence tending to prove that he first met Cochran in the summer of 1889, on a visit to Colorado, and that since May 1, 1890, he had lived at Del Norte. He was then asked the question, "Had you ever had any experience in a bank, or the business of a bank, before you came to Colorado?" There was no error in permitting this interrogatory to be

put. Questions regarding the age, antecedents, business, and experience of a witness are largely within the discretion of the court, and unless it manifestly appears that such questions are put for an improper purpose, such discretion is not reviewable on error. The weight to be given to the testimony of this witness as to the entries in question might depend largely, not only upon his intelligence, but upon his familiarity with the banking business. If he were a man of previous experience in banking, he would be the better qualified to explain to the jury the significance of the entries in question, and the manner in which the reports to the Comptroller of the Currency were made up. If, upon the other hand, he were appointed, because of his inexperience, as a merely perfunctory official, and because he was intended to be made use of as a tool of the defendants in carrying out their plans, this was a fact which the jury were entitled to know, and an item of testimony having some bearing upon the intent to defraud in making the false entry in question.

4. The objection to the following question put to Thomas is equally untenable: "When the Comptroller would call on the bank for statements, what was your habit as to taking any part in the getting up of such statement?" His answer, "I never made any statements," shows of itself that the question was not prejudicial in the answer actually given. If this be the case, the materiality or propriety of the question is of no importance. Beyond this, however, the witness was the cashier of the bank, and was required by section 5211 to verify the reports to the Comptroller of the Currency. Naturally, he was the one to prepare these reports, or at least to take part in preparing them, and if he were not called upon to do so, the fact was at least deserving of explanation, and properly the subject of comment by counsel. The pertinence of the question was manifest in view of his subsequent testimony that "the statements were handed to him, and they told him that the statements were all right, and he would sign them. . . . The reports were never made out by witness, but by some one else. They were made out mostly by Sayre, sometimes under the direction of Cochran, and sometimes written out by other

parties in the bank. . . . Either Cochran or Sayre told him that the statements were all made out ready to sign, and he signed them without examining them, as they were handed to him, and without assisting in their preparation, or comparing them with the books of the bank."

5. So also the question that was put to the witness when shown a note of the Hanover National Bank, which he testified was filled out and signed in the handwriting of the defendant Sayre, as to whether it was a rediscounted note, was perfectly proper, although objected to upon the ground that the witness had shown an entire lack of qualification to pass upon the question whether the note was a rediscount or not. As it appears that the witness had been acting cashier in the bank for two months, even if he had had no prior experience, he could hardly have failed in that time to be competent to express an opinion as to whether a note was a rediscount or not. The weight to be given to his testimony was of course a question for the jury.

6. The fifth assignment is to the introduction of the report of the bank of September 30, 1892, to the Comptroller of the Currency, which was objected to upon the ground, *first*, that the indictment charged the defendants, one as president and the other as assistant cashier, with making the reports, while the report in question appears to have been made and verified by Charles W. Thomas, as cashier, and to have been signed by different parties as directors; *second*, because neither of the defendants could be convicted under the indictments as principals in making the said reports, but only as accessories, if at all; *third*, because no one except he who verified the reports could be convicted under this indictment; and that the defendants were charged with having, as president and assistant cashier, made the false reports and entries therein, whereas the statements offered were signed by defendant Cochran as a director, while the defendant Sayre did not sign the reports at all.

The *first* objection is untrue as a matter of fact. The indictment does not charge the defendants with making a false report, but that they "did make in a certain report . . . a certain

entry, under the head of 'liabilities' and . . . that the said entry so made as aforesaid was then and there false."

The argument of the defendants assumes that the making of the entry, and the making of the report, are the same thing, whereas in fact they are wholly different. By section 5211, the report must be made by the *association*, and must be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors. But, under section 5209, there is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by section 5209 is affixed to the one who makes any false entry in any book, report, or statement of the association; and that penalty is applicable to any officer or agent of the bank, who actually makes the entry, with intent to injure or defraud, or to deceive any agent appointed to examine the affairs of any such association. As was observed by Mr. Justice Woods in *United States* v. *Britton*, 107 U. S. 655, 662, to describe the offence of making a false entry requires the pleader to aver "(1) that the accused was the president or other officer of a national banking association, which was carrying on a banking business; (2) that being such president or other officer, he made in a book, report, or statement of the association, describing it, a false entry, describing it; (3) that such false entry was made with intent to injure or defraud the association, or to deceive any agent, describing him, appointed to examine the affairs of the association." The indictment in this case is a substantial copy of that approved by this court in the *Britton case*, except that the false entry is charged to have been made in a report to the Comptroller of the Currency, instead of an entry made in one of the books of the bank.

The *second* objection, that the defendants could not be convicted as principals in making the reports, but only as accessories, would probably be true, if they were charged with making such reports. And the *third* objection, that no one except he who verifies the reports can be convicted under said indictments, is unsound as matter of law, for the reason

above stated, that the penalty is affixed to the making of the false entry, and not at all to the making of the report. While the officers of the bank who verify and attest the reports are doubtless responsible for what is contained in them; if, as matter of fact, and as often happens, the entries in such reports are actually made by other agents of the association, it does not diminish the criminality of such agents in the eye of the law, that the reports are ostensibly those of the president and cashier. If the statements of Thomas be taken as true, he, although verifying the reports as cashier, could not be held criminally liable for their falsity, since he took and believed the statements of Cochran and Sayre as to the truth and correctness of such reports. If this be true, there was lacking on his part that intent to defraud the association, or to deceive the Comptroller of the Currency, which is made, by section 5209, a material element of the offence. If the persons who actually prepared the report, and made the false entries therein, cannot be held responsible, because they did not ostensibly verify or attest the reports, then, however false such reports might be, no one could be held criminally responsible. This would certainly be an easy method of making false reports, and avoiding all liability therefor. The person who in fact made the false entries would not be liable, because he did not verify the report. The person who verified the report would not be liable, because he was wholly ignorant of the truth or falsity of the entries, and innocent of any criminal intent. His ignorance of the truth of the report might not and probably would not excuse him from liability in a civil action for negligence, but he could only be held criminally for an evil intent actually existing in his mind — at least unless his ignorance were wilful, or his negligence in failing to inform himself so gross as to characterize his conduct as fraudulent.

As it was admitted that Sayre actually made the entries in and filled out the report in question, he was properly charged as principal; and it was a question for the jury to say whether Cochran, the president, so far aided and abetted him in making such entries as to make him liable as accessory.

7. A large number of other objections were made and exceptions taken to the admission of testimony, which may not arise upon another trial, and which it is unnecessary here to discuss. Certain of them, however, are based upon the character of the false entry alleged to have been made, and go to the very foundation of the prosecution. In this particular, the indictment charges the defendants with making "a certain entry under the head of 'liabilities' in said report, numbered '19,' which said entry was then and there in the words and figures following — that is to say: '19. Liabilities other than those above stated, none;' and which said entry, so as aforesaid, made in said report, then and there purported to show, and did in substance and effect indicate and declare, that said association had no other debt and liability other than those debts and liabilities named and set forth in said report, under said head of 'liabilities,' named and set forth in said report, under said head of 'liabilities,' in said report."

After setting forth the general falsity of the entry, the indictment avers "that the said entry so made, as aforesaid, was then and there false, in this, that the said association was then and there indebted and liable to the Hanover National Bank of New York city in the sum of five thousand dollars, evidenced by a certain promissory note executed by the said Robert H. Sayre and one A. H. Clark, and payment thereof guaranteed by said association to said Hanover National Bank of New York city, as he, the said Robert H. Sayre, then and there well knew."

The note was made August 21, 1892, and was payable four months after date to the First National Bank of Del Norte, and consequently was not due until December 21. The guaranty, which was endorsed upon the back, was as follows: "For value received we hereby guarantee payment of the within note at maturity, or at any time thereafter, with interest at the rate of six per cent per annum until paid, waiving demand or notice of non-payment or protest. W. H. Cochran, president."

The indictment, therefore, raises the question whether an unmatured note, the payment of which at maturity is guaranteed

by the bank, is such a liability as is required by law to be shown in the report to the Comptroller of the Currency. The fact that the note had not matured cuts no figure in the case. If the bank had *made* the note, it would not be claimed that the note was not a liability, though it were not yet due. The real question is, whether the fact that the bank was only contingently liable prevented its character as a "liability" of the bank from attaching.

We know of no definition of the word "liability" either given in the dictionaries or as used in the common speech of men, which restricts it to such as are absolute, or excludes the idea of contingency. In fact, it is more frequently used in the latter sense than in the former, as when we speak of the liability of an insurer or a common carrier, or the liability to accidents or to errors; and in Webster's Dictionary the word "liable" is said to refer "to a future possible or probable happening, which may not actually occur: as horses are liable to slip; even the sagacious are liable to make mistakes."

That Congress must have contemplated contingent liabilities is evident, when we consider the object of section 5211, which was to apprise the Comptroller of the Currency and the public of the condition of each national bank at stated periods. It is manifest that a report which failed to specify the liabilities which the bank had assumed, and which it might be called upon to discharge, would represent very imperfectly the actual financial status of the association. While it is true that the bank could not be made chargeable with the payment of the note until its maturity, the guaranty in this case was not that the makers were solvent, or that the bank should pay in case they could not be compelled to do so, but was a guaranty of the *payment* of the note at maturity — such a guaranty in fact as, within the recognized principles of law, would authorize the holder to proceed immediately against the guarantor, without exhausting his remedy against the makers. *City of Memphis* v. *Brown*, 20 Wall. 289, 310; *Arents* v. *Commonwealth*, 18 Grattan, 750; *Campbell* v. *Baker*, 46 Penn. St. 243, 245; *Roberts* v. *Riddle*, 79 Penn. St. 468; *Douglass* v. *Reynolds*, 7 Pet. 113, 126.

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We have held that a contract of guaranty is within the implied powers of a national bank. *People's Bank* v. *National Bank*, 101 U. S. 181. And in this case there seems to have been good ground for believing that the note actually belonged to the bank, as Cochran, president of the bank, in his letter of December 14, 1891, transmitting the original note to the cashier of the New York bank, says: "We enclose a note of five thousand dollars, signed by Sayre and Clark, guaranteed by us, which please *place to our credit.*" It appears, too, by the testimony of the cashier of this bank, that the note was discounted by the cashier of the Hanover National Bank, December 21, 1891, for account of the First National Bank of Del Norte, which was the original transaction for the same amount executed by the same parties.

8. Several of the instructions to the jury relate to the questions whether the note given by Sayre and Clark was immediately discounted by the Del Norte Bank and the amount paid to Sayre, in which case the court charged that it was a loan to Sayre and that the note should have appeared in the report among the notes and bills rediscounted; or whether it was a sale of the note to the Hanover National Bank upon the credit of Sayre and Clark and the Del Norte Bank, in which case the court charged that all parties would be liable as makers, and the note should have appeared in the report under the head of bills payable. We fail to see how the defendant was prejudiced by these instructions. The material question was, not under what particular head the note should have appeared, but whether it should not have appeared somewhere in the report as a liability. In that view the court charged: "The pleader in setting it forth seems to have been in doubt as to whether it should be called one thing or another, and so he assumed that it was one which should have been mentioned under the head of liabilities other than those above stated; and I think he could reasonably do so, and that he may charge that the entry was not true, as he has done." Of course, the defendant in this connection could show that the entry was made under some other head, but no attempt appears to have been made to do so.

9. The thirtieth assignment is to an alleged error of the court in refusing to instruct the jury as follows: "You are instructed that a false entry in a report of a national bank officer or director to the Comptroller of the Currency, within the meaning of the Revised Statutes, section 5209, is not merely an incorrect entry made through inadvertence, negligence, or mistake, but is an entry known to the maker to be untrue and incorrect, and intentionally entered, while so knowing its false and untrue character. The intention to deceive is essential to constitute a violation of the statute, and you must be satisfied beyond a reasonable doubt from the evidence, first, that the defendants or one of them made a false entry in said report; and second, that it was made with the intention of misleading or deceiving the Comptroller of the Currency, or some other person or persons alleged in the said indictment."

The court in this connection charged: "There is no doubt that intent to injure and defraud must exist in order to make the party liable under this statute — that is to say, if the omission was ignorantly made, if it was made merely out of stupidity and because the parties did not understand what was required of them, there is no offence under the statute. The statute relates to intentional wrongdoing. The intent must have been, as laid in the indictment, to mislead and deceive one of these parties, either some of the officers of the bank or the officer of the government appointed to examine into the affairs of the bank. . . . So that you must find, not only the fact that there was an omission to make the proper entry but that it was with an intent to conceal the fact from somebody who was concerned in the bank, or concerned in overseeing it, and supervising its operations and the conduct of its business."

We think this charge practically covers everything contained in the instruction refused. Certainly the jury could not have convicted if they had found that the entry had been omitted through any inadvertence or negligence, or in ignorance of its untrue character.

10. The thirty-sixth assignment is to an error of the court in refusing to give the following instructions: "You are further instructed that the defendants are presumed to be

innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in their favor." In the recent case of *Coffin* v. *United States*, 156 U. S. 432, one of the instructions asked and refused was as follows: "The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are all entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt." The court instructed the jury as follows: "Before you can find any one of the defendants guilty, you must be satisfied of his guilt as charged in some of the counts of the indictment beyond a reasonable doubt." And again: "You may find the defendants guilty on all the counts of the indictments if you are satisfied that beyond a reasonable doubt the evidence justifies it." In other words, while the court refused to instruct as to the presumption of innocence, it did instruct fully as to reasonable doubt, and the contention was that, as the charge given by the court on the subject of reasonable doubt substantially embodied the statement of the presumption of innocence, the court was justified in refusing in terms to grant the latter. It was held that the charge that there could not be a conviction unless the proofs showed guilt beyond a reasonable doubt did not so completely embody the statement of the presumption of innocence as to justify the court in refusing, when requested, to inform the jury concerning the latter. The court drew a distinction between the presumption of innocence as one of the instruments of proof, contributing to bring about that state of case, from which reasonable doubt arises, and a condition of mind called reasonable doubt produced by the evidence.

In the case under consideration the court charged the jury that "these matters are to be established in your minds beyond reasonable doubt, and upon that subject as to what is a reasonable doubt, which should be heeded by the jury in a trial of this kind, I read an instruction prepared by defendants' counsel." There follows here a carefully prepared

definition of the words "reasonable doubt," but there is nothing in this request, as given by the court, which refers to the presumption of innocence, which attends the accused at every stage of the proceeding; and we think the defendants were entitled to an instruction upon that point, if requested. It is frequently assumed by courts that an instruction to a jury that they must not convict unless satisfied of the defendant's guilt, beyond a reasonable doubt, carries with it an implication that the presumption of innocence has been overborne by satisfactory evidence of guilt. This, as stated in the *Coffin case*, is the tenor of some of the authorities upon the subject; but in that case they were distinguished, and a presumption of innocence said to be "a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty;" while reasonable doubt is defined as a "condition of mind produced by the proof resulting from the evidence in the cause." "To say that the one is the equivalent of the other is, therefore, to say that legal evidence can be excluded from the jury, and such exclusion can be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them." We held that this could not be done — in other words, that the exclusion of an important element of truth could not be justified by correctly instructing as to the proof admitted. In the case under consideration, counsel asked for a specific instruction upon the defendants' presumption of innocence, and we think it should have been given.

The *Coffin case* is conclusive in this particular, and it results that the judgment of the court below must be

Reversed, and the case remanded with instructions to grant a new trial.

REAGAN *v.* UNITED STATES.

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

No. 755. Submitted March 4, 1895. — Decided March 25, 1895.

The offence of knowingly smuggling or clandestinely introducing goods etc., subject to duty into the United States without paying such duty, in violation of the provisions of Rev. Stat. § 2865, and of concealing such smuggled goods, is only a misdemeanor, and the defendant is only entitled to three peremptory challenges.

When a person accused of crime offers himself as a witness in his own behalf, the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant; but, on the other hand, the court may, and sometimes ought to, remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation; and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony.

In this case the defendant, accused of the offence of smuggling, was a witness on his own behalf. The court instructed the jury thus: "You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." *Held*, that there was, in this instruction, nothing of which complaint could reasonably be made.

THE case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Solicitor General for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On April 30, 1894, the defendant was found guilty by the verdict of a jury in the Circuit Court of the United States for the Western District of Texas of a violation of section 3082, Revised Statues, in unlawfully, fraudulently, wilfully, knowingly, and with intent to defraud the United States, receiving into his possession and concealing forty head of cattle which had been with like intent smuggled and introduced into the United States from the Republic of Mexico. Judgment having been entered on the verdict, he sued out this writ of error.

The first question presented is in respect to peremptory challenges. Section 819, Rev. Stat., after providing for challenges in capital offences, reads, "on the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges." The contention is that the offence charged is a felony, and that, therefore, defendant was entitled to ten peremptory challenges. The Circuit Court ruled otherwise, and allowed him only three. The question then is whether the offence charged is a felony. The claim of defendant is based upon the character of the punishment, which is a fine not exceeding $5000 nor less than $50, or imprisonment for any time not exceeding two years, or both. By § 5541, Rev. Stat., imprisonment for a period longer than one year may be in a penitentiary, and such an imprisonment, it is said, is the test of felony. It may be conceded that the present common understanding of the word departs largely from the technical meaning it had at the old common law. This departure is owing to the fact that the punishments other than death, to wit, forfeiture of the lands or goods of the offender, which formerly constituted the test of a felony, are no longer inflicted, at least in this country, and to the further fact that in many of the States offences are by statute divided into two classes, felonies and misdemeanors, the former including all offences punishable by death or imprisonment in a penitentiary, and the latter those punishable only by fine or imprisonment in a county jail, and in other States, in which no statutory classification is prescribed, many offences punishable by imprisonment in a

penitentiary are in terms declared to be felonies. These matters have thrown about the meaning of the word as ordinarily used no little uncertainty. Indeed, in Webster's Dictionary, after the common-law definition of the term, there are quoted from John Stuart Mill these pertinent observations: "There is not a lawyer who would undertake to tell what a felony is, otherwise than by enumerating the various kinds of offences which are so called. Originally, the word 'felony' had a meaning: it denoted all offences the penalty of which included forfeiture of goods; but subsequent acts of Parliament have declared various offences to be felonies, without enjoining that penalty, and have taken away the penalty from others, which continue, nevertheless, to be called felonies, in so much that the acts so called have now no property whatever in common, save that of being unlawful and punishable." 1 Mill's Logic, 40.

There is no statutory definition of felonies in the legislation of the United States. We must, therefore, look elsewhere for the meaning of the term. The question was recently before us in *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468, and Mr. Justice Brown, delivering the opinion of the court, after referring to the statutory provisions in some of the States, said: "But in the absence of such statute the word is used to designate such serious offences as were formerly punishable by death, or by forfeiture of the lands or goods of the offender. *Ex parte Wilson*, 114 U. S. 417, 423." See also *United States* v. *Palmer*, 3 Wheat. 610.

But in this case we need not refer to the common law for a classification of the offence. Section 2865, Revised Statutes, provides that "if any person shall knowingly . . . smuggle, or clandestinely introduce into the United States any goods, wares, or merchandise, subject to duty by law . . . without paying or accounting for the duty . . . every such person . . . shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding five thousand dollars or imprisoned for any term of time not exceeding two years, or both." By this section smuggling is in terms declared a misdemeanor. The penalty imposed is

substantially the same as that by § 3082, and the charge of which the defendant was convicted, under this section, was of receiving and concealing smuggled cattle. The latter offence is subordinate to the former. It therefore cannot be an offence of a higher grade. If, for instance, the crime of larceny was by statute classified as a misdemeanor, the receiving of stolen property should not, in the absence of clear language in the statute demanding it, be placed in a higher class. And so of smuggling; when that which is the principal offence is specifically defined a misdemeanor, the subordinate offence of receiving and concealing the smuggled goods ought not to be held a felony unless there be some statutory definition or equally significant provision. There is no such definition, and the punishment prescribed in the two sections is substantially the same. It is neither death nor forfeiture of the lands or goods of the offender. It is true the latter section provides that the smuggled goods shall be forfeited, but these may or may not be the property of the defendant; and the forfeiture of the thing, in respect to which an offence is committed, is not the equivalent of a forfeiture of the lands or goods of the offender. The ruling of the Circuit Court was correct. The offence was nothing but a misdemeanor, and the defendant was only entitled to three peremptory challenges.

A second objection is that the court gave this instruction: "You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit."

By the act of March 16, 1878, c. 37, 20 Stat. 30, a defendant in a criminal case may, "at his own request but not otherwise, be a competent witness." Under that statute it is a

matter of choice whether he become a witness or not, and his failure to accept the privilege "shall not create any presumption against him." This forbids all comment in the presence of the jury upon his omission to testify. *Wilson* v. *United States*, 149 U. S. 60.

On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As to that, he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness. The jury properly consider his manner of testifying, the inherent probabilities of his story, the amount and character of the contradictory testimony, the nature and extent of his interest in the result of the trial, and the impeaching evidence in determining how much of credence he is entitled to.

It is within the province of the court to call the attention of the jury to any matters which legitimately affect his testimony and his credibility. This does not imply that the court may arbitrarily single out his testimony and denounce it as false. The fact that he is a defendant does not condemn him as unworthy of belief, but at the same time it creates an interest greater than that of any other witness, and to that extent affects the question of credibility. It is, therefore, a matter properly to be suggested by the court to the jury. But the limits of suggestion are the same in respect to him as to others. It is a familiar rule that the relations of a witness to

the matter to be decided are legitimate subjects of consideration in respect to the weight to be given to his testimony. The old law was that interest debarred one from testifying, for fear that such interest might tend to a perversion of the truth. A more enlightened spirit has thrown down this barrier, and now mere interest does not exclude one from the witness stand, but the interest is to be considered as affecting his credibility. This rule is equally potent in criminal as in civil cases, and in neither is it error for the trial court to direct the attention of the jury to the interest which any witness may have in the result of the trial as a circumstance to be considered in weighing his testimony and determining the credence that shall be given to his story.

A reference to a few authorities upon this point may not be inappropriate. In *People* v. *Cronin*, 34 California, 191, 195, 204, this instruction was given: "The defendant has offered himself as a witness on his own behalf on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the *consequences* to him relating from the result of this trial, and all the *inducements* and *temptations* which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it." This was sustained, the Supreme Court saying: "The instruction of the court in relation to the credibility of the defendant, who offered himself as a witness, was in all respects legal and proper. We do not agree with the learned counsel for the defendant in holding that it is not competent for the court to single out a particular witness and charge the jury as to his credibility. On the contrary, the less abstract the more useful the charge. Jurors find but little assistance in the charge of a judge who deals only in the general and abstract propositions which he supposes to be involved in the case, and leaves the jury to apply them as best they may." A similar

instruction was approved in *People* v. *Morrow*, 60 California, 142. See also *People* v. *Wheeler*, 65 California, 77; *People* v. *O'Neal*, 67 California, 378; *People* v. *Knapp*, 71 California, 1.

In *State* v. *Sterrett*, 71 Iowa, 386, 388, this instruction was given in reference to the testimony of the defendant: "He testifies as an interested witness, and from an interested standpoint, and as such you should consider his testimony; and when you do this, with all the surrounding circumstances developed by the evidence, give the testimony such weight, in connection with other evidence in the case, as you think it entitled to, and no more." In respect to it the Supreme Court observed: "But the fact that some interest of the witness is at stake may always be considered in weighing his testimony. If there is a question as to whether he is an interested witness, that question should be submitted to the jury; but, if there is no question as to the facts, the court may properly instruct the jury on the assumption that the interest exists, and may tell them that it should be considered in weighing the testimony. Now, the defendant in a criminal case who testifies in his own behalf is always an interested witness. It is impossible that it should be otherwise, and there can be no case in which it would not be proper for the jury to consider that fact in weighing his testimony. The court, therefore, properly assumed the existence of the fact, and directed the jury to consider it in determining the weight which should be given to defendant's testimony."

In *State* v. *Cook*, 84 Missouri, 40, 46, 47, 48, the jury were instructed: "That in determining what weight you give defendant's testimony, you should consider that he is the party accused and on trial in this cause." Objection was made to this on account of the word "should," as being mandatory rather than permissive, but the objection was overruled, the appellate court saying: "If the attitude of the accused, when he takes the witness stand, is in truth different from that of all other witnesses according to our laws, I am at a loss to perceive any error in the court so treating him, and in reminding the jury of such undoubted fact. This, I conceive, the court can do without subjecting itself to the criticism of singling out

a witness in its instructions for the purpose of throwing distrust upon his testimony. There can be no such other witness as the accused. The fact of which the jury is thus reminded is one which they ought to consider; and I am free to say that in my judgment no jury could faithfully discharge its sworn duty who fails to do so." See also from the same State the following authorities: *State* v. *Maguire*, 69 Missouri, 197; *State* v. *Zorn*, 71 Missouri, 415; *State* v. *McGinnis*, 76 Missouri, 326; *State* v. *Elliott*, 90 Missouri, 350.

In *People* v. *Calvin*, 60 Michigan, 113, 123, 124, the trial court charged the jury as follows: "I can't charge you, gentlemen, that you are bound to give the same weight to it that you are to that of a disinterested person. This man testifies as defendant, himself deeply interested, and has a motive for committing perjury or perverting facts which the other witnesses have not. It does not follow, therefore, that you must give the same weight to his testimony that you do to the testimony of any other witness, whether corrobrated or uncorroborated." And the instruction was approved by the Supreme Court, the latter saying: "It was just and proper, in view of the request he had given in which no distinction was made between respondent's testimony and that of any other witness, that the jury should be instructed that in weighing and determining its truth they should take into consideration the interest he must necessarily have in the result of the trial."

In *Hirschman* v. *The People*, 101 Illinois, 568, 576, this instruction was given: "The court instructs the jury, as a matter of law, that in this State the accused is permitted to testify in his own behalf; that when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests as are legally applied to any other witness, and in determining the degree of credibility that shall be accorded to his testimony, the jury have a right to take into consideration the fact that he is interested in the result of this prosecution, as well as his demeanor and conduct upon the witness stand and during the trial; and the jury are to take into consideration the fact, if such is the fact, that he has been contradicted by other

witnesses. And the court further instructs the jury, that if, after considering all the evidence in this case, they find that the accused has wilfully and corruptly testified falsely to any fact material to the issue in this cause, they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other credible evidence." And it was approved with this comment: "We do not think that it can be fairly said that this instruction assumes that the defendant is contradicted, for that is expressly left a question to be determined by the jury. The jury were not bound to believe the evidence of the defendant any further than it may have been corroborated by other credible evidence, *Gainey* v. *The People*, 97 Illinois, 270, and we perceive no impropriety in saying so to them."

A similar instruction was sustained in *Rider* v. *The People*, 110 Illinois, 11. In *Chambers* v. *The People*, 105 Illinois, 409, the instruction was in this language: "The court instructs the jury, for the people, that they are not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he is defendant, and give his testimony such weight as, under all the circumstances, they think it entitled to." This also was sustained. *Bulliner* v. *The People*, 95 Illinois, 394; *Bressler* v. *The People*, 117 Illinois, 422. From other States these authorities may also be noticed: *People* v. *Petmecky*, 99 N. Y. 415; *Anderson* v. *The State*, 104 Indiana, 467; *Haines* v. *Territory*, 3 Wyoming, 168.

Until legislation of a recent date this court has had few criminal cases before it, and so has had little occasion to notice the limits to which a court may go in calling the attention of the jury to matters affecting the credibility of the defendant in a criminal case. In *Hicks* v. *United States*, 150 U. S. 442, 452, an instruction as to the effect of a conflict between the testimony of defendant and other witnesses was condemned, because of the assumption in it that the other witnesses were "telling the truth." In the same case another instruction, which seemed to press heavily upon the credence to be given to the testimony of the defendant, was referred to in these

words: "If this were the only objectionable language contained in the charge, we might hesitate in saying that it amounted to reversible error. It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and, perhaps, a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that 'the person charged shall, at his own request, but not otherwise, be a *competent* witness.' The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law."

The import of these authorities is that the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant, for that would practically take away the benefit which the law grants when it gives him the privilege of being a witness. On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. The court should be impartial between the government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the induce-

ments to falsehood on the part of an accomplice are so great. And if any other witness for the government is disclosed to have great feeling or large interest against the defendant, the court may, in the interests of justice, call the attention of the jury to the extent of that feeling or interest as affecting his credibility. In the same manner in behalf of the government, the court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

Tested by these rules we see in the instruction objected to nothing of which complaint can reasonably be made. In the first part it lays down a general rule, applicable to all circumstances, and then in the latter part simply calls attention to the fact that the defendant has a deep personal interest in the result of the suit, and that that should be considered by the jury. There is no declaration nor intimation that the defendant has been untruthful in his testimony. There is only a reference to the jury of the matter of credibility coupled with the declaration that interest in the result is a circumstance to be weighed in its determination. This clearly is unobjectionable.

These are the only matters which are open for consideration. It is true that error is alleged in overruling a motion for a new trial, but such a ruling is not reviewable in this court. Neither can we take the statements made by the defendant in his motion as evidence that the matters thus stated did, in fact, occur at the trial. In order to authenticate such facts a bill of exceptions is necessary.

The judgment is

Affirmed.

SANFORD FORK AND TOOL COMPANY *v.* HOWE BROWN AND COMPANY, LIMITED.

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

No. 190. Argued January 28, 1895. — Decided March 28, 1895.

A corporation, acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of that credit, and to obtain renewals of maturing paper at a time when the corporation, although it may not be then in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue in business.

Under the circumstances detailed in the statement of facts and in the opinion of the court in this case, it is *held*, that the mortgage given by the Sanford Fork and Tool Company, by special direction of its stockholders, to its directors to secure them for indorsing and for continuing to indorse the paper of the company, is valid.

This was a suit commenced in the Circuit Court of the United States for the District of Indiana by the appellees, creditors of the Sanford Fork & Tool Company, to set aside a mortgage given by such company to secure certain of the directors and stockholders of the company for indorsements made by them of the company's paper. No proofs were taken, and the case was disposed of on the bill and answer, and a decree entered in favor of the plaintiffs, adjudging such mortgage invalid as against them. The facts disclosed by the pleadings are as follows: The Sanford Fork & Tool Company was a corporation organized under the laws of the State of Indiana, doing business at the city of Terre Haute in that State. Its capital stock at first was one hundred thousand dollars, but was afterwards increased to one hundred and fifty thousand dollars. It commenced business in 1888 and continued as a going concern for about eighteen months and up to May 13, 1890, at which time it failed and its property passed

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into the possession of one of the defendants, John W. Davis, as receiver. The plaintiffs were creditors of the company, whose claims all accrued prior to March 17, 1890, at which time the mortgage complained of was executed. The defendants McKeen, Hulman, Nixon, Minshall, Kidder, and Mayer were each stockholders, and the first five constituted the board of directors of the company. Early in its history, and on July 2, 1888, the company had executed a deed of trust to one Deming, as trustee, to secure an issue then made of $50,000 of its ten-year negotiable bonds. This trust deed conveyed as security the manufacturing plant of the corporation — a tract of about three acres in the city of Terre Haute, with the buildings and appurtenances.

Being a comparatively new enterprise the company, in addition to the means derived from its capital stock and its bonded indebtedness, required large sums of money to enable it to successfully carry on and develop its business, and to obtain this money it executed during the fall and winter of 1889–1890 and between September 18, 1889, and March 3, 1890, its ten promissory notes, amounting in the aggregate to the sum of sixty-nine thousand dollars, which notes were indorsed by the six parties named above as directors and stockholders, the notes being severally as follows:

1. Executed to the Terre Haute Savings Bank, for $5000, dated September 18, 1889, due in five months, and indorsed by McKeen, Hulman, Kidder and Nixon.

2. To the same bank, same date, due in six months, for the same amount and indorsed by the same parties.

3. Executed to Nixon, dated December 14, 1889, due March 15, 1890, for $15,000, indorsed by Nixon, Hulman, and Kidder, and held by the Vigo County National Bank.

4. Executed to Nixon, dated January 21, 1890, due in sixty days, for $5000, indorsed by Nixon, McKeen, Hulman, and Kidder, and held by the Terre Haute Savings Bank.

5. Executed to Minshall, dated January 21, 1890, due in thirty days, for $4000, indorsed by Minshall, Hulman, McKeen, and Kidder, and held by the First National Bank of Brazil.

6. Executed January 30, 1890, to Nixon, due in ninety days,

for $15,000, indorsed by Nixon, Kidder, McKeen, Mayer, and Hulman, and held by the Vigo County National Bank.

7. Executed February 5, 1890, to Nixon, due in sixty days, for $5000, and indorsed by Nixon, Minshall, McKeen, Hulman, and Kidder, and held by the Vigo County National Bank.

8. Executed February 2, 1890, to Nixon, due in thirty days, for $5000, indorsed by Nixon, Minshall, McKeen, Hulman, and Kidder, and held by the Vigo County National Bank.

9. Executed March 3, 1890, to Nixon, due in sixty days, for $5000, indorsed by Nixon, Kidder, Hulman, Minshall, and McKeen, and held by the Terre Haute Savings Bank.

10. Executed March 3, 1890, to the Terre Haute Savings Bank, due in sixty days, for $5000, indorsed by Nixon, Kidder, Hulman, Minshall, and McKeen.

All the money received from these notes was expended upon and went directly into the property and material of the Tool Company. At the time these directors and stockholders indorsed these notes the Tool Company was a going concern, in full operation, with property and means "amply sufficient to pay all of its indebtedness if its property was worth what it had cost in cash." They believed that such property was worth what it had cost in cash, that the corporation was "solvent and capable of becoming an independent and profitable manufacturing institution as soon as it could win its way to a favorable market for its manufactured products." As these notes thus indorsed began to mature the directors found that the company was unable to pay them, and required a renewal or an extension. Thereupon, on March 1, 1890, they called a special meeting of the stockholders, which was held on March 15. At this meeting, out of a total of three thousand shares, two thousand two hundred and fifty were represented, and a resolution was passed authorizing the directors to execute a mortgage or mortgages upon all or any part of the property of the corporation, to secure any new indebtedness that might be incurred, or the renewal and extension of any present indebtedness or liability of the corporation. Thereupon, the directors having taken suitable action, the mortgage in controversy was executed conveying to Buena V.

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Marshall, as trustee, the property described in the trust deed hereinbefore referred to, to wit, the company's manufacturing plant, to indemnify the six indorsers for their indorsements of the notes, or renewals thereof, or on account of any moneys thereafter advanced by them. Relying upon such security the indorsers above named either paid or procured renewals of the several notes, and in addition two of them indorsed and subsequently paid other paper of the company to the amount of six thousand dollars. This mortgage was not recorded until May 1, 1890. At the time of its execution and delivery, as at the time of the indorsements hereinbefore mentioned, the company "was in full operation as a going concern," with ample means to pay its indebtedness, if the cash cost of its property could be obtained therefor. The indorsers believed that "the property was worth what it had cost in cash, and believed the corporation to be solvent," and in fact the corporation continued to be "a going concern, and carried on its business in the usual way, and met all its obligations (other than the notes embraced in the indemnity mortgage) as they matured in the usual course of business," until the appointment of a receiver on May 13, 1890, during which time it paid out for current expenses and maturing obligations thirty thousand dollars or over. The indorsers "believed that it was only necessary to tide the corporation over a temporary embarrassment until it could succeed in establishing a favorable footing in the market for the sale of its manufactured products." They accepted the indemnity mortgage in good faith, with knowledge that all the money obtained by means of the notes upon which they had become liable as indorsers had been properly appropriated to and gone into the property and material of the company.

At the date of the execution of this mortgage the Tool Company was indebted in the sum of two hundred and seventy-five thousand dollars. The value of its property at that time does not appear, but after the appointment of a receiver it was appraised, the manufacturing plant — the property described in the trust deed and mortgage — being appraised at $116,055.39; the other and unencumbered property at $88,390.85.

Mr. George A. Knight, (with whom was *Mr. John A. Butler* on the brief,) for appellants.

Mr. Sydney B. Davis, (with whom were *Mr. Cyrus F. McNutt*, *Mr. J. G. McNutt*, *Mr. F. A. McNutt*, *Mr. S. M. Reynolds*, and *Mr. George M. Davis* on the brief,) for appellees.

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

In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer and the new matters set forth in the answer are true. And the question which arises is whether, upon these admitted facts, the decree in favor of the plaintiffs can be sustained.

The manufacturing business in which the corporation was engaged was a new enterprise. It had been carried on for only about eighteen months. In that business had been invested nearly $300,000, and the property possessed by the corporation was at its cost price equal to the entire indebtedness. It thus appears that there had been no waste, mismanagement, or loss. Not a dollar of the indebtedness was held by any director or stockholder, but the personal credit of the six directors and stockholders had been loaned to the company to the extent of $69,000. The corporation was still a going concern. There was no purpose of abandoning the business. The indorsers believed that if the corporation could be tided over its temporary embarrassment it could be made successful. The stockholders authorized the mortgage. It was given only upon part of the property, and that part already encumbered by a fifty thousand dollar trust deed. The value of this property was, according to the subsequent appraisement, much below the sums secured by the trust deed and the mortgage. In addition the corporation had nearly $90,000 of unencumbered property to apply in satisfaction of the claims of its creditors. The mortgage was not given simply as security for a past indebtedness, but to induce the

indorsers to obtain for the corporation a renewal or extension of its obligations, and to make further indorsements. In reliance upon this mortgage the indorsers secured renewals or extensions, or themselves took up the notes they had indorsed, and at the same time lent the credit of their names to new paper of the company. Thus they prevented a suspension of the business and enabled the corporation to continue its operations, and did so believing that by such continuance the corporation would be enabled to work itself out of its temporary difficulties. All this was done in the utmost good faith.

Under these circumstances, should the transaction be condemned and the mortgage held void as against creditors? This question, we think, must be answered in the negative. It is said that the directors of a corporation stand in a fiduciary relation to both the stockholders and the creditors. Whatever may be the extent of the fiduciary obligations of directors to stockholders, there can be no pretence in this case of a breach thereof. The mortgage was expressly authorized by the stockholders, and they cannot claim that the directors in executing the instrument, which they had themselves authorized, were guilty of any breach of duty to them. It is often said that the directors may not take advantage of their position and power to secure personal advantage to themselves, but that proposition has no application here, for the corporation itself directed this mortgage. It was an application by the debtor of its property to secure certain of its creditors, and not the act of the agents of a debtor to protect themselves. The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preferences to certain of his friends, and the general rule is that, in the absence of statute, a debtor has such *jus disponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment.

But, passing from the relations of directors to the corpo-

ration and its stockholders, it is one of the vexed questions of the law as to how far the duty of a corporation and its directors to creditors interferes with the otherwise conceded power of a debtor to prefer certain of his creditors. Into a discussion of this question in its length and breadth we deem it unnecessary now to enter, for the facts of this case remove many of the embarrassments that often attend such questions. This is not like the case of *Sutton Manufacturing Co.* v. *Hutchinson*, 63 Fed. Rep. 496, decided by the United States Court of Appeals for the Seventh Circuit, in which the directors of a corporation, insolvent and intending to discontinue business, gave a mortgage to secure certain of their number who happened to be creditors, and thus attempted to secure a preference in behalf of themselves. Nor is it the case of the directors of a corporation in fact insolvent, though continuing and expecting to continue in business, executing a mortgage on the property of the corporation to simply secure themselves for a past indebtedness; for here the corporation, although insolvent within the rule which declares that insolvency exists when a debtor has not property sufficient to pay his debts, was still a going concern and intending to continue its business, and the mortgage was executed not simply to secure directors and stockholders for past indebtedness but to induce them to procure a renewal or extension of paper of the company then maturing or about to mature, and also to obtain further advances of credit.

Will it be doubted that, if this mortgage had been given directly to the holders of these notes, it would have been valid? Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guarantee of some of the directors or stockholders, whose guarantee may or may not be worth anything?

But even that is not this case, for here the corporation was

a going concern and intending to continue in business, and the mortgage was given with a view of enabling it to so continue, and to prevent creditors whose debts were maturing from invoking the aid of the courts to put a stop thereto. Can it be that, if at any given time in the history of a corporation engaged in business, the market value of its property is in fact less than the amount of its indebtedness, the directors, no matter what they believe as to such value, or what their expectations as to the success of the business, act at their own peril in taking to themselves indemnity for the further use of their credit in behalf of the corporation? Is it a duty resting upon them to immediately stop business and close up the affairs of the corporation? Surely, a doctrine like that would stand in the way of the development of almost any new enterprise. It is a familiar fact that in the early days of any manufacturing establishment, and before its business has become fully developed, the value of the plant is less than the amount of money which it has cost, and if the directors cannot indemnify themselves for the continued use of their personal credit for the benefit of the corporation, many such enterprises must stop in their very beginning.

It is worthy of note, too, that these directors placed the encumbrance not on the entire property of the corporation, but only upon that part which ordinarily shows the greatest difference between value and cost, to wit, the building and the machinery — property, too, which was already encumbered for a large sum, leaving free all the unencumbered property of the corporation to answer to the claims of creditors.

Of course, an underlying fact, expressly stated to have existed in these transactions, is good faith. Carrying on business after the giving of an indemnifying mortgage, with a knowledge of insolvency, with the expectation of soon winding up the affairs of the corporation, and only for the sake of giving an appearance of good faith, leaves the transaction precisely as though the mortgage was executed at the moment of distribution, and with the view of a personal preference.

Again, not only was the corporation a going concern, not only did the directors expect and intend that it should continue, and believe that its continuance would bring financial success, but, as appears, they did continue the business for two months, and during that time paid out in the ordinary management of its affairs and in discharge of its debts over $30,000, without appropriating a single dollar to the payment of the claims for the indorsement of which they had taken this indemnity.

We are of opinion that these facts clearly and fully distinguish this case from many which have been cited, in which the action of the directors of a corporation in securing to themselves preferences in the hour of its extremities has been adjudged void, and that it is going too far to hold that a corporation may not give a mortgage to its directors who have lent their credit to it, to induce a continuance of the loan of that credit, and obtain renewals of maturing paper at a time when the corporation, though not in fact possessed of assets equal to its indebtedness, is a going concern, and is intending and expecting to continue in business. We are, therefore, of opinion that the Circuit Court erred, and the decree will be

Reversed and the case remanded for further proceedings not inconsistent with this opinion.

JOHNSON *alias* OVERTON *v.* UNITED STATES.

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

No. 740. Submitted December 6, 1894. — Decided March 25, 1895.

At the request of the defendant, in a murder case, the court instructed the jury that where the evidence showed that the defendant did not commit the actual killing, and it was uncertain whether he did participate in it, the jury might regard the absence of any proof of motive for the killing in finding their verdict; but the court further added that the absence or presence of motive is not a necessary requisite to enable the jury to find

the guilt of a party, because it is frequently impossible for the government to find a motive. *Held*, that, in thus qualifying the instruction the judge committed no error.

The accused was a witness in his own behalf. The court instructed the jury: "The defendant goes upon the stand before you and he makes his statement; tells his story. Above all things, in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it." *Held*, that, taken in connection with the rest of the charge, there was no error in this.

Though the examination of the evidence leaves on this court the impression that there was reasonable doubt of the guilt of the accused, the verdict of the jury to the contrary and the action of the court below in overruling a motion for a new trial shows that the trial court was satisfied with the verdict, and, there being no error in the rulings, it is not disturbed.

At the August term, 1893, of the Circuit Court of the United States for the Western District of Arkansas, an indictment was found against Willie Johnson, alias Willie Overton, and Sam Woodard, charging them with the murder of one Sherman Russell, by shooting him with a gun.

On the presentment of the indictment in open court the defendant Willie Johnson, alias Willie Overton, pleaded not guilty to the same. The record does not show whether Sam Woodard pleaded to the indictment, nor does it show what became of him. Subsequently a jury was selected, empanelled, and sworn, and Johnson was put upon his trial, which resulted in a verdict of guilty as charged. A motion for a new trial was made and overruled, and on the 4th day of May, 1894, sentence of death by hanging was pronounced against the said defendant, and a writ of error was allowed to this court.

The record discloses a number of exceptions taken on behalf of the defendant during the course of the trial, which were set forth in a bill of exceptions signed by the judge, and which form the subject of the assignments of error. The following quotations therefrom show fully the character and scope of the questions presented:

"1st. It was error of the court to charge the jury as follows: 'Now a word further as to what is meant by this idea

of constructive presence. I have already told you that the test is if a man is so near to the place, no matter how far in feet or yards he may be away, if from the circumstances and from the character of the act done and the way it is done he is so near to where it is actually done as to be able to render assistance or to contribute to the production of that act, and he is there actually to do so, or is there ready to do so wilfully, and intentionally present in pursuance of a previous agreement, and he confederated to render aid and assistance, he is then present in the law. As an illustration take the case decided in Nevada, where the man was 30 odd miles away from the place where a stage was robbed; he built a fire on the top of a mountain to signal to his confederates the approach of the stage, they being down in the valley waiting to rob it. He was arrested as a principal in that crime, although as a matter of fact at the time of the robbery he was 32 miles away, or 30 odd miles away, but the law said he was present, because the test of the law as to what is meant by presence is fully satisfied, because the proof showed that he was able to render assistance that looked toward the completion of it — towards the execution of it. Another case: If a man goes to a store kept in the country and decoys away the clerk who slept in the store, decoys him to go to a dance some miles distant from the store, and detained him at the dance while his confederate robbed the store.'

"2d. It was error to charge the jury as follows: 'If the presence of the defendant in this case at the place where the proof shows he was, was by previous agreement or concert with Sam Woodard, and it was the purpose on his part to assist, aid, or abet the killing of Sherman Russell, and he was there wilfully and knowingly for the purpose, if it should be necessary, of assisting Sam Woodard in killing Sherman Russell, and the knowledge on the part of Woodard of the presence of the defendant at the place where he was for the purpose of assisting him in the killing of Sherman Russell emboldened his purpose and encouraged his heart, or afforded him hope or confidence in his enterprise, or spurred on his mind to do the act, or nerved or strengthened his arm

to fire the pistol shot, then the defendant would be present aiding and abbetting the killing. He may not have done any actual physical act, but if his relation to the act was of the character that I have just named, the relation was a criminal relation upon his part; it was a relation that sprung out of a preconceived design between Woodard and defendant to take the life of Sherman Russell, and if such a presence for the purpose of aiding or assisting or abetting, should it become necessary, exerted a mental influence upon Woodard, so that he the more readily or quickly executed the act, the defendant would then be present at the crime whether he was really and actually at the place or whether he was so near to the place, as by the means I have described to exert an influence of that character upon the mind of Sam Woodard, he would then be present at the crime and he would be an actual participant in it. If at the time Sam Woodard shot and killed Sherman Russell the defendant was constructively present at the place of the killing, and he was at such place with the intent to knowingly and wilfully assist Sam Woodard in killing Russell, should it become necessary to consummate the deadly purpose, but that such aid was not necessary, as Woodard did the killing without such help, then such constructive presence with such purpose would be a legal presence and would make the defendant a participant in the killing.'

"3d. It was error to charge the jury as follows: 'If he is present actually or constructively at the time of the commission of the crime, and is so situated with reference to it, and while so situated wilfully and intentionally knowing the purpose of the man who strikes the deadly blow or fires the fatal ball, and while so situated he then wilfully and intentionally aids either by doing some physical act or by being present at the place by reason of a previous agreement, and the very fact of that presence exerts an influence upon the mind of the party who fires the fatal shot, showing that he more readily or quickly does the act, then he is present at the place and is actually an aider and abettor and is a principal in the crime.'

"8th. It was error to charge the jury as follows: 'The

defendant goes upon the stand before you and he makes his statement; tells his story. Above all things, in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way, you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it.'

"11th. It was error to give the following charge: 'The court charges you that in case of circumstantial evidence motive on the part of the defendant is an important element to be by the jury considered, and where the evidence clearly shows that the defendant had no motive to do the killing, when it is not certain he did the killing, then they may look to such absence of motive for the killing in finding their verdict. The court has already told you that the absence or presence of motive is not a necessary requisite to enable you to find the guilt of a party, because it is frequently impossible for the government or accusing power to find a motive; it is impossible for the jury to find it; it is so hidden, it is so trifling, it is so insignificant that it is apt to be overlooked from its very hidden character, its very hidden nature; it is something often that is so unfathomable that it cannot be found. Do not understand that by the giving of this instruction that proof showing the existence of motive is any requisite to enable you to find the defendant guilty.'"

Mr. Assistant Attorney General Whitney for defendants in error.

No appearance for plaintiff in error.

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

The assignments of error question the correctness of the instructions given to the jury, first, on the subject of a constructive, as distinguished from an actual, presence at the

scene of the murder; secondly, as to the effect to be given to the absence of proof of motive; and, thirdly, as to the weight to be attached to the testimony of the defendant in his own behalf.

Although the indictment charged Johnson with actual presence and participation in the felonious act, yet the evidence disclosed that the fatal wound was inflicted by Woodard, and that Johnson, though near by, did not show himself till after the murder had been accomplished. This state of facts rendered it proper for the court to instruct the jury as to the legal effect of such evidence. This it did, at some length, with illustrations drawn from well-known cases. We are unable to see any misstatement of the law in the instructions given in this respect.

There was nothing in the evidence disclosing previous hostility to the deceased on the part of Johnson, or any reason or motive for the murderous attack. Thereupon the defendant's counsel asked an instruction that where the evidence shows that the defendant did not commit the actual killing, and when it is uncertain whether he did participate in it, then the jury may regard the absence of any proof of motive for the killing in finding their verdict. This instruction the court gave, but added to it the observation that the absence or presence of motive is not a necessary requisite to enable the jury to find the guilt of a party, because it is frequently impossible for the government to find a motive.

In thus qualifying the instruction the learned judge committed no error. The jury were, in effect, told that they had right to consider the absence of any proof of motive, but that such proof was not essential to enable them to convict.

Complaint is made of the instruction as to the weight to be given to the defendant's personal testimony. That instruction was in the following terms: "The defendant goes upon the stand before you and he makes his statement; tells his story. Above all things in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way you are

to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it."

This instruction must be taken in connection with about a page of the charge which immediately preceded it, in which the court laid down certain general rules for weighing the evidence of any witness, naming among them his bearing and conduct in the presence of the jury, his manner in giving his testimony, the character of the story told by him, its harmony or contradiction with other testimony, the opportunities the witness had for knowing the facts of which he testifies, and the motive, by reason of interest or feeling, which may influence him, saying in conclusion that "if the interest is a very great one, if it is a very large one, it is more apt that he would be swayed — it might be unconsciously — away from the truth than if such interest did not confront him. You are simply to weigh that evidence in connection with the statements of the other witnesses in the case, whether it is the defendant or anybody else." After these general observations follows the particular language which is objected to, but in view of that which preceded, it cannot be said that, by it, the defendant was deprived of any advantage to which he was justly entitled in having his personal statement considered by the jury. If such statement was corroborated by facts otherwise proved it was thereby strengthened; if it was not so corroborated it was still to be considered in and of itself, and in the light of "its own inherent proving power." *Reagan* v. *United States ante*, 301.

The learned judge has included in the bill of exceptions the evidence in the case, and we have carefully read it in connection with the portions of the charge and instructions excepted to.

The impression has been made upon us, by our examination of the evidence, that there was room for a reasonable doubt of the defendant's guilt. But the jury that found him guilty saw and heard the witnesses, and we must infer from the conduct of the court in overruling the motion for a new trial that it was satisfied with the verdict; and as we have found no error in the rulings of the court, the judgment in the case is

Affirmed.

BARDON *v.* LAND AND RIVER IMPROVEMENT COMPANY.

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

No. 138. Argued January 18, 1895. — Decided March 28, 1895.

Although section 3186 of the Revised Statutes of Wisconsin may have enlarged the ordinary equitable action to quiet title and remove a cloud, the Circuit Court of the United States, sitting in that District, may take jurisdiction of a bill properly brought under its provisions.

A person in possession, claiming under a tax deed, under which he had obtained title, may institute such a suit.

The jurisdiction of a suit so instituted is not affected by the provision in section 1197 of the Revised Statutes of Wisconsin of 1878 conferring for three years a right of action by the grantee in a tax deed against the owner to bar him and his grantees from claiming the land, nor by the provisions of § 22, c. 138, of the Revised Statutes of 1858.

Questions affecting the validity of a tax deed of real estate in a State must be disposed of in accordance with the interpretation of the statutes of the State by its highest judicial tribunal.

In Wisconsin when a tax deed is in due form and recorded in the proper office, and the lands described therein remain vacant and unoccupied for three years or more after the recording thereof, the tax title claimant is deemed to be in constructive possession, the statute of limitations runs in his favor, and the original owner is barred from attacking the validity of the tax deed.

The introduction of certain evidence by the appellee held not to be a waiver of its right to rely on the statute of limitations.

In considering the acts and proceedings of county boards acting under Rev. Stats. Wis. of 1858, c. 13, § 28, they must be liberally construed.

The Revised Statutes of Wisconsin of 1858 provided that the register of deeds should keep a general index, each page of which should be divided into eight columns, with heads to the respective columns, as follows: "Time of reception. Name of grantor. Name of grantee. Description of land. Name of instrument. Volume and page where recorded. To whom delivered. Fees received;" that such register should make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order; and should immediately, upon the receipt of any such instrument or writing for record, enter in the appropriate column and in the order in which it was received the day, hour, and minute of its reception, and the same should be considered as recorded

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at the time so noted. By section 759 of the Revised Statutes of 1878 it is directed that the division shall be into nine columns, the first column being headed: "Number of instrument," and the others as in the act of 1858. In this case the tax deed was entered in the index under the name of Douglas County by which it was issued, although running in the name of the State as well as of the county. The original index had the eight divisions required by the statute, but the fourth column, under the heading "Description" was subdivided as shown in the opinion. This index becoming dilapidated was laid aside, and a new one was prepared under the provisions of the laws of 1860, c. 201, which complied with the provisions of the statute in that respect, and was substituted for the original. *Held*,

(1) That it was not necessary to insert in the index the name of the State as a grantor;

(2) That taking the page of the original index as a whole, no one could be misled by it who was not wilfully misled, and it was sufficient to set the statute of limitations in operation;

(3) That the new and correct index, having been properly certified to according to law, was from that date as effective as the original;

(4) That the appellant could not question the complainant's title on the ground of informality in the original.

THIS was a bill in equity, filed under section 3186 of the Revised Statutes of the State of Wisconsin, by the Land and River Improvement Company, a corporation of New Jersey, against Thomas Bardon, a citizen of the State of Wisconsin, in the Circuit Court of the United States for the Western District of Wisconsin, to have certain conveyances declared void and to quiet the title to the southeast quarter of section 28, township 49 N., range 14 W., in Douglas County, Wisconsin.

The section in question is as follows:

"SEC. 3186. Any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land, and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately

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as may be, and that he is in possession thereof, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land, adverse to the plaintiff; and the defendant, if he do not so disclaim and release, may answer any matter in denial of the plaintiff's claim, title, or possession, or which, if proved, will establish his own, and judgment shall be rendered according to the rights of the parties. And any person not having such title or possession, but being the owner and holder of any lien or incumbrance on land, shall also have the same right of action as the owner in fee in possession, to test the legality and validity of any other claim, lien or incumbrance on such land or any part thereof."

Complainant purchased the land of one Hiram Hayes and paid him therefor $6400, June 2, 1883, and took a warranty deed of conveyance and had paid the taxes since that time and expended on the land up to 1890, including the taxes of 1889, something over $12,500. Hayes derived title through two tax deeds issued to him, one dated September 5, 1870, for the taxes of 1866, recorded September 7, 1870, and the other issued January 1, 1882, for the taxes of 1877, and recorded January 3, 1882. The original owner of the land was one James D. Ray, who conveyed it to James Bardon by release or quitclaim on March 6, 1878, and James Bardon subsequently conveyed it to Thomas Bardon, the defendant, for a nominal consideration. James Bardon testifies that he paid Ray for his quitclaim deed $100, "and perhaps more;" and conveyed his interest to Thomas without money consideration. The case turned upon the validity of these tax deeds or either of them, and the Circuit Court held that the deed dated September 5, 1870, was valid; that the statute of limitations had run upon it; that the original owner was barred; and that complainant's title was good. A decree was accordingly entered for complainant, to review which this appeal is prosecuted. The opinion of the Circuit Court will be found, 45 Fed. Rep. 706.

Opinion of the Court.

Mr. W. C. Silverthorn and *Mr. T. C. Ryan*, (with whom was *Mr. M. A. Hurley* on the brief,) for appellant.

Mr. A. L. Sanborn, (with whom were *Mr. John C. Spooner* and *Mr. F. W. Downer* on the brief,) for appellee.

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

We remarked in *Gormley* v. *Clark*, 134 U. S. 338, 348, that while the rule was well settled that remedies in the courts of the United States at common law or in equity, according to the essential character of the case, are uncontrolled in that particular by the practice of the state courts, yet an enlargement of equitable rights by state statutes may be administered by the Circuit Courts of the United States, as well as by the courts of the State; and when the case is one of a remedial proceeding, essentially of an equitable character, there can be no objection to the exercise of the jurisdiction. *Broderick Will Case*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15, 25; *Frost* v. *Spitley*, 121 U. S. 552, 557.

Notwithstanding the statute may have enlarged the ordinary equitable action to quiet title and to remove a cloud, the Circuit Court had jurisdiction to award the relief prayed if the bill were properly brought under the section in question; and, as that section provided that any person having the possession and legal title might institute the suit, we perceive no reason why the complainant could not, if it were in possession, as is conceded, and had obtained the legal title through either of the tax deeds, a matter to be hereafter examined.

Section 35 of chapter 22 of the General Laws of Wisconsin of 1859, reënacted as section 1197 of the Revised Statutes of 1878, (Gen. Laws Wis. 1859, p. 21; Rev. Stat. Wis. 1878, c. 50, p. 383,) provided that the grantee in a tax deed might, at any time within three years after its date, commence an action against the owner or any person claiming under him for the purpose of barring such owner or his grantees from all right, title, interest, or claim in the land conveyed, and it

is argued that that remedy was exclusive, and not having been availed of by Hayes, that complainant cannot maintain this suit. But there is nothing in the statute to show that the remedy existing during three years after the date of the tax deed was intended to contract the jurisdiction and practice in equity, independently of statute, in respect of bills to quiet title, or to exclude the general remedy given by section 3186, (a remedy existing in Wisconsin since 1858, § 29, c. 141, Rev. Stat. 1858,) in favor of a person having the legal title and actual possession, though that legal title depended on a tax deed. *Stridde* v. *Saroni*, 21 Wisconsin, 173; *Grimmer* v. *Sumner*, 21 Wisconsin, 179; *Wals* v. *Grosvenor*, 31 Wisconsin, 681; *Grignon* v. *Black*, 76 Wisconsin, 674.

Nor can we regard the position of appellant that this suit was barred under section 22 of chapter 138 of the Revised Statutes of 1858 as tenable. That section provided that "an action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued," and the enumerated actions apparently did not include this suit. But this alleged limitation was not set up in the answer or the question raised in any way so far as appears, in the Circuit Court, and, if so, comes too late. And, apart from that, actual possession was not taken until October 13, 1889, and the bill was filed November 1, 1889.

We proceed then to the objections urged to the validity of the tax deed of September 5, 1870, and these must be disposed of, in accordance with the interpretation of the statutes of Wisconsin, by the highest judicial tribunal of that State. As was observed in *Lewis* v. *Munson*, 151 U. S. 545, 549: "No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the State for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings, the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the State has power to prescribe, and peculiarly and vitally affecting its well-being. The determination of any questions affecting them is a matter

primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal constitution has been invaded."

Under the laws of Wisconsin the owner of land sold for taxes might, at any time within three years from date of the certificate of sale, redeem the same in the manner prescribed, and in like manner redeem at any time before the tax deed executed upon such sale was recorded. Gen. Laws Wis. 1859, c. 22, §§ 18, 19; Rev. Statutes of 1878, § 1165.

By section 25, c. 22, of the laws of 1859, carried forward into section 1176 of the Revised Statutes of 1878, it was provided that the tax deed, "duly witnessed and acknowledged, shall be *prima facie* evidence of the regularity of all the proceedings, from the valuation of the land by the assessor inclusive, up to the execution of the deed, and may be recorded with like effect as other conveyances of land."

Section 5 of chapter 138 of the laws of 1861 provided that no action should be commenced by the former owner to recover possession of land which had been sold and conveyed for non-payment of taxes or to avoid the deed, unless the action should be commenced within three years next after the recording of the deed. Rev. Stat. 1878, § 1188.

By section 32 of chapter 22 of the laws of 1859 it was enacted that no action should be maintained by the grantee in a tax deed or any one claiming under him, to recover the possession of the land described therein unless such action should be brought within three years next after the date of the recording of such deed, or unless such grantee or those claiming under him shall have paid the taxes assessed on such land for five years next after the date of such deed, or unless such grantee, or those claiming under him, had been in actual, continual possession of said land claiming title for three years previous to the expiration of five years next after the date of such deed. Rev. Stat. 1878, § 1187.

The rule may be accepted as thoroughly settled by the decisions of the Supreme Court of Wisconsin that when a tax deed is in due form and recorded in the proper office and the

lands described therein remain vacant and unoccupied for three years or more after the recording thereof, the tax title claimant is deemed to be in the constructive possession, the statute runs in his favor, and the original owner is barred from attacking its validity. *Geekie* v. *Kirby Carpenter Co.*, 106 U. S. 379; *Gunnison* v. *Hoehne*, 18 Wisconsin, 268; *Lawrence* v. *Kenney*, 32 Wisconsin, 281; *St. Croix Co.* v. *Ritchie*, 73 Wisconsin, 409; *Dupen* v. *Wetherby*, 79 Wisconsin, 203; *Lander* v. *Bromley*, 79 Wisconsin, 372; *Hotson* v. *Wetherby*, 60 N. W. Rep. 423; *Oconto Co.* v. *Jerrard*, 46 Wisconsin, 317, 327. In the last case Chief Justice Ryan said: "It has been uniformly held, in a multitude of cases, that, as against the grantee of a tax deed, the statute puts at rest all objections against the validity of the tax proceedings, whether resting on mere irregularity or going to the groundwork of the tax. The statute makes a deed valid on its face *prima facie* evidence, as soon as executed, of the regularity of all the proceedings, from the assessment of the lands, inclusive, to the execution of the deed. And the effect of all the decisions is, that when the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. See *Edgerton* v. *Bird*, 6 Wisconsin, 527, and the cases collected in the note of Vilas & Bryant; *Lawrence* v. *Kenney*, 32 Wisconsin, 281; *Wood* v. *Meyer*, 36 Wisconsin, 308."

Here the land was vacant and unoccupied for more than three years from the time of the record of the tax deed, and if that deed was not void upon its face and was properly recorded it would follow that, under these decisions, Hayes obtained the legal title. With the record of the deed the time of redemption ended and the period of limitation began. Before the deed was recorded the owner might tender the redemption money and defeat the tax title, and at any time within three years after record he might bring suit to impeach the tax deed, or make defence to suit against him, by proof of defects in the proceedings upon which it was based. But after the expiration of three years, the statute purged the tax proceedings of all defects, and the deed could only be attacked on the ground of want of power to levy and sell by reason of

payment of taxes, lack of jurisdiction in the taxing officers, or the like.

On behalf of the appellant a great variety of objections is urged to the validity of the tax deeds and proceedings, many of which are not open to consideration, if the deed was not void on its face and was duly recorded. It is, indeed, contended that appellee, by the introduction of certain evidence, waived its right to reply on the statute of limitations and the conclusive effect of the deed, but we do not think this contention can be sustained. The evidence referred to was adduced in rebuttal or in support of complainant's general equities, and although formal defects in the proceedings may have been disclosed, we cannot hold that the door for an attack thereon was thereby intentionally opened, which the statute had effectually closed. Still less, in a case where the right, as well as the remedy, had been extinguished if complainant's position were as claimed. *Leffingwell* v. *Warren*, 2 Black, 599. We regard the deed as valid on its face, and cannot accept the suggestion that this is not so because too literally following the statutory form. The recital as to redemption was: "And whereas it further appears, as the fact is, that the owner or owners or claimant or claimants of said lands has or have not redeemed from said sale the lands which were sold as aforesaid, and said lands are now unredeemed from such sale, . . ." The meaning is clear that there had been no redemption by the owner or owners or claimant or claimants.

But it is insisted that the tax proceedings in question were void for want of jurisdiction in the taxing officers. These proceedings were carried on by the officers of the town of Superior, and appellant proved that in 1859 the town of Pokegama was organized by the county board and included township No. 49, range 14 W., in which the land in controversy was situated, and that the town of Pokegama was duly organized and represented upon the county board in 1859 and 1860. But it appeared that in 1859 two towns were set off by the board of county supervisors, one, township 48, range 14, to be known as Nemadji, and the other, township 49, range

14, to be known as Pokegama, and that on January 19, 1861, a resolution was passed by the county board as follows: "That the towns of Pokegama and Nemadji be vacated, the above order to take effect and be in force on and after the first day of April next, and the board do further order and determine that the next town meeting shall be held in the town of Superior to elect three supervisors that shall be the county and town board of supervisors."

While not accurately worded in that respect, the obvious intention was that the territory of these two towns should become part of the town of Superior, and the record of town and board meetings thereafter down to a point of time subsequent to these tax proceedings establish the continued exercise of jurisdiction over the whole territory.

By section 28 of chapter 13 of the Revised Statutes of 1858 power was conferred upon county boards "to set off, organize, vacate, and change the boundaries of towns in their respective counties." And to their action, as embodied in this resolution, it will not do, as is well said in *Hark* v. *Gladwell*, 49 Wisconsin, 172, 177, to apply "nice verbal criticism and strict parliamentary distinctions, because the business is transacted generally by plain men, not familiar with parliamentary law. Therefore their proceedings must be liberally construed in order to get at the real intent and meaning of the body."

By chapter 54 of the General Laws of Wisconsin of 1883 (vol. 1, p. 49,) it was provided, among other things, that "every town shall be considered and held to be, and to have been duly organized, which has exercised, or shall hereafter exercise, the powers, functions, and franchises of a town for a period of two years." The statute further enacted that the validity of any order or ordinance purporting to organize or set off any new town, or to change the boundaries of any existing town or towns, might be tested by *certiorari* or any other proper proceeding brought directly for the purpose of vacating such order or ordinance in a court of competent jurisdiction, at any time within two years after the date of such order or ordinance, or within sixty days after the publication of the act if two years had already expired, and that no such order or ordi-

nance should be otherwise questioned than directly. This recognized the general rule of the common law on the subject of collateral attack, and we are of opinion that the corporate standing of the town of Superior as including the other two towns cannot be thus questioned after the years of corporate action shown by the evidence. *Austrian* v. *Guy*, 21 Fed. Rep. 500.

Dismissing the numerous other objections discussed, such as the admission of the deeds in evidence without proof of execution; the alleged payment of the taxes for 1866; the custody of the tax records; the official character of the deputy county clerk; the validity of his appointment, etc., as either not properly raised or arising, on the record, or as not sufficiently well founded to call for observations upon them, although they have all been carefully examined, we are brought to the point which the Circuit Court regarded as the principal question in the case, namely, the objection made to the elder tax deed that the record thereof was void, because not properly indexed as the statute required.

By sections 140, 142, and 143 of chapter 13 of the Revised Statutes of 1858 it was provided that the register of deeds should have the custody of all books, records, deeds, etc., deposited or kept in his office; should record or cause to be recorded correctly and in a plain and distinct handwriting in suitable books, all deeds, mortgages, maps, instruments, and writings authorized by law to be recorded in his office; that he should keep a general index, each page of which should be divided into eight columns, with heads to the respective columns, as follows: "Time of reception. Name of grantor. Name of grantee. Description of land. Name of instrument. Volume and page where recorded. To whom delivered. Fees received;" that such register should make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order; and should immediately, upon the receipt of any such instrument or writing for record, enter in the appropriate column and in the order in which it was received the day, hour, and minute of its recep-

tion, and the same should be considered as recorded at the time so noted. By section 759 of the Revised Statutes of 1878 it is directed that the division shall be into nine columns, the first column being headed: "Number of instrument," and the others as in the act of 1858.

In *Lombard* v. *Culbertson*, 59 Wisconsin, 433, 439, it was said that the entries in the general index are the material things in determining whether a deed has been so recorded as to be notice to subsequent purchasers, prior decisions to the same effect being cited, and as to a claimant under a tax deed it was held that "he is clearly required to show that it was so recorded as to be constructive notice, at least, to the plaintiff, that he held such tax title and intended to rely upon such deed to defeat plaintiff's title. He must record it the same way to set the statute of limitations running in his favor and against the plaintiff as he would be required to do in the case of a deed or mortgage to defeat the right of a subsequent purchaser for value without notice." The decisions are numerous, and many are cited by counsel upon the question whether in recording tax deeds the general index and the record at large can be relied on to help out defects existing in either.

In this case the tax deed was entered in the index under the name of Douglas County by which it was issued, although running in the name of the State as well as of the county. And it is contended that, as a tax deed containing the name of the county as grantor, but omitting the name of the State as grantor, is void upon its face, *Easley* v. *Whipple*, 57 Wisconsin, 485; *Haseltine* v. *Hewitt*, 61 Wisconsin, 121, and that if the index showed a deed void on its face, though it was not so in fact, the falsity of the index would not be cured by the actual and correct spreading of the deed upon the record, therefore this deed should be held void. But it was distinctly ruled in *Hall* v. *Baker*, 74 Wisconsin, 118, 131, that all that is required by the provision regarding the general index is to give the name of the county only, and not the State, as grantor, and Chief Justice Cole said: "A person searching the record for a tax deed would naturally look for the name

of the county which gave it, and would not be likely to look for the name of the State as grantor. It would be laborious to find the proper deed under the name of the State, considering the many counties in the State."

It appeared that none of the tax deeds of record in the register's office of Douglas County, Wisconsin, had been indexed under the name of the State of Wisconsin, either under the letter S or under the letter W, in the index, and that the respective registers of deeds had been and were accustomed to enter such deeds under the letter D with the name of Douglas County as grantor.

We entirely concur in the ruling of the Supreme Court of Wisconsin, and it is decisive of the question made.

We do not understand from the arguments of counsel that it was contended in the court below, or is contended here, that the date of filing, "1870, September 7, 3 P.M.," the name of the grantor, "Douglas County, per clerk," and of the grantee, "Hayes, Hiram," did not appear upon the original index, although in his brief in reply counsel for appellant criticises the language of the District Judge in disposing of the case as if he had therein proceeded upon the ground that a part of the index was the whole of it. We assume that the original index had the eight divisions of the statute, but that the fourth column, under the heading "description," was subdivided, and that all after the first three statutory divisions ran as exhibited in the photographic copy introduced below and presented at the bar, and reproduced on page 339.

The objection appears to be that in the column for the description the figures 28, 49, 14 were not under the sub-headings of the fourth division, but so crowded toward the right as to be so incorrect and misleading as to invalidate the index in respect of that entry. We do not think so. We agree with the Circuit Court that taking the page as a whole any one who would be misled by it would be misled wilfully, and that the index furnished all the information that an ordinarily prudent man would want to send him to the full record of the deed. The entry would be read at once as the southwest quarter or half of section 28, township 49, north of range 14

Description	Acres	Town	Range	Vol	Pages	Grantor	delivered	Fees
Lot 81 on 4th St Lot 19 W 7th St				1	Jay deeds 357	48 James Bardon		1 00
Lots & Block in Superior				1	"	358.359 N. Macara		1 00
Property in Douglas County				1	"	372 373		
Lots 343 345 West 6th St				1	"	365. 366		1 00
Block 118 ft. Superior City				1	"	366 367 S. Hoffman		1 00
N End 105 Bay 447 483 River	35			1	"	369 370		
Lot No 4 Sec 36 T 44 R 10				1	"	368. 369 J. J. Howe		
Lot & Blks in Superior	Mar			1	"	374. 375.		
South East ¼				49	141	"	378 379. A. Hayes	1 00
Lots & Blks in Superior	Mar			1	"	" 376 377		
Lots 235 & 237 4th Street				1	"	" 383. 384 N. Macara		1 00
Lots in Superior and Lands				1	"	" 384. 385 386 N. Macara		1 00
Lots in Elys addition	"			1	"	" 388 to 392 H. Hayes		3 25
Lots & Blks in Superior Lot 2	20	49	14	1	"	" 398. 399 E. W. Ayer		1 00
& Block 33 Superior City				1	"	" 399 400 " "		1 00
Lot 3 West 2nd St				1	"	" 401 402 " "		1 00
South ½ NW ¼	7	48	13	L	387	A Davidson		1 00
Lot 8 Block 28 Superior City				1	Jay deeds	395 396. Robt Osborne		1 00

west, recorded in volume one of tax deeds on pages 378 and 379, and delivered to H. Hayes, who paid the charge of $1. The designation of the range should have been west instead of east, but the owner or any person desirous of obtaining information about the land would know that range 14 west was in Douglas County and that range 14 east was not. At all events, he could refer at once, if he had any doubt, to volume one of tax deeds, pages 378 and 379.

It was said in *Oconto Company* v. *Jerrard*, 46 Wisconsin, 317, 322: "The statutory direction is substantially complied with by a certain reference to another book in the same office. No sane man searching the general index for instruments affecting any land would disregard such a reference, and it would be a severe technicality to avoid the registration of a deed for such a failure in the duty of the register, with such present and easy means given on the face of the index of obtaining the information which the index itself should have given. The cruelty of such a technicality would be apparent in any instrument except a tax deed. And, as already seen, what can impair registry of a tax deed impairs the registry of any deed."

Even if a more rigid rule were applied, we should say that, in any view, the index was sufficient to set the statute of limitations in operation.

But it further appeared that under chapter 201 of the laws of 1860, (Laws 1860, 178,) providing that when public records should become dilapidated it should be the duty of the board of supervisors to cause the same to be transcribed and certified, the original index in the register's office was transcribed under certain resolutions of the board of supervisors of Douglas County of May 28, 1872, and July 2, 1873, and that the record was completed November 9, 1875. It is admitted that the index as thus reproduced is not open to the objections raised.

In *Hotson* v. *Wetherby*, 60 N. W. Rep. 423, it was held that "it is well settled that an omission to make proper entries in the general index at the time the deed is spread upon the record may be removed after such recording by making the proper entries, and when so made the entry will be good from

that date, and it will not be necessary to record the deed again at length." And in that case, and in *Lombard* v. *Culbertson*, 59 Wisconsin, 433, the doctrine is laid down that the register of deeds may correct a record of his own motion.

The law of 1860 directed the officer making the transcript to "certify that he has carefully compared the matters therein contained and written, and that the same is a correct and literal copy of the book from which the same was transcribed, naming such book," and enacted that "such copy record, so certified, is hereby declared a public record, and as such shall, in all respects, have the same effect as the book from which the same was transcribed." The resolution of May 28, 1872, provided that after the indices should be transcribed, "the old volumes shall be carefully preserved as the records of the county, and the new copy shall be for general use until the legislature shall authorize the use of the copies as records." The resolution of July 2, 1873, requested the register to complete the general index as authorized May 28, 1872, and to examine and correct the index and copy in time for legislation by the next legislature.

By chapter 284 of the laws of 1875, approved March 5, 1875, (Laws 1875, 541,) authorizing the county board of supervisors to replace worn or dilapidated records, it was provided that the officer "shall carefully compare the copy so made with the original, and shall certify thereon that he has carefully compared said copy with such original, and that said copy is a correct transcript from such original and of the whole thereof, and that the same has been so transcribed by him pursuant to the resolution of the board of supervisors of the said county, specifying in the certificate the date of the passage of such resolution;" and that "the copy so made shall have the same effect as the original, and be evidence in all cases where such original would be evidence, and shall be in its legal effect in all respects considered as an original record in such office."

The certificate to the copy in this instance, under date November 9, 1875, was by the register, who certified to this effect: "I have carefully compared this copy of 'grantor's index' with the original in this office, and that said copy is a

correct transcript from such original and of the whole thereof, being up to and including the 31st day of December, A.D. 1871, and that the same has been transcribed by me pursuant to the resolution of the board of supervisors of said county passed May 28th, 1872."

After the index was thus reproduced the original was kept in the vault and the certified copy was in common use from November 9, 1875. It would seem that the new volume was from that date as effective as an original, and that the register of deeds would have the same power to correct mistakes in the latter as in the former. At all events, under the circumstances, appellant occupied no position to question the title of complainant as a *bona fide* purchaser in 1883, on the ground of informality in the original index.

Decree affirmed.

WALTON *v.* MARIETTA CHAIR COMPANY.

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

No. 234. Submitted March 4, 1895. — Decided March 25, 1895.

A writ of error, which names, as the plaintiff in error, a certain person as administrator of a certain estate, may be amended by substituting the name of another person who appears by the accompanying record to have claimed to succeed him as such administrator, tendered the bill of exceptions, and given bond to prosecute the writ of error.

A writ of error should state the Christian name of the plaintiff in error, and not the initial letter thereof only.

THIS was a motion to amend a writ of error from this court to the Circuit Court of the United States for the Southern District of Ohio, by changing the name of the plaintiff in error. The record of that court showed the following matters:

The original action was brought in November, 1889, by "W. N. Walton, administrator of the estate of Latimer Bailey, deceased," a citizen of New Jersey, against the Marietta Chair

Company, a corporation of Ohio, and having its principal office and place of business in that district, to recover damages in the sum of $10,000, for trespassing upon land of Bailey, and cutting and carrying away timber therefrom in his lifetime.

After the filing of an answer by the defendant, and of a replication by Walton, as Bailey's administrator, "came L. W. Ellenwood," and suggested that Walton's letters of administration had been revoked, and "the said L. W. Ellenwood has been duly appointed and qualified as administrator of the estate of said Latimer Bailey, deceased;" and the court, "on motion of the said L. W. Ellenwood," ordered "that the said action do stand revived in the name of said L. W. Ellenwood as such administrator, and proceed in his favor."

The defendant filed an answer, protesting against "the revivor of this action in the name of L. W. Ellenwood, as administrator of the estate of Latimer Bailey, deceased;" and setting up that "said L. W. Ellenwood is not the successor in office of said W. N. Walton, as the administrator of the estate of said Latimer Bailey, deceased," and that Walton never was such administrator, and any appointment of him as such was void for want of jurisdiction in the court which appointed him.

Upon the defendant's application, and after the introduction of evidence, and a hearing, the court adjudged that the order reviving the action in Ellenwood's name be vacated and set aside, and that the action be abated, and stricken from the docket. To this judgment "the said L. W. Ellenwood duly excepted," and "the plaintiff, L. W. Ellenwood, as administrator of the estate of Latimer Bailey, deceased," tendered a bill of exceptions, which was allowed by the court on May 27, 1891.

On June 19, 1891, a bond was filed in the clerk's office, executed by "L. W. Ellenwood, as principal," and by two other persons as sureties, reciting that "the above named L. W. Ellenwood, as adm'r of the estate of Latimer Bailey, dec'd," had taken out a writ of error from this court "to reverse the judgment rendered in the above entitled action;" and conditioned that "the above named L. W. Ellenwood, adm'r as

aforesaid, shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea."

On June 20, 1891, there was filed, in the clerk's office of that court, an assignment of errors and prayer for citation, purporting to be made by "L. W. Ellenwood, by his attorneys," three persons named, and signed by them as "attorneys for plaintiff in error."

In all these proceedings, the action was entitled "W. N. Walton, administrator of the estate of Latimer Bailey, deceased," as plaintiff, against the Marietta Chair Company, as defendant.

The writ of error from this court to the Circuit Court was dated June 20, 1891, was signed by the clerk and under the seal of that court, as permitted by Rev. Stat. § 1004, and began thus: "Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between W. N. Walton, adm'r of the estate of Latimer Bailey, d'c'd, and the Marietta Chair Company, a manifest error hath happened, to the great damage of the said W. N. Walton, adm'r as aforesaid, as by his complaint appears."

In this court, at this term, "L. W. Ellenwood, by his counsel," moved to amend the writ of error, by striking out, in two places therein, the words "W. N. Walton" and substituting the words "L. W. Ellenwood;" and the defendant in error filed an affidavit of a person who testified that he was well acquainted with "L. W. Ellenwood" who had filed the motion to amend this writ of error, and that his Christian name was not L., but Lowell, and his legal name was Lowell W. Ellenwood.

Mr. Edward B. Whitney for the motion.

Mr. A. D. Follett, *Mr. R. A. Harrison*, and *Mr. Joseph Olds* opposing.

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

By a provision of the first judiciary act of the United States, "no summons, writ, declaration, return, process, judgment, or

other proceedings, in civil causes in any court of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form;" but the court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and the court shall amend every such defect and want of form, other than those which the party demurring so expresses; and "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions" as it shall, in its discretion and by its rules, prescribe. Act of September 24, 1789, c. 20, § 32; 1 Stat. 91; Rev. Stat. § 954.

At first, it was treated by this court, as of course, that a writ of error, which contained no return day, might be amended by inserting the day; and that the want of a date to the teste of a writ of error, as well as the omission to state the district in which the Circuit Court was held, might be made good by amendment, when there was enough in the record to amend by. *Mossman* v. *Higginson*, 4 Dall. 12; *Course* v. *Stead*, 4 Dall. 22.

Afterwards, adopting a stricter rule, it was held that a writ of error did not give this court jurisdiction, and could not be amended, if the return day was wrongly stated; *Insurance Co. of Virginia* v. *Mordecai*, 21 How. 195; *Porter* v. *Foley*, 21 How. 393; or if the real parties were transposed, although, as the court said: "It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight by the clerk by whom it was issued." *Hodge* v. *Williams*, 22 How. 87, 88.

It was also held that a writ of error or an appeal could not

be amended, if it described either party only as "the heirs" of a person named; *Wilson's heirs* v. *Life and Fire Ins. Co.*, 12 Pet. 140; or by the name of one person "and others;" *Deneale* v. *Archer*, 8 Pet. 526; *Davenport* v. *Fletcher*, 16 How. 142; *Miller* v. *McKenzie*, 10 Wall. 582; or by the name of a person "& Co." *Mussina* v. *Cavazos*, 6 Wall. 355, 361; *The Protector*, 11 Wall. 82. But in the last of those cases, decided at October term, 1870, two justices dissented, upon the ground that the amendment might and should be permitted under section 32 of the Judiciary Act of 1789. 11 Wall. 88.

In 1869, a majority of the court, upon the authority of the cases in 21 Howard, above mentioned, and without referring to the early case of *Course* v. *Stead*, 4 Dall. 22, above cited, held that a defect in the teste of a writ of error could not be supplied by amendment. *Moulder* v. *Forrest*, 154 U. S. appx. 567.

Congress thereupon interposed, and by the act of June 1, 1872, c. 255, § 3, reënacted in the Revised Statutes, enacted that this court "may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error." 17 Stat. 197; Rev. Stat. § 1005.

Under this act, the court has allowed a writ of error to be amended, which bore a wrong teste and seal; *Texas & Pacific Railway* v. *Kirk*, 111 U. S. 486; or contained a wrong return day; *Hampton* v. *Rouse*, 15 Wall. 684; *Semmes* v. *United States*, 91 U. S. 21; *National Bank* v. *Bank of Commerce*, 99 U. S. 608; or no return day at all; *Atherton* v. *Fowler*, 91 U. S. 143; *Evans* v. *Brown*, 109 U. S. 180; or described

either party by the name of a partnership, and not by the names of the individuals composing it; *Moore* v. *Simonds*, 100 U. S. 145; *Gumbel* v. *Pitkin*, 113 U. S. 545; *Estis* v. *Trabue*, 128 U. S. 225; *United States* v. *Schoverling*, 146 U. S. 76; or gave the Christian name of the plaintiff below and defendant in error as Henry, when, as appeared from the record, it should have been George; *Pacific Bank* v. *Mixter*, 114 U. S. 463; or named only one defendant in error, when there were more. *Knickerbocker Ins. Co.* v. *Pendleton*, 115 U. S. 339. But the amendment rests in the discretion of the court, and will not be allowed if there is danger of prejudice to the adverse party, or if there is any other good reason against it, as, for instance, that the main question presented by the record has been often decided by this court. *Pearson* v. *Yewdall*, 95 U. S. 294.

In the present case, the writ of error, describing, with gratuitous abbreviation, "W. N. Walton, adm'r of the estate of Latimer Bailey, d'c'd," as the plaintiff in error, was manifestly intended to be sued out by and in behalf of the administrator of Latimer Bailey's estate. The record sent up with the writ of error shows that the whole controversy was whether Ellenwood was legally such administrator, in place of Walton, by whom the original action had been brought; and that the exceptions to the decision below were taken and tendered, and the bond to prosecute the writ of error was given, by Ellenwood. The case is clearly one in which "the statement of the title of the action or parties thereto in the writ is defective," and in which "the defect can be remedied by reference to the accompanying record," and the amendment asked for cannot prejudice the adverse party; and the merits of the case have not been discussed by counsel. The amendment should therefore be allowed.

The description of Ellenwood, like that of Walton, both in the record and in the proposed amendment, gives him no Christian name, beyond initial letters. It is true, as argued by his counsel, that he might have had no Christian name. *Breedlove* v. *Nicolet*, 7 Pet. 413, 431. But the affidavit filed in opposition to the motion to amend shows that he had one,

Counsel for Defendant in Error.

and that his real name was Lowell W. Ellenwood. The description of him by initials is therefore but an illustration of a loose and careless practice which this court does not countenance. *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 58.

The result is, that the writ of error is to be amended by inserting the name of Lowell W. Ellenwood in the place of the name of W. N. Walton, wherever that name appears in the writ of error.

Amendment allowed.

GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY *v.* SHANE.

ERROR TO THE UNITED STATES COURT FOR THE INDIAN TERRITORY.

No. 212. Submitted January 29, 1895. — Decided April 1, 1895.

It being settled that by the joint resolution of March 3, 1891, 26 Stat. 1115, the jurisdiction of this court was preserved as to pending cases, and cases wherein the writ of error on appeal should be sued out, or taken before July 1, 1891, the court has jurisdiction of this case, the writ of error having been allowed and sealed June 5, 1891.

Under the act of May 2, 1890, c. 182, providing a temporary government for the Territory of Oklahoma, the provisions of the statutes of Arkansas, that if either party shall desire a panel, the court shall cause the names of 24 competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of 18 shall be drawn and entered on a list in the order in which they are drawn and numbered, and that each party shall be furnished with a copy of that list, from which each may strike the names of three jurors, and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining on the original list shall constitute the jury, are mandatory, and no rule or custom of the court can override them.

THE case is stated in the opinion.

Mr. A. T. Britton, *Mr. A. B. Browne*, *Mr. J. W. Terry*, and *Mr. George R. Peck* for plaintiff in error.

Mr. A. H. Garland and *Mr. William M. Cravens* for defendant in error.

Opinion of the Court.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff below sued to recover damages alleged to have been caused by the negligence of the defendant. There was a verdict and judgment in his favor for $16,000.

The defendant then brought the case here by error. The writ of error was allowed and sealed on June 5, 1891. It is contended that we are without jurisdiction, because by the act creating the Circuit Courts of Appeals the Court of Appeals for the Eighth Circuit has alone jurisdiction of this controversy. It is settled "that 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." *Wauton* v. *De Wolf*, 142 U. S. 138, 140; *Mason* v. *Pewabic Mining Co.*, 153 U. S. 361.

The assignments of error are many, but we deem it necessary to consider only one of them, namely, that which relates to the method adopted by the court in empanelling the jury. It is thus recited in the bill of exceptions:

"Whereupon, and before the jury was empanelled in this cause, defendant's counsel requested the court to cause a list of eighteen competent and qualified jurors to be made, and to furnish counsel, for both parties, with a copy of such list of eighteen qualified jurors, from which counsel for each party might strike the names of three jurors, and from which said list the twelve jurors to try this cause should be selected, and that the jury to try this cause be selected in accordance with the statutes in such cases made and provided. The court refused to grant this request of defendant's counsel, for the reason that the rule had been established by the court since its organization, that exceptions should be taken to the twelve men that might be called into the box, and to this refusal defendant then and there at the time duly excepted and still excepts."

By the act of Congress entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the In-

dian Territory, and for other purposes," act of May 2, 1890, c. 182, 26 Stat. 81, it is provided "certain general laws of the State of Arkansas, in force at the close of the session of the General Assembly of that State of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or of any law of Congress relating to the subject specially mentioned in this section, are hereby extended over and put in force in the Indian Terrritory until Congress shall otherwise provide; that is to say, the provisions of said general statutes of Arkansas relating to," etc. The act then enumerates certain provisions of the general statutes of Arkansas as found in Mansfield's Digest, including the following: "To jury, chap. 90." The law relating to the question here raised is found in chapter 90 of Mansfield's Digest, sections 4013, 4014, and 4015.

Section 4013 provides that "if either party shall desire a panel, the court shall cause the names of twenty-four competent jurors written upon separate slips of paper to be placed in a box to be kept for that purpose, from which the names of eighteen shall be drawn and entered on a list in the order in which they are drawn and numbered."

Section 4014 enacts: "Each party shall be furnished with a copy of said list, from which each may strike the names of three jurors, and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining on said original list shall constitute the jury."

Section 4015 provides, in substance, that before drawing the list of eighteen provided for in section 4013, "the court shall decide all challenges for cause, which are presented, and, if there are not twenty-four competent jurors, bystanders shall be summoned" "until the requisite number of competent jurors is obtained, from which said list shall be drawn."

Under these sections, then, the parties are entitled, after the challenges for cause have been exhausted, to have a list of eighteen names drawn according to the terms of the statute, upon which list their peremptory challenges are to be made.

The action of the court below was in violation of this statute. It refused to make up the list of eighteen, as requested, and confined the right of peremptory challenge to the twelve jurymen called to be sworn, on the ground that such was the custom or rule of practice of the court. Manifestly, the "rule" or custom of the court could not override the mandatory terms of the statute. That to thus empanel a jury in violation of law, and in such a way as to deprive a party of his right to peremptory challenge, constitutes reversible error is clear. *United States* v. *Shackleford*, 18 How. 588; *Smith* v. *State*, 4 Greene, (Iowa,) 189; *Schumaker* v. *State*, 5 Wisconsin, 324.

This well-established doctrine has been applied to the statute in question by the Circuit Court of Appeals of the Eighth Circuit in four cases, coming from the court whose judgment is under review here, the ruling of the court below there passed on being in all respects like the one here presented. *Railway Co.* v. *James*, 48 Fed. Rep. 148; *Railway Co.* v. *Washington*, 49 Fed. Rep. 347; *Railway Co.* v. *Childs*, 49 Fed. Rep. 358; *Railway Co.* v. *Martin*, 49 Fed. Rep. 359. It is asserted that these decisions are inapplicable, because the request here made was not for a panel under the statute, but this contention is obviously unsound. The request for a list of eighteen as provided for by the statute, upon which to avail of the right to peremptory challenges, was necessarily a request for such a list, made conformably to law. Besides the request, which was refused, asked not only that the list of eighteen be furnished, but "that the jury to try this cause be selected in accordance with the statute in such case made and provided."

Reversed and remanded with directions to set aside the verdict and grant a new trial.

BARNEY *v.* RICKARD.

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

No. 218. Argued January 31, 1895. — Decided April 1, 1895.

Under the act of February 26, 1845, c. 22, 5 Stat. 727, a protest against the exaction of duties on imported goods, in order to be available for recovering the amount of duties illegally exacted, must be made at or before their actual payment; and when the importer deposits with a collector an amount supposed to be sufficient to pay the duties, subject to future liquidation, and receives the goods, and on such liquidation an amount is found to be due the importer as overpayment and is refunded to him, a protest made after the deposit and receipt of the goods, but before the liquidation, is too late and is of no avail.

In an action, tried in 1890, to recover duties alleged to have been illegally exacted in 1861 on an importation of bareges, grenadines, maretz, and merinos, the plaintiff introduced no samples of the imported goods, nor any evidence as to their loss or destruction, and gave no reasons why they were not preserved and produced. He showed to one of his witnesses samples of grenadines, bareges, etc., but without connecting them in any way with the importations, and questioned the witness concerning them. *Held*, that their admission tended to mislead the jury, and was error; and that such evidence came within the rule that "a fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact."

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiff in error.

No appearance for defendant in error.

Mr. S. F. Phillips and *Mr. F. D. McKenney*, by leave of court, filed a brief on behalf of defendant in error.

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

Opinion of the Court.

This was an action to recover duties alleged to have been paid on some thirty-nine importations made during the years 1863 and 1864 from France into the port of New York of veil bareges, plain bareges, crepe maretz, grenadines, and merinos. The action was commenced January 24, 1866, and tried in May, 1890. The trial resulted in a verdict and judgment for the importers on all of the articles mentioned, except the plain bareges.

These questions are presented by the record: First, whether the protest complied with the requirements of the act of February 26, 1845, c. 22, 5 Stat. 727. Second, whether certain samples were properly admitted in evidence for the consideration of the jury.

1. Two of the importations are referred to by the government as bringing out the first question with distinctness, both of which were made prior to June 30, 1864. The record reads as to these two importations as follows:

"It appeared that in case of the importation covered by Exhibit 28, at the time of the entry thereof, February 15, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon at the rate of about 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated, and the plaintiffs' testator notified of such liquidation May 16, 1864; that the excess of the amount deposited with the defendant, as said collector on February 15, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 23, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 26, 1864, and that the protest relating to said importation was dated and endorsed March 4, 1864. . . .

"That in case of the importation covered by Exhibit 38,

at the time of the entry thereof, April 20, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon, at the rate of above 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation, the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation May 16, 1864; that the excess of the amount deposited with the defendant, as said collector, on April 20, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 19, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to April 30, 1864, and that the protest relating to said importation was dated May 3, 1864."

Both sides having rested, defendant's counsel moved the court to direct the jury to find for the defendant as to each of the importations covered by Exhibits 28 and 38, on the ground that the payment of the duties sought to be recovered as to each was paid on or about the dates of the entries, and the respective protests were not made until after such payments. This motion the court denied, and defendant excepted. Defendant's counsel also moved the court to direct the jury to find for defendant as to the importations covered by Exhibits 28 and 38, on the ground that if the date of the payment was not the date of the entry, and was the date of the liquidation of the duties and the notification of such liquidation, Rickard obtained possession of the goods without such payment, or in other words, did not pay the duties to obtain such possession. This motion the court denied, and defendant excepted.

It will be perceived as to Exhibit 38 that the record states that Rickard at the time of the entry, April 20, 1864, "deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon, at the rate of above forty per centum ad valorem, or, in other words,

an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry;" that he received the goods April 30; that he did not protest until May 3; that the entry was liquidated May 16, and that the collector, finding that there had been an overpayment, refunded the difference between the amount finally decided on by him as correct and the amount as paid by Rickard, May 19.

The contention of the government is that if the actual transfer of the money on April 20 constituted its payment, that payment was not made under protest; and that if the actual payment is to be regarded as having been made when the entry was liquidated, or the excess was repaid, then it was not made under duress, as Rickard had already got his goods.

Actions against collectors for money had and received depended originally on common law principles. The money was regarded as paid under duress in order to obtain possession of the merchandise detained by the collector, and the protest evidenced the fact that the payment was involuntary, and warned the collector not to pay the money into the Treasury.

The history of legislation on the subject is given by Mr. Justice Bradley, in *Barney* v. *Watson*, 92 U. S. 452, and more in detail in the brief for the government.

By the act of March 2, 1799, c. 22, § 49, 1 Stat. 627, 664, the collector (jointly with the naval officer or alone where there was none) was required to make "a gross estimate of the amount of the duties on the goods, wares, or merchandise to which the entry of any owner or consignee, his or her factor or agent," related, to be endorsed upon such entry and signed by the officer or officers making the same; "and the amount of the said estimated duties having been first paid, or secured to be paid, pursuant to the provisions of this act, the said collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the goods, wares, and merchandise, whereof entry shall have been so made, and then, and not before, it shall be lawful to land the said goods." Rev. Stat. § 2869. By section 4 of the act of May 28, 1830, c. 147, 4 Stat. 409, 410, a ten-day bond on delivery to return the goods on call was provided for, but this

was in addition to payment or security therefor, and intended for further security if the duties overran the estimated amount.

In *Elliott* v. *Swartwout*, 10 Pet. 137, the principle was affirmed which had been established by previous authorities, that money paid to a collector for duties illegally demanded, if paid under compulsion, in order to get possession of the goods or to prevent their seizure for duties, might be recovered in a common law action against the collector, provided the payment was made under protest and with full notice of the intent to sue, so that the officer might protect himself by retaining the money in his possession; but that a payment voluntarily made without such protest could not be recovered back. Because of the embarrassments which ensued in consequence of the large amount of duties withheld from the public Treasury by Swartwout, the defendant in that case, a section was inserted in the civil and diplomatic appropriation bill of March 3, 1839, c. 82, § 2, 5 Stat. 339, 348, which read as follows: "That from and after the passage of this act, all money paid to any collector of the customs, or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law, or by regulation of the Treasury Department, to be placed to the credit of said Treasurer, kept and disposed of; and shall not be held by said collector, or person acting as such, to await any ascertainment of duties, or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of unascertained duties or duties paid under protest more money has been paid to the collector or person acting as such than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated."

By the act of August 30, 1842, c. 270, § 12, 5 Stat. 548, 561, the duties were required to be paid in cash.

At January term, 1845, it was held by this court in *Cary* v. *Curtis*, 3 How. 236, that the second section of the act of 1839 took away the importer's right of action. The argument was that as thereby the collector was required to pay moneys collected into the Treasury without regard to protests filed or without awaiting the result of suits brought, he was converted "into the mere bearer of those sums to the Treasury of the United States, through the presiding officer of which department they were to be disposed of in conformity to the law." This decision was referred to with approval in *Curtis* v. *Fiedler*, 2 Black, 461, 478, and the court said: "The law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law. Collectors under the act referred to were required to pay all moneys received for unascertained duties or for duties paid under protest into the Treasury of the United States, and consequently this court held that in a case arising under that law, where that duty had been performed by the collector, the law would not imply a promise on his part to pay the same back to the importer, because he was under no obligation to pay the money twice, and to have paid the same back to the importer in the first place would have been contrary to his official duty as prescribed by an act of Congress."

Thereupon the act of February 26, 1845, c. 22, 5 Stat. 727, was passed, which provided: "That nothing contained in [said section] shall take away, or be construed to take away or impair, the right of any person or persons who have paid or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector, or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial

by jury, touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

Thus the common law right of action was restored, but the protest was required to be in writing and not oral as before allowed. *Swartwout* v. *Gihon*, 3 How. 110.

This was the statute in existence regulating payments under protest upon importations of dutiable goods at the time of the importations under consideration. The act of March 3, 1857, c. 98, § 5, provided for notice of dissatisfaction within ten days after entry, but that act only applied to cases where the question was whether the goods were or were not subject to duty at all. 11 Stat. 192, 195. The act of June 30, 1864, gave ten days after liquidation for such notice. Rev. Stat. § 2931.

By the act of August 6, 1846, c. 84, 9 Stat. 53, the right to secure the duties was restored in case of entries for warehousing, by giving bond in double the amount of the duties as estimated; and in *Tremlett* v. *Adams*, 13 How. 295, 303, Mr. Chief Justice Taney made these observations in respect of that act: "Previous to the passage of this act no goods, chargeable with cash duties, could be landed at the port of delivery until the duties were *paid* at the port of entry. . . . The permit could not be granted unless the duties had been paid. . . . The importer himself had no right to land them, even at the port of entry, before the duties were *paid*. But when the entry at the custom-house was imperfect, for want of the proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained, or the cash duties were not paid after the forms of entry had been complied with; in all of these cases the collector was directed, by existing laws, to take possession

of such goods and place them in public stores, and retain them until the duties were paid."

As we have said, the act of 1799 provided that on entry the duties should be "first paid, or secured to be paid." The act of August 30, 1842, required, however, that "the duties on all imported goods, wares, or merchandise, shall be paid in cash," or otherwise the goods should be stored and sold. The act of August 6, 1846, amended the act of 1842, and while preserving the provision that the duties should be paid in cash and that goods upon which the duties were not paid should be deposited in public store and sold by the collector, established also the system of entries for warehousing, by which the duties, instead of being paid, could be secured by bond with sureties in double their amount in such form as the Secretary of the Treasury should prescribe. None of the statutes provided for a deposit. Either the estimated duty must be paid in cash or a warehouse bond must be given. Otherwise the goods could not be entered, but would be put in the public store by the collector as unclaimed.

We assume that the procedure in estimating duties was for the collector, taking the invoice as true, to ascertain the amount which *prima facie* the importer should pay, and this he was compelled to pay in cash forthwith unless he entered the goods for warehousing. Ordinarily the duties finally liquidated were the same as those originally estimated, but the collector might for various reasons find that the estimated duty had to be changed, and a further payment or refund made. In the case at bar it is stated that the amount originally required to be paid was "about" or "above" forty per cent ad valorem, "or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry," but that cannot be held to mean that, instead of making "a gross estimate of the amount of the duties" as required by law, the collector named a mere arbitrary figure. On the contrary, as the presumption is in favor of the collector and the record shows that he assessed the duties at thirty per cent ad valorem and two cents per square yard, it must be concluded that he so estimated them, but

that the amount required overran the result of subsequent and accurate calculation. Besides, as, when the protest came to be made, the importer claimed that the rate should have been thirty-five per cent ad valorem, the statement may have been inserted as establishing that thirty per cent ad valorem plus two cents per square yard exceeded thirty-five per cent ad valorem.

The question arises then whether, when the duties were estimated and the amount delivered by Rickard to the collector, he should not then have protested if he desired to contest the legality of the exaction. The statute said that an action could not be maintained against the collector, except under protest, and "unless the protest was made in writing, and signed by the claimant, at or before the payment of said duties." Without the protest the money paid was not illegally exacted, and, if not, could not be recovered back. *Lawrence* v. *Caswell*, 13 How. 488, 496. If when final liquidation took place there had been no change in the amount determined or the basis thereof, could he then protest? If the amount had been increased and he protested, could he recover back more than the amount so added? Having obtained his goods by the delivery of the money without protest, could he say after that that it was paid compulsorily in order to get possession of them?

It seems to us that these protests came too late, if the duties were estimated according to law, and that this was distinctly ruled in *Barney* v. *Watson*, 92 U. S. 449.

In that case the goods were entered December 24, 1863. The collector put the duties at the sum of $8840.93, arrived at by the addition of a specific duty to the duty ad valorem, and ascertainable by the rule applied. The amount thus determined was delivered to the collector. On liquidation of the entry, the collector fixed the amount at $10,023.64, leaving a balance of $1187.71. This liquidation of the entry was made March 11, 1864, and the additional duty was paid and the protest made March 24, 1864. The question between the importers and the collector related to the proper rate of duty upon certain flannels. These the importer classified at 35 per

cent ad valorem, while the collector classified them at 35 per cent ad valorem plus a specific duty of eighteen cents per pound. Mr. Justice Bradley, delivering the opinion, states that there were 7984 pounds of these goods, so that the specific duty was $1427.12. This difference was partly represented by the payment, under protest, of $1182.71, but a portion of it was represented by part of the $8840.93 paid at the time of the entry of the goods. This court held that as to the sum illegally exacted in December, the plaintiff must fail to recover, because he had then failed to protest, and Mr. Justice Bradley said: "The question in the case, therefore, really was, whether the importers made their protest in accordance with the act of 1845, namely, at or before paying the duties complained of. It is not denied that they did this so far as relates to the additional charge of $1182.72, but they claim a return of more than this; and under the charge of the court they obtained a verdict for nearly double this amount, which would include some portion of the money paid by them without protest when the goods were first entered. This was erroneous."

The payment of the $8840.93 was payment of the estimated duties, just as in this case, although Mr. Justice Bradley speaks of it as a "payment on account." So far as disclosed by this record the importers knew in this case as in that, upon what basis the collector proceeded as to amount and rate, and if in this case as in that an additional amount had been required to be paid and they had protested, such additional amount might have been recovered back, if otherwise improperly exacted, because it would have been paid under protest at the time of the payment, and the importers could not have been held to have acquiesced by not protesting before.

But it does not follow that the protest can be given effect as of the prior date when the amount of the estimated duties was paid over or deposited, or that the entire amount must be considered as paid under duress at the later date when possession of the goods had already been surrendered.

Hence, in *Crocker* v. *Redfield*, 4 Blatchford, 378, 380, Mr. Justice Nelson, on the question of "estimated duties," held as

follows: "As it respects the excess of duty claimed to be recovered upon the shipment of jute, it is a sufficient answer to say that the protest is defective. It appears, on the face of it, that the money was paid, and in the hands of the collector, before the protest was made against the payment of the duty and the penalty. There is no date to it, but the inference is unavoidable from the facts stated in it. Indeed, a balance is still in the hands of the collector of $92.85. It is said that the money was only deposited with the collector as a security for the payment of the duties when ascertained, and that the application did not take place till the ascertainment of the duties. Admitting this to be so, I do not agree to the consequence claimed. The money deposited was to be applied by the collector to the duties, and it cannot be said, after this, that it was paid compulsorily in order to get possession of the goods. The protest, after the duties were ascertained, came too late."

Mr. Justice Nelson participated in the decision of *Marriott* v. *Brune*, 9 How. 619, in which it is supposed a contrary view was indicated. That case was decided by Chief Justice Taney on circuit. *Brune* v. *Marriott*, Taney Dec. 132. Plaintiffs paid the estimated duties in cash on certain importations of sugar at the port of Baltimore in 1847, which were thereupon landed and examined by the weighers and gaugers, which examination disclosed that the goods had suffered from leakage. Suit was "brought to recover back so much of the money as was paid for duties upon that portion of the cargo which was lost on the voyage by leakage." Plaintiffs did not protest until after the occurrences above mentioned and prior to the final liquidation of the duties. Judgment was unquestionably correctly given for plaintiffs. The goods were not intended to be left in warehouse under the act of August 6, 1846, and payment of the duties was made while the goods were still aboard the ship, and the leakage not ascertained until after they were put ashore. The payment therefore was not made under a mistake of law, but under a mutual mistake of fact, since the importers and collector both assumed that the amount of sugar and molasses named in the invoices was to be unladed.

Clearly there was nothing to show dissatisfaction in the first instance, but when the fact developed that there was a deficiency in respect of which duties should not have been exacted, protest was made as to the amount paid on goods which were lacking, but not in respect of any other part of the importations. The Chief Justice said, however: "The protest is not required to be made on or before the payment of what are called the estimated duties, for this payment is necessarily regulated by the invoice quantity as well as the invoice price. The importer cannot at that time know whether there has been any loss by leakage, nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice. The protest is legally made when the duties are finally determined and the amount assessed by the collector, and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible. . . . The payment of the money upon the estimated duties is rather in the nature of a pledge or a deposit than a payment, for it remains in the hands of the proper officer, subject to the final assessment of the duties, and if more has been paid than is due, which is most commonly the case, the surplus belongs to the importer, and is returned to him. Upon the whole, the court is of opinion . . . that the protest of April 9, 1847, covers all the cargoes where duties had not before been finally assessed and adjusted by the collector."

And in the case on error in this court, 9 How. 619, Mr. Justice Woodbury, speaking for the court, remarked that "where the duties had not been closed up in any cases when the written protest in April was filed — though the preliminary payment of the estimated duties had taken place — the court justly considered the protest valid; because till the final adjustment the money remains in the hands of the collector, and is not accounted for with the government, and more may be necessary to be paid by the importer."

Without analyzing the reason given, in view of the lan-

guage of the statute, and the decisions in *Cary* v. *Curtis* and *Curtis* v. *Fiedler*, these observations must be read in the light of the facts of the case. The protest was confined to the duties paid on the deficiency. Upon discovery of the fact of loss by leakage, the importers became entitled to a repayment, and the action of the collector was equivalent to a then decision that they were not so entitled, against which decision they protested. Up to that time there was no ground for a protest, and when the necessity therefor appeared it was made at the time of the particular payment complained of and was given that effect, a very different thing from carrying it back to the previous payment when there was no complaint.

In *Moke* v. *Barney*, 5 Blatchford, 274, Mr. Justice Nelson held that the requirement of the act of February 26, 1845, of a written protest in order to sustain an action against the collector to recover duties back, applied to the payment of unascertained as well as ascertained duties or "duties paid under protest;" and he there said that the protest was seasonably made, if made at the time of the final liquidation. In that case the question arose in reference to an allowance for draft, and, just as in the instance of leakage, the notice of dissatisfaction could not be given until the ground for dissatisfaction was disclosed.

In *Erskine* v. *Van Arsdale*, 15 Wall. 75, the ruling was that taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them. It is not necessary to discuss the cases in relation to the existence of such duress or necessity as make a payment involuntary. The intention of the statute was that recovery could be had if proper notice of dissatisfaction was given at the proper time, and, as already remarked, in *Brune* v. *Marriott* the payment of so much of the duties as was subsequently disputed was really made under misapprehension of fact. In *Barney* v. *Watson* the same rule was applied to the additional amount required on final liquidation, but the protest was distinctly held not to cover that proportion of the amount assessed illegally which had been included in the prior payment.

In *Davies* v. *Miller*, 130 U. S. 284, 287, 289, it was held that under the act of 1864 the protest could be made at any time after entry, it having been decided in the court below that it could not be made before final liquidation, but whether it could be made after payment was not a question presented for consideration; and *Marriott* v. *Brune* was referred to as generally regarded and acted on as laying down a general rule establishing the validity of prospective protests as it was in *Schell's Executors* v. *Fauché*, 138 U. S. 562. No point was ruled in these cases inconsistent with the conclusion at which we have arrived, which is that these protests were not in time. We think this results from the language of the statutes, the facts disclosed by the record and the decision in *Barney* v. *Watson*, in which the precise question was squarely presented.

It is true that the evidence of a custom-house broker was adduced to the effect that where there was any uncertainty as to the correct rate of duty it was the practice, at the time of the trial, to take from the merchant what was known as a deposit intended to more than cover the exact amount of duty; but we do not understand this practice, if it prevailed prior to the act of June 30, 1864, as dispensing with the necessity of the collector making his estimate of the duties by fixing in dollars and cents the amount which *prima facie* the importer should pay, exacting, if in doubt, the higher of two possible rates.

In this case the collector claimed thirty per cent ad valorem and two cents per square yard. The importer must be held to have known whether this classification was objectionable or not, and was not entitled to wait until final liquidation to make up his mind whether he would protest against that classification, and on what ground he would put the protest. In not protesting he accepted the rates as they stood and took the chances that they might be lowered, while if they were increased a protest would then be effective as to such increase, or if the basis of the exaction was changed. There was no increase and apparently no change. The reasonable inference is that the ground of the refund was some inaccuracy in the computations.

And it might well be held, on this record, that even if the money could be said to have been paid at the time of the final liquidation because not applied until then, it was not paid in order to get possession of the goods. See under subsequent statutes: *United States* v. *Schlesinger*, 120 U. S. 109; *Porter* v. *Beard*, 124 U. S. 429; *Merritt* v. *Cameron*, 137 U. S. 542; *Cadwalader* v. *Partridge*, 137 U. S. 553; *Schoenfeld* v. *Hendricks*, 152 U. S. 691.

2. Among the goods imported were certain plain bareges and grenadines, each composed of a silk warp and worsted weft. No samples of these imports, or any similar goods imported by Rickard, were put in evidence. A sample was shown to one of the witnesses, (and other similar evidence was adduced, not differing from that of this witness,) who testified that it "was known in this country in 1861 as a grenadine or a barege." This was objected to, because "in no way connected with any goods in suit," but was admitted as Exhibit 44, and defendant excepted. The witness was then shown another sample, as to which he testified that it "was a barege, but it might be called a grenadine sometimes." This was also admitted under exception and marked 44. The next sample "was a grenadine, what they call an iron barege, or an iron frame barege; . . . that the real name for it was, in French, canevas, because they resembled canvas; that when they came here they got the name of iron bareges; that it was not a species of grenadine; it was a grenadine, only it had a disposition of threads more or less heavy or harsh." This was likewise admitted, under exception, as Exhibit 45. The witness further testified that "Exhibit 44 did not differ at all from a plain barege, a silk and worsted barege as known in trade and commerce in 1861, '2, '3, and '4; it was simply a barege; that Exhibit 45 was a grenadine, and in 1862, '3, and '4 was known in trade and commerce in this country as an iron barege; that it did not differ in any respect from what was known in trade and commerce in this country in 1862, '3, and '4 as grenadine; . . . that he did not know anything about the bareges in this suit; that there was a great variety of grenadines; . . . that if a grenadine

were of a quality worth 65 cents it would not represent at all one that was worth $1.25; . . . that he did not know anything about the grenadines in this suit." The jury found for the plaintiffs as to the grenadines. There was no evidence adduced of the loss or destruction by Rickard of the samples, nor did the lapse of time raise any presumption of such loss or destruction. The protest for purposes of suit was made not long after the importations, and the action was commenced in 1866 by the same attorney who was spared to try the case nearly a quarter of a century afterwards. The goods were not perishable in nature and no reason was given why the necessary samples were not preserved. It must be assumed that all material testimony bearing upon these exhibits was incorporated in the bill of exceptions, and we cannot discover therefrom that the articles imported by Rickard under the name of grenadines were iron bareges or claimed by him to be such. Unless this were so, the sample numbered 45 was not relevant. Nor does it appear that there was any evidence to connect the samples introduced with the importations in question, or fairly tending to establish substantial identity between them and the importers' goods. We are of opinion that these samples were incapable of raising any reasonable presumption or inference as to whether the goods were properly classified, and that their admission tended to mislead the jury. And if there were some evidence of resemblance, still we think as the record stands the proof came within the rule laid down by Mr. Justice Stephens: "A fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, . . . is deemed not to be relevant to such fact. . . ." Dig. Ev. art. 10.

Judgment reversed and cause remanded with a direction to grant a new trial.

COLVIN *v.* JACKSONVILLE.

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

No. 874. Submitted March 11, 1895. — Decided April 1, 1895.

Maynard v. *Hecht*, 151 U. S. 324, affirmed to the point that, "Where an appeal or writ of error is taken from a District or a Circuit Court in which the jurisdiction of the court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction here; and if it be wanting this court cannot take jurisdiction."

On May 3, 1894, John H. Colvin, describing himself as a citizen of the State of Illinois, filed a bill of complaint in the Circuit Court of the United States for the Northern District of Florida, against the city of Jacksonville, a municipal corporation of the State of Florida, and one D. U. Fletcher, mayor of said city, wherein, alleging that he was the owner of property, real and personal, to the amount of $50,000 within said city and subject to municipal taxation, he prayed that the defendants should be restrained from issuing and disposing of bonds of the city to the amount of one million of dollars. The grounds of relief stated in the bill were that, after the qualified electors approved the issue of the bonds payable in lawful money, the city council, by ordinance, provided that it should be payable in gold coin; and that the law under which the question of issuing the bonds had been submitted to the electors was illegal and void, because repugnant to the Constitution of the United States. The bill was subsequently amended and an answer was filed, denying that the complainant was a citizen of the State of Illinois and that he had taxable property in the city of Jacksonville to the amount of $50,000.

There was a motion for an injunction and the appointment of a receiver, and on the 3d day of December, 1894, the court denied the motion for an injunction; and thereupon the com-

plainant filed a motion and asked leave to further amend his bill by joining as parties complainant the names of other owners of property assessable by the city, so that the joint liability of such owners and the complainant would exceed $2000 for taxes, and thus remove the objection to the jurisdiction of the court that the amount involved in dispute did not exceed the sum of $2000.

On December 4, 1894, the court denied leave to amend the bill, and made a final decree dismissing the bill for want of jurisdiction. Thereupon the complainant prayed for an appeal to the Supreme Court, which was allowed by the District Judge.

Mr. H. Bisbee for appellant.

Mr. John C. Cooper for appellees. *Mr. A. W. Cockrell* filed a brief for same.

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

It is claimed on behalf of the appellant that the appeal may be sustained in this case because it is one in which the question of the jurisdiction of the court below is in issue, and thus within section five of the judiciary act of March 3, 1891.

But that section provides that "in such case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision," and this record does not disclose any such certificate.

Accordingly no course is left open to this court but to dismiss the appeal for want of jurisdiction. Any discussion of this question of practice is rendered unnecessary by the full treatment it received in the recent case of *Maynard* v. *Hecht*, 151 U. S. 324, wherein it was held that in the instance of an appeal upon the question of jurisdiction under the fifth section of the act, a certificate by the Circuit Court presenting such question for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its

appellate jurisdiction, and that the absence of such certificate is fatal to the maintenance of the appeal. See likewise *Shields* v. *Coleman*, *ante*, 168.

Appeal dismissed.

STEVENS'S ADMINISTRATOR *v.* NICHOLS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 789. Submitted March 18, 1895. — Decided April 1, 1895.

The denial by a state court of an application to amend a petition for the removal of the cause to a Federal court is not the denial of a right secured by the Constitution of the United States.

Motion to dismiss or affirm. In January, 1881, the defendant in error as plaintiff commenced a proceeding in the Circuit Court of Pettis County, Missouri, to procure the issue of executions against Robert S. Stevens and another as stockholders in the Texas & Atlantic Refrigerator Car Company, against which he had previously recovered a judgment. This proceeding was based upon section 736, Rev. Stats. Missouri, 1879 (now section 2517, Rev. Stats. 1889). The proceeding was removed by the defendants to the Circuit Court of the United States for the Western District of Missouri. In that court upon proper pleadings a trial was had resulting in a verdict and judgment in favor of the plaintiff and against each defendant for a separate amount. Stevens brought the judgment against him to this court by writ of error, but on examination it was found that the petition for removal was defective, in that it failed to allege the existence of diverse citizenship at the time of the commencement of the proceeding as well as at the time of the application for the removal. The case was, therefore, sent back to the United States Circuit Court, with instructions to remand it to the state court. *Stevens* v. *Nichols*, 130 U. S. 230. This order was carried into effect by the United States Circuit Court. In the state court thereafter an application was made for leave to amend the petition for the removal

so as to include an allegation of diverse citizenship at the time of the commencement of the proceeding. This application was denied. Subsequently a trial was had and a judgment rendered in favor of the plaintiff and against the defendant Stevens, which judgment was affirmed in the Supreme Court of the State. Whereupon defendant Stevens sued out this writ of error.

Mr. George P. B. Jackson for the motion.

Mr. George A. Madill, *Mr. John M. Holmes*, and *Mr. James A. Carr* opposing.

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

The Supreme Court of the State held that the refusal of the trial court to permit the defendant to amend his petition for removal was proper. Amendments of pleadings or other proceedings are as a rule matters of discretion with the trial court, and a writ of error will not lie to review its action in respect thereto. *Walden* v. *Craig*, 9 Wheat. 576; *Chirac* v. *Reinicker*, 11 Wheat. 280; *United States* v. *Buford*, 3 Pet. 12; *Matheson's Administrators* v. *Grant's Administrator*, 2 How. 263.

The denial by a state court of an application to amend a petition for removal is therefore not the denial of any right secured by the Constitution of the United States. *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Pennsylvania Co.* v. *Bender*, 148 U. S. 255. The judgment is

Affirmed.

ORCHARD *v.* ALEXANDER.

PIERCE *v.* FRACE.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Nos. 192, 193. Argued and submitted March 13, 1895. — Decided April 1, 1895.

The Commissioner of the General Land Office may direct the proper local land officer to hear and pass upon charges of fraud in the final proof of a preëmption claim upon which the requisite cash entry has been paid, and has jurisdiction to review the judgment of the local land officer in respect thereof; and the Secretary of the Interior has jurisdiction to review such judgment of the Commissioner, and to order such an entry, shown to be fraudulent, to be cancelled.

While these two cases differ in their particular facts, they agree in the question involved, and for convenience may be considered together. As the opinion of the Supreme Court of the State of Washington was filed in the second case, the special facts of that will be stated. The action was commenced in the District Court of the Territory of Washington, sitting in and for the county of Pierce.

The complaint alleged that the plaintiff was the owner and entitled to the possession of a certain described tract or parcel of real estate situate in the county of Pierce, and prayed judgment for the recovery of possession, together with rents, issues, and profits.

The answer, beyond a general denial, set up by way of equitable defence that on December 20, 1880, the land described in plaintiff's complaint was unoccupied, unappropriated public land of the United States, and that on that day the plaintiff filed his declaratory statement therefor under the preëmption laws of the United States; that on February 13, 1883, he made his final proof, and on March 12, 1883, his cash entry was allowed by the register and receiver of the local land office; that on August 7, 1883, the defendant filed in the office of the Commissioner of the General Land Office, and afterward with the local land officers, his corroborated affidavit, in which he alleged that plaintiff had at no time estab-

lished his residence on the land; that he had failed to improve and cultivate the same as required by law, and that the cash entry had been procured by fraud; that on May 16, 1885, the Commissioner of the General Land Office ordered a hearing on those charges before the local land officers, and that in pursuance of such order the plaintiff and defendant appeared before those officers on July 13, 1885, for a trial of the questions raised and presented by the defendant's affidavits; that a trial was had, evidence was submitted, and the case argued by counsel, and thereupon the local land officers found as facts that the plaintiff had at no time established his residence on the land embraced in his entry, and that he had failed to improve and cultivate the land as required by law, and, as a conclusion of law therefrom, that the plaintiff's entry should be cancelled; that the plaintiff appealed to the Commissioner of the General Land Office, who, on June 3, 1886, affirmed the decision of the local land officers; that he took a further appeal to the Secretary of the Interior, who, on March 31, 1888, sustained the Commissioner of the General Land Office, and cancelled plaintiff's entry; that after this defendant filed upon the land under the homestead laws of the United States, made final proofs thereon, paid to the government of the United States the required price, and on July 26, 1889, received from the receiver of the land office a patent certificate for the land, by virtue whereof he claimed to be the owner and entitled to the possession.

To this answer an amended reply was filed, in which the plaintiff alleged that the proceedings initiated by the defendant were wholly void on the ground that the officers referred to had no jurisdiction over the lands or of the plaintiff, for the reason that the United States had theretofore sold and disposed of the land to plaintiff and received from him the sum of $400, in consideration of which sum the United States had undertaken and agreed to execute and deliver to him a patent. He set forth in detail that he had, in accordance with the preëmption laws of the United States and the requirements of the General Land Office, published notice of his intention to make final proof; that on the date named in

Counsel for Defendant in Error.

such publication he had appeared with his witnesses before the local land officers and made such final proof, and paid to them the land office fees and the sum of $400, the legal price of the land; that they had accepted such final proof as sufficient and received such sum of money, and executed and delivered to him a duplicate receiver's receipt therefor, and that thereupon he became entitled to have and receive from the United States, in the due course of the administration of the General Land Office, a patent for the land; that no lawful proceedings had ever been taken by the United States to rescind the contract so entered into between the government and himself, nor had the sum of $400, or any part thereof, ever been repaid or tendered to him by the government. He denied that the defendant had, in his affidavits, alleged that the plaintiff failed to improve and cultivate the land as required by law, or that his entry had been procured by fraud. He also denied that the decision of the Commissioner of the General Land Office was affirmed by the Secretary of the Interior, except as to finding that plaintiff had not made his residence upon the land.

To this amended reply the defendant demurred on the ground that it did not contain facts sufficient to constitute a defence to the affirmative matter set up in the answer. The demurrer was sustained, the case at the time of the hearing being in the Superior Court of the State of Washington in and for the county of Pierce, Washington having been admitted as a State since the commencement of the action. No further amendment being desired, judgment was entered on the pleadings, in favor of the defendant. This judgment was affirmed by the Supreme Court of the State, 2 Washington, 81, whereupon plaintiff brought this writ of error.

Mr. W. H. Pritchard for plaintiff in error. *Mr. S. F. Phillips* and *Mr. F. D. McKenney* were with him on his brief.

Mr. C. C. Lancaster, (with whom were *Mr. John P. Judson* and *Mr. W. C. Sharpstein*,) for defendants in error submitted on their brief.

Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

Section 2259, Rev. Stat., authorizes one possessed of certain personal qualifications, "who has made, or hereafter makes, a settlement in person on the public lands subject to preëmption, and who inhabits and improves the same, and who has erected or shall erect a dwelling thereon," to enter not exceeding 160 acres. Section 2262 provides that before any person shall be allowed to enter lands he shall make oath before the register or receiver that he has never had the benefit of any right of preëmption; that he is not the owner of 320 acres of land; that he has not settled upon and improved the land for speculation, but in good faith to appropriate it to his own exclusive use, and that he has not directly or indirectly made any agreement or contract by which the title which he is to acquire is to inure in whole or in part to any person except himself; and further that a false oath in these respects shall forfeit the money which he has paid and all right and title to the land. This oath is to be filed in the local land office and a duplicate thereof transmitted to the General Land Office. Section 2263 reads:

"Prior to any entries being made under and by virtue of the provisions of section twenty-two hundred and fifty-nine, proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie, agreeably to such rules as may be prescribed by the Secretary of the Interior."

The contention of the plaintiff is that this last section authorizes a quasi-judicial hearing before the local land officers, whose decision is tantamount to a judgment binding both the government and the applicant in respect to the matter of settlement and improvement, and one which, inasmuch as no special right of appeal or review is given, is not subject to reexamination by the Commissioner of the General Land Office or the Secretary of the Interior, but is a final adjudication as to those matters. As a necessary result therefrom he contends that the order of the Commissioner directing a hearing on the

charges made by the defendant, as well as the hearing before the local land officers in pursuance thereof, were all without authority and unavailing to disturb the conclusive force of the adjudication theretofore made. Upon the question which this contention presents the case depends, and to it, therefore, we direct our attention.

If there were no other provision in the statutes than that found in section 2263, the contention of the plaintiff would find support in the decisions of this court. By the act of May 29, 1830, 4 Stat. 420, c. 208, the right of preëmption was given to certain settlers on the public lands. Section 3 was similar to section 2263, in that it required that prior to any entry "proof of settlement or improvement shall be made to the satisfaction of the register and receiver." In *Lytle* v. *Arkansas*, 9 How. 314, 333, it was held that their decision was conclusive upon the questions of settlement and improvement, the court saying: "The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed preëmptions under it. From their decision no appeal was given. If, therefore, they acted within their powers, as sanctioned by the Commissioner, and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final."

Subsequently, and on July 4, 1836, 5 Stat. 107, c. 352, Congress, without any repeal of the act of 1830, passed an act to reorganize the General Land Office, the first section of which is as follows:

"That from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States."

This section, so far as any question here is concerned, was

substantially carried forward into the Revised Statutes, as section 453, and is still in force. Under this law the case of *Barnard's Heirs* v. *Ashley's Heirs*, 18 How. 43, 45, arose. It was there contended, in accordance with the prior cases, that the decision of the register and receiver was final and conclusive, but, the entries having been made on *ex parte* affidavits, the right of review by the Commissioner of the General Land Office was sustained, the court saying:

"The necessity of 'supervision and control,' vested in the Commissioner, acting under the direction of the President, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the Commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety.

"The case relied on, of *Wilcox* v. *Jackson*, 13 Pet. 511, was an ejectment suit, commenced in February, 1836; and as to the acts of the register and receiver, in allowing the entry in that case, the Commissioner had no power of supervision, such as was given to him by the act of July 4, 1836, after the cause was in court.

"In the next case, 9 How. 333, all the controverted facts on which both sides relied had transpired, and were concluded before the act of July 4, 1836, was passed; and therefore its construction, as regards the Commissioner's powers, under the act of 1836, was not involved. Whereas, in the case under consideration, the additional proceedings were had before the register and receiver in 1837, and were subject to the new powers conferred on the Commissioner."

It will be noticed that the right of review on the part of the Commissioner of the General Land Office, sustained by this decision, was one existing under the act of 1836, and before the act of September 4, 1841, c. 16, 5 Stat. 453, section

11 of which provided that "all questions as to the right of preëmption arising between different settlers shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury of the United States." This section is substantially reënacted in the Revised Statutes, section 2273. The case, therefore, is a direct decision that the power of supervision and control granted by the act of 1836, although in terms extending to only executive duties, included the right to review a decision of the local land officers as to the matter of settlement and improvement, at least in cases in which the proof before those officers was by *ex parte* affidavits. And if the right of supervision and control over their decision exists under those circumstances, it is difficult to perceive any reason why it does not exist under all. There is certainly nothing in the statute which in terms creates any distinction, and, indeed, in the nature of things there is no foundation for any. If a provision that proof of settlement and improvement shall be made to the satisfaction of the local land officers does not exclude a review, when such officers are satisfied by evidence in writing, there is no legal principle on which it can be held that there is no review when they are not satisfied by written evidence, but require in addition oral testimony. Indeed, could not the Secretary of the Interior, by virtue of the power given him in said section 2263, prescribe as a rule of procedure that only affidavits should be receivable, and so bring every case within the letter of this decision? But the grant of power to the local officers is not limited by the manner in which they exercise that power, and does not rest at all upon the kind of evidence on which they act. Their adjudication must be final in all cases, or it is final in none. It was final when no supervising power was by statute vested in the Commissioner of the General Land Office. It ceased to be final when the general power of review and supervision of all "executive duties" concerning the survey and sales of lands was vested in the higher officials of the Land Department at Washington.

Stress is laid upon the words "executive duties," as though

the approval of the evidence of settlement and improvement was not an executive duty but a purely judicial act. This is a mistake. True, it involves the weighing of testimony and the exercise of judgment, but equally so do many administrative acts. The approval of a bond, for instance, involves an inquiry as to the sufficiency of the sureties, which is to be determined by the testimony in support thereof, as well as a consideration of the question whether its terms satisfy all the demands of the law. But who would think of calling it a purely judicial act? Any determination of a ministerial officer may by statute be declared final and conclusive, but such finality does not change its character and transform it from an executive to a judicial act.

The approval of the evidence offered in respect to settlement and improvement is only quasi-judicial. It is as much an administrative as a judicial act. There is no contest before the register and receiver. No one represents the government. The action taken is purely *ex parte*. It is only one step in the procedure by which through an executive department the title to public land is obtained by an individual.

In this connection it may be remarked that the plaintiff in his amended reply does not allege that the local land officers demanded from him oral testimony, or that they did not act alone upon written evidence filed with them. There is, therefore, nothing in the record which excludes the case from the very terms of the decision from which we have just quoted.

Since that decision the question of the supervising power of the general officers of the Land Department has been more than once presented to this court. In *Harkness* v. *Underhill*, 1 Black, 316, 325, the first proposition in the syllabus is thus stated: "A fraudulent entry of public land allowed by a register and receiver, upon false proofs of settlement, occupancy and housekeeping, may be set aside and vacated by the Commissioner of the General Land Office." And in the opinion, pronounced by Mr. Justice Catron, it is said: "The question is again raised, whether this entry, having been allowed by the register and receiver, could be set aside by the Commissioner. All the officers administering the public lands were bound by

the regulations published May 6, 1836. 2 L. L. & O. 92. These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court. This question has several times been raised and decided in this court, upholding the Commissioner's powers. *Garland* v. *Winn*, 20 How. 8; *Lytle* v. *State of Arkansas*, 22 How. 193."

Hosmer v. *Wallace*, 97 U. S. 575, 578, was a case coming from the Supreme Court of California (47 California, 461). In the opinion filed in the state court there is quite an extended discussion of the question and the conclusion reached is in favor of the reviewing power of the Commissioner of the General Land Office.

In this court the opinion was announced by Mr. Justice Field, who thus stated the facts and the decision:

"In July, 1866, the plaintiff filed a declaratory statement in the proper land office, claiming to preëmpt the premises together with other land, alleging his settlement thereon in October, 1856, and in September following made proof of his claim before the register and receiver, and was allowed to enter the land. He then paid the purchase money and obtained a certificate of payment. In the meantime, the act of July 23, 1866, was passed, and under it the defendant claimed the right to purchase the premises. The Commissioner of the General Land Office thereupon directed the register and receiver at San Francisco to investigate the entry of the plaintiff, and to take such testimony as might be offered by him and the defendant concerning their respective claims, and to report the same to him, together with their decision. Both parties appeared before these officers and supported their respective claims. The decision of the officers was in favor of the plaintiff; the defendant appealed to the Commissioner, by whom the decision was reversed, and the land awarded to him. On further appeal to the Secretary of the Interior, the decision of the Commissioner was affirmed; and, upon payment of the purchase money, a patent was issued to the defendant. The decision of the Commissioner and of the Secretary was clearly correct."

It is true that the case in this court did not turn on the matter of settlement or improvement, and so the decision does not reach to the precise question here presented, but it is pertinent as an affirmation of the Commissioner's right of review of preëmption entries.

Cornelius v. *Kessel*, 128 U. S. 456, holds directly that the Commissioner may, at least in some cases, review the action of the local land officers in respect to such entries, though declaring that his power is not arbitrary and unlimited. In the recent case of *Knight* v. *Land Association*, 142 U. S. 161, 177, the power of the Secretary was considered at length by Mr. Justice Lamar, who, speaking for the court, said, after referring to sections 441, 453, and 2478 of the Revised Statutes:

"The phrase, 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. It means that, in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States. As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this pueblo case (5 Land Dec. 494): 'The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals.

The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the despatch of business, not to defeat the supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter."

We have made these somewhat extensive quotations from prior decisions in order to show the rulings of this court since the act of 1836 in favor of the power of the general officers of the Land Department to review and correct the action of the subordinate officials in all matters relating to the sale and disposal of public lands. These cases might be supplemented by others in which, with more or less fulness of statement, the same affirmations have been made.

Similar decisions, some upon the precise question here involved, have been made in several state courts. See, among others, the following cases: *Bellows* v. *Todd*, 34 Iowa, 18; *Morton* v. *Green*, 2 Nebraska, 441; *Hestres, Administrator* v. *Brennan*, 50 California, 211; *Figg* v. *Hensley*, 52 California, 299; *Randall* v. *Edert*, 7 Minnesota, 450; *Gray* v. *Stockton*, 8 Minnesota, 529; *Judd* v. *Randall*, 36 Minnesota, 12; *Darcy*

v. *McCarthy*, 35 Kansas, 722; *Gray* v. *McCance*, 14 Illinois, 343; *Aldrich* v. *Aldrich*, 37 Illinois, 32; *McLane* v. *Bovee*, 35 Wisconsin, 27; *Vantongeren* v. *Heffernan*, 5 Dakota Ter. 180.

Again, one of the instructions issued by the Land Department to the registers and receivers, and which has been in force for half a century, is this: "Final proof in preëmption cases must be made to the satisfaction of the register and receiver, whose decision, as in other cases, is subject to examination and review by this office." And all these years the practice has been to exercise the power of review thus claimed. 1 Copp's Land Owner, 123, 124; 11 Copp's Land Owner, 181; 13 Copp's Land Owner, 13. While, of course, no practice of a department can nullify an act of Congress, yet such practice, if uniform and long continued, is a matter worthy of consideration in determining its construction. *Heath* v. *Wallace*, 138 U. S. 573, 582. So many rights, it may be presumed, have been created in reliance upon it that the courts will hesitate to decide that the construction thus practically asserted is erroneous, and so overthrow all the titles depending thereon.

Of course, this power of reviewing and setting aside the action of the local land officers is, as was decided in *Cornelius* v. *Kessel*, 128 U. S. 456, not arbitrary and unlimited. It does not prevent judicial inquiry. *Johnson* v. *Towsley*, 13 Wall. 72. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210. The government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the Land Department.

While the departmental practice and judicial decisions unite to compel the construction thus placed upon the statutory provisions, we may add that if the question were entirely

new we should be led to the same conclusion. If the section declaring that proof in respect to settlement and improvement should be made to the satisfaction of the local land officers, stood alone, as it formerly did, it might well be contended that as the local land officers were the ones to whose determination the question of settlement and improvement was confided, and as there was no statute granting any review of their determinations, they must be taken as final. It was, of course, competent for Congress to give finality to their determinations, and having given them the power to determine, and made no provision for any review, it naturally followed that their judgment was final. It is not strange that the mischiefs liable to flow from such a provision attracted the attention of Congress. Great inequalities in the administration of the Land Department of the United States would inevitably ensue if the final determination of matters connected with the sale and disposal of the public lands was left to a multitude of local land officers. The character and amount of testimony which would be held sufficient in one State and by one set of officers would be held insufficient in another State and by another set. Local influences might help or hinder individuals in acquiring titles to the public lands. Obviously, in order that equal justice might be administered, it was necessary that there should be a superintendence of all the actions of the local land officers and all the proceedings in the local land offices. And so it was that Congress made the several provisions which we have noticed for control by the general officers of the Land Department of proceedings for the survey, sale, and disposal of the public lands. Indeed, the language of section 2263, upon which alone rests the contention of the plaintiff, is itself suggestive of some control. While it says that "proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district," it also provides that such proof shall be made "agreeably to such rules as may be prescribed by the Secretary of the Interior." It may be argued that this only contemplates that the Secretary shall prescribe the mode of procedure, the rules

by which testimony shall be received, and does not necessarily interfere with the provision that the proof shall be satisfactory to the register and receiver, or grant to the superior officer a right to revise their determination; and such was the construction placed on the similar section prior to the legislation of 1836. Nevertheless the section contemplates that the proceedings shall not be wholly withdrawn from the control of the Secretary, and implies that they are but part and parcel of the general administrative system for the disposal of the public lands. While it is within the discretion of Congress to segregate any particular step in the proceedings for the disposal of the public lands from the scope of the general system, and place it outside of and beyond any supervising control of the higher officers, yet the courts should be satisfied that the language indicates an intention on the part of Congress so to do before any such break in the harmony of the system is adjudged. In this connection reference may be made to section 2273, which provides for a contest between two parties claiming the right of preëmption. Such a contest is to be heard, in the first instance, by the local land officers, subject by express declaration to the right of appeal to the Commissioner, and subsequently to the Secretary of the Interior. In other words, when any individual contests the validity of the action of the local land officers there is confessedly the right of appeal. Can it be that if the government is the only party wronged by their action there is no review except by the slow and expensive process of a suit in the courts?

Some reliance is placed on the case of *Butterworth* v. *Hoe*, 112 U. S. 50, in which it was held that the Secretary of the Interior has no power to revise the action of the Commissioner of Patents in awarding to an applicant priority of invention and adjudging him entitled to a patent. But an examination of the opinion shows that it throws very little light upon this question. Indeed, it is said therein that "each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature;" and the lack of power in the Secretary to revise

the action of the Commissioner of Patents in the particular matter was denied by reason of the various provisions of the statute applicable thereto, among others one providing for an appeal from the decision of the Commissioner to the Supreme Court of the District of Columbia, whose decision, as expressly declared, (sec. 4914, Rev. Stat.,) "shall govern the further proceedings in the case." This special provision for an appeal to a judicial tribunal, with a declaration as to the effect of the decision of such tribunal, was held to be conclusive so far as respects proceedings in the department. But the difference between the two cases is obvious. There is no special provision for an appeal from the decision of the local land officers as to the matter of settlement and improvement; nothing, therefore, to take the case out of the general grant of power to the Commissioner of the General Land Office and the Secretary of the Interior to control all matters in respect to the sale and disposal of the public lands.

It is unnecessary to pursue this discussion further. The conclusions of the Supreme Court of the State of Washington were correct, and the judgments are

Affirmed.

RALLI *v.* TROOP.

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

No. 46. Submitted April 27, 1894. — Decided April 1, 1895.

The scuttling of a ship by the municipal authorities of a port, without the direction of her master or other commanding officer, to extinguish a fire in her hold, is not a general average loss.

If the cargo in the hold of a ship moored in a port takes fire, and the port authorities come on board with fire-engines, take charge of her, pump steam and water into the hold, and move her and put her aground, without any objection by the master; and the master successfully removes part of the cargo, and desires, and believes it to be prudent and feasible, to remove more; but the port authorities forbid and prevent his doing so, because of the danger of increasing the fire, and themselves ex-

Statement of the Case.

tinguish the fire by scuttling the ship, whereby she becomes a wreck, not worth repairing; the loss of the ship is not a subject of contribution in general average against the owners of the cargo, although the court is of opinion that the measures taken by the port authorities were the best available to save the cargo from greater loss.

THIS was a libel in admiralty, filed May 16, 1889, in the District Court of the United States for the Southern District of New York, by the charterers against the owners of the British bark J. W. Parker, of St. John, New Brunswick, alleging that pursuant to a charter-party, dated October 25, 1885, the libellants on February 16, 1886, loaded on the bark in the port of Calcutta, to be carried to the port of New York, at a certain rate of freight, a full cargo, consisting, among other things, of 7592 bales of jute butts, and received from her master bills of lading therefor, agreeing to transport the jute to the port of Boston; that on the same day "fire broke out, and said bark was thereby so badly damaged as to become unseaworthy, and her said voyage was thereupon broken up and abandoned by the respondents;" that afterwards 552 bales of the jute were delivered to the libellants at Boston from a steamship; that the respondents failed and neglected to deliver the remaining bales, and by their agent, the master of the vessel, sold and delivered them at Calcutta, and received and held the proceeds of the sale, and refused, on demand, to pay them to the libellants, whereby the libellants were damaged to the amount of $22,000, the value of the undelivered jute.

The respondents, in their answer, claimed a contribution in general average. Admitting that the master sold the jute, and that they received and held the proceeds, they alleged the following facts: "In accordance with the terms and provisions of the charter-party, a cargo of jute had been laden on said bark at Calcutta, and on February 18, 1886, said vessel was ready for sea. Flames broke out in the hold of said bark about 10 A.M. from causes unknown, but presumably from spontaneous combustion of the jute in the bales, and said bark and cargo were in great danger of destruction and of becoming a total loss. Immediately upon discovery of the fire, the

officer in charge of the J. W. Parker sent for the crews of the neighboring vessels to assist, and under his supervision and direction a quantity of water was poured down the forward ventilator and fore hatchway, after which those openings were tightly covered with a sail, and all ventilators closed. Later the engines of the port came to assist, and their hose, charged with fire-extinguishing chemicals, were let into the hold through holes cut in the deck. Other sacrifices and measures were taken against the common danger, which resulted in saving 552 bales of jute uninjured, although the residue of said cargo was so much damaged that the same was condemned and sold. The 552 bales aforesaid were forwarded by steamer to Boston, and there delivered to the libellants."

The respondents further alleged that they executed an average bond; that an adjustment of general average was made, which showed that the proceeds of the sale of cargo at Calcutta amounted to $20,752.83, and that the balance due to the owners of cargo was $7420.48, which they were ready to pay to the libellants, and had deposited in the registry; and denied any other liability to the libellants.

The District Court held that the respondents were entitled to a general average, and confirmed the adjustment, and entered a decree in favor of the libellants for said sum of $7420.48, and interest, for the reasons stated in its opinion in 37 Fed. Rep. 888.

The libellants appealed to the Circuit Court, which made the following findings of facts:

"1. Libellants, who constituted the firm of Ralli Brothers, of New York and Calcutta, on October 25, 1885, chartered the British bark J. W. Parker to load jute and saltpetre for a voyage from Calcutta to New York.

"2. The vessel accordingly proceeded to Calcutta, and, while moored in the river there, was fully laden by libellants with 7592 bales of jute butts and 1062 bags of saltpetre, for which the master signed the usual bills of lading, undertaking to deliver said cargo at Boston.

"3. On the morning of February 18, 1886, a port pilot came on board and took charge of unmooring, preparatory to

taking the bark to sea. All the hatches had been tightly covered the night before. As the anchor chain was hove in, it was necessary for a man to go into the chain locker forward to stow the chain. To reach the locker, the fore hatch had to be opened. Thence one could go through a narrow passage, about three feet wide and three feet high, between the jute bales, to the chain locker, which was about eight feet forward of the hatch. Ernest Edwards, an able seaman, who had been several months on the bark, took a globe lantern, which did not have a lock, but in which the lamp was screwed into the body of the lantern, and, by the mate's orders, went through the fore hatch into the chain locker to stow the chain. This was between 9 and 10 o'clock A.M. A few minutes afterwards, he was heard to scream. At the same time, smoke was seen coming out of the ventilators. The men who tried to rescue him were driven back by the smoke in the fore hatch. Edwards was suffocated. His body was afterwards found in the chain locker.

"4. Thereupon the second officer of the bark caused an alarm to be sounded by ringing the vessel's bell, and from sixty to seventy men from the crews of the neighboring vessels came to his assistance. These men brought buckets with them; water was poured from the buckets into the fore hold. A force-pump on the bark, and another force-pump brought from a ship near by, were both playing large streams of water down the hold. After half an hour of this work, the hatches were covered with wet sails and tarpaulins, but the pumps were kept playing into the chain lockers.

"5. Between 11 and 12 o'clock, and while both force-pumps were still being steadily worked, the port authorities came with fire-engines, and took direction of the vessel; and on the return on board of the master he found the port authorities in charge. The port fire-engines, charged with fire-extinguishing chemicals, were placed through holes cut in the deck. During the night the fire-engines continued pumping in steam; and in the morning the fore hatchway was opened, and six hose were played on the fire in the fore hold, but, as this seemed to increase the fire, the hatches were put on

again. The port authorities then moved the ship, and put her aground. In the forenoon, the captain removed 552 bales of jute from the bark, and desired to remove more; but the port authorities objected, and forbade it, because of the danger of increasing the fire. During that day the port authorities pumped water in the ship; and during the night and following morning the fire was extinguished by the vessel being scuttled. The master believed that it was prudent and feasible to discharge more cargo at the time he was prevented from doing so by the authorities. The measures taken by the mate before the port authorities took charge of the ship, and those subsequently taken by the port authorities, were the best available to extinguish the fire, and to save greater loss upon the cargo.

"6. The fire was communicated to the said cargo by the lamp carried by the seaman Edwards while on his errand to the chain locker; but whether the occurrence happened by the accidental breaking of the glass of the lantern, or whether by his act in removing the lamp from the lantern, or whether by the lamp becoming unscrewed, or how the occurrence took place, cannot be ascertained. Jute or jute butts in bales is very inflammable cargo, and a lamp or lantern in which the flame is exposed cannot safely or prudently be carried through such a narrow passage as Edwards had to pass. At the time, there was in force a regulation of the port of Calcutta, which had been duly promulgated by the proper authorities, as follows: 'Rule 30. No person shall smoke, or use naked lights of any description, in the hold or between decks of any vessel lying in the port. Closed lanterns, secured by a lock and key, and in charge of an officer of the vessel, shall alone be taken between decks and into the hold.' Neither the master nor the officers of the bark had any notice of this regulation.

"7. The jute had been packed in the bark's hold as closely as the compressed bales could be forced together by screws. The effect of the water poured on the jute was to expand it, and spring up the decks, break the hatch coamings, and draw out the timbers. The raising of the decks and starting of the beams was observed early in the morning of the day after the

fire. The swelling continued even after a portion of the cargo was removed. The J. W. Parker became a wreck, not worth repairing.

"8. The master, when the port authorities allowed him to resume charge of the vessel, acting for the best interests of all concerned, proceeded to save the residue of the cargo that remained in the vessel. By the outlay of about $8000 for men and lighters, to get the damaged jute out of the bark, and for repacking it in condition for sale, he was able to land the same in godowns or warehouses. He consulted the firm of Turner, Morrison & Co., who were agents of the underwriters on cargo, and followed their directions as to landing the cargo before sale. Surveys were then had, and the cargo was condemned and sold as unfit to go forward, and realized on such sale $20,752.83. The ship was also condemned as unseaworthy, and was sold for 8000 rupees, equal to about $2716.24.

"9. The said master, second officer, and a seaman of said bark, duly made and extended, under oath, a protest against the said fire, and against the said actions of the said port authorities in depriving the master of his said command, and in refusing to permit of the discharge of cargo after it had been commenced, and in causing the said vessel to be stranded or scuttled, and in allowing the tidewater to rise over her deck.

"10. On March 8, 1886, the owners of the bark J. W. Parker offered to turn over all the cargo to the libellants, if they should sign an average bond. This offer was made in New York, and was declined.

"11. The 552 sound bales of jute were transshipped by the captain, and were delivered to libellants' agents at Boston. An average bond was then executed by libellants, by which it was provided that the general average should be adjusted by Jacob R. Telfair, an average adjuster at the port of New York. This was in pursuance of the following clause of the charter-party: 'All questions of average to be settled in accordance with York-Antwerp rules and the established usages and laws of the port of destination, to be stated by average adjusters appointed by charterers' agents and approved by owners.'

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"12. On December 7, 1886, a general average adjustment was made up in accordance with the York-Antwerp rules and the usages of said port. The libellants presented to their adjuster various claims for their disbursements, which were allowed as general average, as were also certain disbursements, by the underwriters upon the cargo.

"13. By the adjustment as made up as aforesaid, it was found and stated, after allowing the general average due to the vessel, that the libellants, as owners of the jute, were entitled to an average contribution of $5335, and to the further sum of $1283 for the loss of their saltpetre, together with the sum of $290.51 for advances and profits upon their charter-party, and $227.76 for certain disbursements of Ralli Brothers incurred in connection with said average adjustment. The owners of the vessel were willing to abide by this adjustment, but libellants or their underwriters declined to accept the same.

"14. Some months afterwards this action was begun. The respondents thereupon paid into court the full amount found due to libellants and to their underwriters by said adjustment, and gave security for the residue of libellants' demand.

"15. The District Court having made a decree sustaining said average adjustment, but condemning respondents in interest upon the sum of $5335 as the contribution due for the loss on the jute, also in the sum of $77.89, the amount of the clerk's fees on respondents' deposit, the respondents thereupon paid into that court the further sum of $286.86, making the full amount of the decree of the District Court."

The charter-party and the protest were made parts of the findings of facts. But so much of either as is material to the decision of the case is stated in those findings.

The Circuit Court made the following conclusions of law:

"1. The extinguishing of the fire at Calcutta was a general average act, and the water damage so incurred was a general average sacrifice, for which contribution is due from all interests thereby benefited.

"2. An average bond having been given by the libellants, and the loss being adjudged a proper subject of general average, and no errors being shown in the adjustment, the libellants

are entitled to a decree for the balance stated by the adjustment as aforesaid, and for no more.

"3. The respondents are entitled to their costs in this court."

The decree of the District Court was thereupon affirmed, and, on February 5, 1890, the libellants appealed to this court.

The case was argued here on the 19th and 20th of March, 1894. On the 23d of the following April an order was made restoring it to the docket for reargument; or, if counsel desired, for resubmission on or before April 27, 1894, on the briefs already filed or additional briefs. On that day it was accordingly resubmitted by the same counsel.

Mr. Sidney Chubb for appellants.

Mr. Harrington Putnam for appellees.

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

The law of general average, coming down to us from remote antiquity, is derived from the law of Rhodes, through the law of Rome, and is part of the maritime law, or law of the sea, as distinguished from the municipal law, or law of the land.

The typical case is that mentioned in the Rhodian law preserved in the Pandects of Justinian, by which, if a jettison of goods is made in order to lighten a ship, what is given for the benefit of all is to be made good by the contribution of all. *Cavetur ut, si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.* Dig. 14, 2, 1, 1.

Another case of general average, put in the Pandects, and the only one, beside jettison, mentioned in the Judgments of Oleron, or in the Laws of Wisby, is the cutting away of a mast to save ship and cargo. Dig. 14, 2, 1, 4; Oleron, arts. 8, 9; Wisby, arts. 7, 11, 14.

The distinction between voluntary and compulsory sacrifice is well illustrated by another case stated in the Pandects, recognized in the earliest English case on general average,

and approved in all the books, in which money voluntarily paid by the master to ransom the ship and cargo from pirates is to be contributed for; but not so, as to goods or money forcibly taken by pirates. Dig. 14, 2, 1, 5; *Hicks* v. *Palington*, (32 Eliz.) Moore, 297.

In the courts of England and America, general average has not been restricted to the cases put by way of illustration in the Rhodian and Roman laws; but it has never been extended beyond the spirit and principle of those laws.

In the earliest case in this court, Mr. Justice Story, in delivering judgment, stated the leading limitations and conditions, as recognized by all maritime nations, to justify a general contribution, as follows: "First, that the ship and cargo should be placed in a common imminent peril; secondly, that there should be a voluntary sacrifice of property to avert that peril; and, thirdly, that by that sacrifice the safety of the other property should be presently and successfully attained." *Columbian Ins. Co.* v. *Ashby*, 13 Pet. 331, 338.

In the next case which came before this court, Mr. Justice Grier, in delivering judgment, defined these requisites, somewhat more fully, as follows: "In order to constitute a case of general average, three things must concur: 1st. A common danger, a danger in which ship, cargo and crew all participate; a danger imminent and apparently 'inevitable,' except by voluntarily incurring the loss of a portion of the whole to save the remainder. 2d. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole. 3d. This attempt to avoid the imminent peril must be successful." *Barnard* v. *Adams*, 10 How. 270, 303.

There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice, or upon an implied contract, or upon a rule of the maritime law, known to and binding upon all owners of ships and cargoes. But the difference has been rather as to forms of expression, than as to substantial principles or legal results.

Opinion of the Court.

Mr. Justice Clifford, speaking for this court, stated, in several cases, as the basis of general average, that natural justice requires that where two or more parties are engaged in a common sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the general safety of the associated interests, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure. *McAndrews* v. *Thatcher*, 3 Wall. 348, 366; *The Star of Hope*, 9 Wall. 203, 228; *Fowler* v. *Rathbones*, 12 Wall. 102, 114; *Hobson* v. *Lord*, 92 U. S. 397, 404. That the doctrine applies only where something, which is part of the common adventure, is sacrificed solely for the benefit of the rest of the adventure, is apparent in those cases. In *McAndrews* v. *Thatcher*, it was held that there could be no contribution for expenses incurred after the master had abandoned the stranded ship, and had left her in charge of the agent of her underwriters; because, as the court said: "Complete separation had taken place between the cargo and the ship; and the ship was no longer bound to the cargo, nor the cargo to the ship. Undoubtedly the doctrine of general average contribution is deeply founded in the principles of equity and natural justice; but it is not believed that any decided case can be found, where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs." 3 Wall. 372. In *The Star of Hope*, and in *Fowler* v. *Rathbones*, the general average allowed was for the loss of the vessel by stranding by the voluntary act of the master. See *Emery* v. *Huntington*, 109 Mass. 431, 436. And in *Hobson* v. *Lord*, the contribution allowed was for wages and provisions of the crew while assisting in repairing the injuries suffered by the vessel from such a stranding.

In *Wright* v. *Marwood*, in which it was held by the English Court of Appeal that a jettison, by the master, of cattle carried on deck, though proper and necessary for the safety of the ship, did not give a right to general average, Lord Justice Bramwell said: "It is not necessary to say what is the origin or principle of the rule; but, to judge from the way it is

claimed in England, it would seem to arise from an implied contract *inter se* to contribute 'by those interested.'" The judgment, however, was put upon the ground that, whether the rule was treated as arising from implied contract, or as a matter of positive law, it was subject to an exception in the case of goods loaded on deck, unless a deck cargo was customary. 7 Q. B. D. 62, 67.

In *Burton* v. *English*, in the same court, in which the charter-party stipulated that the ship should be "provided with a deck load, if required, at full freight, but at merchant's risk," and the last words were held not to exclude the right to a general average contribution for a necessary jettison of timber carried on deck, Lord Justice Brett, (since Lord Esher, Master of the Rolls,) in answering the question, "By what law does the right arise to general average contribution?" said: "I do not think that it forms any part of the contract to carry; and that it does not arise from any contract at all, but from the old Rhodian laws, and has become incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, where natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one in order that the whole adventure may be saved. If this be so, the liability to contribute does not arise out of any contract at all, and is not covered by the stipulation in the charter-party on which the defendants rely." 12 Q. B. D. 218, 220, 221.

In the same case, Lord Justice Bowen, with characteristic clearness and felicity of expression, said of the same question: "In the investigation of legal principles, the question whether they arise by way of implied contract or not often ends by being a mere question of words. General average contribution is a principle which comes down to us from an anterior period of our history, and from the law of commerce and the sea. When, however, it is once established as part of the law, and as a portion of the risks which those who embark their property upon ships are willing to take, you may, if you like, imagine that those who place their property on board a ship on the one side, and the shipowner who puts his ship by the quay to receive

the cargo on the other side, bind themselves by an implied contract which embodies this principle, just as it may be said that those who contract with reference to a custom impliedly make it a portion of the contract. But that way, although legally it may be a sound way, nevertheless is a technical way of looking at it. This claim for average contribution, at all events, is part of the law of the sea, and it certainly arises in consequence of an act done by the captain as agent, not for the shipowner alone, but also for the cargo owner, by which act he jettisons part of the cargo on the implied basis that contribution will be made by the ship and by the other owners of cargo. He makes the sacrifice on behalf of one principal, whose agent of necessity he is, on the implied terms, if you like to call it so, that that principal shall be indemnified afterwards by the rest." 12 Q. B. D. 223.

As the right to general average may be considered as resting not merely on implied contract between the parties to the common adventure, but rather on the established law of the sea, in the light of and subject to which all owners of ships and cargoes undertake maritime adventures, so the authority of the master may be treated as resting either on implied contract of the parties, or on the duty imposed upon him by the law, as incident to his station and office, to meet the necessity created by an emergency which could not be foreseen or provided for, and to prevent the property in his custody and control from being left without protection and care.

Sir William Scott, speaking of the powers and duties of the master, said: "Though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate

ports, into which he may be compelled to enter." He illustrated this by the case of jettison to be contributed for in general average, by the case of ransom, and by the case of sale of perishable cargo in a port of necessity, and added: "In all these cases, the character of agent respecting the cargo is thrown upon the master, by the policy of the law, acting on the necessity of the circumstances in which he is placed." *The Gratitudine*, 3 C. Rob. 240, 257, 258, 260.

In the case of *The Hornet*, reported as *Lawrence* v. *Minturn*, 17 How. 100, in which the question was whether a certain jettison of goods was lawful as against their owner, Mr. Justice Curtis, delivering the judgment of this court, spoke of the authority of the master in the threefold aspect, as "imposed on him by the nature of the case," as "derived from the implied consent of all concerned in the common adventure," and as "intrusted to him by the law," saying: "The nature of the case imposes on the master the duty, and clothes him with the power, to judge and determine, upon the facts before him, whether a jettison be necessary. He derives this authority from the implied consent of all concerned in the common adventure. The obligation of the owners is to appoint a competent master, having reasonable skill and judgment and courage; and they are liable, if through his failure to possess or exert these qualities, in any emergency, the interest of the shippers is prejudiced. But they do not contract for his infallibility, nor that he shall do, in an emergency, precisely what, after the event, others may think would have been best. If he was a competent master; if an emergency actually existed, calling for a decision, whether to make a jettison of a part of the cargo; if he appears to have arrived at his decision with due deliberation, by a fair exercise of his skill and discretion, with no unreasonable timidity, and with an honest intent to do his duty, the jettison is lawful. It will be deemed to have been necessary for the common safety, because the person, to whom the law has intrusted authority to decide upon and make it, has duly exercised that authority." 17 How. 100, 109, 110. See also *Dupont* v. *Vance*, 19 How. 162, 166, 170.

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In former times, when merchants voyaged with their wares, their consent was held necessary to a jettison; and the captain was also required to consult with his officers, or with some of his crew, then, perhaps, more nearly his equals than in later times. But, even then, the final decision rested with the captain; for, as Emerigon said, "The captain is master. He is obliged to take advice; but the law does not oblige him to submit himself blindly to that advice, if it is bad, or if, under the circumstances, it appears to be bad." Emerigon on Ins., c. 12, sect. 4, § 3; sect. 40, § 3; *The Nimrod*, 1 Ware, 1, 13–15.

At the present day, since voyages are longer, and merchants seldom go with their goods, there is the greater reason that upon the captain, selected for his skill and courage, and for his fitness to command the whole adventure, and to decide promptly and justly in cases of emergency, and better acquainted than any one else with the qualities and condition of the ship, and with the nature and stowage of her cargo, should rest the authority and the duty, in case of imminent peril, first taking such advice as he sees fit, to determine finally, so far as concerns the mutual relations of those interested in the maritime adventure, the time and the manner of sacrificing part of the adventure to secure the safety of the rest.

In the leading case of *Columbian Ins. Co.* v. *Ashby*, already cited, this court, speaking by Mr. Justice Story, said: "A consultation with the officers may be highly proper, in cases which admit of delay and deliberation, to repel the imputation of rashness and unnecessary stranding by the master. But if the propriety and necessity of the act are otherwise sufficiently made out, there is an end of the substance of the objection. Indeed, in many, if not most, of the acts done on these melancholy occasions, there is little time for deliberation or consultation. What is to be done must often, in order to be successful, be done promptly and instantly by the master, upon his own judgment and responsibility." 13 Pet. 343, 344.

In *The Star of Hope*, already cited, this court said: "From

the necessity of the case, the law imposes upon the master the duty, and clothes him with the power, to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted his care." 9 Wall. 230, 231.

If the master does not exercise reasonable skill and judgment and courage in sacrificing goods for the benefit of the adventure, the master and the owner of the ship are each liable to the owner of the goods sacrificed. *Barnard* v. *Adams*, 10 How. 270, 304; *Lawrence* v. *Minturn*, 17 How. 100, 110, above quoted.

After a voluntary sacrifice of part of the adventure, and a consequent escape of the rest from imminent peril, the owner of the ship, or in his absence the master as his agent, has the duty of having an adjustment made of the general average, and has a maritime lien on the interests saved, and remaining in his possession, for the amount due in contribution to the owner of the ship; and the owner of goods sacrificed has a corresponding lien on what is saved, for the amount due to him. *Cutler* v. *Rae*, 7 How. 729, 731, 732; *Dupont* v. *Vance*, 19 How. 162, 168–171; *Strang* v. *Scott*, 14 App. Cas. 601, 606, 607; 3 Kent Com. 244.

Whether the master is considered as acting under an implied contract between the owners of the vessel and the shippers of the cargo, or as the agent of all from the necessity of the case, or as exercising a power and duty imposed upon him by the law as incident to his office — whatever may be considered the source of his authority — the power and the duty of determining what part of the common adventure shall be sacrificed for the safety of the rest, and when and how the sacrifice shall be made, appertain to the master of the vessel,

magister navis, as the person intrusted with the command and the safety of the common adventure, and of all the interests comprised therein, for the benefit of all concerned, or to some one who, by the maritime law, acts under him, or succeeds to his authority.

In case of the master's death, disability or absence, no doubt, the mate or other chief officer of the vessel may succeed to the authority of the master, in this as in other respects. *The Ann C. Pratt*, 10 N. Y. Leg. Obs. 193; 1 Curtis, 340, and 18 How. 63.

In *Price* v. *Noble*, 4 Taunt. 123, in which a necessary jettison, made after a privateer had captured the ship, had taken out her captain and crew, except the mate and two men, and had put a prize master and crew on board, was held (the ship having been recaptured by the mate, and carried into a British port) to be a ground for contribution in general average, the jettison was made, as the report states, "with the assistance and approbation of the mate;" and the prize master and crew, as the court noted, "had so much better an opinion of the judgment of the mate, than of their own, that they consulted him and intrusted him with the navigation, and the stores seem to have been thrown over by his own individual direction." And Lord Tenterden so understood that case, saying that it was there decided "that the shippers of goods were liable to contribution for stores necessarily and by the advice of the mate thrown overboard, after the ship was captured, and while in possession of the enemy; for the capture, without condemnation, did not devest the property of the owners while a *spes recuperandi* remained." Abbott on Shipping, (11th ed.) 528.

A German commentator has suggested that, if a peril should be encountered while a pilot has command of the vessel, a case may be supposed in which the pilot might order a sacrifice in contradiction to the master, without depriving the sacrifice of the character of a general average loss. Ulrich, Haverei Gesetze, 6. But no judicial decision has been found, which recognizes a right in the pilot to make a jettison or other sacrifice. The reason for requiring a vessel to take a

pilot is his familiar acquaintance with particular waters. "His duty," said Mr. Justice Story, speaking for this court, "is properly the duty to navigate the ship over and through his pilotage limits, or, as it is commonly called, his pilotage ground." *The Hope*, 10 Pet. 108, 123. To the pilot, therefore, temporarily belongs the whole conduct of the navigation of the ship, including the duty of determining her course and speed, and the time, place and manner of anchoring her. *Cooley* v. *Board of Wardens*, 12 How. 299, 316; *The Christiana*, 7 Moore P. C. 160, 171; *The City of Cambridge*, L. R. 5 P. C. 451. But the master still has the duty of seeing to the safety of the ship, and to the proper stowage of the cargo. For instance, the duty to keep a good lookout rests upon the master and crew. *The Iona*, L. R. 1 P. C. 426. And it has been held by Dr. Lushington, in the English High Court of Admiralty, that, although a pilot is in charge, the trim of the ship is within the province of the master; *The Argo*, Swabey, 462; as well as the duty, if two vessels are entangled together, to cut away part of the rigging of his vessel, when necessary, in order to avoid a collision, or to lessen its effect; because the vessel, the judge said, "was not under the orders of the pilot for this purpose; she was only under the pilot's directions for the purpose of navigation; and the master, in a case of this description, is not to wait for the pilot's directions, which would tend to create great confusion and delay." *The Massachusetts*, 1 W. Rob. 371, 373. Rigging so cut away by the master would seem to be a subject of general average, as between the vessel and her cargo. Lowndes on Average, (4th ed.) 109, 110; 1 Parsons on Shipping, 351.

The authority of the pilot, as regards general average, was not touched by the decision of this court in *The China*, 7 Wall. 53, by which a vessel, in charge of a pilot whom she had been compelled by law to take on board, and brought by his negligence into collision with another vessel, was held, upon a libel *in rem*, to be liable in damages to the owners of that vessel. That decision proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of

the owners of the ship and cargo; nor upon the law of contribution in general average as between them; but upon a distinct principle of the maritime law, namely, that the vessel, in whosesoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. 7 Wall. 68. As said by Mr. Evarts, in his argument for the libellants, "This theory treats the faults of conduct in the vessel's navigation as imputable to the vessel itself, and discards as immaterial all considerations touching the *adjustment* among the navigators, or between them and the owners, of the personal fault or personal responsibility of the misgovernment of the vessel." 7 Wall. 56. And, as observed by this court, in another case decided at the same term, cases of general average "certainly are not cases of tort." *The Eagle*, 8 Wall. 15, 23. It is worthy of notice, also, that the responsibility of the vessel for torts does not include her cargo. *The Malek Adhel*, 2 How. 210, 235–237; *The Victor*, Lushington, 72; *The Flora*, L. R. 1 Ad. & Ec. 45, 48.

But if a general average loss could be held to arise from an act of a pilot, without or against the order of the master of the vessel, it could only be because the pilot, by the maritime law, and by reason of his nautical skill and experience, temporarily took the place of the master, and was specially charged with the command and the safety of the whole maritime adventure, and of that adventure only. However it might be with a pilot, there is no case, in England or America, before the one at bar, in which a sacrifice made by a stranger, in no way connected with the navigation of the ship, or with the control or the care of the ship and cargo, as a distinct maritime adventure, has been held to give a right to contribution in general average.

There can be no general average, unless there has been a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure, or the authorized representative of all of them. The safety of any property, on land or water, not included in that adventure, can neither

be an object of the sacrifice, nor a subject of the contribution.

For example, from early times and in all countries, the master has been required, upon arrival of the ship in port, to make, with some of the crew, a protest, upon oath, that the jettison was made for the safety of the ship and lading, and for no other cause. Oleron, art. 8; Wisby, art. 20; 1 Malyne, (3d ed.) 113; Beawes, (4th ed.) 148; 2 Molloy, c. 6, § 2; Marsh. Ins. (5th ed.) 433; Abbott on Shipping, (11th ed.) 526.

The first edition of Arnould on Marine Insurance, indeed — substantially following 2 Phillips on Insurance, c. 15, sec. 2, (2d ed.) 96 — contained this paragraph: "If, with a view to the general safety of ship and cargo, it becomes necessary to damage and destroy another ship, or any part thereof, the loss thereby incurred must, it seems, be made good by a general average contribution. Thus, if a number of ships are lashed together and one takes fire, and the crews of the others unite in scuttling the burning ship for the safety of the rest, the loss of the ship so sunk is said to be a general average loss, to which all those saved thereby must contribute; and the law is the same if a crew, for the safety of their own ship, cut the cable of another." 2 Arnould on Ins., pt. 3, c. 4, (1st ed.) 895, 896. This is not laid down absolutely, but only as "it seems," and "is said."

The authorities there cited, as to contribution for one ship taking fire and scuttled to save neighboring ships, are Casaregis, disc. 46, no. 45; Ordinance of Bilbao, c. 20, art. 21; and 2 Azuni on Maritime Law, c. 3, art. 2. Casaregis states the point as a doubtful one, and the authorities to which he refers are conflicting, and more or less influenced by local law or custom. The Ordinance of Bilbao was a peculiar and local ordinance, apparently not in accord with the general law of Spain. 2 Magens, 400; Stevens and Benecke on Average, (Amer. ed.) 166; Gregorio Lopez, ad Partidas, pt. 7, tit. 15, l. 12, note 2. And Azuni, speaking by way of illustration only, treats the right to destroy, and the duty to make contribution, as alike in the cases of a burning ship on the sea, and of a burning house upon land.

But the law of general average, in England and America, is limited to property included in a maritime adventure; and has no application to other property, on land, or to contracts relating to such property. In *Welles* v. *Boston Ins. Co.*, 6 Pick. 182, sometimes cited as a judicial application of general average to insurance of buildings or their contents against fire, there was nothing of the kind. That was an action on a policy of insurance against fire on a stock of goods, the owners of which, upon the breaking out of a fire in the neighborhood, and with the consent of the insurance company, and in order to save the goods and the building containing them, procured blankets, wet them, and spread them on the outside of the building, whereby the building and goods were saved, and the blankets rendered worthless. The insurance company having admitted its liability for such proportion of the value of the blankets as the amount of its insurance on the plaintiffs' goods bore to the whole value of their goods and building, the court had no occasion to pass and did not pass upon that, saying only that, for a proportion of the sacrifice made by the plaintiffs, "they are equitably, if not legally, entitled to recover." The only claim in controversy was the claim of the plaintiffs to recover the whole value of the blankets, or at least to a contribution from neighboring buildings insured by the same company; and this claim was disallowed by the court.

By our law, indeed, either public officers or private persons may raze houses to prevent the spreading of a conflagration. But this right rests on public necessity, and no one is bound to compensate for or to contribute to the loss, unless the town or neighborhood is made liable by express statute. 2 Kent Com. 338, 339; *Bowditch* v. *Boston*, 101 U. S. 16; *Taylor* v. *Plymouth*, 8 Met. 462; *The John Perkins*, 21 Law Reporter, 87, 97; *The James P. Donaldson*, 19 Fed. Rep. 264, 269. Another instance of a right founded on necessity is the case of *The Gravesend Barge*, or *Mouse's case*, decided and reported by Lord Coke, in which it was held that in a tempest, and to save the lives of the passengers, a passenger might cast out ponderous and valuable goods, without making himself

liable to an action by their owner. 12 Rep. 63; *S. C.* 1 Rol. R. 79; 2 Bulstr. 280.

The suggestion of Arnould, in the passage above cited, that a ship, whose crew, for her safety, cut the cable of another ship, must contribute in general average for the value of the cable, is directly contrary to the opinion of Labeo, preserved in the Pandects, and approved by Emerigon. *Labeo scribit, si cum vi ventorum navis impulsa esset in funes anchorarum alterius, et nautæ funes præcidissent, si nullo alio modo, nisi præcisis funibus, explicare se potuit, nullam actionem dandam.* Dig. 9, 2, 29, 3; Emerigon on Ins., c. 12, sect. 14, § 5.

In the case of a collision between two vessels, by the fault of both, the maritime law everywhere, by what has been called *rusticum judicium*, apportions equally between both vessels the damages done to both. *The Catharine*, 17 How. 170; *The North Star*, 106 U. S. 17; *The Max Morris*, 137 U. S. 1. But if the collision, without fault on the part of either vessel, is caused by inevitable accident, as by the one being driven by a storm against the other, then, although by the law of some European countries the loss is apportioned, yet by our law, as by the laws of Rome and of England, each vessel must bear her own loss, and, as said by Mr. Justice Story, "it is not the subject of apportionment, or contribution, or of general average in any form." *Peters* v. *Warren Ins. Co.*, 3 Sumner, 389, 394; *The Washington*, 14 How. 532, 538; *The John Fraser*, 21 How. 184, 194.

In the later editions of Arnould, by Machlachlan, the paragraph above quoted has been doubtingly retained, and finally omitted, and the following propositions laid down: "The singular law relating to this subject, adopted and observed by all the maritime peoples of Europe, and now also of America," "is unknown to us, except in connection with seafaring adventure." "When the danger is of a total loss of the common adventure, so imminent and conclusive as in the view of a judicious and skilled mariner to admit of but one alternative, and that the alternative of a sacrifice, say of part of the whole, the making of such sacrifice is justified in fact, becomes a duty of the master as agent of all, and is a general average

act in law." "In order to its being a general average act, it must have been done for the common adventure." 2 Arnould on Ins., pt. 3, c. 4, (3d ed.) 782; (5th ed.) 813, 814, 820, 832.

Mr. Justice Shee, in a note to Abbott on Shipping, after reviewing the statements of many continental writers upon the subject, concludes: "Upon the whole, it is impossible, consistently with the opinion of Lord Tenterden, and with the doctrine of all the writers on maritime law, whose opinions have not been warped by the exceptional legislation or practice of the countries in which they have written, to recognize a rule respecting ship's expenses more comprehensive than the following one: Expenses voluntarily and successfully incurred, or the necessary consequences of resolutions voluntarily and successfully taken, by a person in charge of a sea adventure, for the safety of life, ship and cargo, under the pressure of a danger of total loss or destruction imminent and common to them, give, the ship being saved, a claim to general average contribution." Abbott on Shipping, (11th ed.) 537, note. In *Harrison* v. *Bank of Australasia*, L. R. 7 Ex. 39, 48, that statement was quoted as laying down the true rule, although there was a difference of opinion as to whether the facts of the case came within it. See also *Robinson* v. *Price*, 2 Q. B. D. 91, 94, 295.

The general maritime law is in force in this country, so far only as it has been adopted by our own laws and usages. *The Lottawanna*, 21 Wall. 558, 572; *The Scotland*, 105 U. S. 24, 29; *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 444.

Three important decisions in the courts of the United States directly support the position that, in order to give a right to contribution in general average, the sacrifice must have been made for the safety of the common adventure, and for no other purpose. *The Mary*, 1 Sprague, 17; *The John Perkins*, 3 Ware, 89, and 21 Law Reporter, 87; *The James P. Donaldson*, 19 Fed. Rep. 264, and 21 Fed. Rep. 671.

In *The Mary*, in the District Court of the United States for the District of Massachusetts, Judge Sprague, a most eminent admiralty judge, held that a voluntary sacrifice, made for the

general benefit of the whole adventure, and also for the particular benefit of the cargo, was not a subject of general average. 1 Sprague, 19.

In *The John Perkins*, in the District of Massachusetts, two schooners, the John Perkins and the Wyvern, having accidentally been enclosed in a large and dangerous field of ice, and being in great peril, and the crews of both vessels having left them and escaped to the shore, except one Nickerson, who remained on board the Wyvern, which was at anchor, he, perceiving the John Perkins drifting towards the Wyvern, and to prevent a collision, cut the Wyvern's cable, and thus prevented the destruction of both vessels; and a libel was filed by him, and by the master, in behalf of the owners, officers and crew of the Wyvern, claiming salvage, and also damages, or else a contribution in general average, for the loss of her cable and anchor. Judge Ware in the District Court, and Mr. Justice Curtis in the Circuit Court on appeal, both held that neither the claim of salvage nor that of general average could be sustained; and Mr. Justice Curtis, reversing in this respect only the decision of Judge Ware, held that there could be no recovery in damages for the value of the cable and anchor. 3 Ware, 89; 21 Law Reporter, 87.

Mr. Justice Curtis declared that the right of contribution in general average had never been, so far as he was aware, and could not be, extended beyond those who had voluntarily embarked in a common adventure; and therefore decided that the cutting of the cable of the one vessel by her crew, to avoid or escape an apprehended collision with the other vessel, made no case for contribution in general average. After saying, "It is certainly true that such a claim, when viewed theoretically, has an equity very similar to, if not identical with, that on which the famous Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown," he added, "At the same time, it is quite clear that the Roman law never applied the principle between mere strangers," and cited the opinions of Labeo and of Emerigon, above referred to, as being upon "the precise case under consideration, except that the cable is cut by the mari-

ners of the other vessel, which can scarcely weaken the claim." He further observed that in *Dupont* v. *Vance*, 19 How. 162, as well as in *Lawrence* v. *Minturn*, 17 How. 100, both cited above, this court "considered that the master, in case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure, and so bound all by his act, a principle which could hardly apply between mere strangers." After referring to other authorities, he said that in *Sturgis* v. *Cary*, 2 Curtis, 382, 384, he had declared that he did not consider the right to recover a general average contribution as arising from a contract, but from "a principle of natural justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure, should unite to make good the loss which that sacrifice occasioned;" and concluded as follows: "But I never entertained a doubt, that from the relation of the parties to a common adventure, the law would imply a contract for the purpose of a remedy; nor did I then suppose that it would be implied between strangers, who were not united in a common adventure by one or more contracts of affreightment. The ancient as well as the modern codes of sea laws proceed upon the assumption that the master, representing all the aggregate interests by holding that office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represents, for the benefit of the others. But they afford no ground for the position that he may judge and act for mere strangers, whose property has not been confided to his care. In my opinion, the only subjects bound to make contribution are those which are united together in a common adventure, and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent of all concerned, and which are relieved from a common peril by a voluntary sacrifice made of one of those subjects. Consequently, I must reject the claim for general average." 21 Law Reporter, 97, 98.

That judgment of Mr. Justice Curtis clearly shows that in his opinion there could be no general average, except upon a voluntary sacrifice of part of the common adventure, for

the benefit of the adventure alone, and made by the owners of the interests engaged in that adventure, or by the master representing them all; and therefore the cutting of the cable of one vessel to avoid an impending collision with another vessel driven by a storm, would not be a subject of contribution between the two vessels, whether the cable was cut by the vessel to which it belonged, or by the other vessel.

In *The James P. Donaldson*, in the Eastern District of Michigan, Mr. Justice Brown, then District Judge, and Mr. Justice Matthews, each fully approved and strongly relied on that judgment, and on the principle which governed it, although they differed as to the application of the principle to a claim of general average against a tug for the abandonment of her tow of barges, with the intention, and with the effect, of losing the tow and saving the tug.

In the District Court, Judge Brown said: "It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Barnard* v. *Adams*, 10 How. 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law maritime as applied to the carriage of goods by sea. It is never applied to cases of a voluntary sacrifice of property upon land, when made to preserve the property of others from a greater loss." "Indeed, the cases have gone so far as to hold that the parties themselves who commit an act of depredation for the public safety are not liable in trespass." After referring to a number of authorities, he stated his conclusions as follows: "From this review of authorities, it is quite apparent that the doctrine of general average contribution arises from the peculiar relations existing between the ship and her cargo." "The law of general average is confined to those cases wherein a voluntary sacrifice is made of some portion of the ship or cargo for the benefit of the residue, and it has no application to a contract of towage." 19 Fed. Rep. 269, 270, 272.

In the Circuit Court, on appeal, Mr. Justice Matthews,

after citing the passage, above quoted, from the first edition of Arnould on Insurance, said that "it must be admitted that no judicial precedent to that effect has been found in the decisions of either English or American courts; and that the case, as put, lacks the necessary element of a common interest, united by consent of several owners, delivered by the authorized act of a common agent, from an imminent peril threatening the whole, by the voluntary sacrifice of a part." And he reversed the decision of the District Court solely because, as he thought, the tug and the barges were not strangers to each other, but by the contract of towage were bound together and interested in a common adventure, and the master of the tug had charge of the navigation of the whole tow for the voyage and for the purposes of that navigation, and, to meet its exigencies, was invested with authority to act for all. 21 Fed. Rep. 676, 678.

This summary of the grounds of the two opinions delivered in *The James P. Donaldson* sufficiently shows that both proceeded upon the fundamental principle in general average, that the sacrifice must be made solely for the benefit of the common adventure, and that the interests of strangers to that adventure neither contribute nor are contributed for.

Doubtless, acts necessary to save the common adventure from an impending peril, or from its consequences, may either be done by the master and crew themselves; or else the master of the ship, or the owner, if present, may, in a proper case, avail himself of the aid of other private persons, or of public authorities, and necessary and reasonable expenses paid for such aid may be a subject of contribution in general average. *The Star of Hope*, 9 Wall. 203, 227, 234; *Gage* v. *Libby*, 14 Allen, 261, 269; *Rose* v. *Bank of Australasia*, (1894) App. Cas. 687.

In this country, when a ship is on fire, damage caused to goods in the hold by water, either poured down from above, or let in by scuttling the ship, by the master, or under his order and direction, for the purpose of saving ship and cargo, has long been considered a subject of general average. *Columbian Ins. Co.* v. *Ashby*, 13 Pet. 331, 340; 1 Parsons on

Shipping, 365; and many cases cited below. In such a case, at one time, the practice of English adjusters was to allow only the damage done to the ship by cutting holes in her to admit the water, but not the damage done by the water to the ship or cargo. Lowndes on Average, (4th ed.) 68. But that practice was changed, in deference to the opinion of the Court of Queen's Bench, (although any expression of opinion upon the point was avoided in the Exchequer Chamber,) in *Stewart* v. *West India Co.*, (1873) L. R. 8 Q. B. 88, 362. And the law of England in that respect has since been settled in accordance with our law. *Whitecross Co.* v. *Savill*, (1882) 8 Q. B. D. 653.

By Rule 3 of the York-Antwerp Rules of 1877, adopted while the law of England upon that question was unsettled, and referred to in the charter-party of the J. W. Parker, "damage done to a ship and cargo, or either of them, by water or otherwise, in extinguishing a fire on board the ship, shall be general average; except that no compensation be made for damage done by water to packages which had been on fire." All those rules, like the Glasgow Resolutions of 1860, and the York Rules of 1864, relate only to the subjects of contribution in general average, and do not touch the question by whom the voluntary sacrifice must be made. Lowndes on Average, (4th ed.) appx. U.

The Resolutions of the International Congress at Brussels, in 1888, while they likewise include, among the things considered as subjects of general average, "damage caused to the ship, and to the goods not injured by the fire, as the result of extinguishing a fire taking place on board," lay down, in the first article, as the leading principle of general average, *Les avaries communes sont les dépenses extraordinaires et les sacrifices faits volontairement par le capitaine ou d'après ses ordres, pour le bien et le salut commun du navire et du chargement* — which may be rendered in English: "General average is an extraordinary expenditure or a sacrifice voluntarily made by the captain or pursuant to his orders, for the common good and safety of the ship and cargo." Actes du Congrès International de Droit Commercial de Bruxelles, (1888) pp. 418, 419.

In none of the cases cited by the appellees, was property, sacrificed to put out a fire, by direction of others than the master or mate of a ship, adjudged to be a general average loss.

In *Nimick* v. *Holmes*, 25 Penn. St. 366, in which a fire had broken out on a steamboat lying at a wharf, it was by direction of her officers, that steam and water were poured into the hold by means of her own apparatus and hose, and that she was afterwards scuttled. In *Heye* v. *North German Lloyd*, 33 Fed. Rep. 60, and 36 Fed. Rep. 705, also, the fire was extinguished by the officers and crew only. In *Gregory* v. *Orrall*, 8 Fed. Rep. 287, the floating fire-engines used in putting out the fire were apparently employed by the master and under his control. In *Nelson* v. *Belmont*, 5 Duer, 310, 322, and 21 N. Y. 36, the fire-engine companies were hired by the master of the ship, and the question controverted was whether a valuable part of the cargo, previously put by him on board another vessel, was liable to contribute.

In *The Roanoke*, 46 Fed. Rep. 297, and 53 Fed. Rep. 270, in the District Court of the United States for the Eastern District of Wisconsin, although the fire department took part in extinguishing the fire, everything was done by the direction and with the approval of the master. Judge Jenkins, in overruling exceptions to the libel, said: "It was a selection by the master for sacrifice of that which by the act must necessarily be destroyed." "The master must be presumed to have designed the consequences necessarily resulting from the act directed." "The objection that the act was that of the municipal authorities, without direction or concurrence on the part of the master, is ill sustained in point of fact. The protest discloses that the alarm was given, and the fire department called into action, by the master of the vessel. The action of the firemen was therefore by his procurement. Subsequent flooding was the direct act of master and crew." 46 Fed. Rep. 299, 300. And his decision on the merits was based upon this postulate: "The master is made the agent, in the law, of the vessel, of the cargo, of the parties owning the cargo and owning the vessel, and given the discretion in

time of emergency to subject the one to loss for the preservation of the other." 53 Fed. Rep. 271. His opinion was approved and adopted by the Circuit Court of Appeals, without further discussion of the question. 18 U. S. App. 407. The opinion of Judge Hanford in *The Rapid Transit*, 52 Fed. Rep. 320, contains only a very brief and general statement of facts, and is rested on the authority of the first opinion of Judge Jenkins in *The Roanoke*.

In *Whitecross Co.* v. *Savill*, 8 Q. B. D. 653, in the English Court of Appeal, a fire which had broken out in the hold of a ship, while she was lying at a wharf in her port of destination, was extinguished by pouring water into the hold, pursuant to the orders of the master, and it was the consequent damage to the cargo from his act that was held to be a general average loss. Lord Coleridge said: "It must be shown that an imminent peril existed, and that the master, deliberately and for the sake of preserving the adventure, sacrificed that in respect of which contribution is claimed." 8 Q. B. D. 659. And Lord Justice Brett said: "If there is an imminent danger, and if the captain sacrifices part in order to save the rest of the adventure, a claim for a general average contribution arises." "It has been said that the defendant's vessel might have been scuttled; but the expense of raising and repairing her would have entitled her owners to a general average contribution; and because an apparently alternative mode of proceeding existed, the captain cannot be said to have acted unreasonably." 8 Q. B. D. 662, 663.

The members of a fire department, or other persons, under the command of municipal officers of a port, and not under the employment and direction of the master of the ship, are simply executing a public duty, and are not acting, by any implication of contract or of law, for or in behalf of the owners of the ship and cargo. *The Mary Frost*, 2 Woods, 306; *The Cherokee*, 31 Fed. Rep. 167, 170; *Wamsutta Mills* v. *Old Colony Steamboat Co.*, 137 Mass. 471.

Considering how ancient and universal is the law of general average, how frequent the occasions for invoking it under every variety of circumstances, and how diverse the opinions

which have been expressed in regard to its application and extent, it is significant that the learned arguments of counsel, supplemented by further researches, have disclosed no commercial code, no opinion of a commentator, and no judicial decision, supporting a claim to contribution in general average for the destruction of ship or cargo by the municipal authorities of a port, without the direction of the master or other commanding officer of the ship. That being so, it is difficult to see how the parties to a maritime adventure can be considered either to have contracted to contribute to such a loss, or to be subjected by the law, without their consent, to the duty of so contributing.

The first and only case, so far as we are aware, in which a claim of general average was ever made, in any court, for the destruction of vessel or cargo by act of the municipal authorities of a port, without the order or concurrence of the master or commanding officer of the vessel, was in the Supreme Judicial Court of Massachusetts, in *Wamsutta Mills* v. *Old Colony Steamboat Co.*, (1884) 137 Mass. 471. In that case, a steamship with her cargo having just arrived in the port of New Bedford, and lying at a wharf near other vessels and near buildings, a fire broke out in her hold. The chief engineer of the fire department of the city went to the vessel with firemen and fire-engines, and, acting entirely on his own judgment, without any orders or directions from, or conference with, the officer in charge of the vessel, ordered holes to be cut in her, through which water was poured by the engine into the hold until the vessel sank. The mate and crew were present, but rendered no assistance in extinguishing the fire; and no objection to the use of the water was made by the mate, or by the master, when he arrived. What was done was necessary to extinguish the fire, which, if allowed to burn, would have spread to the neighboring vessels and buildings. A claim of general average was made against the owner of the steamship by an owner of cotton on board, damaged by the water poured into the ship by the fire department.

The court, speaking by Mr. Justice Field, since Chief Justice of Massachusetts, admitted that, "although the steamship

was at her wharf, the maritime adventure was not at an end; the ship was still bound to the cargo for its safe delivery; and the cotton, on account of which the suit has been brought, was undischarged;" and that "it must be considered that it is now established that damage to unburnt portions of the cargo, caused by water intentionally used to extinguish a fire in a ship, is of the nature of a general average loss." 137 Mass. 472.

Yet the claim of general average was disallowed, because the fire was not extinguished by the master or by any person in charge of the steamship or her cargo, but by the chief engineer of the fire department of the city, acting not as the agent of the owner of the ship, but under his own public employment, vesting him with authority over all property within the municipality, the burning of which was dangerous; and the essential requisites of a general average loss were stated as follows: "To constitute a general average loss, there must be an intentional sacrifice of a part of the property, for the purpose of saving the remainder from a common peril, or extraordinary expenditures must be incurred for the purpose of saving the property in peril. The authority to determine when a sacrifice should be made, and what property shall be sacrificed, rests with the master or other person lawfully in command of the ship. His right to sacrifice the property of other persons than the shipowner is derived from necessity, whereby, in circumstances of great peril, he becomes the agent of all persons whose property in the common adventure is in peril. If this property is injured or destroyed by strangers to the ship and cargo, who are not employed by the master or other person in command, it is not a general average loss. This is evident, if the act of the stranger is a tort; but we do not see that it makes any difference in principle, if the act of the stranger is justifiable, on the ground of public or paramount right. The distinction between a fire put out by the authority of the master, or other person in command, and one put out by public authority, without regard to the will of the master, we think, is sound. When a ship has been brought to a wharf, so far as it has become

subject to municipal control, if that control is exercised, we think that it stands no differently from any other property within the municipality, over which the same control has been exercised; and that the general maritime law does not cover the reciprocal rights and obligations of the parties to the maritime adventure, so far as the consequences of this control are concerned, but that they are to be determined by municipal law." 137 Mass. 473, 474.

The case at bar comes to this court by appeal from the Circuit Court under the act of February 16, 1875, c. 77, § 1, by which that court is required to state its findings of facts and its conclusions of law separately, and the jurisdiction of this court is limited to the determination of the questions of law presented by the record. 18 Stat. 315. The findings of facts by the Circuit Court are conclusive, and cannot be added to or qualified, by referring to the evidence taken in the cause, or to the opinion of that court, or of the District Court. *The Annie Lindsley*, 104 U. S. 185, 187; *Sun Ins. Co.* v. *Ocean Ins. Co.*, 107 U. S. 485, 500; *The Gazelle*, 128 U. S. 474, 484; *The City of New York*, 147 U. S. 72, 76.

The leading facts found by the Circuit Court are as follows: The vessel, when the cargo in her hold took fire, was moored in the port of Calcutta, and near other vessels, as is shown by the finding of fact that, as soon as the mate sounded the alarm of fire, "from sixty to seventy men from the crews of the neighboring vessels" came to his assistance, bringing their buckets with them, as well as a force-pump "from a ship near by," and poured water into the hold. Afterwards, the port authorities came with fire-engines, and took the direction of the vessel, and were found by the master, when he returned on board, in charge of her. The port authorities pumped steam and water from their engines into the hold, and moved the vessel from her moorings and put her aground. The master does not appear to have objected to their taking charge of and moving the ship, and any objection on his part would have been futile, for it was clearly within their powers as conservators of the port. The master successfully removed part of the cargo, and desired, and believed it to be prudent and

feasible, to remove more. But the port authorities forbade and prevented his doing so, because of the danger of increasing the fire, and, acting upon their own judgment, extinguished the fire by scuttling the vessel, whereby she became a wreck, not worth repairing. The master, being then permitted by the port authorities to resume charge of the vessel, saved the rest of the cargo in a damaged condition.

If the course desired and proposed by the master had been followed, the injuries, either to the cargo or to the ship, or to both, might have been different from those caused by the measures taken by the port authorities; and the difference in the property sacrificed might have affected the adjustment of contribution in general average.

The Circuit Court, indeed, has found, as facts, that "the measures taken by the mate before the port authorities took charge of the ship, and those subsequently taken by the port authorities, were the best available to extinguish the fire, and to save greater loss upon the cargo." But it is not found whether the motive and purpose of the port authorities was to save this vessel and her cargo, or to save other vessels and property in the port; whereas, in order to constitute a general average, the sole object of the sacrifice must appear to have been to save this vessel and cargo. Moreover, by the law of general average, the question what measures were the best and most prudent, the most feasible and available, to extinguish the fire, or, in other words, what part of the maritime adventure should be sacrificed, and in what manner, for the safety of the rest of the adventure, was to be determined by the master at the time of the emergency; and his determination, faithfully and reasonably made, was, so far as affects the right of mutual contribution between the parties to the adventure, not to be overruled by the municipal authorities at the time, or by the court long afterwards.

The result of the principles above stated, confirmed by the authorities above referred to, may be summed up as follows:

The law of general average is part of the maritime law, and not of the municipal law, and applies to maritime adventures only.

To constitute a general average loss, there must be a voluntary sacrifice of part of a maritime adventure, for the purpose, and with the effect, of saving the other parts of the adventure from an imminent peril impending over the whole.

The interests so saved must be the sole object of the sacrifice, and those interests only can be required to contribute to the loss. The safety of property not included in the common adventure can neither be an object of the sacrifice, nor a ground of contribution.

As the sacrifice must be for the benefit of the common adventure, and of that adventure only, so it must be made by some one specially charged with the control and the safety of that adventure, and not be caused by the compulsory act of others, whether private persons or public authorities.

The sacrifice, therefore, whether of ship or of cargo, must be by the will and act of its owner, or of the master of the ship, or other person charged with the control and protection of the common adventure, and representing and acting for all the interests included in that adventure, and those interests only.

A sacrifice of vessel or cargo by the act of a stranger to the adventure, although authorized by the municipal law to make the sacrifice for the protection of his own interests, or of those of the public, gives no right of contribution, either for or against those outside interests, or even as between the parties to the common adventure.

The port authorities are strangers to the maritime adventure, and to all the interests included therein. They are in no sense the agents or representatives of the parties to that adventure, either by reason of any implied contract between those parties, or of any power conferred by law over the adventure as such.

They have no special authority or special duty in regard to the preservation, or the destruction, of any vessel and her cargo, as distinct from the general authority and the general duty appertaining to them as guardians of the port, and of all the property, on land or water, within their jurisdiction.

Their right and duty to preserve or destroy property, as necessity may demand, to prevent the spreading of a fire, is

derived from the municipal law, and not from the law of the sea.

Their sole office and paramount duty, and, it must be presumed, their motive and purpose, in destroying ship or cargo, in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure; but to protect and preserve all the shipping and property in the port, for the benefit of the public.

In the execution of this office, and in the performance of this duty, they act under their official responsibility to the public, and are not subject to be controlled by the owners of the adventure, or by the master of the vessel as their representative.

In fine, the destruction of the J. W. Parker by the act of the municipal authorities of the port of Calcutta was not a voluntary sacrifice of part of a maritime adventure for the safety of the rest of that adventure, made, according to the maritime law, by the owners of vessel or cargo, or by the master as the agent and representative of both. But it was a compulsory sacrifice, made by the paramount authority of public officers deriving their powers from the municipal law, and the municipal law only; and therefore neither gave any right of action, or of contribution, against the owners of property benefited by the sacrifice, but not included in the maritime adventure, nor yet any right of contribution as between the owners of the different interests included in that adventure.

Mr. Justice Jackson, now absent, took part in the decision of this case, and concurs in the opinion of the court.

Decree reversed, claim of general average for loss or damage by the acts of the port authorities disallowed, and case remanded to the Circuit Court for further proceedings consistent with this opinion.

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

I am compelled to dissent from the opinion of the court in this case. I find myself unable to escape the conviction that

a person who has lawful possession of a vessel, and exercises the authority of a master over it, either by appointment or consent of the owner, or by operation of law, is to be considered the master *pro hac vice*, and competent to bind the vessel or her cargo by all acts within the scope of his apparent authority.

There is in this case a failure to find an important fact, namely, whether the action of the port authorities was taken in the interest of the ship and cargo alone, or in the interest of other neighboring property exposed to the conflagration. In the opinion of the court it is assumed that the barque was moored near to other vessels, from the fact found by the Circuit Court that as soon as the mate sounded the alarm of fire, "from sixty to seventy men from the crews of the neighboring vessels came to his assistance," bringing their buckets with them, as well as a force-pump "from a ship near by," and poured water into the hold. That appears to me very slender evidence upon which to base the opinion that the action of the port authorities was dictated mainly by a desire to prevent a general conflagration, especially in view of the fact that the District Judge in his opinion, which under our rules is sent up with the record in the case, states that "if it appeared in this case, or if the evidence warranted the inference that their measures were adopted in view of any actual or supposed danger to the port, or to other ships, and that they acted differently than if the common benefit of the ship and cargo alone were considered; in other words, if there was any sacrifice of the ship and cargo for the supposed interest of other property, I should consider the case not one of general average. But there is no evidence to warrant any such inference. This ship was far from shore, and apparently threatened no other property. The circumstances do not indicate that there was any conflict of interests between the ship and the shore; or that the port officials in any degree designed to sacrifice, or did sacrifice, any interest of the cargo to the safety of other property. There was no occasion and no motive for their doing so. The most that can be inferred is that there was some difference of judgment between them

and the master as to the amount of exposure it was prudent to permit to the smouldering fire; and in case of a difference of judgment, the determination must rest upon those upon whom the law for the time being imposes the responsibility of action; in this case, the port officials." He further finds that "the port officials were by law in command while the ship was on fire; that the purpose of the act of sacrifice was the common good of the ship and cargo alone; that the circumstances indicate that there was not in this case any interest of the port, or of other vessels, that in the least influenced the port officials in their action, or the smallest sacrifice of the ship or cargo in reference to any outside interests."

It may be true that the facts here stated, not being incorporated in the findings, are not such as can be considered by us upon appeal to this court; but speaking for myself, I think the case should have been remanded for a further finding upon this point, since it is quite possible these facts might be considered as having a bearing upon the result. The opinion, however, is put upon the broad ground that the sacrifice must not only be for the benefit of the common adventure, but must be made by some one specially charged with the control and safety of that adventure, and must not be caused by the compulsory act of others, whether private parties or public authorities. To this I am unable to give my assent.

No authority is cited in support of this proposition except the single case of the *Wamsutta Mills* v. *Old Colony Steam Boat Co.*, 137 Mass. 471, in which it appeared that the steamship was lying at a wharf, "near other vessels, and near buildings," when a fire broke out in her hold, and that what was done was necessary to extinguish the fire, which, if allowed to burn, would have spread to the neighboring vessels and buildings. The opinion of that court, though perhaps broader in some of its statements than the circumstances of the case called for, carefully distinguishes between cases where action is taken for the protection of the vessel and cargo alone, and those wherein action is taken for the supposed benefit of the public. In delivering this opinion, Mr. Justice Field said "that it was necessary to do what he" (the chief engineer) "did, not only for

the purpose of saving the ship and cargo, but for preventing the spread of the fire to buildings and other property in the city. . . . No one has a right to have his property burn, if thereby the property of others is endangered. . . . In taking possession of property for the purpose of extinguishing a fire that threatens to spread to other property, the chief engineer does not act as agent of the owner, but under a paramount right. If, indeed, the fire does not endanger the property of others, he may act merely *as the agent of the owner;* but if the safety of other property is imperilled, he must act under his public responsibility." While this case is distinguishable from the one under consideration in the particular above stated, its general statements have not escaped criticism. At the annual meeting of the British Association of Adjusters the case was commented upon by the president as "much at variance with our law," that is, the law of England.

I see no reason for criticising the case of the John Perkins, and none for changing the opinion expressed by me in the case of the James P. Donaldson. But it seems to me they have only the remotest analogy to the case under consideration. The first case involved the power of the custodian of a ship, who for the time being represented the master, to bind *another* ship to contribute to the sacrifice of the cable and anchor of his own ship. The second case involved the right of a tow to recover compensation in general average for a sacrifice made by the master of *another* ship, namely, the tug by which she was being towed, in casting off her tow line and suffering her to go ashore. In each case there was an attempt to extend the law of general average beyond the ship and cargo engaged in the particular adventure.

A case which seems to me to be more closely allied in principle to the one under consideration is that of *The China*, 7 Wall. 53, in which this court held, contrary to the English, but conformably to the continental, authorities, that a vessel was liable for the consequences of a collision through the negligence of a pilot taken compulsorily on board, although it was admitted that, if the action had been at common law against the owner, and probably also *in personam* in admiralty, there

could have been no recovery, as a compulsory pilot is in no sense the agent or servant of the owner. The opinion must necessarily rest upon the ground that the vessel is in some sense herself a principal, and any one having lawful command of her is, for the time being, her agent, for whose conduct she is herself responsible both in contract and in tort. The principle of the case is, that a person who is exercising the authority of a master by operation of law is to be considered as master *pro hac vice*, and as invested with authority as such.

While the master is, under ordinary circumstances, undoubtedly the person to direct that the sacrifice should be made, it was held in *Price* v. *Noble*, 4 Taunt. 123, that a jettison made by a prize crew put on board of a British ship was a proper subject for a general average contribution. This was an action by the owners of a ship, which had been captured by a French privateer, and put in charge of a prize master and a part of the privateer's crew, against the owners of the cargo for a general average contribution caused by throwing overboard certain anchors, cables, and other stores. The jury found a verdict for the plaintiffs subject to the question whether, under the law, they were entitled to recover. The argument made in behalf of the defendants was that "every person who puts goods on board a ship, tacitly contracts to intrust their safety to the discretion of the master of the ship, and to abide by his judgment of the necessity of sacrificing a part of the ship or cargo for the preservation of the rest, and, in case of such necessity, to contribute accordingly; but the sacrifice in this case made is not dictated by the master and mariners of the ship, but by strangers, to whom the respective owners of ship and cargo have never delegated the like discretion." Sir James Mansfield held the objection to be untenable, and refused to set aside the verdict, though the mate, who must have been their prisoner, and hence without authority, appears to have concurred in the action of the prize crew.

That damage done by pumping in water, or by scuttling and sinking the ship and extinguishing a fire, is a subject of general average contribution is now too well settled both in

England and in this country to be longer a question of doubt, although the practice was formerly the other way. There is no disagreement upon this point. That there must be a common danger in which ship, cargo, and crew all participate; that the sacrifice must be necessary, or at least made in the exercise of a reasonable judgment that it was necessary; and that it must be voluntary, is also admitted. But whether the water be pumped in by the crew, or by a fire-engine stationed on shore, is quite immaterial, as was held in *Nelson* v. *Belmont*, 5 Duer, 10; *S. C.* 21 N. Y. 36; *Gregory* v. *Orrall*, 8 Fed. Rep. 287; *The Roanoke*, 46 Fed. Rep. 297; *S. C.* 53 Fed. Rep. 270, and 59 Fed. Rep. 161; *Stewart* v. *West India &c. Steamship Co.*, L. R. 8 Q. B. 88.

But if the master be engaged in extinguishing a fire by pumping in water, and the damage thereby done subjects the property saved to a general average contribution, I fail to see why he should lose his right to such contribution, if the port authorities, acting under a local ordinance, interfere and take possession of the vessel, and do exactly what he was engaged in doing, but more efficiently and expeditiously. It was for the interest of all parties that the fire should be extinguished as quickly as possible, and if the port authorities had more efficient means for such purposes than the master, and therefore interfered to assist him, it seems to me he should not lose his right to contribution. His loss was no greater than it would have been, if the port authorities had not interfered. The damage to the cargo was evidently much less, so that the shippers were obviously benefited by such interference. Under such circumstances it appears highly inequitable that they should set up a defence which they would not have been able to assert, if their loss had been greater.

If it be true, as assumed in the opinion of the court, that the right to a general average contribution arises, not from the contract of the parties, but from operation of law and upon principles of natural justice, it seems an anomaly to say that one who is in possession of the vessel by act of law is not in a position to make a sacrifice, out of which a right of contribution shall arise. The consequences of the rule an-

nounced by the court might, under certain circumstances, be so inequitable as at once to challenge its soundness. Suppose, for instance, the master had nearly succeeded in extinguishing the fire before the port authorities had arrived, and, against his protest, had assumed charge of the vessel. Under such circumstances, he would clearly be entitled to contribution from such of the cargo as he had already saved, but how would it be possible to distinguish between that and such as might have been saved after the port authorities took possession? In saying that the sacrifice must have been made by the act of the master, the law evidently intends not that the word "master" shall be taken in its technical sense, but that the act must be that of one in authority, and must be the result of the judgment of some one competent to judge and with authority to act, as distinguished from the hasty and arbitrary or timorous action of the crew or of a passenger, who have no authority to bind the vessel.

Suppose, for instance, a vessel and cargo be discovered abandoned at sea and derelict, and be taken possession of by salvors, who, for the purpose of saving the property, throw overboard a portion of the cargo. Can it be possible that the value of the property so jettisoned should not be estimated in the salvage expenses, and be contributed for by the property thus saved? There can be no question that, under such circumstances, the salving vessel would be entitled to remuneration, but the logical result of the opinion of the court in this case is that the owner of the property thrown overboard would lose its entire value, because the salvors are not agents of the owners of the vessel, and are strangers to the adventure.

In this case there is no finding that the port authorities took charge of the fire against the will of the master or mate, but upon his return on board the master found them in charge. There is no finding that he made objection to this. The only disagreement between him and the port authorities seemed to arise from the fact that the master, after having "removed 552 bales of jute from the barque, desired to remove more; but the port authorities objected and forbade it,

because of the danger of increasing the fire." But this was evidently a disagreement as to a minor particular, and there is an express finding that "the measures taken by the mate before the port authorities took charge of the ship, and those subsequently taken by the port authorities, were the best available to extinguish the fire and to save greater loss upon the cargo." There seems to have been no objection at the time to the port authorities moving the ship and putting her aground, although the master subsequently incorporated an objection to such action in his protest. In fact, the District Judge states that "the master did not object to the scuttling," and that the chief difference between them was with respect to keeping the hatches open longer for the purpose of removing more of the cargo, to which the officials objected, in consequence of the increased draft of air serving as fuel to the flames.

The opinion of the court tends, in every such emergency, to put the master and local authorities in antagonism, to give rise to unseemly conflicts between them, and to prevent the master from availing himself of their superior facilities for extinguishing fires. It seems to me there is no distinction in principle between a sacrifice made by a master and one made by authority of law, provided the common safety of the ship and cargo be the object of their action.

I am authorized to state that MR. JUSTICE HARLAN concurs in this dissent.

LUTCHER *v.* UNITED STATES.

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

No. 271. Submitted April 5, 1895. — Decided April 8, 1895.

For the reasons stated in the opinion of the court it is *held*, (1) that this court has no jurisdiction to review the judgment of the Circuit Court in this case, and (2) that the writ of error was brought too late.

THE case is stated in the opinion.

Mr. J. L. Bradford for plaintiffs in error.

Mr. Solicitor General for defendants in error.

THE CHIEF JUSTICE: This was an action brought by the United States in the Circuit Court of the United States for the Eastern District of Texas against the firm of Lutcher & Moore of that district, doing a milling and manufacturing business at Orange, Texas, to recover damages for cutting, carrying away, and converting to their own use certain timber, the property of the United States. Judgment was rendered in favor of the United States March 11, 1891. April 3, 1891, a writ of error was allowed from the Circuit Court of Appeals for the Fifth Circuit. The record does not disclose what proceedings were had thereon in that court. July 2, 1891, a writ of error from this court was sued out and filed, the bond thereon being approved and the citation signed July 10, 1891. The petition for the allowance of the writ states that the Circuit Court of Appeals refused to allow the cause to be docketed and the transcript of record to be filed therein, on the ground that the cause should have been taken to this court and not to that court. But the last clause of section six of the Judiciary Act of March 3, 1891, refers to the Circuit Court of Appeals and not to the Circuit Court, and this writ of error is to the Circuit Court and not to the Circuit Court of Appeals, and does not, therefore, reach the proceedings in the latter court. We perceive no ground on which this court has jurisdiction to review the judgment of the Circuit Court on this writ, and, moreover, it was brought too late. *Cincinnati Safe and Lock Co.* v. *Grand Rapids Deposit Co.*, 146 U. S. 54. Either objection is fatal.

Writ of error dismissed.

POLLOCK *v.* FARMERS' LOAN AND TRUST COMPANY.

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

No. 893. Argued March 7, 8, 11, 12, 13, 1895. — Decided April 8, 1895.

A court of equity has jurisdiction to prevent a threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits.

Such a bill being filed by a stockholder to prevent a trust company from voluntarily making returns for the imposition and payment of a tax claimed to be unconstitutional, and on the further ground of threatened multiplicity of suits and irreparable injury, and the objection of adequate remedy at law not having been raised below or in this court, and the question of jurisdiction having been waived by the United States, so far as it was within its power to do so, and the relief sought being to prevent the voluntary action of the trust company and not in respect to the assessment and collection of the tax, the court will proceed to judgment on the merits.

The doctrine of *stare decisis* is a salutary one, and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but this court should not extend any decision upon a constitutional question, if it is convinced that error in principle might supervene.

In the cases referred to in the opinion of the court in this case, beginning with *Hylton* v. *United States*, 3 Dall. 171, (February Term, 1796,) and ending with *Springer* v. *United States*, 102 U. S. 586, (October Term, 1880,) taxes on land are conceded to be direct taxes, and in none of them is it determined that a tax on rent or income derived from land is not a tax on land.

A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

So much of the act "to reduce taxation, to provide revenue for the government, and for other purposes," 28 Stat. 509, c. 349, as provides for levying taxes upon rents or income derived from real estate, or from the interest on municipal bonds, is repugnant to the Constitution of the United States and is invalid.

Upon each of the other questions argued at the bar, to wit: 1, Whether the void provision as to rents and income from real estate invalidates

the whole act? 2, Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3, Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? — the Justices who heard the argument are equally divided, and, therefore, no opinion is expressed.

THIS was a bill filed by Charles Pollock, a citizen of the State of Massachusetts, on behalf of himself and all other stockholders of the defendant company similarly situated, against the Farmers' Loan and Trust Company, a corporation of the State of New York, and its directors, alleging that the capital stock of the corporation consisted of one million dollars, divided into forty thousand shares of the par value of twenty-five dollars each; that the company was authorized to invest its assets in public stocks and bonds of the United States, of individual States, or of any incorporated city, or county, or in such real or personal securities as it might deem proper; and also to take, accept, and execute all such trusts of every description as might be committed to it by any person or persons or any corporation, by grant, assignment, devise, or bequest, or by order of any court of record of New York, and to receive and take any real estate which might be the subject of such trust; that the property and assets of the company amounted to more than five million dollars, of which at least one million was invested in real estate owned by the company in fee; at least two millions in bonds of the city of New York; and at least one million in the bonds and stocks of other corporations of the United States; that the net profits or income of the defendant company during the year ending December 31, 1894, amounted to more than the sum of $300,000 above its actual operating and business expenses, including losses and interest on bonded and other indebtedness; that from its real estate the company derived an income of $50,000 per annum, after deducting all county, state, and municipal taxes; and that the company derived an income or profit of about $60,000 per annum from its investments in municipal bonds.

It was further alleged that under and by virtue of the pow-

ers conferred upon the company, it had from time to time taken and executed, and was holding and executing, numerous trusts committed to the company by many persons, copartnerships, unincorporated associations, and corporations, by grant, assignment, devise, and bequest, and by orders of various courts, and that the company now held as trustee for many minors, individuals, copartnerships, associations, and corporations, resident in the United States and elsewhere, many parcels of real estate situated in the various States of the United States, and amounting, in the aggregate, to a value exceeding five millions of dollars, the rents and income of which real estate collected and received by said defendant in its fiduciary capacity annually exceeded the sum of two hundred thousand dollars.

The bill also averred that complainant was and had been since May 20, 1892, the owner and registered holder of ten shares of the capital stock of the company, of a value exceeding the sum of $5000; that the capital stock was divided among a large number of different persons who as such stockholders constituted a large body; that the bill was filed for an object common to them all; and that he, therefore, brought suit, not only in his own behalf as a stockholder of the company, but also as a representative of and on behalf of such of the other stockholders similarly situated and interested as might choose to intervene and become parties.

It was then alleged that the management of the stock, property, affairs, and concerns of the company was committed under its acts of incorporation to its directors, and charged that the company and a majority of its directors claimed and asserted that under and by virtue of the alleged authority of the provisions of an act of Congress of the United States entitled, "An act to reduce taxation, to provide revenue for the government, and for other purposes," passed August 15, 1894, the company was liable and that they intended to pay to the United States before July 1, 1895, a tax of two per centum on the net profits of said company for the year ending December 31, 1894, above actual operating and business expenses, including the income derived from its real estate and

its bonds of the city of New York; and that the directors claimed and asserted that a similar tax must be paid upon the amount of the incomes, gains, and profits, in excess of $4000, of all minors and others for whom the company was acting in a fiduciary capacity. And further, that the company and its directors had avowed their intention to make and file with the collector of internal revenue for the second district of the city of New York a list, return, or statement showing the amount of the net income of the company received during the year 1894 as aforesaid, and likewise to make and render a list or return to said collector of internal revenue, prior to that date, of the amount of the income, gains, and profits of all minors and other persons having incomes in excess of $3500, for whom the company was acting in a fiduciary capacity.

The bill charged that the provisions in respect of said alleged income tax incorporated in the act of Congress were unconstitutional, null, and void, in that the tax was a direct tax in respect of the real estate held and owned by the company in its own right and in its fiduciary capacity as aforesaid, by being imposed upon the rents, issues, and profits of said real estate, and was likewise a direct tax in respect of its personal property and the personal property held by it for others for whom it acted in its fiduciary capacity as aforesaid, which direct taxes were not in and by said act apportioned among the several States as required by section 2 of article I of the Constitution; and that if the income tax so incorporated in the act of Congress aforesaid were held not to be a direct tax, nevertheless its provisions were unconstitutional, null, and void in that they were not uniform throughout the United States as required in and by section 8 of article I of the Constitution of the United States, upon many grounds and in many particulars specifically set forth.

The bill further charged that the income tax provisions of the act were likewise unconstitutional in that they imposed a tax on incomes not taxable under the Constitution and likewise income derived from the stocks and bonds of the States of the United States and counties and municipalities therein,

which stocks and bonds are among the means and instrumentalities employed for carrying on their respective governments, and are not proper subjects of the taxing power of Congress, and which States and their counties and municipalities are independent of the general government of the United States, and the respective stocks and bonds of which are, together with the power of the States to borrow in any form, exempt from Federal taxation.

Other grounds of unconstitutionality were assigned, and the violation of articles IV and V of the Constitution asserted.

The bill further averred that the suit was not a collusive one to confer on a court of the United States jurisdiction of the case, of which it would not otherwise have cognizance, and that complainant had requested the company and its directors to omit and refuse to pay said income tax, and to contest the constitutionality of said act, and to refrain from voluntarily making lists, returns, and statements on its own behalf and on behalf of the minors and other persons for whom it was acting in a fiduciary capacity, and to apply to a court of competent jurisdiction to determine its liability under said act, but that the company and a majority of its directors, after a meeting of the directors, at which the matter and the request of complainant were formally laid before them for action, had refused and still refuse, and intend omitting to comply with complainant's demand and had resolved and determined, and intended to comply with all and singular the provisions of the said act of Congress, and to pay the tax upon all its net profits or income as aforesaid, including its rents from real estate and its income from municipal bonds, and a copy of the refusal of the company was annexed to the complaint.

It was also alleged that if the company and its directors, as they proposed and had declared their intention to do, should pay the tax out of its gains, income, and profits, or out of the gains, income, and profits of the property held by it in its fiduciary capacity, they will diminish the assets of the company and lessen the dividends thereon and the value of the shares; that voluntary compliance with the income tax provisions would expose the company to a multiplicity of suits, not only by and

on behalf of its numerous shareholders, but by and on behalf of numerous minors and others for whom it acts in a fiduciary capacity, and that such numerous suits would work irreparable injury to the business of the company, and subject it to great and irreparable damage, and to liability to the beneficiaries aforesaid, to the irreparable damage of complainant and all its shareholders.

The bill further averred that this was a suit of a civil nature in equity; that the matter in dispute exceeded exclusive of costs the sum of five thousand dollars, and arose under the Constitution or laws of the United States; and that there was furthermore a controversy between citizens of different States.

The prayer was that it might be adjudged and decreed that the said provisions known as the income tax incorporated in said act of Congress passed August 15, 1894, are unconstitutional, null, and void; that the defendants be restrained from voluntarily complying with the provisions of said act, and making the lists, returns, and statements above referred to, or paying the tax aforesaid; and for general relief.

The defendants demurred on the ground of want of equity, and the cause having been brought on to be heard upon the bill and demurrer thereto, the demurrer was sustained and the bill of complaint dismissed with costs, whereupon the record recited that the constitutionality of a law of the United States was drawn in question, and an appeal was allowed directly to this court.

An abstract of the act in question will be found in the margin.[1]

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[1] By sections 27 to 37 inclusive of the act of Congress entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes," received by the President August 15, 1894, and which, not having been returned by him to the House in which it originated within the time prescribed by the Constitution of the United States, became a law without approval, (28 Stat. 509, c. 349,) it was provided that from and after January 1, 1895, and until January 1, 1900, "there shall be assessed, levied, collected, and paid annually upon the gains, profits, and income received in the preceding calendar year by every citizen of the United States, whether residing at home or abroad, and every person residing therein, whether said gains, profits, or income be derived from any kind of property, rents, inter-

By the third clause of section two of Article I of the Constitution it was provided: "Representatives and direct taxes shall

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est, dividends, or salaries, or from any profession, trade, employment, or vocation carried on in the United States or elsewhere, or from any other source whatever, a tax of two per centum on the amount so derived over and above four thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income from all property owned and of every business, trade, or profession carried on in the United States by persons residing without the United States." . . .

"SEC. 28. That in estimating the gains, profits, and income of any person there shall be included all income derived from interest upon notes, bonds, and other securities, except such bonds of the United States the principal and interest of which are by the law of their issuance exempt from all Federal taxation; profits realized within the year from sales of real estate purchased within two years previous to the close of the year for which income is estimated; interest received or accrued upon all notes, bonds, mortgages, or other forms of indebtedness bearing interest, whether paid or not, if good and collectible, less the interest which has become due from said person or which has been paid by him during the year; the amount of all premium on bonds, notes, or coupons; the amount of sales of live stock, sugar, cotton, wool, butter, cheese, pork, beef, mutton, or other meats, hay, and grain, or other vegetable or other productions, being the growth or produce of the estate of such person, less the amount expended in the purchase or production of said stock or produce, and not including any part thereof consumed directly by the family; money and the value of all personal property acquired by gift or inheritance; all other gains, profits, and income derived from any source whatever except that portion of the salary, compensation, or pay received for services in the civil, military, naval, or other service of the United States, including Senators, Representatives, and Delegates in Congress, from which the tax has been deducted, and except that portion of any salary upon which the employer is required by law to withhold, and does withhold the tax and pays the same to the officer authorized to receive it. In computing incomes the necessary expenses actually incurred in carrying on any business, occupation, or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness. And all national, state, county, school, and municipal taxes, not including those assessed against local benefits, paid within the year shall be deducted from the gains, profits, or income of the person who has actually paid the same, whether such person be owner, tenant, or mortgagor; also losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise, and debts ascertained to be worthless, but excluding all estimated depreciation of values and losses within the year on sales of real estate purchased within two years previous to the year for which income is estimated: *Provided*, That no deduction shall be made for any amount paid out for new buildings, permanent im-

be apportioned among the several States which may be included within this Union, according to their respective num-

provements, or betterments, made to increase the value of any property or estate: *Provided further*, That only one deduction of four thousand dollars shall be made from the aggregate income of all the members of any family, composed of one or both parents, and one or more minor children, or husband and wife; that guardians shall be allowed to make a deduction in favor of each and every ward, except that in case where two or more wards are comprised in one family, and have joint property interests, the aggregate deduction in their favor shall not exceed four thousand dollars: *And provided further*, That in cases where the salary or other compensation paid to any person in the employment or service of the United States shall not exceed the rate of four thousand dollars per annum, or shall be by fees, or uncertain or irregular in the amount or in the time during which the same shall have accrued or been earned, such salary or other compensation shall be included in estimating the annual gains, profits, or income of the person to whom the same shall have been paid, and shall include that portion of any income or salary upon which a tax has not been paid by the employer, where the employer is required by law to pay on the excess over four thousand dollars: *Provided also*, That in computing the income of any person, corporation, company, or association there shall not be included the amount received from any corporation, company, or association as dividends upon the stock of such corporation, company, or association if the tax of two per centum has been paid upon its net profits by said corporation, company, or association as required by this act.

"SEC. 29. That it shall be the duty of all persons of lawful age having an income of more than three thousand five hundred dollars for the taxable year, computed on the basis herein prescribed, to make and render a list or return, on or before the day provided by law, in such form and manner as may be directed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to the collector or a deputy collector of the district in which they reside, of the amount of their income, gains, and profits, as aforesaid; and all guardians and trustees, executors, administrators, agents, receivers, and all persons or corporations acting in any fiduciary capacity, shall make and render a list or return as aforesaid, to the collector or a deputy collector of the district in which such person or corporation acting in a fiduciary capacity resides or does business, of the amount of income, gains, and profits of any minor or person for whom they act, but persons having less than three thousand five hundred dollars income are not required to make such report; and the collector or deputy collector shall require every list or return to be verified by the oath or affirmation of the party rendering it, and may increase the amount of any list or return if he has reason to believe that the same is understated; and in case any such person having a taxable income shall neglect or refuse to make and render such list and return, or shall render a wilfully false or fraudulent list or return, it shall be the duty of the

bers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of

collector or deputy collector, to make such list, according to the best information he can obtain, by the examination of such person, or any other evidence, and to add fifty per centum as a penalty to the amount of the tax due on such list in all cases of wilful neglect or refusal to make and render a list or return; and in all cases of a wilfully false or fraudulent list or return having been rendered to add one hundred per centum as a penalty to the amount of tax ascertained to be due, the tax and the additions thereto as a penalty to be assessed and collected in the manner provided for in other cases of wilful neglect or refusal to render a list or return, or of rendering a false or fraudulent return." A proviso was added that any person or corporation might show that he or its ward had no taxable income, or that the same had been paid elsewhere, and the collector might exempt from the tax for that year. "Any person or company, corporation, or association, feeling aggrieved by the decision of the deputy collector, in such cases may appeal to the collector of the district, and his decision thereon, unless reversed by the Commissioner of Internal Revenue, shall be final. If dissatisfied with the decision of the collector such person or corporation, company, or association may submit the case, with all the papers, to the Commissioner of Internal Revenue for his decision, and may furnish the testimony of witnesses to prove any relevant facts having served notice to that effect upon the Commissioner of Internal Revenue, as herein prescribed." Provision was made for notice of time and place for taking testimony on both sides, and that no penalty should be assessed until after notice.

By section 30 the taxes on incomes were made payable on or before July 1 of each year, and five per cent penalty levied on taxes unpaid, and interest.

By section 31, any non-resident might receive the benefit of the exemptions provided for, and "in computing income he shall include all income from every source, but unless he be a citizen of the United States he shall only pay on that part of the income which is derived from any source in the United States. In case such non-resident fails to file such statement, the collector of each district shall collect the tax on the income derived from property situated in his district, subject to income tax, making no allowance for exemptions, and all property belonging to such non-resident shall be liable to distraint for tax: *Provided*, That non-resident corporations shall be subject to the same laws as to tax as resident corporations, and the collection of the tax shall be made in the same manner as provided for collections of taxes against non-resident persons."

"SEC. 32. That there shall be assessed, levied, and collected, except as herein otherwise provided, a tax of two per centum annually on the net profits or income above actual operating and business expenses, including expenses for materials purchased for manufacture or bought for resale, losses, and interest on bonded and other indebtedness of all banks, banking institutions, trust companies, saving institutions, fire, marine, life, and other

years, and excluding Indians not taxed, three-fifths of all other persons." This was amended by the second section of the

insurance companies, railroad, canal, turnpike, canal navigation, slack water, telephone, telegraph, express, electric light, gas, water, street railway companies, and all other corporations, companies, or associations doing business for profit in the United States, no matter how created and organized but not including partnerships."

The tax is made payable "on or before the first day of July in each year; and if the president or other chief officer of any corporation, company, or association, or in the case of any foreign corporation, company, or association, the resident manager or agent shall neglect or refuse to file with the collector of the internal revenue district in which said corporation, company, or association shall be located or be engaged in business, a statement verified by his oath or affirmation, in such form as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, showing the amount of net profits or income received by said corporation, company, or association during the whole calendar year last preceding the date of filing said statement as hereinafter required, the corporation, company, or association making default shall forfeit as a penalty the sum of one thousand dollars and two per centum on the amount of taxes due, for each month until the same is paid, the payment of said penalty to be enforced as provided in other cases of neglect and refusal to make return of taxes under the internal revenue laws.

"The net profits or income of all corporations, companies, or associations shall include the amounts paid to shareholders, or carried to the account of any fund, or used for construction, enlargement of plant, or any other expenditure or investment paid from the net annual profits made or acquired by said corporations, companies, or associations.

"That nothing herein contained shall apply to States, counties, or municipalities; nor to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes, including fraternal beneficiary societies, orders, or associations operating upon the lodge system and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members; nor to the stocks, shares, funds, or securities held by any fiduciary or trustee for charitable, religious, or educational purposes; nor to building and loan associations or companies which make loans only to their shareholders; nor to such savings banks, savings institutions or societies as shall, first, have no stockholders or members except depositors and no capital except deposits; secondly, shall not receive deposits to an aggregate amount, in any one year, of more than one thousand dollars from the same depositor; thirdly, shall not allow an accumulation or total of deposits, by any one depositor, exceeding ten thousand dollars; fourthly, shall actually divide and distribute to its depositors, ratably to deposits, all the earnings over the necessary and proper expenses of such bank, institution, or society, except such as shall be applied to sur-

Fourteenth Article, declared ratified July 28, 1868, so that the whole number of persons in each State should be counted,

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plus; fifthly, shall not possess, in any form, a surplus fund exceeding ten per centum of its aggregate deposits; nor to such savings banks, savings institutions, or societies composed of members who do not participate in the profits thereof and which pay interest or dividends only to their depositors; nor to that part of the business of any savings bank, institution, or other similar association having a capital stock, that is conducted on the mutual plan solely for the benefit of its depositors on such plan, and which shall keep its accounts of its business conducted on such mutual plan separate and apart from its other accounts.

"Nor to any insurance company or association which conducts all its business solely upon the mutual plan, and only for the benefit of its policy holders or members, and having no capital stock and no stock or shareholders, and holding all its property in trust and in reserve for its policy holders or members; nor to that part of the business of any insurance company having a capital stock and stock and shareholders, which is conducted on the mutual plan, separate from its stock plan of insurance, and solely for the benefit of the policy holders and members insured on said mutual plan, and holding all the property belonging to and derived from said mutual part of its business in trust and reserve for the benefit of its policy holders and members insured on said mutual plan.

"That all state, county, municipal, and town taxes paid by corporations, companies, or associations, shall be included in the operating and business expenses of such corporations, companies, or associations.

"SEC. 33. That there shall be levied, collected, and paid on all salaries of officers, or payments for services to persons in the civil, military, naval, or other employment or service of the United States, including Senators and Representatives and Delegates in Congress, when exceeding the rate of four thousand dollars per annum, a tax of two per centum on the excess above the said four thousand dollars; and it shall be the duty of all paymasters and all disbursing officers under the government of the United States, or persons in the employ thereof, when making any payment to any officers or persons as aforesaid, whose compensation is determined by a fixed salary, or upon settling or adjusting the accounts of such officers or persons, to deduct and withhold the aforesaid tax of two per centum; and the pay roll, receipts, or account of officers or persons paying such tax as aforesaid shall be made to exhibit the fact of such payment. And it shall be the duty of the accounting officers of the Treasury Department, when auditing the accounts of any paymaster or disbursing officer, or any officer withholding his salary from moneys received by him, or when settling or adjusting the accounts of any such officer, to require evidence that the taxes mentioned in this section have been deducted and paid over to the Treasurer of the United States, or other officer authorized to receive the same. Every corporation which pays to any employé a salary or compensation exceeding four thousand dollars per annum shall report the same to the collector or

Indians not taxed excluded, and the provision as thus amended, remains in force.

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deputy collector of his district and said employé shall pay thereon, subject to the exemptions herein provided for, the tax of two per centum on the excess of his salary over four thousand dollars: *Provided,* That salaries due to state, county, or municipal officers shall be exempt from the income tax herein levied."

By section 34, sections thirty-one hundred and sixty-seven, thirty-one hundred and seventy-two, thirty-one hundred and seventy-three, and thirty-one hundred and seventy-six of the Revised Statutes of the United States as amended were amended so as to provide that it should be unlawful for the collector and other officers to make known, or to publish amount or source of income under penalty; that every collector should "from time to time cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects;" that the tax returns must be made on or before the first Monday in March; that the collectors may make returns when particulars are furnished; that notice be given to absentees to render returns; that collectors may summon persons to produce books and testify concerning returns; that collectors may enter other districts to examine persons and books; and may make returns; and that penalties may be imposed on false returns.

By section 35 it was provided that corporations doing business for profit should make returns on or before the first Monday of March of each year "of all the following matters for the whole calendar year last preceding the date of such return:

"First. The gross profits of such corporation, company, or association, from all kinds of business of every name and nature.

"Second. The expenses of such corporation, company, or association, exclusive of interest, annuities, and dividend.

"Third. The net profits of such corporation, company, or association, without allowance for interest, annuities, or dividends.

"Fourth. The amount paid on account of interest, annuities, and dividends, stated separately.

"Fifth. The amount paid in salaries of four thousand dollars or less to each person employed.

"Sixth. The amount paid in salaries of more than four thousand dollars to each person employed and the name and address of each of such persons and the amount paid to each."

By section 36, that books of account should be kept by corporations as prescribed, and inspection thereof be granted under penalty.

By section 37 provision is made for receipts for taxes paid.

By a joint resolution of February 21, 1895, the time for making returns of income for the year 1894 was extended, and it was provided that "in com-

The actual enumeration was prescribed to be made within three years after the first meeting of Congress and within every subsequent term of ten years, in such manner as should be directed.

Section 7 requires "all bills for raising revenue shall originate in the House of Representatives."

The first clause of section 8 reads thus: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." And the third clause thus: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The fourth, fifth, and sixth clauses of section 9 are as follows:

"No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

"No tax or duty shall be laid on articles exported from any State.

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."

It is also provided by the second clause of section 10 that "no State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be

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puting incomes under said act the amounts necessarily paid for fire insurance premiums and for ordinary repairs shall be deducted;" and that "in computing incomes under said act the amounts received as dividends upon the stock of any corporation, company, or association shall not be included in case such dividends are also liable to the tax of two per centum upon the net profits of said corporation, company, or association although such tax may not have been actually paid by said corporation, company, or association at the time of making returns by the person, corporation, or association receiving such dividends, and returns or reports of the names and salaries of employés shall not be required from employers unless called for by the collector in order to verify the returns of employés."

absolutely necessary for executing its inspection laws;" and, by the third clause, that "no State shall, without the consent of Congress, lay any duty of tonnage."

The first clause of section 9 provides: "The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importations, not exceeding ten dollars for each person.

Article V prescribes the mode for the amendment of the Constitution, and concludes with this proviso: "Provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article."

This case was argued with *Hyde* v. *Continental Trust Company*, No. 894 and *Moore* v. *Miller*, No. 915. *Hyde* v. *Continental Trust Company* is disposed of, (*post*, 654,) in accordance with the opinion and judgment in this case. *Moore* v. *Miller* is still undecided; but, as *Mr. Edmunds's* argument for the appellant formed an important part of the general discussion, it is reported in this connection.

The reporter has had the advantage of consulting stenographic reports of all the arguments here reported, except that of *Mr. Whitney*, who has been good enough to furnish material for the report of his argument.

Mr. W. D. Guthrie for Pollock, appellant in 893, and Hyde, appellant in 894. *Mr. Benjamin H. Bristow*, *Mr. David Willcox*, and *Mr. Charles Steele* were with him on his brief.

The provisions as to an income tax contained in the act of August 28, 1894, are unconstitutional, in that they violate the requirement of the Constitution as to apportionment in respect of direct taxes, or as to uniformity in respect of duties, imposts, and excises.

Mr. Guthrie's Argument for Appellants.

Congress has no constitutional power to impose taxes, duties, or excises which shall vary according to ownership of the subject-matter of the tax, and which shall be at one rate upon the income of individuals, and at an entirely different rate upon the income of corporations and of those who derive their income from corporate profits. It has no power to foster and aid favored classes of corporations and associations by arbitrarily exempting them from taxation. It is the fundamental rule of all taxation that there shall be equality of burden among those of the same class; and that, under well-settled principles, if a tax be levied upon any citizens at a higher rate than is imposed upon others of the same class, having like property, it is depriving the former of their property without due process of law and taking the same for public use without just compensation. It is also submitted that Congress cannot tax income derived from state, county, and municipal bonds.

The issues in No. 893 and No. 894 are substantially the same; but in the Pollock suit, No. 893, the interests involved are larger and more important, and I shall confine the statement of facts to that case. The Farmers' Loan & Trust Company is one of the largest trust companies in the United States, and is a private trading corporation organized under the laws of the State of New York. It carries on no business which a partnership could not transact; it exercises no special privileges; it performs no public duty; its business is impressed with no public interest; its capital stock is $1,000,000, divided into 40,000 shares scattered over the United States and abroad. The present capital and accumulations exceed the sum of $5,000,000, and the annual profits amount to over $300,000. The company owns in its own right real estate which brings in an income from rents of $50,000 a year. It also owns $2,000,000 of municipal bonds of the city of New York, the income of which is over $60,000. It holds one hundred parcels of real property for minors and other beneficiaries of the value of over $5,000,000, and collects as trustee, annually, rents exceeding $200,000.

The provisions of the act of 1894 impose a tax of two per

cent upon the gains, profits, and income derived from any kind of property, including rent and the growth and produce of land and profits made upon the sale of land if purchased within two years. Every element that could make real or personal property a source of value or income to an owner is taxed. An excise or duty is also imposed upon income derived from any profession, trade, employment, or avocation. The tax upon persons generally is not upon their entire income, but upon the excess over and above $4000. All persons having incomes of $4000 or under are exempted. The whole burden of the tax falls upon less than two per cent of the population of the country.

The rate of taxation upon corporations and associations is in excess of the rate imposed upon individuals and associations. Persons having incomes of $4000 or under pay nothing; corporations having like incomes pay two per cent. Persons having incomes of over $4000 pay on the excess. Corporations having like incomes, derived from like property and like values, pay two per cent upon the entire amount. Partnerships are expressly exempted from the operation of the act. An individual owning lands, the rents of which net him $8000, pays $80, or two per cent upon the excess over $4000. A corporation or association having like property pays a tax of two per cent upon the whole $8000, or $160, double the tax upon the individual. Five individuals as partners own property or carry on business netting them, after paying all taxes and expenses, $20,000, which they divide equally. The partnership is entirely exempted from taxation, and each member is exempted. If those same five individuals organized a private trading corporation or association under the laws of one of the States, and held the property in that form, they would have to pay an income tax of $400, simply and solely because they had united their interest in a corporate or associate form instead of a partnership. In a word, the rate varies according to the form or nature of ownership. Citizens whose income is $4000 and under, derived from profits and dividends of corporations, are deprived of the benefit of the exemption, because their shares or interests

in the profits of corporations are subjected to a tax of two per cent, while the same income derived from similar business and similar property by those who carry on business individually or as partners would be wholly exempted. If the exemption of the $4000 was to cover the expenses of a household, certainly all persons having all their means invested in corporate shares equally have their household expenses. Why not exempt them?

The act of 1894 is new in the provisions discriminating against those whose income is derived from dividends of corporations and in the exemptions from taxation of favored private corporations and associations. Under the old income tax laws, the business of certain selected classes of corporations, such as banks, saving institutions, insurance companies and railroads was taxed. The language of the present act is "all corporations, companies, or associations, doing business for profit in the United States, no matter how created and organized, but not including partnerships." The tax upon classes of corporations under the old law was sustained, not because it was a tax upon the property of the corporations selected, but upon the distinct ground that it was an excise upon their business. Such was the reason assigned by Mr. Justice Swayne in the case of *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, and such the ground reiterated by Mr. Justice Miller in delivering the opinion of the court in *Railroad Co.* v. *Collector*, 100 U. S. 595. The bank tax was held to be a tax, not upon property or income, but upon the act of issuing notes; not on the obligation itself, but on its use in a particular way. The judgment in *Veazie Bank* v. *Fenno*, 8 Wall. 533, followed by *National Bank* v. *United States*, 101 U. S. 1, clearly shows this to be the true ground.

The act of 1894 not only exempts charitable, religious, and educational institutions, but it specially excepts from the operation of the tax certain private business concerns, such as building and loan associations, savings banks and mutual insurance companies — not merely mutual life companies, but all mutual insurance companies or associations, whether life, fire, marine, inland, or accident. The exemption is granted without regard

to the amount of property or income. If the business of an insurance company is conducted on the stock plan for the benefit of its shareholders, every dollar of profit is taxed; if it is carried on for the benefit of its members or policy-holders, who are but another form of shareholders, it is wholly exempted. The census reports show the immense accumulations of estates in the hands of these exempted corporations or institutions. In the State of New York, the act exempts hundreds of millions of property.

The census reports show that when the statistics were compiled in 1890 there were 1926 insurance companies transacting insurance business relating to property, of which 1689 were doing business on the mutual plan. The assets of all these companies are not reported, but taking those ascertained, we find $278,000,000 of assets owned by stock insurance companies and $1,200,000,000 of assets owned by mutual companies: the former are subjected to the income tax; the latter are absolutely freed from any such burden simply because the method or manner of conducting the very same business happens to be the mutual plan. The amount of tax saved to these favored mutual companies is at least $1,200,000 per annum.

It is not contended that any doubt exists as to the power of Congress to tax the property or income of private corporations organized under state laws in the same manner and at the same rate that it taxes the property and income of individuals; but it is insisted that the property or income of corporations or of citizens deriving their income therefrom cannot be singled out to be assessed and taxed at a higher rate than the property or income of other individuals or partnerships. If exemptions are to be granted, then such exemptions must be equally allowed to those who have their means invested in corporations and who derive their income from the corporate profits. The question is not whether Congress can select particular classes of property or income for taxation, — whether it can tax one article at one rate and another article at a different rate, — but whether it can prescribe rules of taxation upon like property or like income which shall vary as it is held or collected by individuals and partnerships on the one

hand or by corporations and their stockholders on the other. The power of Congress to impose an excise upon certain peculiar or distinct businesses or occupations is not challenged; the question is regarding its right to impose an excise tax upon a particular business or occupation which shall vary as it is carried on by individuals or by corporations.

Congress has no power, at the expense of others owning property of the same character, to foster and aid private trading corporations, such as building and loan associations, savings banks and mutual life, fire, marine, inland, and accident insurance companies or associations, which serve no national purpose or public interest whatsoever and which exist solely for the pecuniary profit of their members. There seems to be a notion that the courts have held that the right to exempt is one of legislative discretion, and that there is no check upon it and no limit to its exercise. With us, under the American system, no power of government is untrammelled or unrestrained. The exercise of the discretion to exempt must be regulated by some public interest; it cannot be arbitrary or capricious; there must be some principle of public policy to support the presumption that the public and not private interests will be subserved by the exemptions which are allowed. Private enterprises for the pecuniary profit of their members can never be aided under the guise of the exercise of the discretion to exempt. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *La Grange*, 113 U. S. 1; *People* v. *Eddy*, 43 California, 331, 339; *State* v. *Indianapolis*, 69 Indiana, 375, 378; *Barbour* v. *Louisville Board of Trade*, 82 Kentucky, 645, 654, 655; *Railroad Co.* v. *Smith*, 23 Kansas, 745, 751; *Brewer Brick Co.* v. *Brewer*, 62 Maine, 62, 72; *Lexington* v. *McQuillan's Heirs*, 9 Dana, 513, 516, 517; *Sutton's Heirs* v. *Louisville*, 5 Dana, 28, 31.

We now come to the question whether these gross inequalities and discriminations are unconstitutional. Section 8 of Article I of the Constitution is as follows: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and

general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The contention of the government and of the appellees, in support of the act, seems to be that the uniformity required is simply geographical in character, and does not prohibit inequality among persons in regard to the same property or subject of the tax, provided the inequality be uniform throughout the United States. This contention is without merit, and is certainly not sustained by authority. The true meaning of that clause in the Constitution is that duties, imposts, and excises shall bear equally upon the subject of taxation and be uniform throughout the United States. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Cole* v. *La Grange*, 113 U. S. 1; *People* v. *Salem*, 20 Michigan, 452; *Albany Bank* v. *Maher*, 9 Fed. Rep. 884; *Mobile* v. *Dargan*, 45 Alabama, 310; *Davis* v. *Litchfield*, 145 Illinois, 313, 327; *City of Lexington* v. *McQuillan*, 9 Dana, 513; *State* v. *Readington*, 36 N. J. Law, 66; *State* v. *Newark*, 37 N. J. Law, 415; *Tide-Water Co.* v. *Coster*, 18 N. J. Eq. 518; *S. C.* 90 Am. Dec. 634; *State* v. *Express Co.*, 60 N. H. 219, 252; *Gatlin* v. *Tarboro*, 78 N. C. 119, 122; *Durach's Appeal*, 62 Penn. St. 491, 494; *Taylor* v. *Chandler*, 9 Heisk. 349, 356; see also *Washington Avenue*, 69 Penn. St. 352, 363; *Hammett* v. *Philadelphia*, 65 Penn. St. 146, 153; *Talbot County* v. *Queen Anne's County*, 50 Maryland, 245, 260; *Ryerson* v. *Utley*, 16 Michigan, 269; *McCormack* v. *Patchin*, 53 Missouri, 33.

A tax which imposes one rate upon individuals and a higher rate upon corporations, which exempts individuals generally to the extent of $4000, but practically denies any such exemption to those deriving their income from corporate investments, and which arbitrarily exempts immense accumulations of property in the hands of favored private corporations and associations, is not uniform in any sense or in any part of the United States.

The court cannot strike out the exemptions and itself remodel the act so as to make it uniform. The act of 1894 must fall because of its utter lack of uniformity. It is not within the judicial province to make a new law. It would be

decreeing as law what Congress deliberately refused to enact. If these immense accumulations of property had not been exempted, if corporations had not been discriminated against, the law might never have been passed: at all events, the rate of taxation would probably have been reduced to one per cent. The court will not strike out these exceptions and exemptions so as to give the act an operation which Congress confessedly never meant. If you annul the exemptions, what warrant of law would exist for collecting a tax from these mutual concerns? As Mr. Justice Matthews said in the case of *Spraigue* v. *Thompson*, 118 U. S. 90, 95, delivering the opinion of the whole court, this would confer "upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

But, irrespective of the constitutional limitation, the grant to Congress of the power to tax necessarily implied the limitation that all taxes should be equal, impartial, and uniform as to all similarly situated.

The requirement of approximate equality inheres in the very nature of the power to tax, and it exists whether declared or not in the written Constitution. It may be difficult, if not impracticable, to obtain absolute equality as between all classes of property. We recognize that; but there must be absolute equality as between persons or owners of the same kind of property. The taxing power may select land and omit personal property, or select any particular kind of personal property and omit land, and the courts cannot interfere; but on whatever subject the tax is imposed, it must apply equally and uniformly to all owning similar property; it cannot vary according to ownership; it cannot tax one and arbitrarily exempt another; it cannot be at one rate for the individual, and at another rate for the corporation.

The provisions of the Fifth Amendment, prescribing due process of law and just compensation if private property be taken for public use, restrain the Federal government from enforcing unequal and partial tax laws.

When the Constitution was adopted, the people expressed

their apprehension that powers not intended to be conferred might be claimed and exercised by the Federal government, and that there might be an abuse of taxation. Hamilton had argued in the Federalist that adequate precautions had been inserted, and that the door had been closed to partiality and oppression; but the people insisted on further specific restrictions upon Congress, and to that end ten amendments were proposed at the first session of the First Congress in March, 1789.

The Fifth Amendment, thus adopted to restrict the powers of Congress, provides that no person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation. We contend that an act of Congress which imposes the burden of a tax upon the property or income of certain citizens, while others owning like property or having like income are exempted, or which imposes a rate of taxation upon like subjects which varies according to their ownership, deprives those discriminated against of their property without due process of law and arbitrarily takes such property for public use without just compensation. To impose a tax on A and B, and exempt C and D similarly situated, is not taxation, but exaction and confiscation. Our conception of the rights of our clients under the shield and protection of due process of law finds its definition in the language of the Chief Justice in *Caldwell* v. *Texas*, 137 U. S. 692, 697: "'Due process of law' is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

And further, there can be no doubt that in enacting the income tax law of 1894, it was the deliberate intention of Congress to tax the income derived from state, county, and municipal securities. The precise question as to the power of Congress to tax income derived from state, county, and municipal bonds has never been decided, but it has often been held that the instrumentalities of the state governments cannot be, directly or indirectly, taxed, and of course, a municipal corpo-

ration is but a branch of the government of the State. The authorities fully sustain the proposition that Congress cannot tax the borrowing powers of the States or their municipalities; for clearly if the right to tax existed, it would place the borrowing powers of the States completely at the mercy of a majority in Congress. *Holy Trinity Church* v. *United States*, 143 U. S. 457; *Blake* v. *National Banks*, 23 Wall. 307; *Jennison* v. *Kirk*, 98 U. S. 453; *United States* v. *Union Pacific Railroad*, 91 U. S. 72; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, *Collector* v. *Day*, 11 Wall. 113; *United States* v. *Railroad Company*, 17 Wall. 322; *Weston* v. *Charleston*, 2 Pet. 449; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496, 504; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178; *Ward* v. *Maryland*, 12 Wall. 418, 427; *Fifield* v. *Close*, 15 Michigan, 505; *Jones* v. *Estate of Keep*, 19 Wisconsin, 369, 373; *Sayles* v. *Davis*, 22 Wisconsin, 225; *Union Bank* v. *Hill*, 3 Coldwell, 325; *Warren* v. *Paul*, 22 Indiana, 276; *State* v. *Garton*, 32 Indiana, 1, 4.

The discrimination in the present case cannot be sustained upon the theory that the taxing power may classify the various kinds of property or the various kinds of business for purposes of taxation. It is not classification to impose a tax at one rate on the income or business of corporations and at a different rate upon the same income or the same business if carried on by individuals or partnerships. Classification to be lawful must distinguish between different kinds of property, not different ownership, or between different business pursuits, not between particular or selected individuals or corporations of the same class. If the difference in the rate of taxation is not based upon the nature of the property, nor upon the use made of the property, irrespective of its ownership, then it is based on ownership and involves a discrimination against particular owners, which is unlawful. In the present case, corporations have not been classified as a class, but the same tax is imposed upon companies or associations as distinguished from corporations, no matter how created and organized. Besides, under this act, a large class of these corporations, companies, and associations are withdrawn from the operation of the act, and

it cannot be said, therefore, that Congress has classified corporations as a class, even if it had the power to do so.

We are not instructed to present any argument which shall abridge the taxing power of Congress or embarrass the government in any emergency that may now exist or hereafter arise. Let Congress remodel the act, apportioning direct taxes and equalizing indirect taxes, within the limitations of the Constitution, and none more willingly than our clients will contribute their share of the burden to maintain, defend, and preserve the national government, even if it shall take all their property. We ask you to impose no limitation upon the right of Congress to tax up to the full measure of the requirements of the Nation. Recognizing that authority to tax in its nature must be without limitations except equality of burden, and that it involves the power to destroy, we are here to plead that the destruction must result from some necessity or peril of the Union, and that however the occasion may arise, the destruction must be equal and uniform and not of selected individuals or classes: we are here to plead that Congress cannot sacrifice one — the lowliest or the richest — for the benefit of others.

Mr. Clarence A. Seward for Pollock, appellant in 893, and Hyde, appellant in 894.

Is an income tax a direct tax within the provisions of the Federal Constitution? This is a question of fact, to be determined by the meaning of the term "direct tax" at the time of the adoption of the Constitution.

There is no doubt that that term as used in state statutes and constitutions at the present day is universally construed not to be limited to a tax on land, but to include also a tax on income. How was it in the year 1787? The theory that the words "direct taxes," as used in the Constitution, did not include a tax on income was first judicially voiced in the *Springer case*, decided in 1880, 102 U. S. 586. This case was founded upon *Hylton* v. *United States*, 3 Dall. 171, decided in 1796. Alexander Hamilton, as counsel for the govern-

ment in that case, undertook to define the phrase "direct taxes" so as to exclude from it a tax on carriages. He said: "The following are *presumed* to be the only direct taxes: Capitation or poll taxes; taxes on lands and buildings; general assessments, whether on the whole property of individuals, or on their whole real or personal property. All else must of necessity be considered as indirect taxes."

When the case passed into the hands of the court, Mr. Justice Paterson said: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land, is a questionable point." Mr. Justice Chase said: "I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two; to wit, a capitation or poll tax simply, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term 'direct tax.'" Mr. Justice Iredell said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. A land or poll tax may be considered of this description. In regard to other articles, there may possibly be considerable doubt."

There was no evidence adduced by Mr. Hamilton in support of his presumption. The question arose solely and wholly upon the statement by him that that was his presumption. It is upon this presumption of Mr. Hamilton and these three doubtful expressions of judicial opinion that the subsequent decisions of this court in *Pacific Insurance Company* v. *Soule*, 7 Wall. 433; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Scholey* v. *Rew*, 23 Wall. 331; and *Springer* v. *United States*, 102 U. S. 586, were founded.

If the conclusion reached in the *Hylton case* was unsupported by evidence — was in direct antagonism to the evidence as it exists — and which was not produced or passed upon — and if a time of peace is more favorable for an absolute disassociation from political atmosphere than was possible when the *Springer case* was decided, then the rule of *stare decisis* ought not to constitute a bar to a new exami-

nation of the question involved, upon grounds not heretofore presented, nor the reaching of a different conclusion, if such a conclusion can be judicially justified. *Leloup* v. *Mobile*, 127 U. S. 640.

In considering this question, this court has supplied in *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 323; *Gibbons* v. *Ogden*, 9 Wheat. 1, 188; and *Rhode Island* v. *Massachusetts*, 12 Pet. 657, 721, rules for the interpretation of the Constitution. Words are to be taken in their natural sense, and the courts may resort to such sources of judicial information as are resorted to by all courts in construing statutes.

Is there any persuasive evidence that the framers of the Constitution did not use the words "direct taxes" in their "natural and obvious sense?" Would there be any absurdity or injustice in holding that they did so use them, and that they intended precisely what they said? Is there any persuasive evidence that they intended to restrict the present meaning of the phrase to a more limited signification, and to reject therefrom the inclusion of a tax on income?

It would seem, from a reference to such sources of judicial information as are resorted to by the courts in construing the Constitution, that these questions must be answered in the negative. There is no evidence that either the constitutional convention or the assenting conventions of the several States, or the people who attended both, used the words "direct taxes" with any restricted meaning, in an unnatural sense, or that they intelligently excluded a tax on incomes therefrom. The only qualification of this explicit statement is to be found in the language of this court in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 546, where, in treating of the decision in the *Hylton case*, the court spoke of Mr. Justice Paterson's statements as "testimony." There is nothing either in Elliott's Debates or Madison's Reports which shows that the question of the definition of the words "direct tax" or "direct taxes" ever came before the Philadelphia convention. It was not there discussed, debated, or decided. Under these circumstances, any opinion which Justice Paterson expressed was an opinion rendered nine years after the conven

tion had ceased its labors — was his individual opinion, and was not fortified by any reference to the evidence. Such an opinion ought not to be construed as "*testimony.*" Apart from this so-called testimony no evidence has been produced before the courts in antecedent cases tending to show that a tax upon incomes was intentionally excluded by the people and by the framers of the Constitution from the meaning of the phrase "direct taxes," or that such taxes were limited to taxes on land only. This conclusion has been reached only as a matter of opinion, and not as a conclusion founded upon the weight of evidence.

At the date of the Constitution (1787) the words "direct taxes" and "indirect taxes" were household words. They were borrowed from the literature and practice of Great Britain and the continent of Europe. They are to be found in the literature of the period, and in the debates of both Federal and state conventions. They had been used in Europe as meaning taxes which fell directly upon property and its owner, like a land tax or a tax on incomes, and as meaning taxes of which the ultimate incidence might fall upon another than the one who originally paid them, like taxes upon consumption. The inquiry, therefore, now is, whether, when adopted in this country, they carried with them the signification which universally obtained elsewhere, or whether they were accepted with a limited and restricted signification, which confined the meaning of the words to taxes on land and capitation taxes.

The Articles of Confederation, as originally adopted, provided for a common treasury, to be supplied by the several States, in proportion to the value of all land within each State, the taxes for paying that proportion to be levied by the authority and direction of the state legislatures. But in 1783 this was amended by providing that this treasury should be "supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes, in each State; which number

shall be triennially taken and transmitted to the United States in Congress assembled, in such mode as they shall direct and appoint." 1 Ell. Deb. 95.

Why was this phrase "land, buildings, and improvements thereon," in the original Articles, stricken out by this amendment? Mr. Rufus King answers this inquiry. He said: "According to the Confederation, ratified in 1781, the sums for the general welfare and defence should be apportioned according to the surveyed lands and improvements thereon in the several States; but that it hath never been in the power of Congress to follow that rule, the returns from the several States being so very imperfect." 2 Ell. Deb. 36. "In 1778, Congress required the States to make a return of the houses and lands surveyed; but one State only complied therewith — New Hampshire. Massachusetts did not. Congress consulted no rule. It was resolved that the several States should be taxed according to their ability." 2 Ell. Deb. 45. "Massachusetts has paid while other States have been delinquent. . . . Requisitions on the States for that money were made. Who paid them? Massachusetts and a few others. . . . But $1,200,000 have been paid. And six States have not paid a farthing of it." 2 Ell. Deb. 56.

Therefore, there is this concurrent testimony that the words "land, buildings, and improvements thereon" were intelligently rejected by the Confederate Congress as not being either a just, an equal, or a convenient source of revenue for the Federal government, and if that was the opinion prior to the adoption of the Constitution, how comes it at a later day that the phrase "direct taxes" is to be interpreted as relating only to a tax on "land, buildings, and improvements thereon," and thus to place the tax back upon that which had been previously rejected as the only source of Federal taxation?

In his letter to the Georgia convention of the 10th of October, 1787, Governor Randolph said: "There is another consideration not less worthy of attention — the first rule for determining each quota by the value of all lands granted or surveyed, and of the buildings and improvements thereon. It

is no longer doubted that an equitable, uniform mode of estimating that value is impracticable; and therefore twelve States have substituted the number of inhabitants, under certain limitations, as the standard according to which money is to be furnished." 1 Ell. Deb. 484.

This amendment to the Articles of Confederation was sent forth by Congress to the people, accompanied by an address prepared by Messrs. Madison, Ellsworth, and Hamilton. In this, when speaking of population as the rule of taxation, they said: "This rule, although not free from objection, is liable to fewer than any other that could be devised. The only material difficulty which attended it in the deliberations of Congress was to fix the proper difference between the labor and industry of free inhabitants and of all other inhabitants. The ratio ultimately agreed to was the result of mutual concessions."

Two of the States accepted these amendments in full. All the others accepted the first part, which related to the appropriation by them of substantial and effectual revenues for the support of the general government, as they might deem most convenient. Two of the States, New York and Georgia, did not act upon the amendments at all (Jour. of Congress, 1783–4); but the fact remains that from the time of their adoption by the Confederate Congress until the decision in the *Hylton case*, land and buildings and improvements thereon were never thereafter regarded as the source of revenue for the Federal government. It results, therefore, that after "land, buildings, and improvements thereon" were withdrawn as a subject of Federal taxation, the requisitions of Congress were met by the States by their own system of taxation. What was that system?

A careful examination of state legislation prior to 1787 establishes that the States of Vermont, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from their professions, trades, and employments, and collected a tax thereon for the benefit of the States and of the general government.

In addition to these taxes upon income, nearly all the States imposed poll taxes, taxes on lands, on cattle of all kinds, and various kinds of personal property.

How were all these taxes known to the people of the States at the time when they were paying them?

The Century Dictionary says: "In the United States, all state and municipal taxes are direct, and are levied upon the assessed valuations of real and personal property." Cooley and the American Cyclopædia also assert that all state taxes are direct taxes. But there is more persuasive evidence as to what kind of taxes the people at the time called those which they were paying in the States for the joint support of the States and of the general government.

In the Massachusetts convention, Mr. Dawes said: "Congress had it not in their power to draw a revenue from commerce, and therefore multiplied their requisitions on the States. Massachusetts, willing to pay her part, made her own trade law, on which the trade departed to such of our neighbors as made no such impositions on commerce; thus we lost what little revenue we had, and our only course was, to a direct taxation." 2 Ell. Deb. 41.

Mr. Nicholas, in Virginia, said: "Nine-tenths of the revenues of Great Britain and France are raised by indirect taxes; and were they raised by direct taxes, they would be exceedingly oppressive. At present the reverse of this proposition holds in this country, for very little is raised by indirect taxes. The public treasuries are supplied by means of direct taxes, which are not so easy for the people." 3 Ell. Deb. 99.

Mr. Iredell, of North Carolina, said: "Our state legislature has no way of raising any considerable sums but by laying direct taxes. Other States have imports of consequence. This may afford them a considerable relief; but our State, perhaps, could not have raised its full quota by direct taxes without imposing burdens too heavy for the people to bear." 4 Ell. Deb. 146.

Gouverneur Morris, in his observations on the Finances of the United States, says, two years after the Constitution was adopted: "There is a concurrent jurisdiction respecting internal or direct taxes."

Mr. Seward's Argument for Appellants.

In his report to Congress, in 1812, Albert Gallatin said: "The direct taxes laid by the several States during the last years of the Revolutionary War were generally more heavy than could be paid with convenience; but during the years 1785 to 1789, an annual direct tax of more than two hundred thousand dollars was raised in Pennsylvania, which was not oppressive, and was paid with great punctuality."

This establishes the fact that all the taxes which the people were paying in 1787 were, according to their common understanding, expressed in their conventions, and expressed afterwards in the writings of those who had been constituents of the State at the time, direct taxes; that such direct taxes were paid out of income, and were so paid for the support of the Federal government. True, they were collected by state officers, but the fact that it is now proposed to collect them out of income by Federal officers, does not seem to change the income tax from the direct tax of 1787 into the indirect tax of 1894.

The inquiry now arises, whether the practical interpretation given to the words "direct taxes" by the people and the laws of the several States, was in any way limited or restricted by the proceedings of the Philadelphia convention. In speaking of this convention this court said, in *Daniels* v. *Tierney*, 102 U. S. 415, 419: "The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them."

In examining the debates it must be borne in mind that the words "direct taxation" do not occur in the Constitution. That instrument is limited to the words "direct tax" and "direct taxes." A careful examination of the debates warrants the assertion that the phrase "direct taxation" as used in the Philadelphia convention was not always used as a synonym for "direct taxes." The term "direct taxes" implies one of two things; either the objects upon which the tax is placed, or the incidence of the tax upon the property and upon the person of its owner. "Direct taxation," in very many instances, refers to the *modus operandi* of collecting

the tax; that is, whether the power should be given to Congress to collect the tax by direct taxation, or whether the power to collect Federal taxes should be exercised only after requisitions upon the States had been dishonored.

Mr. Pinckney's draft of the Constitution regulated direct taxation according to the whole number of inhabitants and left the power to Congress. Mr. Paterson's resolution authorized Congress to make a requisition upon the basis of population, estimated according to the old Articles of Confederation. Mr. Wilson introduced a resolution providing that in order to ascertain the alterations that may happen in the population and wealth of the several States, a census should be taken; thus reaffirming the original doctrine that population was the true criterion and index of wealth, and this resolution was thereupon adopted: "That in order to ascertain the alterations that may happen in the population and wealth of the several States, a census shall be taken."

Then came the appearance of representation, and it was moved, and agreed to, that direct taxation ought to be proportioned according to representation, thus striking out population and substituting the number of representatives as the basis for the apportionment of direct taxes. The amendment rejected representation as the basis of taxation, and substituted the old rule of population, computed in the given manner. It was again moved that representation ought to be proportioned according to direct taxation, and in order to ascertain the alterations in the direct taxation which might be required, that a census should be taken. This was the introduction of the rule finally adopted, that representation ought to be proportioned in the same manner as taxation.

There was an animated contest over this proposition, and there were extended debates over the question whether direct taxation should be proportioned to representation or according to population. Finally, on the 16th of July, 1787, this resolution was adopted: "Representation ought to be proportioned according to direct taxation. And in order to ascertain the alteration in the direct taxation which may be required, from time to time, by changes in the relative circumstances of the

States — Resolved, That a census be taken, . . . and that the legislature proportion the direct taxation accordingly."

There was again a debate over this suggestion, which culminated in the draft of a constitution which apportioned direct taxation according to the number of the representatives. This was remodelled, and on the 12th of September, 1787, a revised draft of the Constitution was introduced, which provided that "representatives and direct taxes shall be apportioned on the basis of population," and under the rule prescribed by the Articles of Confederation. On this same 12th of September, 1787, the revised draft of the Constitution contained these words: "That no capitation tax shall be laid unless in proportion to the census hereinbefore directed to be taken." Then there came a debate in which these questions were discussed: The States are asked to give the power of internal taxation, now exercised by them respectively for the benefit of the general government, directly to Congress, so that it may exercise such power concurrently with the States, and directly upon the property and inhabitants of the States. This was the understanding of what the States were asked to do, and, after the constitution was adopted, of what they had done.

In the Massachusetts convention, Mr. Parsons said: "Congress have only a concurrent right with each State, in laying direct taxes, not an exclusive right; and the right of each State to direct taxation is equally extensive as the right of Congress." 2 Ell. Deb. 93.

In New York, Chancellor Livingston said: "It is observed that, if the general government are disposed, they can levy taxes exclusively. But they have not an exclusive right. . . . Their right is only concurrent." 2 Ell. Deb. 346.

Mr. Hamilton said: "Unless, therefore, we find that the powers of taxation are exclusively granted, we must conclude that there remains a concurrent authority." 2 Ell. Deb. 363.

The States were also asked to give up their right of laying imposts and duties on imports and exports, the surrender of which right would confine them thereafter to their own internal taxes. They said in substance: If we surrender the right to imposts and duties, and if we divide the power of direct

taxation by giving to Congress a concurrent right with ourselves to lay direct taxes, such as have heretofore existed in our States, how are we to guard the exercise of this power so that it shall not be used oppressively? How is it to be restricted so that Congress will not have the right to impose undue burdens upon the States?

The answer to this was: Such restriction can be properly imposed with justice to ourselves and to Congress by limiting the exercise of this concurrent power to the rule of population, which is the index and criterion of wealth. If we give this power to the Federal government to come into the States and tax the same objects which we are there taxing, the amount of such tax on behalf of Congress must be apportioned upon the basis heretofore obtaining, and so that each State will know precisely how much it is called upon to contribute.

It would indeed be singular if, when the States were giving to the Federal government a concurrent right to levy and collect the direct taxes which they themselves were collecting, only the right to collect this unjust, unequal, and inconvenient tax on lands actually passed. This limitation, if it exists, does not arise from the language which the States used, "direct taxes," but only from an interpretation which, without supporting evidence, excludes the residue.

The struggle was, first, to require Congress to apply to the States before having the right of direct taxation; and second, if that could not be carried, then to limit the right of direct taxation to population. Mr. Martin voiced this when he said: "Many of the members, and myself in the number, thought that States were much better judges of the circumstances of their citizens, and what sum of money could be collected from them by direct taxation, . . . and that the general government ought not to have the power of laying direct taxes in any case but in that of the delinquency of a State." 1 Ell. Deb. 369.

That the States believed that they had limited the power of assessing and collecting direct taxes to the rule of population, is further clearly shown in the debates in the state conventions. Having relinquished imposts and duties, and given to

Congress a concurrent power to collect direct taxes, they limited the exercise of the collection of such taxes to the rule of population. Hence the phrase, "representation and direct taxes;" hence the phrase, "no capitation tax shall be laid unless in proportion to the census hereinbefore directed to be taken." This latter phrase was, on the 14th of September, 1787, amended on motion of Mr. Read of Delaware. He "moved to insert after 'capitation' the words 'or other direct tax.' He was afraid that some liberty might otherwise be taken to saddle the States with the readjustment by this rule of past requisitions of Congress, and that his amendment, by giving another cast to the meaning, would take away the pretext." 5 Ell. Deb. 545. Mr. Williamson seconded the motion, which was agreed to.

The effect of adding the words "or other direct tax," so that the sentence should read "No capitation or other direct tax shall be laid, unless in proportion to the census," was to include therein not only a capitation tax, but also all the other taxes which the States at that time were collecting to pay their indebtedness to the general government.

Thus far, therefore, there is nothing in the debates to indicate that the words "direct tax" were to have a restricted and limited meaning, or were to apply only to taxes on land and taxes on polls.

Mr. Madison's Journal is printed as the fifth volume of Elliot's Debates. He there states that "Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the principles of wealth and number of inhabitants, a proviso that taxation should be in proportion to representation. . . . He admitted that some objections lay against his motion, but supposed they would be removed by restraining the rule to direct taxation. With regard to indirect taxes on exports and imports and on consumption, the rule would be inapplicable."

Mr. Morris, having so varied his motion by inserting the word "direct," it passed as follows: "Provided always, that direct taxation ought to be proportioned to representation." 5 Ell. Deb. 302.

Mr. Ellsworth moved to amend, in substance, (Id. 302,) so that the rule of contribution by direct taxation for the support of the government of the United States should be the rule as stated in the Articles of Confederation.

In the debates on the 20th of August, 1787, (Id. 451,) Mr. King of Massachusetts asked what was the precise meaning of direct taxation? No one answered. This inquiry, it is to be observed, was not "What is meant by a direct tax, or by direct taxes?" If so, there would doubtless have been an answer that by direct taxes was meant such taxes as the States were then paying; but having asked the question "What was meant by direct taxation?" he left it to be inferred that he used the phrase "direct taxation" not with reference to the objects upon which direct taxes were to be assessed and collected, but that he had reference to the same question of *modus operandi*, and he asked "What was meant by direct taxation?" that is, whether Congress should have power to levy and collect the tax, or whether requisitions therefor should be first made upon the States. The question was answered by Mr. Gerry, if it related to the *modus operandi* of taxation, for he moved, (5 Ell. Deb. 451,) that "from the first meeting of the legislature of the United States, until a census shall be taken, all moneys for supplying the public treasury by direct taxation shall be raised from the several States according to the number of representatives respectively in the first branch."

The motion was lost. The practical result, therefore, was that the old words of the amended Articles of Confederation were taken as affording the standard for both taxation and representation. The South secured the exclusion of two-fifths of its slaves in apportioning the taxes, and the North secured the exclusion of the same two-fifths in apportioning the representatives. The latter object was attained, as Mr. Morris said, "incidentally," leaving the ostensible exclusion as referable to taxes only, as it had been under the Confederation. The North was satisfied to have the apportionment of representation controlled by the same rule of taxation, and to which latter rule the States had theretofore consented. So long as

the rule was adopted for controlling both representation and taxation, it was immaterial whether such rule was introduced "incidentally" or otherwise. The attempt to limit taxation by representation was defeated, and representation was subjected to the old rule, which had been in force as to taxation since 1783.

It is evident, therefore, that the interpretation given by the people and the laws of the several States to the words "direct taxes" was not limited or restricted by any of the proceedings of the Philadelphia convention.

And further: It is conclusively and affirmatively established that the people, as represented by their delegates to the state conventions called to adopt and ratify the Federal Constitution, did not limit the phrase "direct taxes" to a tax on land only. The language used by Mr. Dawes and Mr. Adams in Massachusetts, by Mr. Ellsworth in Connecticut, by Chancellor Livingston and Mr. Jay in New York, and by Mr. Nicholas, Mr. Mason, and John Marshall in Virginia, proves this. The latter said: "The objects of direct taxes are well understood. They are but few. What are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property." 5 Ell. Deb. 229.

What were the direct taxes to which he was referring? Not the direct taxes of the United States, because the United States had yet no power to levy any tax, whether direct or indirect. Therefore, when he spoke of "direct taxes" he was speaking of them as he understood them and as they existed in the States and in the State of Virginia, from which he was a delegate.

Mr. Wolcott, in his Report to Congress, when speaking of taxes assessed under the laws of Virginia of 1781, 1782, said that "taxes were assessed on lots and houses in towns;" being the "lands" of Mr. Marshall; on "slaves," being the "slaves" of Mr. Marshall; on "stud horses, jackasses, other horses and mules," being the "stock of all kinds" of Mr. Marshall; and on "billiard tables, four-wheeled carriages, phaetons, stage wagons, and riding carriages with two wheels," being the "few other articles of domestic property" referred to by Mr. Mar-

shall, as being the objects of direct taxes which were then well understood.

It is fair to infer from this statement of Mr. Marshall that if he had been a member of the court at the date of the decision in the *Hylton case*, he would not have concurred in the opinions of Justices Chase, Paterson and Iredell. When Congress undertook to pass the law which was under judgment in the *Hylton case*, Mr. Madison said that he should vote against it because it was unconstitutional. Why? Because the tax was a direct tax.

It is evident, therefore, that the delegates to the state conventions understood that by "direct taxes," which the Constitution gave Congress the power to levy and collect, they meant not taxes on lands only, but all such taxes as the States were then levying and collecting, under the name of "direct taxes," exclusive of duties and imposts on exports and imports. Chancellor Livingston and Mr. Jay said that direct taxes meant taxes on land and specific duties, and these were the kind of taxes which all the States were then levying and collecting, with the exception of New York, which had a property tax. The other States had direct taxes on property; on incomes, on slaves, on stock, and two of them on carriages. All were taxing by direct taxes that description of property more or less enumerated by Mr. Marshall. Recalling the fact that in 1787 there was no standard of Federal taxation from which can be drawn a definition of the words "direct taxes;" bearing in mind that "direct taxes" were known to the people of all the States by that name and as "direct taxes," and that in various of the States such taxes included a tax on incomes, the conclusion is inevitable that both in the Philadelphia convention and in the state conventions the "direct taxes" referred to by the delegates were those to which they were accustomed in their own States; that those delegates used the words "direct taxes" in their natural sense, as the people then understood them; that they used the phrase "direct taxes" as a noun of multitude, as Congress to-day speaks of the Supreme Court, the Army, the Navy, and the United States without particularizing any member of either.

Mr. Seward's Argument for Appellants.

The phrase "direct taxes" was a household phrase known to all, and is susceptible of definition only in accordance with the literature; in accordance with the definition placed upon it by other nations, or it must include the taxes of the period which the people were then paying in their respective States for the joint support of the States and of the Federal government; and those "direct taxes" were not limited to a tax on lands, but included all the internal taxes which fell upon the property and upon the person of the citizen of the State who owned it.

The "presumption" advanced by Mr. Hamilton is overcome by the historic evidence here produced. Possibly such evidence was not accessible when the *Hylton case* was argued.

One word as to the literature.

Adam Smith's Wealth of Nations was published in 1776. It was referred to by the court in the *Hylton case.* It is spoken of by Judge Cooley as a book whose maxims had secured for them universal acceptance. It was a recognized authority on both sides of the Atlantic. Smith made it clear that by "direct taxes" he meant taxes on persons assessed according to property or income, and as opposed to "indirect taxes" on expenses or consumption.

Turgot, the French author, lived from 1727 to 1781. He published in 1764 a work on taxation. He says of its forms: "There are only three possible: Direct upon the funds; direct upon the person, which becomes a tax upon labor; the indirect imposition, or that which is placed upon consumption."

In the American Museum for January, 1787, this work of Turgot is quoted, showing that it was then in circulation in America.

Inasmuch as these words of the Constitution are written words selected deliberately and discussed, after they were selected, anxiously and patiently by the several States, and that no question was ever raised until the carriage case as to what was meant by the term "direct taxes," — as to whether such phrase in the Constitution had a different interpretation from what it had when used in the States — the inquiry arises whether the States have ever given to the judiciary the power

to say that the language so selected and so discussed was to have a more limited and restricted signification than the natural sense of the words as they were understood by those who used them.

If the words "direct taxes" are to be interpreted as being a tax on land only, then it is to be said that the interpretation was not placed upon them by the Philadelphia convention, and was repudiated by the conventions of the several States. It is a new interpretation, equivalent to substituting a new word.

That the Philadelphia convention, or the conventions of the States, would have assented to and adopted this new and restricted meaning, and surrendered their judgment as to what they were then doing to the new meaning, cannot now be affirmed.

The words had a natural sense; they were commonly understood to mean what they imported; they were used for the purpose of expressing a fact then existing, and if a new interpretation is to be placed upon them, it must be so placed without the assent of either Federal or state conventions.

If the court is to strike out "direct" and insert "land," either by expunging the word "direct" or by interpreting it as confined in its meaning only to land, it is in effect inserting a new phrase in the Constitution, which is not there to be found, and to which the States have never given their assent.

It results, therefore:

(1) That an income tax as a direct tax existed long before the Constitution; existed in some of the States after the Constitution, and in one of the States until the present day. It was as well recognized in the localities as any other tax. It was known and called a direct tax, as one of the taxes imposed by the States.

(2) When the words were introduced into the Constitution, they were used, as Chief Justice Marshall said, "in their natural sense," and are to be taken, as he also said, "in their natural and obvious sense." It is not a "natural sense" nor a "natural and obvious sense" to reject from the taxes which the people were paying when the words were used, all of such taxes except a tax on land, and to limit and restrict the words

which they did use to that individual tax. The people have never assented to that restriction in any convention.

(3) If an income tax be a direct tax, then, in order to be a constitutional tax, it must be apportioned and collected as such.

(4) Such apportionment and collection do not involve any practical difficulty.

Mr. Assistant Attorney General Whitney, who appeared by leave of court, for the United States.

The method by which the questions are presented in the *Pollock* and *Hyde cases* was not chosen with the consent of the government. The corporations have ample remedy at law, either by standing on the defensive, or by paying the tax under protest and suing to recover the amount paid. Plaintiffs would be sufficiently protected by a decree restraining the corporations from *voluntary* payment. Yet the bills do not allege that the corporations intend to pay voluntarily. No injunction, it is believed, has ever been granted against the payment of a tax to the United States government; or against the execution of a law of the United States on the ground that the law was unconstitutional. It is believed that in no case can such an injunction properly be granted; and it is regarded as important not to break the chain of precedent against such relief. These objections, however, are not jurisdictional in the strictest sense. *Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371, 380, 381, and cases cited; *Insley* v. *United States*, 150 U. S. 512, 515, and are not taken by defendants. In view of the great public interest aroused, and of the fact that no cases in proper form are now pending, these objections are waived on behalf of the government, so far as it is in the power of its officers to waive them.

As to the method in which the questions are presented in the *Moore case*, the objection to the form of action is not waived. The appellant had full remedy by suit, to recover taxes paid under protest (*Elliott* v. *Swartwout*, 10 Pet. 137; *Insurance Co.* v. *Ritchie*, 5 Wall. 541; *City of Philadelphia*

v. *Collector*, 5 Wall. 720; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Assessors* v. *Osbornes*, 9 Wall. 567; *Collector* v. *Day*, 11 Wall. 113; *Collector* v. *Hubbard*, 12 Wall. 1; *Erskine* v. *Van Arsdale*, 15 Wall. 75; *Barnes* v. *The Railroads*, 17 Wall. 294; *Stockdale* v. *Insurance Cos.*, 20 Wall. 323; *Cheatham* v. *United States*, 92 U. S. 85; *Railroad Co.* v. *Commissioners*, 98 U. S. 541; *Railroad Co.* v. *Collector*, 100 U. S. 505; *Wright* v. *Blakeslee*, 101 U. S. 174; *James* v. *Hicks*, 110 U. S. 272; *Manhattan Co.* v. *Blake*, 148 U. S. 412); because the general laws concerning collection of internal revenue apply to the income tax. See *Stuart* v. *Maxwell*, 16 How. 150; *United States* v. 67 *Packages of Dry Goods*, 17 How. 85; *Ring* v. *Maxwell*, 17 How. 147; *Saxonville Mills* v. *Russell*, 116 U. S. 13. Hence a remedy by injunction will not lie. *Cheatham* v. *United States*, 92 U. S. 85; *United States* v. *Pacific Railroad*, 4 Dill. 66. This is confirmed by a declaratory statute, Rev. Stat. § 3224; *Snyder* v. *Marks*, 109 U. S. 189; *State Railroad Tax Cases*, 92 U. S. 575. A taxpayer cannot have a vested right in any particular remedy. *Collector* v. *Hubbard*, 12 Wall. 1. Proceedings to collect taxes have been, are, and always will be arbitrary. *Fong Yue Ting* v. *United States*, 149 U. S. 698, and cases cited; *Origet* v. *Hedden*, 155 U. S. 228. The execution of a law will not be enjoined on the ground that the law is unconstitutional. *Mississippi* v. *Johnson*, 4 Wall. 475; *Gaines* v. *Thompson*, 7 Wall. 347; *Robbins* v. *Freeland*, 14 Int. Rev. Dec. 28, approved in *Snyder* v. *Marks*, *supra*. This follows from the doctrines that injunction is a remedy correlative to mandamus (*Gaines* v. *Thompson*, *supra*; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165); and that mandamus will not lie when the law is doubtful. *Bayard* v. *White*, 127 U. S. 246. The constitution does not guarantee to the citizen all common law and equitable remedies known in 1787. Notwithstanding its provisions he may have a right without any remedy in a judicial tribunal. *McIntyre* v. *Wood*, 7 Cranch, 504; *Cary* v. *Curtis*, 3 How. 236.

The government presents no synopsis or review of economic writings relating to direct and indirect taxation, or of the discussions upon this point prior to the excise laws of 1794. This

is because the definition of "direct taxes" has been settled, and the constitutionality of the income tax sustained, by decisions of this court which the government assumes will not be reconsidered.

Economic definitions are inapplicable. By general consensus of the economists of the present century, a direct tax is a tax which can be shifted by the taxpayer on to the shoulders of some other person, as upon a buyer, mortgagor, or tenant. Whether or not a particular tax can be shifted is in many instances a difficult question upon which economists are not agreed. Some taxes can be shifted in part only. It cannot have been intended that the validity of a tax law should depend upon such abstruse discussion. See *State Tax on Railway Gross Receipts*, 15 Wall. 284, 294. Nor was there any settled definition of "direct taxes" in the last century. The French economists, who then had great influence in America, held that poll taxes and land taxes were direct and all others indirect. No general income tax was then known in Europe. The English partial income tax of 1759 on salaries, professional receipts, etc., was called a "duty," as distinguished from a "tax" like the land tax. The inapplicability of the economic definition, however, was settled during Washington's administration by Congressional construction, confirmed by a decision of this court. The excise laws of 1794 were hotly contested in Congress upon constitutional grounds, the opposition being led by Madison. Shortly after the passage of these laws, a test case was made in Virginia, doubtless upon consultation with Madison and the other leaders. This was the carriage tax case of *Hylton* v. *United States*, 3 Dall. 171. According to strict economic definition, a carriage tax is part direct and part indirect. It is direct as against pleasure carriages kept for use of their owners; indirect as against carriages belonging to livery stables. The tax is usually classified by economists as direct. It was held, however, to be a "duty," as it had been called by Congress. The inapplicability of economic definitions was further confirmed by practical construction during the period of the war of 1812 by the levy under the rule of uniformity of taxes which economists would classify

as direct. Acts of July 24, 1813, c. 24, 3 Stat. 40; Dec. 15, 1814, c. 12, 3 Stat. 148; Jan. 18, 1815, c. 23, 3 Stat. 186; Feb. 27, 1815, c. 61, 3 Stat. 217. Similar legislation during and after the civil war, completed a course of practical construction which should of itself be conclusive. The economic definition was then again repeatedly disavowed by this court. In *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, the taxes under discussion included a tax upon dividends and undistributed sums, — in fact, a complete corporation income tax, — in *Scholey* v. *Rew*, 23 Wall. 331, a succession tax upon real estate was discussed; and in *Springer* v. *United States*, 102 U. S. 586, an individual tax. All of these were unanimously sustained. All would be construed direct taxes by economists. That the true definition is not the economic definition is indeed shown by the Constitution itself. The distinction there drawn is not between direct taxes and indirect taxes, but between direct taxes on the one hand and "duties, imposts, and excises" on the other. This is radically different from the economic definition. Many or most excises are direct taxes as understood by economists.

The constitutional definition as "direct taxes," as thus far settled, is negative in character. The best evidence of the intentions of the friends of the Constitution is to be found in the *Hylton case*, in which two of the concurring Justices were not only prominent members of the Constitutional Convention, but members who gave especial attention to questions of taxation. Without definitely so deciding, the court intimated, as stated by Mr. Justice Chase, "that the direct taxes contemplated by the Constitution are only two, to wit: a capitation or poll tax simply, without regard to property, profession or any other circumstance, and a tax on land" (3 Dall. 175) — in other words, the French definition. After a series of cases in which this question was considered (see particularly *Veazie Bank* v. *Fenno*, 8 Wall. 533), this court finally and deliberately laid down in the *Springer case* the following proposition through Mr. Justice Swayne: "Direct taxes within the meaning of the Constitution are only capitation taxes as expressed in that instrument, and taxes on real estate." This definition, closing a controversy of 88 years'

standing, should be regarded as one upon which Congress might implicitly rely.

"Direct taxes," by a more practicable definition, would mean taxes falling directly upon the thing taxed and, at least primarily, collectible out of it. Familiar instances are poll taxes, and in many States land taxes chargeable only against the land and not a charge against its owner at all. An income tax is less direct than a carriage tax, which may be made to fall directly upon the carriages by distraint; or even than an import duty upon goods, which are seizable for nonpayment of the tax. It is not a tax on property at all; it is a tax not on what a man now has, but on himself, measured by what he did have, although most of it he may have already spent.

Not only, however, has this court held an income tax not to be a direct tax; it has expressly held it to be an excise or duty. A tax on net income is similar in character to a tax on gross receipts, and is even less direct. Such taxes have been often defined as duties or excises. In the *Springer case* this court said: "The tax of which the plaintiff in error complains is within the category of an excise or duty." 102 U. S. 602. Besides the *Pacific Insurance* and *Scholey cases*, we may refer to *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293; *Railroad Co.* v. *Collector*, 100 U. S. 595, 598; *Memphis & Charleston Railroad Co.* v. *United States*, 108 U. S. 228, 234; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217, 228; *Ficklen* v. *Shelby County*, 145 U. S. 1, 24; *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 699; see also 2 Steph. Com. 6th ed. p. 603; *Portland Bank* v. *Apthorp*, 12 Mass. 252, 256; *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298, 307, aff. 6 Wall. 632; *Commonwealth* v. *Lancaster Savings Bank*, 123 Mass. 493; *Connecticut Ins. Co.* v. *Commonwealth*, 133 Mass. 161; *Minot* v. *Winthrop*, 162 Mass. 113.

If the tax were an excise and also a direct tax, the former term governs. It is more specific, and, as held in the *Hylton case*, the rule of apportionment as applied to "direct taxes" was "the work of compromise" and "radically wrong" as

well as impracticable, and therefore "not to be extended by construction." The two words, however, are used exclusively by the Constitution, and whatever is an excise cannot be a direct tax within the meaning of that instrument.

Next as to the "uniformity clause." This is geographical in character and means that the tax must be the same in each State as it is in every other State. The construction is clear from a comparison of the two clauses under consideration. The words "uniform throughout the United States" are evidently used in contradistinction to the words "apportioned among the several States . . . according to their respective numbers." It is also well established. *Head Money Cases*, 112 U. S. 580, 594; Miller on Constitution, pp. 240, 241; Pomeroy's Constitutional Law, §§ 280, 287; 1 Story on the Constitution § 957. Moreover, the history of the Constitutional Convention of 1787 shows clearly that its members had in mind uniformity between the different States and not uniformity between different classes of individuals. The same phraseology is elsewhere used in the same article with reference to naturalization and bankruptcy. The uniformity requirement as to these has never been supposed to be other than geographical.

While the "uniformity clause" is merely geographical in character, there is, however, a certain degree of uniformity involved in the very word "tax;" a uniformity requirement involved in the definition of that word and guaranteed by the Fifth Amendment to the Constitution. While A cannot be taxed merely to benefit B (*Calder* v. *Bull*, 3 Dall. 386; *Loan Association* v. *Topeka*, 20 Wall. 655; *Cole* v. *La Grange*, 113 U. S. 1; Pomeroy's Constitutional Law, § 295 *c*; *Miles Planting & Manufacturing Co.* v. *Carlisle*, Ct. App. Dist. Columbia, January 8, 1895), so on the other hand, if A and B belong to the same class, we may concede that they are to be taxed alike. A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be "uni-

form on the same class of subjects;" while the Supreme Court of that State has decided that this requirement is merely declaratory. *Kitty Roup's Case*, 82 Penn. St. 211.

The question, therefore, arises, how far the legislative power of classification extends. Most decisions in State courts are inapplicable, as they construe provisions not found in the Federal Constitution. Under the Pennsylvania requirement above quoted, the power of classification is very extensive. *Commonwealth* v. *Germania Brewing Co.*, 145 Penn. St. 83, 86, 89; *Commonwealth* v. *National Oil Co.*, 157 Penn. St. 516. In the absence of special Constitutional restrictions, similar latitude has been allowed by this and other courts. *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 606, 607; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351; *Giozza* v. *Tiernan*, 148 U. S. 657, 662; *Matter of McPherson*, 104 N. Y. 306, 316, 317, 318; *Gibbons* v. *District of Columbia*, 116 U. S. 404, 408; Cooley on Taxation, 2nd ed., p 164.

Congress in this act has simply exercised its right of classification. The provisions now objected to are nearly all to be found in the income tax laws of the war and reconstruction period, and many are general in all similar fiscal systems. It is impossible to construe this law and discuss its constitutionality or application without understanding its underlying principle. This principle is one of compensation. Certain principles of taxation are well settled, and almost universally recognized: first, that taxes on consumption bear unduly hard upon the poor and upon what is called by the economists the lower middle class, financially speaking, because the comparatively poor consume all or nearly all of their income; second, that the fairest method of equalizing taxation is by an income tax with an exemption of all incomes below a certain amount. John Stuart Mill's Political Economy, Vol. 2, p. 476; Sir Robert Peel, quoted by Senator Sherman, Cong. Globe, May 23, 1870, p. 381; Senator Fessenden, Id. July 25, 1861, p. 255; Senators Sumner and Trumbull, Id. May 28, 1864, pp. 2512–15; Senator Sherman, Id. May 23, 1870, Appendix, pp. 377–380; and March 15, 1872, p. 1708. This exemption approximately

represents the incomes which, prior to the establishment of the income tax, bore more than their fair share of taxation. Economists and statesmen differ as to the advisability of adopting this method of compensation. Many urge that the familiar objections to it as inquisitorial, productive of dishonesty, discriminating against the honest, etc., are sufficient to counterbalance its advantages. Such practical considerations are exclusively for the economists and statesmen and not for the court to decide. *Pennington* v. *Coxe*, 2 Cranch, 33, 59.

The various objections upon the score of uniformity will now be considered in their order.

The minimum of $4000. This has already been explained. It is the limit fixed by Congress as dividing the incomes previously unduly taxed from those previously unduly favored. The whole attack on the justice of this *minimum* feature is based upon a fundamental fallacy; upon the notion that the income tax stands alone instead of forming part of a general fiscal system, the different parts of which are set to balance each other in approximation to that equality which in its perfection is "a baseless dream." *Head Money Cases*, 112 U. S. 580, 595. All our previous income tax laws contained a similar *minimum* provision, and some of them levied graduated taxes. The last previous one, that of July 14, 1870, c. 255, 16 Stat. 256, taxed only incomes over $2000. The same is true of all or nearly all similar laws, past and present, domestic and foreign. Personal property and succession taxes and many others carry a like exemption. The uniformity clause of the Constitution applies to import duties as well as to internal taxes. From 1846 to 1861 import duties were *ad valorem* entirely. At all other periods they have been partly specific, although specific duties are notoriously unequal, bearing harder on the poor than on the rich. Instances have also been common of compound duties classifying the same article according to value with a series of *minimum* rates (*Arthur* v. *Vietor*, 127 U. S. 572, 575; *Hedden* v. *Robertson*, 151 U. S. 520, 521), and exempting all imports below a certain value. *Arthur* v. *Morgan*, 112 U. S. 495, 498. Our first excise act taxed city distilleries at one rate and country distilleries at another. Act of

March 3, 1791, c. 15, 1 Stat. 199. The next provided for drawbacks on distilled spirits, but not on any quantity less than 100 gallons. Act of May 8, 1792, c. 32, 1 Stat. 267. The early excise acts also contain *minimum* provisions. Act of June 9, 1794, c. 65, 1 Stat. 397; acts of January 18, 1815, c. 22, 3 Stat. 180; c. 23, 3 Stat. 186. This legislation is a Congressional assumption of the very widest possible powers of classification. Having stood so long unquestioned, it constitutes a practical construction of the Constitution which should be conclusive. *Field* v. *Clark*, 143 U. S. 649, 691; *McPherson* v. *Blacker*, 146 U. S. 1. Similar *minimum* provisions are familiar in the succession taxes levied by the States. *Minot* v. *Winthrop*, 162 Mass. 113; *Matter of McPherson*, 104 N. Y. 306. In *Home Insurance Co.* v. *New York*, 119 U. S. 129; 122 U. S. 636; 134 U. S. 594, 607, this court sustained under the Fourteenth Amendment a law taxing corporations dividing over 6 per cent per annum by one system, and those dividing less at one wholly different, Mr. Justice Field saying: "All corporations, joint-stock companies, and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class." *Minimum* provisions are familiar in exemptions from levy on execution and bankruptcy laws, laws relating to criminal as well as civil procedure, right of appeal, qualification of jurors and sometimes of voters.

Objection is further made that but one exemption is allowed to each family, whether its income belong to one member or is contributed by more than one — that is, when the family consists of husband and wife, or parents and minor children, so that the income is combined by the common law. This is a corollary to the reasoning upon which the law is based. Two families of equal size and pecuniary ability may be presumed to suffer to the same extent from taxes upon consumption, whether the income all belongs to one member of the family, or not.

It is further said that a corporation is not allowed to deduct $4000 from its income before paying the tax, as is the case

with an individual. The reason is plain. This is not a tax upon gross income, but a tax upon net income. The net income of a corporation is radically different in character from that of an individual. Among the elements which go to make up the so-called net profits or income of an individual is that known to economists as "wages of superintendence" or the value of the labor of the individual himself. See *Muser* v. *Magone*, 155 U. S. 240. The individual business man does not pay himself wages or keep any account representing his estimate of the value of his own services. Everything that he makes over and above what he pays out to somebody else must be returned as net income. The net income of a corporation, on the other hand, contains no such element. The "wages of superintendence" consist of the salaries of its managers and is counted as an expense. When the individual owner of a business incorporates it, he at once begins to pay himself a salary from the funds of the corporation. If, therefore, the corporation were allowed the same *minimum* as an individual, there would be a lack of uniformity prejudicial to the individual.

Next as to exemptions. The law exempts certain classes of corporations from taxation. Some of these exemptions are contained also in the prior income tax laws. The power to exempt is well settled. *Bank of Commerce* v. *New York City*, 2 Black, 620, 631; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 438; *Welch* v. *Cook*, 97 U. S. 541; *Bell's Gap Railroad* v. *Pennsylvania*, 134 U. S. 232, 237. Congress thought that by making these exemptions it was encouraging thrift and providence on the part of the poor. (Cong. Rec., April 29, 1894, p. 5190; June 2, 1894, pp. 6565, 6568; June 22, 1894, p. 7828; see Stat. 16 and 17 Vict. c. 34, §§ 49, 54; 5 and 6 Vict. c. 35, § 88; Barry on Bldg. Soc., §§ 1, 2, and pp. 48, 111, 112; Endlich Law of Bldg. Asso., § 1; *Loan Association* v. *Morgan*, 57 Alabama, 53; Acts of June 30, 1864, c. 173, § 120; July 14, 1870, c. 255, § 15.) The incomes exempted are comparatively small in total amount, although large in actual figures. Their inclusion cannot, therefore, be regarded as a vital part of the whole scheme of taxation; hence, if the

exemption is improper, it does not invalidate the law *in toto*. *Supervisors* v. *Stanley*, 105 U. S. 305, 312; *Huntington* v. *Worthen*, 120 U. S. 97, 102; *Field* v. *Clark*, 143 U. S. 649, 695–6.

The other objections to the law as a whole do not seem to be seriously pressed. It is no objection to a tax that it is measured in part by income received prior to the passage of the act. *Stockdale* v. *Insurance Companies*, 20 Wall. 323; *Railroad Company* v. *Rose*, 95 U. S. 78; *Locke* v. *New Orleans*, 4 Wall. 172; *Gray* v. *Darlington*, 15 Wall. 63, 66; *Wright* v. *Blakeslee*, 101 U. S. 174. If there be anything invalid in the administrative provisions of the law (a subject which we do not discuss), the whole law is not thereby invalidated.

The claimed exemption of rentals. Such a claim is made in briefs filed. It is submitted that this tax on income, so far as the income is from rentals, is not a tax on the land rented and is therefore not a direct tax. "The tax is payable by the person because of his income, according to its amount and without any reference to the way in which it was obtained. *Memphis & Charleston Railroad* v. *United States*, 108 U. S. 228, 234. See *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Osborne* v. *Mobile*, 16 Wall. 479, 481; *Murray* v. *Charleston*, 96 U. S. 432, 446; *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, 344, 345.

This law does not contain any tax measured by land values. Land may have a good selling value, but little or no rental value; a high present rental value, but a low stipulated rental; a high stipulated rental, but little or no collections. Moreover, the value of land is quite independent of mere temporary taxes or assessments laid by States and municipalities; and is never affected by the question whether the losses by fire, incurred during the past year, were compensated to the owner by insurance. Nevertheless, in estimating for the income tax, he is allowed for all such taxes, and is allowed for all losses not compensated by insurance, while disallowed the rest. Finally, these net rentals thus estimated are then lumped with all other sources of income and subjected to a deduction to offset the estimated average excess of expenditure in duties

upon articles of consumption from the first $4000 of one's income. Hence, the measure of this tax does not bear the slightest proportion to the values of land.

Moreover, the tax on land, when it is a direct tax, is a tax upon, and collectible out of, the land itself. Here there is not even a lien, for the tax, upon the land whose rentals have entered into the gross income of the tax-payer.

An income tax is no more a tax on land than is a succession tax when the succession is to land. *Scholey* v. *Rew*, 23 Wall. 331, is, therefore, in point. In that case the tax was even made a specific lien upon the land itself. The government relied on authorities holding that a covenant in a lease to pay taxes on land does not cover a tax imposed on the landlord in respect to the land. The court held that it was not a tax on land. See also *Minot* v. *Winthrop*, 162 Mass. 113, and *cas. cit.; Wallace* v. *Myers*, 38 Fed. Rep. 184.

In political economy a tax on all property or all income is not regarded as the equivalent of a series of special taxes covering all parts of the property or income. The same distinction is recognized by the law. *Railroad Company* v. *Collector*, 100 U. S. 595; *United States* v. *Erie Railway*, 106 U. S. 327; *Society for Savings* v. *Coite*, 6 Wall. 594; *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; *Home Insurance Co.* v. *New York*, 134 U. S. 594. See also *Van Allen* v. *The Assessors*, 3 Wall. 573, 583; *Bradley* v. *The People*, 4 Wall. 459; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136-7; *Wilcox* v. *Middlesex County Commissioners*, 103 Mass. 544; *State Tax on Railway Gross Receipts*, 15 Wall. at p. 294.

If the tax on rentals is so vital an element in the whole scheme as to make void the entire law if the rentals are not taxable by the rule of uniformity, then the *Springer case* is in point. While Springer's own particular income included no rentals of real property, nevertheless, the question was involved in his case; for if the law was void *in toto* as to persons whose income was in part made up of rentals, so it was void *in toto* as to everybody else also.

If the rentals are regarded as separable from the rest of the tax, then the *Scholey case* is still in point as already shown.

We do not discuss the suggestion that income from personal property is non-taxable, for two reasons; first, that the *Hylton case* settles the rule that a tax on personal property, at least a tax other than on all personal property at a valuation, is a duty or excise; second, that these appellants did not appear to have any income from personal property other than municipal bonds.

Municipal bonds. It is settled that the bonds of one State or its municipalities may be taxed by another State. *Bonaparte* v. *Tax Court*, 104 U. S. 592; but it is not settled whether they may be taxed by the Federal government. See dissenting opinion of Mr. Justice Bradley in *Collector* v. *Day*, 11 Wall. 113, 128, 129. The remarks of Mr. Justice Matthews in *Mercantile Bank* v. *New York*, 121 U. S. 138, 162, are *obiter*. Chief Justice Marshall regarded the question as left open, whether the Federal government could tax state bonds, even if it were decided that the State could not tax Federal bonds. *McCulloch* v. *Maryland*, 4 Wheat. 316, 435, 436. It has never been decided that the State could not include Federal bonds in a general property tax (in the absence of express prohibition by Congress), except in *Bank of Commerce* v. *New York City*, 2 Black, 620. See *People* v. *Commissioners of Taxes*, 23 N. Y. 192; 26 N. Y. 163. The power of the States was asserted by the dissenting Judges in *Weston* v. *Charleston*, 2 Pet. 449. The question was not involved in that case, however, and not decided by the court; for that was not a general property or income tax, but a special tax on certain named securities (p. 450), and it is undoubted that a special tax cannot be laid by the State on Federal securities, since the power to tax in that manner is the power to destroy; and therefore such a tax may justly be described as a tax upon the borrowing power of the government. No such argument can be drawn from the inclusion of Federal bonds in a general income tax. The power to tax in that manner would not be the power to destroy, by any reasonable interpretation. The Federal borrowing power could not be destroyed without destroying all the property in the State and reducing all its laborers to a condition of slavery, except those

who were fortunate enough to divide its spoils. A general state income tax could not impede or disadvantage in any way the Federal right to borrow. The property of the lender was taxable before the loan. He simply changes its form. The tax goes on at the same rate. Exemption, on the other hand, is a positive advantage to the Federal borrower. If the citizen lends to the government, he will pay no more taxes to the State. He therefore is supposed to calculate the principal sum representing the interest he will thus save, and pays that principal sum, in the form of a premium, to the government. What is the net result? The government has confiscated the taxable value of some of the taxable property in the State, and then sold it to somebody for cash.

The question in the *Bank of Commerce case* never came before the court a second time, because Congress, by the act of February 25, 1862, c. 33, 12 Stat. 345, expressly exempted United States bonds from State taxation. The court's line of reasoning has not been sustained in other cases. The principle of the case has not been applied to other Federal agencies. *Railroad Co.* v. *Peniston*, 18 Wall. 5. The argument that, if the Federal bonds were taxable at all, the State could establish a general tax with exemptions, which would be the substantial equivalent of a special tax, and that the Federal courts would be unable to pass upon the propriety of the exemptions, has been overruled in *Mercantile Bank* v. *New York*, 121 U. S. 138, 161, 162.

Mr. George F. Edmunds for Moore, appellant in 915. *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* were with him on his brief.

I am first to consider whether my client, Mr. Moore, has any standing to be heard in this court. There are very important questions involved in this so-called income tax law. It is objected to his right to be heard by the judicial power of the United States against what he conceives to be, and what we believe and maintain to be an absolute and unauthorized invasion of his private rights, that Congress has said that he shall not be heard.

If he has no right under the Constitution to appeal to the courts of his country for protection against that which no law authorizes, and which is absolutely destitute of authority on the part of persons who thus undertake to invade his office, explore his books, and compel him to pay, and to finally decide in fact, so far as that goes, whether he has told the truth about it or not, and if they think he has not told the truth, to punish him by a penalty as a final judgment; if, in such a case, he cannot appeal to the courts, of course he has no business to be here.

But if the Constitution of our country has really created a judicial power of the United States, independent in itself, and standing on the rock of the Constitution — a department of the government to which the Constitution has imputed the authority and the duty to protect the citizen against unlawful and tyrannical invasions of his private rights — then he has a right to ask you to decide whether these invasions which are now threatened against him are those which the law has warranted, or are only those which have been invited by a body of respectable gentlemen, who had no right to speak, and who have now disappeared off the face of the political earth.

The Constitution declares that the judicial power shall extend to all cases in law and in equity arising under the Constitution and laws of the United States, and gives this Court original jurisdiction in such cases. The judiciary act of 1789 put the judicial power in motion, and it has continued so without change, as to the point about which I am speaking.

The statute which is supposed to bar Mr. Moore of the right to be heard in equity is the provision in Rev. Stat. § 3224, that "no suit for the purpose of restraining the collection or assessment of any tax shall be maintained in any court."

If that means any lawful tax, it is absurd. If it means, as it probably was intended to mean, to apply merely to questions of the amount of the assessment, of classification, of irregularities, of technicalities, etc., in one point of view it is consistent with public interest. But if it is meant, as I assume it to be, as a prohibition against every citizen to whom a man falsely pretending to be a collector or assessor of taxes comes,

without any real act of Congress behind him, and by the sheer arbitrary force of an executive branch of the government, invades his office and his books, and decides whether he has reported truthfully or not, and finally seizes his property, I say it is a declaration that Congress had no power to make.

The Constitution certainly regarded cases in equity that accorded with acknowledged, settled, and well-known historical principles and the historic practice of jurisprudence for hundreds of years, as proper ones for an appeal to a judicial tribunal; it said so, and it meant what it said. And when it declared that the judicial power should consider and decide, in cases brought before it, all cases in equity arising under the Constitution and laws of the United States, it was a function that the Constitution implanted in the courts, and one which no so-called act of Congress could abolish or diminish.

Suppose Congress says that in exercising the original jurisdiction of this court no suit in equity shall be brought by one State against another, or respecting an ambassador. Can we think that there would be any want of unanimity in this supreme tribunal in holding that it was a matter beyond the competence of Congress to say that you could only exercise a part of what the Constitution had given you, and that you should not, in respect to particular States or ambassadors, or particular topics that fell within the range and scope of the Constitutional description and boundary of your powers, permit them to be heard while you did exercise your powers in all other cases?

All such action of Congress defies the Fourteenth Amendment, if that amendment applies to the United States (as I think it does) as well as to the States, for it declares that the equal protection of the laws is to be everywhere inviolable for the protection of everybody.

So that I maintain, with confidence and hope, that this court will have no difficulty in saying that this prohibition of Congress against this particular kind of suit, on account of its being a suit in respect of a tyrannical and unconstitutional attempt on the part of the person who holds a particular office to invade the private affairs of my client, is no impediment to your consideration of the case.

Mr. Edmunds' Argument for Moore, Appellant.

I come now to the question whether there is equity jurisdiction. It is insisted that where there is a plain and adequate remedy at law the courts of equity cannot be appealed to. We all grant that. Everybody knows it. And then it becomes a question in tax cases, as in every other, whether there is an adequate remedy at law. While courts are inclined in tax cases, as they are in some other cases (when it is a question of stopping a railroad or stopping a trespass), to refrain from issuing injunctions, etc., yet the courts everywhere in respect to these tax cases have been careful to express a saving clause, meaning that if there be the circumstance of multiplicity of suits, irreparable injury in respect of matters incapable of redress in a just sense, by a suit at law for damages, equity will intervene.

Now, do we fall within the principle? Here is a statute, so called — I call it a statute for brevity — here is a statute which declares that a particular officer of the government and his deputies appointed by himself — which the Constitution gives him no authority to appoint at all, he is not the head of a department — but we do not now stand on that — I only speak of it as one of the plants of vice that bloom in this tax garden of injustice in the last Congress — may compel every citizen of the United States, not only if he has $4000 a year, but if he has earned $3500, in respect to which no tax is to be assessed — to make a report to him, answering a series of questions under authority of this act — and I assume for the moment that they are authorized by the act — which invade every item of his private transactions, and affect the interests of everybody with whom he has been in connection, in situations of trust of the most sacred confidence, as a lawyer, for instance; in situations of trust of the most sacred confidence, as a physician; in situations of the most private character in business purely his own; in situations of the most sacred confidence, as the president of a bank, or a broker acting for thousands of customers in the market, and compel him to expose everything to the satisfaction of this agent of the law, as he is called. And if he does not do it, what then? Then this so-called agent of the law is to make up his mind,

from such inquiries as he chooses to make, how much the man's income really is. If the man has submitted to exaction far enough to make a return, and the collector or his deputy chooses to be dissatisfied, he may punish him by a penalty of 100 per cent added. Then the citizen may appeal to the collector of internal revenue for final justice. The collector is not a jury of his countrymen. Probably it is an equity trial, such as the statute forbids to the Circuit Court and to this court, but an equity trial before the collector of internal revenue. He decides upon the whole case, and the statute says it shall be final. That is the end of the jurisdiction. The judicial power is not to be invoked at all. It comes around to the question of whether the final disposition of these exactions under pretence of authority of law is to be determined by the judiciary, or whether it is to be determined by the administrative officers who are made the inquisitors as well as the final judges of everything.

We have been referred to the *Hylton case*, decided in 1794. That was the case which allowed a duty on carriages as not a direct tax. In the court below Mr. Justice Blair — and you will find the whole case an extremely amusing and suggestive one — was of the opinion that this tax on carriages was a direct tax. The judges were divided in opinion. But the judges in the Supreme Court who heard the case held that that tax was valid, and that it was not a direct tax. Well, let us suppose for a moment that that is good law. I believe that this was a chariot, if it will add anything to the dignity of the case. But the tax on these was eight dollars each. The decision then was simply and solely that a tax on carriages was not a direct tax, but it was a duty, as the court called it, and how a duty in that sense differs from an impost I will not take up your time to discuss.

Now suppose that was so. A carriage is a thing which is separable from the person of the owner. There is no doubt that the owner is separable from the carriage when he is thrown out in a runaway. A carriage is a thing which we have an idea of as a definite and complete thing, as distinguished from the personality of the owner.

Can you have any such idea about an income? I take it not. Therefore, whatever we may say as it respects a tax upon a thing which moves about as a physical object, it is a different idea and a different thing to the conception of a tax upon a person, and that is all this income tax is or professes to be — a tax upon a person, because of a particular circumstance inseparable from him. It is curious that in old English times, and in the law dictionaries, even since the Constitution was formed, an income tax was described as a capitation tax imposed upon persons in consideration of the amount of their property and their profits.

In fact there is no escape from the proposition that the Supreme Court of the United States made a mistake when it said, doubtingly and with hesitation, that a tax upon carriages fell over into the region of indirect taxes which, as everybody described them, were those which are intended to fall upon the movement of commodities, and the voluntary occupations of men. So much for the *Hylton case.*

Then we come along down through a series of corporation cases, of insurance and banks, etc., which I think your Honors would hardly excuse me for going over one by one, all of which, I submit, are entirely distinguishable from this.

At last we come to *Springer's case*, which did hold, although the facts as to the sources of income were not all clear, that that income tax was within the competence of Congress without regard to apportionment.

That decision I request your Honors to reconsider, and to come back again to the true rule of the Constitution. It is always well, it is always necessary in the progress of human affairs and society and in government, to remember that gradual and infinitesimal departures from the Constitutional line marked out for our march (if there be one, and we all believe there is) gradually depart further and further, one precedent following another, until at last we are obliged, like the mariner after a storm, or like the traveller in the wilderness, when the stars come out, to take a new observation and correct our course.

Now, I propose to prove that at the time this Constitution was proposed, at the time it was discussed, both in the conven-

tion and in public discussions, and in the conventions of the States that adopted it, the principles and practice of the government which led these gentlemen to employ these terms so industriously and carefully as they did, demonstrate beyond cavil or doubt that a tax upon the person in respect of his income did not fall within the category of the words, duties, imposts, and excises, but that it fell within the terms and description of capitation and other direct taxes. And if this be true, I submit that you ought to say so now. Every dictionary shows — I have looked at Johnson's dictionary — the great dictionary at that time — and in Jacob's, of the editions of those dates, and in the Acts of Parliament, and in Blackstone, and in Coke, and everywhere this distinction appears in the clearest way.

Our fathers who built this Constitution were as familiar with Blackstone as any of us below the bar are. They were as familiar with Coke. They knew as much of the meaning of the English language as anybody who has succeeded them. There can be no improvement upon the clearness and the style of the language of the Constitution. There are fewer phrases in it, probably, that are capable of different constructions and equivocal interpretations, than any other similar number of words in any document existing. It therefore does not do to say that they put words into the Constitution without consideration, and without intellectual and industrious selection of the terms which they intended to use, and without intending the clear and definite meaning that the universal practice of mankind at that time imputed to them.

There was Blackstone, for instance, whose work was printed in 1765, twenty-two years before this Constitution was formed. That book was undoubtedly on the tables of half the lawyers of the United States, and undoubtedly on the tables of the committees and on the tables of the constitutional convention.

He treats of taxes in this first volume (the whole is very interesting, but I only read the phrase in question). First, there is the direct tax, the land tax, and the subsidies, and all that variety of things, there being no income tax, *eo nomine*, except upon official salaries, etc., and there were stamps, etc.,

but the idea of income at that time as being a measure of the contribution that the subject should make to the common treasury was found in the arrangement of their tax system in this way: The valuation was made of all the land and property, etc., in the several counties, and then when the Parliament or the kings, when they usurped the power — as this administration under the direction of Congress is usurping power now — wished to raise a levy of £100,000, this was apportioned among the counties, just as the Constitution says direct taxes shall be apportioned among the States, following the course of the English taxes. Then it came at last to the idea of adjusting that amount, the amount usually paid on the land and the property, which was already in the tax book — and they did not have a new assessment every year, but the valuation stood a long time — and they provided in the Acts of Parliament that the tax should be paid upon these ratable properties in proportion to the amount of income that the owners of the property got out of them. If the man's property was rated at £100, for instance, he was to pay a tax of a penny in the pound; if his property was rated at £1000 and his income was £500, then he had to pay a tax at the rate of sixpence in the pound, and so on.

That was the state of that kind of taxation at the time our Constitution was formed. That was the manner of regulating the burdens and taxes that were paid upon things and real estate and property by the inhabitants of the various counties of England; and that our forefathers knew when they made this Constitution; and our forefathers knew it was a direct tax as distinguished from duty, excise and impost.

But it may be said that the term "duties" covers any kind of taxes. So it would in its broadest sense; but when our Constitution distributes its description of subjects and modes of taxation, and says in one place "taxes," and in another says "duties" and "excises" and "imposts," is it not obvious that they intended to throw one part of the things into one class and the other part into the other class, and that duties were put into the association where they belonged according to Blackstone, as those imposts which were usually imposed

upon customs, sometimes upon exports, which our Constitution forbids, but always upon imports, which our Constitution allows.

Blackstone says of these taxes that they are "the customs, or the duties, toll, or tariff payable upon merchandise exported or imported." Supposing that this book lay upon the table, and we were framing a constitution, and wished to class this income tax and put it in its proper place among the descriptions of taxes which Congress should be authorized to raise, would anybody doubt where we must put it? So I say, that in all the dictionaries of the time, in all the commentaries of the time, in all the statutes of the time in that kingdom from which we drew our inspirations of public liberty and our principles of judicial justice, there was never a thought or a suggestion of an income tax except as direct taxation upon the body of the property of the kingdom, regulated from time to time and graduated as a direct tax, according to the ability of the person that owned the property, as shown sometimes by his income for one year and sometimes by the average for three years.

If that be so — and it is so — how is it possible for us in an intellectual sense, the matter being *res nova*, to conclude that a tax upon personal incomes falls under the head of duties, imposts, and excises, to be uniform throughout the United States? And a tax which, at that time, if the power had then been exerted in that way, would have accomplished the very mischief and the wrong that the founders of that Constitution intended to prevent, by imposing almost the entire burden of the government upon three or four States. And thus we see that, when this Constitution was adopted, the very point was in the discussions everywhere that those burdens from which the citizen could not ordinarily escape, or diminish by act of his own will, as he can in respect to how he lives and what he consumes, should not be committed to a mere majority of the voters to impose upon others, but that they should be apportioned among the States according to their population, and if it was found when it came to be applied that it would work injury and injustice, as sometimes all taxes do, then Congress need not adopt it.

Mr. Justice Harlan: — Have you formulated in your own mind any general rule by which we are to determine whether a tax is direct or indirect?

Mr. Edmunds: — I have. I am perfectly ready to state it. But like most general rules, it requires exceptions, as all judicial courts know and all people acquainted with affairs know. It is almost impossible to state a general rule which will not have its exceptions, and its qualifications, and its variations.

But my definition is — and I believe it to be generally found to be universally true — that a direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit or acts, as importing goods which he may import or not import as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business and in all of which the burden is to some degree moved on — but in respect of things that belong to the existence of property as an entity — a state of physical being.

Duties, imposts, and excises are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will. If we say, as some writers do, that indirect taxes are those upon consumption, I repeat again what I believe I said before to some extent, that taxes upon consumption are not taxes which bear unequally upon the so-called poor and the so-called rich, because we all know — it is an everyday experience — that there are people in this very town and probably in this very room — I know there are — who live respectably and comfortably upon half that which it costs some who are their neighbors.

Mr. Justice Brown: — Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

Mr. Edmunds: — Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each

agent in the movement. The income of a man is inseparable from him. It is as inseparable from a man as his character is, or his name. It is there. It is personal. It begins and ends with him. It was for that reason that I read the definitions in existence at the time this Constitution was made — as a capitation tax included an income tax. It is an inseparable quality, idea, entity that could not be grasped by the human mind otherwise than in connection with the person. It may be that it should not have been so. Perhaps our patriotic friends who have left us would have made it some other way. But our mission is to find out what it was, and not what it ought to have been. Personally, I think that if you were to impose an income tax upon the gains of all property as property according to valuation all over the United States, according to their population, it would come much nearer being uniform, man for man, throughout the United States, than a great many politicians and philosophers suppose.

I come now, if your Honors please, to the point of uniformity. The dictionary meaning of "uniform" is: "Having always the same form, manner, or degree; not varying, or variable; unchanging; consistent; equable; homogeneous."

I have to submit that the phrase in the Constitution, "duties, imposts, and excises shall be uniform throughout the United States," is not merely a geographical phrase. I take it that my learned friends on the other side will agree that the word uniform is not a geographical word taken alone. And what the Constitution meant, after it had provided that direct taxes should be apportioned according to population, and so on, by the requirement that duties, excises, and imposts should be uniform throughout the United States, was that they must be assessed and collected upon the principles of fundamental justice and of equality that are implied in the very name of taxes in a constitutional government of free men. And I submit that it would not, in a direct tax case, have been within the competence of Congress, having imposed a direct tax upon lands and apportioned it among the States according to population, to say that in any one State or all States the owners of two hundred acres of land should pay

all the tax, and all the owners of less than two hundred acres should pay none, although the Constitution said nothing about it.

And so in regard to uniformity under the other class — duties, imposts, and excises. When it speaks of uniformity throughout the United States it means, I submit, literally and grammatically, not merely that it shall be everywhere the same, but, first, that it shall be uniform *per se*, and after being uniform *per se*, that the uniformity shall be universal as to places. That is the grammar of it; the common sense of it. That is the sense in which the word uniform is used in my learned brother's brief for the defense. That is the sense and very phrase in which the writers, Hamilton and the others, preceding the Constitution, and in the discussions in the Federalist, speaking of the principles of taxation and the imposition of burdens, that these were to be uniform, used the word.

Mr. Justice Harlan: — You think the word "uniform" necessarily implies equality?

Mr. Edmunds: — I do. The dictionary says so. One of its definitions is equable.

Mr. Justice White: — Then the use of both the words "equal" and "uniform" was mere tautology?

Mr. Edmunds: — Yes. The word "equal" was in the original draft, and when being revised it was stricken out, not by the committee that was reforming it, but by the committee on style, as tautology. Thus making of this instrument, as I said before, as perfect a model of symmetrical and concrete English as was ever printed in the world.

So I maintain that it is not merely or chiefly a geographical word, but also a word qualifying duties, imposts, excises, thus made equable and homogeneous in respect of the things and the persons to which they applied, and that the equality shall be everywhere.

Mr. Justice White: — If your rule applies here, how do you meet the statement made by you a while ago in discussing the question of the exemption of a certain amount of furniture, which was universally not taxed?

Mr. Edmunds: — I meet it upon the principle and practice that existed when the Constitution was formed, and that has existed in every government since, that the lawmaking power does not tax things that are of so small value that the cost of collection of the tax is more than the amount of the tax; and in dealing affirmatively, by the implied consent prevailing in every constitution among civilized men, the principle and practice of leaving to the whole body of the citizens those small personal effects, etc., like furniture, family bibles, etc., free from taxation. And it is upon that principle and practice that charities and churches and schools and libraries and public buildings have been exempted; and also for these latter things that they are things devoted to the public use in one way and another, and therefore taxing them is merely taxing the public for itself, and, consequently, of no advantage. It seems so to me.

An illustration of this geographical notion of the uniformity, which has just occurred to me, might be stated, for I think it is a good one. It is the inscription that is still upon the old, cracked, but still inspiring Bell of Liberty, in Philadelphia. That bell was cast in England on the order of the colonial assembly before the Revolution, and had cast on it, very curiously enough and prophetically enough — in the land of Cromwell, and, perhaps, within reach of the ears of George III — these words: "Proclaim liberty throughout all the land, and to all the inhabitants thereof."

That was not geographical liberty. It was a liberty, *per se*, inherent in the rights of man, and that should expand and live everywhere, and among all. That was the uniformity, I think, that our fathers meant in using that phrase in the Constitution. There was the important and the fundamental principle of equal rights and justice embraced in the word uniform, and then there was the added requirement that everywhere within the borders of all the States that same principle of equality and justice should exist.

Mr. Justice White: — How do you meet the argument advanced by the other side in regard to the construction of the specific duties levied in all the tariffs during the last thirty

years? For instance, take the imposition of two cents per pound on cotton without reference to the value of the cotton. That would strike at the root of legislation which has existed since the foundation of the government. Is not that a necessary consequence of that construction?

Mr. Edmunds: — I think not, sir.

Mr. Justice White: — I would like to see why.

Mr. Edmunds: — The introduction of commodities from foreign countries into the United States is one that depends upon the free will of the importer. There is no statute of the United States that commands any citizen of Louisiana, of Vermont, of Iowa, or of Texas, or of California to do anything of the kind. Congress, having the power to exclude altogether, or to admit imports, has the power to say that they shall be admitted upon any qualification it likes. It may say you may bring them into the country upon the terms prescribed or not, as you please. It is the granting of a privilege. You may exclude or admit them, just the same as a State grants or refuses corporate rights. It may grant them on certain terms to A. and on entirely different terms to B. A. may have restrictions and B. may have none. There is another thing, it seems to me, and that is that in nearly all cases where specific duties have been assessed, and probably in all cases, those specific duties are based on the value of the article. For instance, cloths having forty threads to the inch and worth one dollar might be taxed ten cents a yard. Cloths having eighty threads to the square inch and worth two dollars shall pay so much more.

Then again, the language of this Constitution as applied to one set of subjects may have one meaning, and when applied to another set the meaning varies, as we all know it may, and as it has been decided by this court it may sometimes. Again, if all of a whole body of men or things are embraced in a tax or other burden the imposition would be uniform, without regard to any particular differences in the circumstantial characteristics or qualities of the men or things. A tax on polls does not distinguish between tall and short men, or their wealth or health. A tax on all horses, per head,

would be uniform. A tax on all cotton at so much per pound would be uniform. But in every such case the tax would be direct.

But when it comes to the case of a tax imposed upon the people, which the people must pay, and which does not depend upon the conduct of the man or anything he may do, but is one from which he cannot escape, then the principle of universal uniformity, as among men as well as within boundaries, is applied, and the language is capable of that expansion and application according to the different subjects to which it might be applied.

Some allusion has been made to the head money cases. I will only say a word about this. The taxes, so called, could not be geographically uniform, because it is perfectly clear that in a State like Montana, and many others which are not on the water, where no ship could possibly get in, such a tax could not apply. But they could be and were intrinsically uniform as to men and things.

Congress had passed a law that people coming by vessel should pay a tax; but suppose Congress had said that in the port of New York the people coming by one line, the Cunard Line, should pay ten dollars; and that the people coming by the International Line (the Paris and New York), into the same port, should pay fifteen dollars a head. What do you think would have been the decision in that case? Would my brother Carter say that was uniform? I take it not. You would say that Congress had no power to do anything of the kind.

I shall ask your attention for only a few moments more with respect to the general aspects of this case. I insist that the inherent quality of taxation in a government professed to be founded on democratic principles (as in England it exists on an unwritten constitution — for the government of England is founded on democratic principles — it is in some respects more democratic than ours — administrations come and go by the mere will of one branch of that government), with written constitutions, with equal rights, equal responsibilities, equal duties, is that the name and idea of taxation is the imposition of the burdens upon its people for their common benefit, and

that the imposition of the burdens in order to be just must be equal as far as human exertion can make it so. It must not be, as it is in this case, intentionally and tyrannically and monstrously unequal. If it were a state tax in the State of Vermont which provided that all persons owning property worth more than $80,000 should pay all the taxes of the State, and those having less shall pay none, probably not exceeding one hundred persons in the rural and modest State to which I belong — certainly less than two hundred — would bear the whole expenses of the State.

I maintain, therefore, that pervading every line of the instrument providing for the distribution and exercise of the powers of this government, the power to impose taxes, direct and indirect, must, to the greatest degree possible, be so exercised that the taxes bear upon its people equally in respect of the subjects, persons, and rates to which they can apply. Allowing large latitude as to where we draw the lines, still the taxes must be laid as nearly equal as fair human exertion can make them. And when you find a case where Congress or a state legislature has undertaken deliberately to make a discrimination which throws all the burden upon a very small minority of the people, and on purpose to do it, and not from any necessity of the situation, and a tax which relieves the vast majority, which is just as able to bear it as the minority, you must decide that the Congress has gone beyond the boundary of its powers, and that the judicial power, which Hamilton so prophetically said embraced the majesty and the justice of the government, is bound to see it and to hold the calm and regnant shield of the Constitution between the citizen and despotism.

So I maintain that it is a fundamental principle, written or unwritten, that the burdens of taxation should bear equally. But the fifth and fourteenth amendments of the Constitution certainly would relieve us of all difficulty, if any existed, in the fundamental principles I have stated. Take the Fourteenth Amendment. In terms it does not say that Congress shall not deny to all the people the equal protection of the laws. Suppose it had said that Congress may deny, although

the States may not, to all the people the equal protection of the laws? Everybody would have said that it was a monstrous proposition, and if this court had the power of the highest courts in Great Britain, you would have said such a provision in the Constitution was void as against natural law. But I believe it is now understood by this court, and everybody in this land, that the principle and the substantial application of the provisions of the Fourteenth Amendment are just as binding upon Congress as they are upon the States, and as Congress was and is a body of delegated powers, that it was not necessary to say that Congress is not to deny to anybody the equal protection of the laws, because no power was delegated to them to do such monstrous things. It is true that the attainment of perfect equality in taxation is a baseless dream, as has been said. But it does not follow that the legislative power can lawfully and purposely go to the other extreme and impose taxes broadly designed to be unequal, and by false and arbitrary classification set one great body of citizens in conflict with another.

If the Fourteenth Amendment applies to this case, is the taxing of this small minority — two per cent of the people of the United States — imposing upon them this burden, and denying to them the protection that the ninety-eight per cent have, and granting a privilege to the ninety-eight per cent to pay nothing, and imposing a duty on the two per cent to pay much or little as Congress may declare (for if it has the right to impose a two per cent tax, it can compel twenty or fifty or one hundred) warranted by the clause of equal protection? If such discrimination is to be upheld, then we have taken the first great step toward the destruction of all free government.

I believe I have said, in reference to the framers of this Constitution, that they must have been learned in the law, and that they must have understood clearly the meaning of the plain phrases and paragraphs which they used — I am sure I am right about that. All their writings, all their discussions in the conventions and in the Federalist and in other publications show that they were acquainted with the whole history of civilization in detail, from the Egyptian, and the Greek, and

the Roman governments, where the tyranny of taxation produced so much misery, down through all the performances of the French feudal times and British times, and the British administration at that time. Everything was before them. The past was present and the distant near. And now we are to be told that these gentlemen did not know what they were talking about, and that they did not mean what all the literature, all the lexicons, and the legislation, and all the law books of the time plainly imputed to those words; and all this for the purpose of allowing the majority to levy a tax upon the minority.

It appears to me, therefore, that it is the grand mission of this court of last resort, independent and supreme, to bring the Congress back to a true sense of the limitations of its powers. Hamilton in one of his letters stated the great truth, that "In framing a government which is to be administered by men over men, the great difficulty lies in this — you must first enable the government to control the governed; and, in the next place, *oblige it to control itself*. A dependence on the people is, no doubt, a primary control on the government; but experience has taught mankind to insist on auxiliary precautions." Of these, he said the chief is "in the distribution of the supreme powers of the State."

In the exercise of its clear jurisdiction it is the right of this court, and we hope it will find it to be its glad duty, to see that this fundamental principle of equality in taxation is not disregarded. If the Constitution has been invaded, and if recognition by the courts has been mistakenly given to that invasion heretofore, now is the time, before we depart wider and wider from that true line of equal justice and equal rights which cannot exist without equality of burdens, to return to the true paths of the Constitution.

Mr. Attorney General, by leave of court, for the United States in all the cases.

The chief interest of the government in the present litigations relates to the constitutional questions which the several

plaintiffs allege to be involved. Whether they are really involved or not, or whether the suits should and must be disposed of on different grounds, is a matter upon which I do not care to be heard. For present purposes, I am willing to assume that the plaintiffs are right in their claim, and that the constitutional issues they desire to have settled are so presented by these litigations that the court either must, or properly may, consider and determine them.

An examination of the plaintiffs' bills and briefs and arguments seems to show quite satisfactorily that many of the alleged objections to the validity of the income tax law are simply perfunctory in character. They are taken pro forma, by way of precaution, because of the possibility of a point developing in some unexpected connection, just as a good equity pleader, be his knowledge of his case and of the pertinent remedies ever so thorough, never fails to wind up his bill with the general prayer for other and further relief. There is nothing to criticise, of course, in the plaintiffs pursuing that plan. It only makes it proper to sift out at the outset the exact propositions upon which alone the plaintiffs can and do place any real reliance. For example, no time need be spent, I take it, in discussing the averments that the income-tax law is an invasion of vested rights, or takes property without due process of law. These propositions are pure generalities, glittering or otherwise, and if there is anything in them it is because they comprehend others which are more specific and which are the only real subjects of profitable discussion. Again, suppose it to be true that the income-tax law undertakes to ascertain the incomes of citizens by methods which are not only disagreeable, but are infringements of personal rights. The consequence is, not that the law is void, but that the hotly denounced inquisitorial methods which are merely ancillary to its operation cannot be resorted to. The like considerations apply to the objection that the law is to be pronounced void because taxing the agencies and instrumentalities of the governments of the several States.

I will not undertake to repeat the able and satisfactory argument of my associate on that point. There seems to be

no good reason why the income of state and municipal securities should not be taxable by the United States when it is assessed as part of the total income of the respective owners under a law assessing income generally and not discriminating between those securities and others of like character. In making that suggestion I do not overlook the able and elaborate opinion of the supreme court of the District, holding, largely on the ground of want of power in the United States, that this income-tax law properly construed has no application to the income from state and municipal securities. But suppose the contrary — suppose that the statute must be interpreted as taxing and unlawfully taxing state agencies and instrumentalities. The result is, not that the law is bad in toto, but that it is bad only as to the income of state and municipal securities. The plaintiffs seek to meet this view by alleging in their bill that the income from state and municipal securities throughout the country amounts to $65,000,000. Having made that allegation, they then declare that it was the intent of Congress and is necessary to accomplish the general purpose of the law, that this $65,000,000 should be taxed. But the declaration is mere assertion without evidence in its support either in the statute or outside of it. The plaintiffs do not even attempt to give the assertion an air of probability by comparing this $65,000,000 of income which the law cannot reach with the other and remaining income which the law does reach. Yet they certainly would have made the attempt if the comparison would show that this $65,000,000 of non-taxable income is so large a proportion of the entire income of all the people of the country as to make it inconceivable or even highly improbable that Congress could mean to tax income at all unless this $65,000,000 were included as part of it.

If I am right in these observations, the constitutional contention of the plaintiffs simmers down to two points. One is that an income tax is a direct tax and must be imposed according to the rule of apportionment. I do not stop to discuss the question what the constitutional rule of apportionment is. I do not think I ought to delay the court for any considerable

time with the question whether an income tax is direct or indirect. Scientifically, economically, practically, it may be either the one or the other without the result of the present cases being in the slightest degree affected. In them, the only material point is, is an income tax "direct" or otherwise in the sense in which the term "direct" is used in the Constitution? The answer is that it is not a "direct" tax within the meaning of the Constitution unless at least five concurring judicial expressions of opinion by this court, the earliest in 1796, when three leading spirits of the constitutional convention were on the bench, and the last in 1880, have all been erroneous and ought now to be reversed. But, whether or not they be erroneous is, when all is said, matter of the gravest doubt, and, were it ever so certain, no idea of reversing them ought now to be seriously considered. A constitutional exposition practically coeval with the Constitution itself, that has been acted upon ever since as occasion required by every department of the government, that is not irrational in itself nor vicious in its workings, and that indeed during a stress and strain such as that of the civil war was found of the greatest value to the Republic, deserves to be considered as immutable as if incorporated into the text of the Constitution itself. To reject it after a century's duration is to set a hurtful precedent and would go far to prove that government by written constitution is not a thing of stable principles, but of the fluctuating views and wishes of the particular period and the particular judges when and from whom its interpretation happens to be called for. In this connection, therefore, there is but one suggestion which I desire to very briefly notice. A part of the income taxable under the law is rents of land, and a tax upon rents is claimed to be a tax upon the land, and so to be a "direct" tax within the meaning of the Constitution. But the suggestion is by no means novel, and certainly is not to be accepted as sound. There is a practical commercial sense in which a tax upon rents is always a tax upon land. It affects the value of land; land, the income from which is subject to a tax, must sell for less in the market than land the income of which is not so subject. But, except in that view, a tax upon rents is not necessarily a

tax upon land, but may be a tax upon a wholly distinct subject-matter. Instead of being upon realty, it may be upon so much personalty wholly dissociated from the land. It is, of course, competent for the government to tax upon either plan — to tax rents under a scheme of taxation of personalty as personal property, or to tax them under a scheme of taxation as realty and as representing and measuring the value of real estate. The only question is of the intent — an intent to be looked for and found only in the statute imposing the tax. That test being applied, what is the purpose of Congress in the present income-tax law? Is it to tax land — rents being used as a ready mode of valuation — or is it to tax rents as so much personal property irrespective of its origin? It is difficult to see how that question can be answered except in one way. No land tax is aimed at or attempted by the statute — there is no lien on land for its payment — and the whole scope and tenor of the statute show the subject of the contemplated tax to be personal property and nothing else. It is well nigh conclusive on this point that there is no provision for the valuation and taxation of unproductive land — a provision that would almost certainly have been found if the object had been to make a real-estate tax. It may be suggested, however, that it may be the purpose to tax land but only such land as yields rent. But there is no sign or symptom of such an intent in any specific provision of the statute, while its general provisions, as already observed, contemplate nothing but a tax on personal estate. It may also be suggested that if a tax reaches rents in point of fact, it is a tax upon land no matter what the intent of the taxing statute may be. But that position is wholly untenable, because rents in the pocket of the owner are not intrinsically and of themselves land. They are money, like any other. If for the purpose of a tax they are to have any artificial character as the representative of land, it is a character impressed upon them from some source and can come from no other source than the taxing statute itself. I submit, therefore, with great confidence, that while a tax upon rents may under some circumstances be held to be in truth and in fact a tax upon land, it cannot be held to be such under a

statute like the present which taxes rents without regard to land and merely as one of the constituents of income.

This brings me to the only remaining point — to *the* constitutional objection which, notwithstanding all that has been so earnestly and forcibly said on the direct tax part of this controversy, is, I am satisfied, the plaintiffs' main reliance. The point is that the income tax imposed by the statute under consideration is not uniform. But what does the Constitution mean by "uniform" as applied to a tax? But for the strong pressure upon the plaintiffs' counsel to find objections to this statute there would be no controversy as to the meaning. It is clearly shown by the debates in the constitutional convention and by the repeated and unequivocal utterances of the framers of the Constitution themselves. It is set forth by the writers on constitutional law, who are unanimous in their interpretation. It is judicially expounded by this court in the well-known judgments in the so-called *Head Money cases*. The uniformity of tax prescribed by the Constitution is a territorial uniformity. A Federal tax, which is not a poll tax nor a tax on land, must be the same in all parts of the country. It cannot be one thing in Maine and another thing in Florida. The law providing for such a tax must be like a bankruptcy law or a naturalization law. It must have the same operation everywhere, wholly irrespective of state lines.

It is manifestly impossible for the plaintiffs to assent to this settled construction of the word "uniform," and they do not assent to it. They are compelled to insist that a tax, to be "uniform" within the meaning of the Constitution, must be uniform, not only geographically but as between taxpayers. In other words, they make it prescribe the nature and quality of a tax as well as its local application. I submit that their contention is hopeless and may fairly be regarded as already decided against them. Let it be, however, for present purposes that the adjective "uniform" describes and regulates the properties of a tax. I then beg leave to submit that the plaintiffs gain nothing by the concession, and that, so far as the validity of this income-tax law or any other tax law is concerned, the word "uniform" might as well be out of the

Constitution as in it. The word is surplusage. It simply designates and describes an essential element of every tax — an element which is inherent in every valid tax and the absence of which would be sufficient to annul any attempted exercise of the taxing power.

For the basis and the truth of this position it is only necessary to refer for a moment to the nature of the taxing power. The power to tax is wholly legislative, and in its essence is the power to raise money *from* the public *for* the public. That the object of a tax must be public is undeniable. To force money from the pockets of the people at large to enrich a private individual is so clear an abuse of the taxing power that every court would so declare on general principles without the aid of any express constitutional prohibition. Conversely, to take the property of a single individual for public uses is not to exercise the power to tax but the power of eminent domain, and can be done only on the condition of rendering the individual full indemnity. These inherent limitations of the taxing power necessarily enter into and control every scheme of taxation and determine the mode and extent of its operation upon private persons and estates. Theoretically, a tax for the benefit of the public should fall equally upon all persons composing the public; should, as text writers and judges often express it, be ratable and proportional, and be so adjusted that every member of the community shall contribute his just and equal share toward the common defence and the general welfare. Moreover, under theoretical and ideal conditions such as can be conceived of, these general maxims would be actually and exactly applicable. If, for example, every individual in a community were like every other in respect of property, of the ability to bear taxation, and of the benefit to accrue from taxation, the question how he should be taxed could receive but one answer. Nothing would have to be done but to apply the rule of three, and any other rule would be inadmissible for obvious reasons. To make one man pay a higher rate of tax than another when all the conditions in both cases are exactly alike would, to the extent of the excess be a taking of private property for public uses without making that special compensation which alone can justify such a taking.

Taxation, however, is an uncommonly practical affair. The power to tax is for practical use and is necessarily to be adapted to the practical conditions of human life. These are never the same for any two persons, and for any community, however small, are infinitely diversified. Regard being paid to them, nothing is more evident, nothing has been oftener declared by courts and jurists, than that absolute equality of taxation is impossible — is, as characterized in an opinion of this court, only "a baseless dream." No system has been or can be devised that will produce any such result. Suppose, for instance, manhood taxation were resorted to, as a sort of offset to manhood suffrage, and that the public exchequer were sought to be filled by a tax levied on adult males at so much per head — the inequity and impolicy of such a tax would be universally recognized and universally denounced. But if such would be the fate of a capitation tax employed as the sole source of public revenue, hardly less objection lies to an ad valorem property tax which should make every owner, without exception or discrimination of any sort, pay in exact proportion to the value of his estate. Logically and theoretically, no criticism could be made on such a tax. But practically it loses sight of a most important element, to wit, the ability to bear taxation, and ignores the fact that exacting $5 from a man whose annual income is $500 puts upon him an infinitely greater burden than the exaction of $500 from one whose annual income is $50,000. There is at first blush plausibility in the suggestion that the rule should be that every person should contribute to a tax ratably to the benefits derived from it. But nothing could be more objectionable or would be more certainly objected to than an attempt to collect the public revenue on any such plan. The principal beneficiaries of almost all taxes, of the taxes for highways and schools and sewers, and almost all other objects of state and municipal expenditure, are the poorer classes of the community. To impose taxes solely upon the principle of the ensuing advantages realized would in effect largely exempt the more fortunate and wealthy classes and place the greater part of the burden upon those least able to bear it.

These considerations serve to show the nature of the taxing power; that it offers little, if any, opportunity for the exploitation of theories or for experiment with abstract generalizations; that it calls for the highest practical wisdom to be applied to the actual and infinitely varied affairs of a particular community and people; and that in its exercise, in the selection of the subjects of taxation, in taxing some persons and estates and in exempting others, the legislature is vested with the largest and widest discretion. It by no means follows that the power to tax is without any limits. They are, so to speak, self-imposed, that is, as already observed, they result from the very nature of the power itself. No country, for example, no State of this Union, ever adopted a plan of taxation that did not except some portions of the community from a burden that was imposed upon others. The power to do so is unquestioned and is universally exercised. Nevertheless, the power to exempt has bounds. It cannot be used without regard to the end in view, nor to gratify a mere whim or caprice. A law, for instance, providing for a tax to be paid by the light-complexioned members of the community and exempting the dark, would be unhesitatingly pronounced void as being not a use but an abuse of the taxing power. It would be an abuse because the discrimination made by it could not be traced to any line of public policy. So, having classified the community for the purpose of a tax, the legislature cannot then proceed by arbitrary selection to take individuals out of the class to which they belong. That is the rule of uniformity — that is what "uniform" means as applied to a tax — and that is its whole meaning as used in the Federal Constitution, even when it is conceded that it prescribes the nature of a tax, not merely as between localities, but as between taxpayers. The rule of uniformity places no restrictions upon any division of the community into classes for taxable purposes which the legislature may deem wise. It merely declares that, the classes being formed, the members of each shall be on the same footing, and shall be taxed alike or be exempted alike without arbitrary discriminations in individual cases. Uniformity between members of a class

created for taxable purposes is required upon the same grounds which prevent a purely senseless and capricious division into classes. The classification must be such that it can be referred to some view of public policy. Being made and justified only on that principle, any exemption of particular members of a class is void because necessarily in conflict with the principle and preventing its operation.

For these reasons I maintain that the term "uniform" in the Constitution, even if it describes the properties of a tax, puts no limitations upon the taxing power of Congress that are not inherent in the very nature of the power. It is a power to enforce money from the public for public uses. Could it be exercised so as to produce equality of taxation, it could be exercised in no other manner. That not being feasible in the nature of things, it is for Congress and Congress alone to decide how the taxing power shall be applied so as best to approximate that result. In making that application, Congress is of course bound to keep in view the fundamental purpose of the power and to aim at its accomplishment. Hence, in taxing this class or exempting that, Congress must proceed upon considerations of public policy, and cannot adopt a classification which has no relation to the end to be attained and is founded only in whim or caprice. Hence, and on the same ground, classes for the purpose of taxation being constituted, the rule of taxation or exemption must be uniform between members of the class. But, these limitations upon its taxing power being granted, the right of Congress to determine who shall be taxed and what shall be taxed and all the ways and means of assessment and collection, is practically uncontrolled. It is quite beside the issue to argue in this or any other case that Congress has mistaken what public policy requires. On that point Congress is the sole and final authority, and its decision once made controls every other department of the government.

These familiar principles, so well established that any citation of authorities and decisions is, I think, quite unnecessary, effectually dispose, I submit, of the plaintiffs' contention in the present cases. What do they complain of? It is not that

Congress has determined to tax and has taxed income generally. It is that Congress has made exemptions in favor of certain classes, and the plaintiffs' contention, if pushed to its logical conclusion, means that Congress cannot tax income at all without taxing ratably the income of every man, woman, and child in the country. The preposterously harsh and impolitic operation of any such tax as that it is not necessary to descant upon. Congress has rightfully repudiated any such plan. While taxing incomes generally, it had full power to make such exemptions as its views of public policy required, and the only real question now and here is, has it abused or exceeded that power of exemption? The tests already stated are applicable, and being applied render but one answer to the question possible. The statute makes no exemption in favor of a class that is not based on some obvious line of public policy, and, the class being established, one uniform rule is applicable to its members. Take, for example, the principal classification of all — the grand division by which the entire population of the country is separated into people with incomes of $4000 and under who are non-taxable, and people with incomes of over $4000 who are taxable. It is manifest that in this distinction Congress was proceeding upon definite views of public policy and was aiming at accomplishing a great public object. It was seeking to adjust the load of taxation to the shoulders of the community in the manner that would make it most easily borne and most lightly felt. Having so much revenue to raise, it might have got it by a proportional tax upon the entire income of all the people of the country. But it bore in mind the fact that a small sum taken from a small income is an infinitely greater deprivation than a large sum taken from a large income; that in the one case the very means of decent support might be impaired, while in the other the power to command all the luxuries of life would hardly be affected. Acting upon these considerations or considerations such as these, Congress undertook to exempt moderate incomes from the tax altogether. It had to draw the line somewhere, and it drew it at $4000. The same objections in point of principle would have existed if it had drawn

the line at $400, or at any other figure. But no objection in truth lies at all, because it is entirely evident that, as well in exempting incomes of $4000 and under as in taxing incomes of over $4000, Congress has been governed by what it deemed sound public policy. Take another illustration — an example of a class formed by way of exception to a larger class. The statutory general rule is that every taxpayer is entitled to a fixed deduction of $4000 before taxable income is reached. In the case, however, of a family consisting of husband and wife, or parent and a minor child or children, there is but one $4000 deduction from the aggregate income of all the members of the family. Here is a differentiation of a special class whose members may be taxed higher than others having incomes of the same amount. But the discrimination is not arbitrary nor senseless, but is founded on obvious views of equity and policy. It assumes — what is undoubtedly true — that as a rule there is but one income and one breadwinner to one family, but, recognizing the fact that the rule has many exceptions, it makes the existence of several incomes to a family the just and proper basis of a somewhat higher rate of tax. It is an attempt, in short, to tax with some regard to the capacity of the taxpayer to bear it. Take another illustration — that of a class which the plaintiffs' counsel dwell upon at great length and with exceeding unction — the class, namely, of business corporations. Their net incomes are taxed at the standard rate of two per cent undiminished by the standard deduction of $4000. The result is that a man in business as a member of a corporation is taxable at a little higher rate than a man in the same business by himself or as a copartner. Here, it is claimed, is a distinction without a difference, is the establishment of a special class without special reasons of equity and policy to justify it. But I venture to submit that that is not so, and that the higher statutory rate of tax for corporate incomes is founded upon and vindicated by essential differences in the conditions under which corporations and individuals respectively carry on business. The advantages acquired by doing business as a corporation, rather than as individuals or partners, are plain and are notorious. The

interest of a corporator is in distinct and tangible shape, is marketable at any moment, and is unaffected by the insolvency or decease of other corporators. It is an interest attended with a definite and limited liability for debts. It is an interest through which the corporator ratably participates in all the benefits arising from the transaction of business on a large scale. These and other like commercial advantages of incorporation are wholly dependent upon legislative grant, which is the only fountain of corporate franchises. But so pronounced and so general has been the appreciation of these advantages that there is hardly a State of the Union which does not facilitate the formation of business corporations by a general corporation law, and that the great and ever-growing multitude and variety of such corporations is one of the striking phenomena of modern times. It is common knowledge, indeed, that corporations are so successful an agency for the conduct of business and the accumulation of wealth that a large section of the community views them with intense disfavor as malicious and cunningly devised inventions for making rich people richer and poor people poorer. When, then, this income-tax law takes a special class of business corporations and taxes their incomes at a higher rate than that applied to the incomes of persons not incorporated, it simply recognizes existing social facts and conditions which it would be the height of folly to ignore. It but classifies and discriminates upon the plainest basis of equity and public policy, upon a superiority of business conditions both enabling those enjoying them to pay a special and higher rate of tax and making it just and equitable that they should pay it. Other like exemptions of the statute, covering religious, educational, charitable and semi-charitable companies, and embracing institutions where wage-earners lodge their scanty earnings and by which persons of small means are enabled to coöperate in various ways for mutual security and benefits, these exemptions rest firmly upon the same legal footing of a wise and humane public policy. It would be tedious and cannot be necessary to consider each in detail. Suffice it to say that the statute lays down a rule for the taxation of incomes generally,

and then adds qualifications, exceptions, and exemptions, as to no one of which can it be fairly said that it does not represent an honest attempt of Congress to make the operation of the tax just and equitable, and that it does not reflect the honest views of Congress respecting the requirements of true public policy. That being so, it avails nothing for the plaintiffs to point out instances in which the law taxes property twice over or produces other inequalities and incongruities in the way of taxation. Nothing else could be expected and nothing different, it is safe to predict, would result from any other law, even if the plaintiffs had the drawing of it. It avails nothing, also, for the learned counsel to convince themselves, and perhaps the court also, that Congress's views of public policy are quite mistaken. When they have done that, what have they accomplished? They have gone through an intellectual exercise which from the character of counsel is bound to be both interesting and brilliant. But they have accomplished nothing else because, be Congress's views of public policy ever so mistaken, this court cannot avoid ruling that it is absolutely bound by them.

My endeavor has been to eliminate and discuss such of the legal issues presented as are not already too conclusively settled to admit of discussion, and to do so succinctly, without unnecessary elaboration of details, and without being betrayed into those bypaths of metaphysical and economical and historical inquiry which, however fascinating in themselves, have so little connection with the real business of the case. It would be a mistake — I am aware that the court is in no danger of falling into it — but it would certainly be a mistake to infer that this great array of counsel, this elaborate argumentation, and these many and voluminous treatises miscalled by the name of briefs, indicate anything specially intricate or unique either in the facts before the court or in the rules of law which are applicable to them. An income tax is preëminently a tax upon the rich, and all the circumstances just adverted to prove the immense pecuniary stake which is now played for. It is so large that counsel fees and costs and printers' bills are mere bagatelles. It is so large

and so stimulates the efforts of counsel that no legal or constitutional principle that stands in the way, however venerable or however long and universally acquiesced in, is suffered to pass unchallenged. It is matter of congratulation, indeed, that the existence of the Constitution itself is not impeached, and that we are not threatened with a logical demonstration that we are still living, for all taxable purposes at least, under the régime of the old Articles of Confederation. Seriously speaking, however, I venture to suggest that all this laborious and erudite and formidable demonstration must necessarily be without result on one distinct ground. In its essence and in its last analysis, it is nothing but a call upon the judicial department of the government to supplant the political in the exercise of the taxing power; to substitute its discretion for that of Congress in respect of the subjects of taxation, the plan of taxation, and all the distinctions and discriminations by which taxation is sought to be equitably adjusted to the resources and capacities of the different classes of society. Such an effort, however weightily supported, cannot, I am bound to believe, be successful. It is inevitably predestined to failure unless this court shall, for the first time in its history, overlook and overstep the bounds which separate the judicial from the legislative power — bounds, the scrupulous observance of which it has so often declared to be absolutely essential to the integrity of our constitutional system of government.

Mr. Herbert B. Turner filed a brief on behalf of The Farmers' Loan and Trust Company, appellee in 893.

Mr. William Jay and *Mr. Flamen B. Candler* filed a brief on behalf of The Continental Trust Company, appellee in 894.

Mr. James C. Carter for the Continental Trust Company, appellee in 894. *Mr. William C. Gulliver* was with him on the brief.

I appear here for the Continental Trust Company. This is one of the companies which, it might be supposed, represent interests which would be the especial subjects of income tax-

ation, and yet I am instructed by it to defend and maintain to the best of my ability the validity of the law. I am glad that there is at least one great corporation subjected to the tax, which avows its readiness to submit itself without controversy or contention to the law of the country, and to discharge the burdens which that law imposes upon it.

It admits by its demurrer to the bill that, unless restrained by the process of injunction, it will, in accordance with the requirements of the law, make the prescribed returns and pay the tax. Outside of this bill it admits, and indeed asserts, this determination; and if those circumstances constitute any reason why a court of equity should take jurisdiction of the case and listen to argument upon the questions which are raised, then there is some support for the equity jurisdiction invoked by the complainant.

Inasmuch as the main position of the other side, upon this branch of the inquiry, is that the taxes imposed by the act are unjust because they violate the true principle of equality in taxation, I shall be obliged to inquire, for a few brief moments, what that principle of equality is; how it has been stated and laid down by statesmen and economists; how far governments in practice adhere to it, and to what extent, and upon what occasions, they depart from it.

We begin, of course, with the admitted truth that governments must exact very large sums from those who live under them for the purposes for which governments are established, and the first principle or rule which, as I believe, is laid down and agreed to by the most approved statesmen and economists, representing, otherwise, every variety of opinion, is that taxes must be laid according to the several and respective abilities of the people upon whom they are imposed to bear them. It will be observed that this rule has regard, principally, to the different members of society considered as individuals, and its purpose is to fairly and justly arrange the public burdens as between them. Government, however, is a complex problem in which many different considerations are involved, and this rule or principle of equality is, in practice, in all countries, departed from in a variety of ways.

In the first place, the rule is departed from in most countries in favor of the very poor, and by various exemptions, either partial or total, and the effort is made to mitigate the burden which would otherwise fall upon them.

In the next place the expense of collecting taxes is an important item for consideration. To collect taxes with exact equality might require a very large expenditure and involve otherwise many difficulties. It is important that the revenues of a government should be cheaply and certainly and easily collected, and modes are, therefore, contrived with this end in view.

Again, moral purposes are taken into view. There are some consumable articles, such as intoxicating drinks, indulgence in which it is the policy of some States to endeavor to repress, and they seek and carry out this object by imposing duties upon such commodities, and thereby increasing their price and making the use of them more difficult. The wisdom of such enactments is the subject of much dispute.

Again, some forms of taxation, otherwise very desirable because just and equal, are avoided, because of the ease with which they may be evaded. The income tax is supposed to be particularly open to this objection. It is, however, not so much to be objected to on this account as the personal property tax in large communities. Notwithstanding this objection, however, it may be said that the income tax is at the present day everywhere among civilized States a part of the system of taxation.

There is another form of taxation which society adopts which flagrantly disregards the principle of equality, indeed, pays no regard to it whatever; but which is recommended to statesmen and public administrators by some especial qualities which it possesses. This is the tax on consumable goods, whether foreign or domestic. It is said, with truth, that this mode of collecting the taxes saves great expense, and it is also said with truth, that it is a very desirable thing for the good of society, as a whole, to establish and maintain in every nation all the important industries upon which society depends for its convenience and its comfort. It is, indeed, a tax which,

when imposed for this purpose, is particularly liable to abuse, and the controversy concerning it turns for the most part upon the real or supposed abuses of it.

But there is another cause tending to introduce inequality in the burdens of taxation of far greater effect than all the instances of departure from the rule of equality which I have just mentioned; and this is a cause which does not arise from any consideration of the public good whatever, but from the inherent selfishness of men. In every community those who feel the burdens of taxation are naturally prone to relieve themselves from them if they can; and the extent of the effort which they make to relieve themselves is, in general, proportionate to the extent of the burden which they suppose has been laid upon them. One class struggles to throw the burden off its own shoulders. If they succeed, of course it must fall upon others. They also, in their turn, labor to get rid of it, and finally the load falls upon those who will not, or cannot, make a successful effort for relief. This is, in general, a one-sided struggle, in which the rich only engage, and it is a struggle in which the poor always go to the wall.

This struggle on the part of the wealthy and highly organized classes of society constantly, unceasingly exerted, must necessarily succeed, either completely or partially, and it does everywhere succeed. The consequence is that in every country and in every age the principal burdens of taxation have been borne by the poor. This fact is so universal that it furnishes no inconsiderable argument in support of the view that it ought to be so.

Now let me pass from this general view of the grounds, reasons and motives by which the systems of taxation are fashioned and shaped, to the conditions in which we in the United States stood at the period immediately preceding the enactment of the law before us. We were collecting annually for governmental expenditure $500,000,000; and the striking and impressive fact to which I call the attention of the court is that no one dollar of this amount was collected in accordance with that first and fundamental principle of taxation to which I have alluded, namely, that it should be proportioned

according to the ability to bear the burden. The whole of this $500,000,000 was collected upon a rule which is a confessed departure from that principle, and which does not regard it in the slightest degree. It was collected by duties upon consumable commodities; duties which went into and increased the price of the articles upon which they were imposed and were thus paid by every purchaser of them who purchased them for consumption.

It is alleged by the counsel for the appellant that the income tax — and this they consider its most monstrous form of injustice — falls upon two per cent only of the population of the United States; but what must we think of the fact that this two per cent have been paying but a trifle more than two per cent of the $500,000,000, while of the annual income of the nation, after deducting what would be sufficient to furnish a living for the people, they have been receiving probably more than fifty per cent? At the same time another impressive and startling fact, not adverted to by them, has also been receiving more and more of the attention of the people of the country — I mean the growing concentration of large masses of wealth in an ever diminishing number of persons.

It was impossible to avoid the suggestion that there was some connection between these striking facts, and it was also impossible that they should not form the point of conflict around which political contentions would gather. They did finally succeed in dividing the two great political parties of the country. At last the party complaining of these things gained an ascendency in the legislative counsels, and efforts were made to devise a remedy. This income tax is a part of that remedy.

The view taken by the Congress which passed the tax law in question is plain upon its face. The object was to redress in some degree the flagrant inequality by which the great mass of the people were made to furnish nearly all the revenue, and leave the very wealthy classes to furnish very little of it in comparison with their means. Of course, nothing, therefore, was to be taken from the wages of labor, or from

very small incomes proceeding from other sources than labor. How much further the exemption should be carried was a question upon which great difference of opinion existed, and there was much contest.

Upon the passage of the law it was very naturally greeted by those upon whom the principal burden was imposed with much dissatisfaction. Efforts on the part of those who can afford to make such efforts to throw off the burdens of taxation were made, not only before the passage of the law, but they were resumed in another form after the law was passed. These suits are the result.

Some general criticisms made by way of objection to the law, and supposed to be sufficient to condemn it, are wholly lacking in merit: they amount to clamor only. It is said to be class legislation, and to make a distinction between the rich and the poor. It certainly does. It certainly is class legislation in that sense. That was its very object and purpose. This is a distinction which should always be looked to in the business of taxation. Unfortunately heretofore it has been observed in the wrong direction, as I have already pointed out, and the poorer class prodigiously over-burdened.

It is said also to be sectional legislation, and that too is true. It is so, not in terms, but in operation and effect; but it is so only because wealth has become sectional. If either of the two objections alluded to could be allowed to prevail, it would be forever impossible for this country to lay any income tax whatever. Such features belong to the very nature of an income tax.

There are two principal objections urged against the law. First, it is said that the income tax is a direct tax, and therefore an infraction of the constitutional requirement that such taxes should be apportioned among the States according to population, and in the next place it is said that if it is not a direct tax it must be a duty, impost, or excise, and then invalid because not uniform throughout the United States. There is, besides, a third objection applying to income drawn from a particular description of property, namely, state and municipal bonds, which objection insists that that form of property

is a subject withdrawn from jurisdiction of the Federal government.

As to the first of these questions, whether the taxes are direct or not, I begin by saying that it is not open to debate in this court. If it is possible to put a question at rest by solemn judicial decision, acquiesced in and undisturbed for a long series of years, this should be regarded as beyond the reach of further agitation. I am not one of those who make a fetich of the doctrine of *stare decisis*. Even this tribunal, as it has often told us, is liable to err, and it has on numerous occasions revised its decisions and corrected them for supposed error.

The question arose a very few years after the Constitution went into operation. It arose upon a dispute as to whether a carriage tax was a direct tax within the meaning of the Constitution. As is freely admitted by the counsel upon the other side, according to their interpretation, such a tax is a direct tax, and ought therefore to be apportioned. A supreme court, three of whose members had participated in the deliberations of the convention at Philadelphia, decided, without dissent, that such a tax was not, within the contemplation of the Constitution, a direct tax. The case was argued by the most eminent lawyers of the time. It was considered with the greatest deliberation. It is for these reasons entitled to the highest regard; but it has an authority far beyond that which these reasons would furnish. It was the decision of men who had themselves had a hand in the framing of these very provisions of the Constitution, who had participated in the debates which preceded their adoption, and who had qualifications, therefore, for construing its meaning far superior than any which have ever since been, or can now be, found.

The question has since that time, and after the passage of the internal revenue laws during and subsequent to the period of the war, in several distinct cases, come before this tribunal. In every instance the views which the learned counsel for the appellant have urged here have been rejected; and the views announced by the Supreme Court in the *Hylton case*, have been considered and adopted. When a court undertakes to review and correct the opinions of its predecessors it does so

upon the assumption that it occupies a superior position and enjoys better lights and assistances for the ascertainment of truth than those which were possessed and enjoyed at the time the decision was made. Will this court think that, after the lapse of a hundred years, the Constitution can be construed upon a disputed point better than at the time when the instrument itself was framed?

And then what good is to be gained by a reconsideration? Has it been found that the operation of the law as declared in *Hylton* v. *United States* has been productive of injustice which demands a remedy? And what is the new mode of laying a tax like this which the learned counsel for the appellant propose to substitute in place of the one required by the doctrine hitherto established? Simply this: they demand that the tax shall be an apportioned tax among the States according to population, when the very subject of taxation may not be found at all in some States, and in others found only to a very slight extent, and in others found in overwhelming measure. And all this to prevent a slight burden being lifted from the shoulders of the poor, who have borne it so long, and placed upon the shoulders of the rich who have been comparatively exempt!

It is said that the term "direct tax" had a distinct and well-understood meaning at the time of the adoption of the Constitution, and that such meaning should therefore be accepted. But upon looking into the literature of the time we find that this is far from being the truth, at least so far as any use of the term is concerned with which American statesmen and legislators may be supposed to have been acquainted. We find that the economists of that day were divided, as they have been from that time to this, in their views as to the incidence of taxation. Some faint support for the appellants may be found in the writings of Turgot, the celebrated French economist, but his book was not translated at the time, and we can hardly suppose it to have been known beyond a very select few of the members of the convention. And as to Adam Smith, also referred to, there was doubtless a very considerable acquaintance among the most

prominent of American statesmen of the constitutional period with the works of that illustrious writer. But does he make any such distinction as that insisted upon? Does he draw any line of division between taxes as being direct or indirect? None whatever. He evidently considered the distinction of no value, and it certainly is of no value until economists have become so agreed upon the subject of the incidence of taxation that it can be made to import something far more definite than it has hitherto done.

In the convention which framed the Constitution the question was asked without being answered: "What is a direct tax?" No such definition, no such distinction, as the learned counsel for the appellants now insist upon is anywhere to be found in the constitutional debates of the time, or, if there is any, their eager research has failed to disclose it. In short, in place of a distinct and determinate meaning of the term we find nothing but doubt and obscurity. Is this the sort of clear signification of words which the law justifies us in assuming to have been intended wherever the words are found?

What is the true pathway which the law follows in such cases? When it cannot find any clear ordinary meaning of words sufficient to furnish a correct guide to determine the real thoughts of men, it carefully scrutinizes the instrument itself which is to be interpreted, and seeks to inform itself of the principal objects and purposes which the framers of it had in view, and puts such a meaning upon the language employed as will best carry out those things and purposes. Acting upon this sound principle we at once gain light. We observe, in the first place, that the injunction of the Constitution is that all direct taxes shall be apportioned among the States according to population, and therefore such taxes as could not, with some reasonable approach to justice and equality as between the States, be thus apportioned, could not have been regarded by the framers of the Constitution as direct taxes, even if, according to the preponderating opinion, or understanding, of the time among economists, such taxes would more properly be classed under the denomination of direct.

At that time, the ordinary method of collecting taxes known and in use in this country, other than capitation taxes, was the tax on land. The principal revenues of the States were everywhere collected in this manner. The tax upon personal estate may have had some feeble operation in some quarters, but no considerable amount of revenue, I think, was anywhere derived from it; and, in most parts of the country, it amounted to nothing at all. There was another tax which was resorted to as a partial tax designed to reach a class of persons who were able to pay a tax, and yet were not landholders. That was a tax upon particular trades, occupations and callings, such as lawyers, physicians, mechanics and traders. This has been called an income tax. In some respects it partakes of that character, but really is so no more than all taxes partake of that character. All taxes are eventually paid out of incomes, except where a nation makes such ruinous imposts as to encroach upon capital, but they are not for that reason income taxes. The true income tax is a tax which disregards the matter of occupations and callings, personal property, land, or any source from which the income comes; nor is it laid upon gross receipts, but upon the net receipts after the payment of expenses. Now, it is the characteristic of these taxes, other than the general form of taxation then in use, that is land taxes and capitation taxes, that they are partial. They rest upon particular subjects of taxation, and are the incidental and supplementary methods of raising the revenue designed to complete a system. In this respect they resemble imposts, duties and excises. They are laid upon particular things, or upon particular sources of revenue. A tax upon persons engaged in the sale of intoxicating liquors may indeed in one aspect be regarded as a direct tax; but in the minds of men it is more naturally viewed as an excise. Certainly it could not have been intended by the framers of the Constitution, that these partial and supplementary taxes, in use in some places and not in others, which fall upon particular subjects, which might, or might not, be found distributed in some degree proportionately to the population, should be apportioned, and such were not therefore within their con-

templation direct taxes. They certainly did not intend to limit the power of Congress to raise revenue, either in this, or in any other form of taxation. The broad power of taxation, in whatever form, was granted to Congress, and we cannot limit it by any implications. What, therefore, in their minds could not be apportioned, cannot be regarded as direct within the meaning of that word as employed by them. This is the precise reasoning which was adopted by the learned judges in *Hylton* v. *United States.*

Let me now call attention to a consideration which I do not think has as yet been adverted to, and which I do not find in any of the briefs. It is perfectly well known from the history of the time that the question of taxation was one which greatly excited local and state jealousies and apprehensions. A principal source of revenue, then as since, had been derived from duties on imports. That the States should still preserve this means of defraying their expenses was a lost hope. That concern, together with all others which touch the common interest, had necessarily to be surrendered to the new government. In surrendering it one care was taken, namely, that the power should not be used, so as to make distinctions between State and State, but should be exercised with uniformity throughout the United States. But how should these taxes be so imposed as to bear equally upon the different members of the new government? Apprehensions upon this point were very natural and they were very strong. One good general test would be to apportion and distribute them according to the wealth of the country. But how could the wealth of the country be ascertained by any reasonably correct assessment? This was an insuperable obstacle in the way of adopting that criterion. The next best criterion as between different communities is of course relative numbers.

But here a difficult question arose, and that was whether slaves should be treated as property, or as persons, and thus the subject of taxation became involved with the subject of representation. The Southern States preferred that in taking the population for the purposes of taxation the slaves should not be counted. The North did not wish to impose an injus-

tice upon the South, but it was determined that the slaves should not be counted for the purposes of representation, and left out for the purposes of taxation. The South felt that it was taking an additional burden if it allowed the slaves to be counted, but it preferred to assume it rather than lose the dearly prized representation. The same rule therefore was adopted as was provided for representation, and a compromise effected upon that.

Now in all this we perceive that while the minds of the members of the convention were intensely engaged upon the subject of how taxation should fall upon the States, they did not very much — indeed they did not apparently at all — consider how it was going to fall upon and affect different classes of individuals in the States themselves. I cannot find anywhere any proof that this subject even engaged their attention, and yet it was a most important one. I cannot help thinking that this omission to give attention to this consideration arose, not wholly from the fact that the minds of the members of the convention were chiefly bent upon securing their respective States from undue burdens, but also from the fact that by the term direct taxes they looked only to those general methods of raising revenue which prevailed at the time, and that in their minds the words embraced only those general and universal taxes laid upon subjects which were necessarily found wherever population was found, namely, capitation taxes, and taxes upon land.

I now pass to the other principal objection against the tax, and that is that if it be an impost, duty, or excise, it is invalid because not uniform throughout the United States. It is insisted by our adversaries that "uniform throughout the United States" means two things. First, that the tax itself should have a certain character; and, second, that when that character has once been impressed upon it, it should operate precisely the same throughout the country. We say, on the other hand, that in making this grant of power no limit was imposed by Congress as to the character of the tax itself, but that, whatever plan or method should be adopted for laying it, the same plan and method should operate alike in all the

States. Whatever subject is taxed anywhere, the same subject must be taxed everywhere, and at the same rate. This construction is demanded by the plain meaning of the phrase on its face.

It is, moreover, reinforced and strengthened by the consideration to which I have already alluded, namely, that while the convention gave the most studied attention to the matter of securing fairness and equality as between States, it did not give the like attention to securing equality of operation as between the individual citizens of each State. The notion of our adversaries is, that it was the design of this provision of the Constitution to secure equality between individuals upon whom the tax was imposed and upon whom the burden really rests — an equality which consists in exacting from one set of men under certain circumstances just the same sum and no more than that which is exacted from another set of men who are in the same circumstances. We must see that this could not have been the intention when we consider that this word "uniformity" is applied to the case of duties, imposts and excises alone.

The true interpretation to give to this constitutional requirement is, that it was designed to secure territorial uniformity in the operation of the taxation. This is what the plain meaning of the words requires on their face, and the real error of our opponents is that they read out of the provision the words "throughout the United States."

I admit, however, that, quite aside from this requirement of the Constitution, Congress is bound to observe, in laying duties, imposts and excises, a certain rule or principle, extremely ill expressed by the word "uniformity," and yet having some of the elements indicated by that word. This principle is one which has been declared many times by this court, and that is, that under our system of government, whether national or state, there is no room for the exercise of what is called arbitrary power. All the powers of government are, in a certain sense, given and held in trust that they will be exercised for public objects and on public grounds and reasons. What is arbitrary power? It is power exercised,

not as a trust, but as if it were the private and personal possession of those who exercise it. It is a power exercised in disregard of the idea that those who exercise it are morally accountable to those from whom it proceeds. It is, in short, a power exercised upon other than public grounds and public reasons. The business of determining what particular burdens of taxation shall fall upon particular classes of people, and how the classes shall be made and arranged, is the province of the legislature, and of the legislature alone, and the judicial tribunals have absolutely nothing to do with it except where there is some constitutional provision imposing a limit, or imposing a method, upon the exercise of the power of taxation. Whenever the legislature creates a class for the purpose of taxation, and differentiates that class by grounds and reasons which are public in their nature, and which, whether right or wrong, wise or unwise, are grounds and reasons upon which intelligent legislators might honestly act, it is within its province; it is not exercising arbitrary power; it is proceeding upon public grounds, and its action cannot be reviewed by the judicial tribunals. Applying this rule to the provisions exempting incomes to the amount of $4000, and to the exemptions of successions to realties, we say that it is a matter entirely within legislative discretion.

Then there are objections to certain exemptions of a quite different character. I mean those exemptions examples of which are savings banks. Indulgence to these is, in many forms, everywhere, and under all systems of taxation, extended, and such exemptions have many times received the approval of judicial tribunals, the practice of the making of small savings as a provision against old age, sickness, and disability, which is effected through the instrumentality of savings banks, is one of those practices and tendencies which every State ought to encourage. It raises the condition of every individual who engages in it. It makes him a property holder, and therefore makes him a friend instead of an enemy to the institution of property, an institution which lies at the very basis of our civilization, and which ought to be encouraged in every possible manner, and particularly to be encouraged by

those who have large interests and who are so apprehensive of the future. Moreover, it indirectly furnishes a great relief to the whole community in the general burden of taxation, for by means of it individuals make provision for themselves for their support in old age and disability, without which provision they would become a direct burden upon the State. All statesmen and economists are agreed that here is a most useful field for the exercise of legislative discretion — that here is a particular in which exemption from the burden of taxation may be made to bring the most solid and most general public advantages.

Another objection is against the exemption in favor of companies doing business on the mutual plan whilst stock companies doing the same business are not exempted. Here it is strenuously urged is a distinction without a difference; but there is a very palpable difference, and one which furnishes a clear public ground which may properly engage the attention of legislators when employed in laying the burdens of taxation. So far as respects life insurance companies doing business on the mutual plan, there are some distinct reasons in favor of exemption. The business of life insurance performs a similar function in the State to that which is performed by savings banks. It is a mode, not the same in its details, but very similar in principle, by which individuals are induced to save from time to time small sums from their incomes for the purpose of making provision, sometimes for themselves, sometimes for their children or those who are dependent upon them, in the cases of old age, disability, and death. All this is in the highest degree a matter of public importance and of public interest. It is a disposition which should be favored. It is a disposition which, if indulged, leads men to look forward to the acquisition of property, even though it may be a small property. It makes them friends to the institution instead of enemies. It secures to them the blessings and enjoyments of private property. Much ado is made on the other side about the enormous accumulations of these life insurance companies. They are said to amount to a sum in the case of a single company of $200,000,000, and the intimation is that it is a gross

departure from reason to leave such an immense amount of property exempted from taxation. But those who exhibit these pictures to the court of enormous accumulations of property did not at the same time state the vast number of people who are interested in that property, and to whom in a just sense it belongs, and among whom its benefits are distributable. If the accumulated reserve of the life insurance company referred to exceeds $200,000,000, it is probable that the number of persons interested in it and to whom it equitably belongs, and among whom it will from time to time be distributed, amounts probably to half a million.

But it is insisted that the distinction made between mutual and stock companies of other kinds, such as those engaged in the ordinary business of insurance, has not these considerations to support it, nor, indeed, any consideration at all; that it is a distinction without a difference; but this is not so. There is a well-founded distinction between these classes of corporations. Take, for instance, the case of the business of marine insurance which is conducted by both stock and mutual companies. What is its nature when conducted by a stock company? Its general nature, whether conducted by a stock or a mutual company, is the prevention of serious loss and, perhaps, ruin to a single individual by the occurrence of a peril insured against, when, if the same loss were distributed among a large number it would not be sensibly felt. Private underwriters, whether incorporated or unincorporated, when they engage in such a business take from the other callings of life, and from productive employments, a certain amount of capital and put it aside as a sum from which to pay losses which may from time to time arise from particular perils. They insure against such perils, charge a price for such insurance, and make a profit for themselves upon which they live. The object of a mutual company is to enable those who require this insurance to dispense with the necessity of employing this outside capital and paying interest on it, by organizing themselves together and, their number being very large, creating a fund by small contributions of money and notes in the form of premiums, and thus become the insurers

of each other; in other words, by distributing a loss which falls, in the first instance, upon a particular one, upon a great number. Accordingly those who participate in mutual insurance pay their premiums, in cash, or partly in cash and partly in the shape of notes, and thus create a fund upon which an immediate draft can be made, in case of a particular loss, sufficient to furnish an indemnity against it, and if, at the end of the year, the whole amount paid in is not exhausted in paying losses, the residue is distributed, and paid back. They do not make a dollar of profit themselves in any instance.

Then it is said that there is a wholly inexcusable exemption in favor of individuals and against corporations generally, in that corporations are not allowed a deduction of $4000 from their incomes, although individuals engaged in precisely the same business enjoy it. I undertake to say that this discrimination is not only founded upon public considerations, but that it is entirely and indisputably right.

The case of building and loan companies has been alluded to, and it is said some of them have large accumulations of property. What is a building and loan company? It is a contrivance by which a large number of people of small means may unite together, and by their small contributions made from time to time, mainly from the savings of labor, get together a large fund which may be used in the purchase of property and its improvement by the building of houses for the occupation of the members, and which becomes their property when they shall have completed the requisite payments for it. It is an institution of the same character with savings banks and life insurance companies and calculated to perform the same useful services to the public. I wonder that large property holders should ever look with jealousy upon the extension of indulgence as to such enterprises as this. They are the most efficient agencies which can possibly be employed to induce the great mass of the community to make savings which will end eventually in their becoming private property holders, and thus attach them to the institution and make them ready at any time to defend it against all enemies.

There are other exemptions to which exception has been

taken, but what I have already said will sufficiently dispose of them. It will be obvious when they come to be considered that there is nothing arbitrary in any of them. They all of them stand upon public grounds and public reasons, and the aim of all of them is to extend benefits — very small benefits indeed — but still benefits which have a powerful tendency to encourage the disposition to make savings, to encourage the ambition and desire to become owners of property, and thus to strengthen at its foundation the basis upon which the prosperity and even the existence of states depends. So much for the question of uniformity.

There is another objection made to a distinct feature of this law, resting, not upon grounds of a failure to observe uniformity, but upon the allegation that the subject-matter upon the income of which the tax is imposed has been withdrawn from the field of federal authority and cannot be touched directly or indirectly. This is the case of state and municipal bonds, the income of which, it is said, is taxed under this law without authority. I do not doubt that it was the intention of the law to tax this income. It would be extremely unfortunate and unwise if, upon any view, this species of property were withdrawn from the sphere of federal taxation. The reasons upon which the claim to exemption is put are drawn from a series of decisions by this court upon the question of the right of a state to tax the agencies and instrumentalities of the Federal government, such, for instance, as United States bonds, and the United States banks.

I think the objection is untenable, first, because if the tax is a tax upon any state agency, it is a tax upon the borrowing power, and this is not necessary to municipalities, or even to States, in any such sense or degree, as it is necessary to the United States. The great exigency of war, which is the principal case calling for an exercise of the borrowing power, if not the only one in which loans are absolutely necessary, does not rest upon the States. Their existence with all their functions can be maintained by means of revenue derived from taxation, and perhaps it would be better if no other means had ever been resorted to by them. In the next place this court

has held what must undoubtedly be true, that each State has the right to tax the municipal and state bonds of every other State, and shall it be said that the United States do not have the power to tax a species of property which every other State in the Union has the power of taxing?

A few words in conclusion upon the general aspects of this case, and, especially, as they relate to the question of uniformity.

I am not one of those who believe in what is called a latitudinary construction of the powers of Congress, and who seek to circumscribe within the narrowest limits the power of this tribunal to sit in judgment upon the validity of congressional action. Ours is a government of delegated and limited powers, and I hope the day will never come when this court will hesitate to declare that the limit has been passed, when it is clearly convinced of the fact. But I also hope that it will forever decline the office of judgment in cases where the question does not assume a purely judicial form; and that it will especially refrain when there is mingled with the question any element of legislative discretion which cannot be separated from it. The powers of this court are limited as well as those of Congress, and those limits are already transgressed when it finds itself even considering whether this or that view of a question of political economy, or of the wisdom of taxation, is a sound one.

These suggestions are all the more weighty and important in those controversies which, like the present are calculated to arouse the interests, the feelings — almost the passions — of the people, form the subject of public discussion, array class against class, and become the turning points in our general elections. Upon such subjects every freeman believes that he has a right to form his own opinion, and to give effect to that opinion by his vote. Nothing could be more unwise and dangerous — nothing more foreign to the spirit of the Constitution — than an attempt to baffle and defeat a popular determination by a judgment in a lawsuit. When the opposing forces of sixty millions of people have become arrayed in hostile political ranks upon a question which all men feel is

not a question of law, but of legislation, the only path of safety is to accept the voice of the majority as final. The American people can be trusted not to commit permanent injustice; nor has history yet recorded an instance in which governments have been destroyed by attempts of the many to lay undue burdens of taxation on the few. The teachings of history have all been in the other direction.

Mr. Joseph H. Choate for Pollock, appellant in 893, and for Hyde, appellant in 894. *Mr. Charles F. Southmayd* was on his brief.

I look upon this case with very different eyes from those of either the Attorney General or his associate who has just closed. I believe there are private rights of property here to be protected; that we have a right to come to this court and ask for their protection, and that this court has a right, without asking leave of the Attorney General or of any counsel, to hear our plea. The act of Congress which we are impugning before you is communistic in its purposes and tendencies, and is defended here upon principles as communistic, socialistic — what shall I call them — populistic as ever have been addressed to any political assembly in the world.

Now, what is this law? My friend, Mr. Carter, has said that in the convention which created the Constitution there was one ever-present fear. There was; I agree with him as to that. It was that by a combination of States an unjust tax might be put upon a single State or upon a small group of States. Let us see about this act which, exempting all incomes under $4000 of individuals, but denying the exemption to corporations and to persons drawing their income from corporations, seeks to raise a sum, as has been stated here, of from $30,000,000 to $50,000,000. There are sources of information as to how such a law will strike, to which I wish to direct the attention of the court.

There was formerly an income-tax law, and the last year it was in force was the year 1873. The exemption then was $2000. In that year the collections for that tax were such in the States of New York, Pennsylvania, Massachusetts, and

New Jersey that even then, with that exemption, those four States paid four-fifths of the entire tax. What is their political power? What is their political representation in the lower House of Congress, which only can initiate and secure the passage of revenue bills? Eighty-three out of three hundred and fifty-six, or a little less than one-quarter. Anybody who knows anything about the operation of these income-tax laws and as to the effect of changing the exemption from $2000 to $4000, knows that that inequality of burden will, under the act of 1894, press upon those four States with vastly greater force. This most iniquitous result has been brought about by an express violation of two of the leading restraints of the Constitution.

Did your Honors observe what the learned counsel claimed, namely, that $20,000 might have been made the minimum of exemption of taxation of this law, and there would have been no help for it? If you approve this law, with this exemption of $4000, and this communistic march goes on and five years hence a statute comes to you with an exemption of $20,000 and a tax of 20 per cent upon all having incomes in excess of that amount, how can you meet it in view of the decision which my opponents ask you now to render? There is protection now or never. If it goes out as the edict of this judicial tribunal that a combination of States, however numerous, however unanimous, can unite against the safeguards provided by the Constitution in imposing a tax which is to be paid by the people in four States or in three States or in two States, but of which the combination is to pay almost no part, while in the spending of it they are to have the whole control, it will be impossible to take any backward step. You cannot hereafter exercise any check if you now say that Congress is untrammelled and uncontrollable. My friend says you cannot enforce any limit. He says no matter what Congress does, if in its views of so-called — what did he call it? — sociology, political economy, it establishes a limit of a minimum of $20,000 or a minimum of $100,000, this court will have nothing to say about it. I agree that it will have nothing to say about it if it now lets go its hold upon this law — upon a law

passed for such a purpose, accomplishing such a result and by such means.

I have thought that one of the fundamental objects of all civilized government was the preservation of the rights of private property. I have thought that it was the very keystone of the arch upon which all civilized government rests, and that this once abandoned, everything was at stake and in danger. That is what Mr. Webster said in 1820, at Plymouth, and I supposed that all educated, civilized men believed in that. According to the doctrines that have been propounded here this morning, even that great fundamental principle has been scattered to the winds.

It is not any part of our mission here to question the power of Congress to raise money by taxation. We believe that Congress has plenary power in the last exigencies of the government to reach every man, every dollar, every inch of ground, to secure the common defence and the general welfare; that it was the purpose of the convention that created the Constitution to give Congress that power, and that it is one of the absolute essentials of a great sovereignty which was to cover a continent and to last for untold ages. There is no doubt about that. We are perfectly aware, too, of the difficulties that lie in our way; that it is necessary for us to show, in the first place, either that the power to pass this act was not conferred upon Congress, or that in passing it Congress has exceeded the power entrusted to it by the Constitution.

One thing is certain, absolutely certain, that although the power was given Congress to tax, no power was given it to confiscate; and that, the Attorney General and his associates all admit. If this is a confiscation under the forms of law, there is no power given to Congress in the Constitution that could by any possibility enable it to validly enact such a law.

I can add nothing to the wealth of argument, the force and power of the claim presented by my two associates, that this tax is wholly void because absolutely in all its parts a direct tax not imposed by the rule of apportionment. But, as we may distrust, in view of the former decisions of this court, the willingness of the court to come to such a conclusion as

that an income tax in all its extent, levied upon all callings, levied upon all earnings as well as upon the rents of land and the income of personal property, is in the meaning of the Constitution a direct tax, I may present the case as to direct taxes upon somewhat narrower grounds, grounds consistent with every case that has yet been decided by this court, and maintained by the uniform course of the Federal government in its legislative capacity for over half a century after the adoption of the Constitution. If you should conclude that it is not possible to condemn this entire tax law as unconstitutional because entirely a direct tax, my purpose is to present, then, the only safe and practicable alternative upon which this court can place, as I believe, any decision, and which is based upon the clear distinction, the distinction which we find in the Constitution itself, between direct taxes upon the one hand, and duties, imposts, and excises upon the other.

Therefore, for the purposes of this argument, I shall assume that it may possibly be decided by this court, as it has so often been decided before, that all duties, all excises, all imposts are shut out from the class of direct taxes by the necessary meaning and effect of the Constitution, and that they are to be administered by the rule of uniformity, as they ought to be in this law and are not. I shall claim, upon the other hand, that at any rate so far as regards the direct, inevitable, necessary income, and outgrowth of real estate and of personal estate, the tax is a direct tax levied upon the proper subject of a direct tax within the meaning of the Constitution, and is therefore invalid.

First, I desire to call attention to the rules regulating the power and the methods of exercising the power of taxation, laid down in the Constitution, which are absolutely imperative upon Congress and from which by no contrivance, by employing no name, can it possibly escape.

Under the provision of section 2 of article I of the Constitution, it had already been declared that representatives and direct taxes should be apportioned among the several States according to the census, according to numbers to be ascertained by an original census, and by a decennial census

from time to time, as years rolled on. The framers had not yet, so far as concerns the arrangement of sections in the Constitution as it was finally drawn, given to Congress the general power to tax. That first provision was a restraint upon what was intended to be given by a subsequent clause, all of course finally speaking with one voice. Then the framers came to the first clause of the eighth section, which described the power of Congress, and naturally and necessarily gave to Congress plenary power of taxation, which might meet the exigencies, necessities, and demands of the Government at any period and under any stress. I agree with the Attorney General that nothing could be more comprehensive; that no other language could be used to include the entire power of taxation which it was the evident, the obvious, the necessary purpose of the framers to bestow upon the new government. "Congress shall have power to lay and collect taxes, duties, imposts, and excises." They added, however, to that clause, "but all duties, imposts, and excises shall be uniform throughout the United States," which I understand to mean exactly what it says — that all duties, imposts, and excises shall be uniform duties, uniform imposts, uniform excises throughout the United States.

The first question that suggests itself is why these words added in that particular form, especially why the word "taxes" was included in the grant of power and excluded from this particular modification of it. I am not one of those who attribute ignorance or heedlessness or acting in the dark or in a maze to the men who, after sitting four months together, evolved this piece of work. I submit that upon every reasonable rule of construction, in view of the nature and character of those men, in view of the light of the history of the confederation and of English history in which they were acting, they intended by their prescription of methods of exercising the power to cover absolutely the whole subject of taxation, and that the reason why the limitation as to uniformity, the prescription of method as to uniformity, was applied to duties, imposts, and excises was that the framers knew very well that they had already prescribed the measure for all other taxes

under the term of direct taxes. The undoubted reason why the framers of the Constitution limited the provision of the method of uniformity for the measurement of taxes to duties, imposts, and excises was that they understood that they had already provided for the measurement of all other taxes.

In respect to this, what the Attorney General says regarding the uniform conduct of the government from the beginning is entitled to our greatest respect, and I draw from it what appears to me to be a very strong argument and one that I do not remember to have heretofore seen suggested. Your Honors will remember that Mr. Justice Chase in the case of *Hylton* v. *United States* threw out the suggestion that there was some mistake about the word "taxes" in the first clause of the eighth section; that all duties, imposts and excises necessarily were taxes; and he hinted that possibly there might be some kind of a tax of which he could not then think, the nature of which he did not intimate, that might neither upon the one hand be a direct tax, nor upon the other be a duty, an impost, or an excise. That suggestion has lingered in the minds of the profession from about a hundred years ago until now, and you find it reproduced in the brief of the learned Attorney General or of his associate. They say that there may be a tax which on one side is neither a direct tax, nor on the other side a duty, impost, or excise.

Now, for the argument that I draw from it: How about the corpus of personal property? If a tax upon that were such a tax, neither direct upon the one hand nor a duty, impost, or excise on the other, then what would follow? What Mr. Justice Chase suggested, that neither rule prescribed would apply; that it would not have to be rated either according to apportionment or according to uniformity. Would it not have suggested itself to some astute mind connected with the executive or legislative departments of the government at some time since the adoption of the Constitution until now, in all the great exigencies and emergencies of the nation, that there was a tax unlimited in respect to measure, in the meting out of which there was no restraint upon Congress? Under that construction, under that theory or imagination, what has there

been from the beginning to prevent Congress from raising all the money required for the purposes of the government from the corpus of personal property throughout the United States without any rule of apportionment, without any rule of uniformity, laying it exactly as it pleased, and coming to every citizen, saying, "I find you are worth so much personal property; pay me two per cent of that." No; this has never been dreamed of — it has never been suggested to this hour — and why not? It is because everybody who thought for a moment about this subject knew that the judgment I have ascribed to the framers of the Constitution was sound and right, namely, that in providing for direct taxes and that direct taxes should be collected according to apportionment, they covered a tax upon personal property.

The income of all accumulated property, whether it be the rent of lands or the interest of bonds or the immediate outgrowth of any other specific form of personal property, is necessarily, under the Constitution, the subject of a direct tax and of no other.

One thing is absolutely certain in this Constitution, and that is that the difference between the subjects of taxation by apportionment and taxation by the rule of uniformity was considered one of vast importance by the framers of the Constitution. It was no trifling thing. They did not think either branch of this question of taxation inconsiderable or unimportant. My proposition is that real estate itself and the rent of it, the bulk of personal property and the income from it, was what was in their minds under the subject of direct taxation. I ascertain this by comparing and studying these clauses of the Constitution which I have already quoted and the other clauses of the Constitution and the whole scope and purpose of them. The mere talk of this man or that in the convention, mere talk of this man or that upon the bench of any court, unless it was a solemn adjudication upon his oath of office and the decision of a case, is of very little weight. I have found from a careful study of it very little help upon this subject in the debates of the Federal convention, and I think there are two reasons why no conclusive force, as Justice Swayne said in the *Springer case*, can be drawn from

them. In the first place, it was not a legislative body: it was merely a deliberative body, coming voluntarily together at the invitation of Virginia and of Congress, submitting its work to Congress with a suggestion that it finally be submitted for adoption to the conventions of the several States. In the second place, its deliberations were absolutely secret.

The first step which I take as the starting point of my argument in support of the proposition that I am submitting is that, whatever else was or was not included in the term direct tax, real estate was included, real estate in the several States, real estate that was distributed equally everywhere, found everywhere, in every State, although necessarily differing in value and differing in acreage. From the beginning, the power to tax land has not been rested upon theories of distinctions between the increment of land, the improvement of land, and the growth or value of land; but it has been applied, according to such practical construction, to improved and unimproved real estate. There have been three cases of a direct tax, which has never been imposed except in cases of great emergency: First, there was the direct-tax law of 1798, when trouble with France was apprehended; then the land-tax act of 1812, and the direct tax of 1861. All were of one type. They were not taxes on naked land; they were taxes arranged carefully upon improved and upon unimproved property, just as a land tax, if you please to call it so, a direct tax may now be imposed upon rented property and unrented and unproductive property. What did Congress do? Take the first tax as a specimen of them all. It said, first, we will tax the houses. That is improved real property, is it not? That is rented real property, is it not? It taxed them according to their value, from $3000 ranging all the way up to $30,000, at a differing rate. Then we will tax the slaves so much a head. I think it was fifty cents a head. Then we will tax all the rest of the land a dollar for a hundred acres or whatever the rule was. So I say there is an absolute consensus, confirmed by these hundred years of history, that a direct tax upon land was not a purely naked land tax, but it was a tax, as I have said, upon all possible improvements or outgrowth of the property.

Mr. Choate's Argument for Appellants.

Now, we come to the second proposition, which it seems to me is equally easy to establish, and that is that the rent of real estate issuing from it is indistinguishable from a tax on the real property itself. As to this matter of rent, is a tax on rent distinguishable from a tax on land? I say that a tax on land yielding income by whatever name is in reality, in effect and substance, a tax upon the rental. I speak now, of course, of rented property. I am not foolish enough to argue that a tax on rents is the same thing as a tax on land which nobody rents. I am looking, however, at the nature of the tax; not the form, but the substance. Your Honors will observe that the tax laid by this law is a yearly tax upon the yearly rental. Can that be distinguished from a tax on land? How is a tax on land to be paid, except out of the income? How is it possible? I mean in the common, ordinary, practical business of life which the court is bound to look at. We are living under a constitutional government, are we not? We have regulated the measure of our own taxation by the Constitution. Was it intended that, although Congress could not put an unapportioned tax upon real estate, it could put an unapportioned tax upon rent of real estate and so eat all the real estate up? How can a man pay this five years' annual tax on the rent of real estate? Absolutely only out of the rental. Would any free people, if they had prohibited a land tax, submit to a tax on the rentals?

We are deciding this as a question of law, not of political economy. I say that every time the courts ever passed upon the question of an annual tax on land, by whatever name you call it, whether you call it a real-estate tax or a land tax or an income tax or whatever you please, it has been held to be a tax on the immediate ownership, upon the immediate freehold, and upon the man who was in possession thereof receiving the income. What has been the law from the beginning of the common law? What do the old writers say? "If a man seized of land in fee by his deed granteth to another the profit of those lands to have and to hold to him and his heirs and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits

thereof?" That is Coke upon Littleton. That has been law ever since in every court in English Christendom. It is applied now just the same as it was in the time of Coke. It was applied in the State of New York to the matter of a devise. "A devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue." That is the law as administered by the Supreme Court of the State of New York when your late associate, Mr. Justice Nelson, was a member of it.

Let me call attention again to what the Attorney General says. He says: "Well, when a man has got the money in his pocket it is no longer rent." One thing I would say about that, is, that if you are going after the rent as money, the tax is on personal property and should be apportioned, as I think I shall demonstrate by and by. But the answer is that the tax does not go after the rent as money in the tax-payer's pocket. The act of 1894 specifies the rents as a cardinal part and element of this income return, and every man who goes up to make his return has to state under oath what rent he got last year. This fiction — this difference between the name and the thing, between the substance and the shadow — urged by the Attorney General is that, though you cannot tax rent, you can tax the money in the owner's pocket received from rent. If there is one factitious argument, one pretence of a reason, one attempt to make a distinction without a difference that this court has uniformly stamped upon with all its might, it is just that. How in principle does the corpus of personal property differ from a piece of real estate? I own a house to-day and sell it to-morrow, and take as its consideration a mortgage on the same property for $10,000, the value of the house. Is a tax upon the house one kind of a tax and a tax upon the proceeds of the house another? It cannot be; it is impossible. There is no real or substantial difference between a general tax on personal and on real property. No such thing has ever been decided; no such thing has ever been hinted at. A tax on personalty has all the elements of a direct tax exactly as a tax upon real estate. It is directly imposed; it is presently paid; it is ultimately borne by the

party owning it. There is no choice for him to escape from the tax but to run away. There is no volition about it, as there is in the case of any consumable commodities upon which excises are laid. Suppose a direct tax be levied upon real and personal property in the States, could a man whose personal property was touched by it appeal to the court with any hope of success and say, "That tax on my personal property is not a direct tax, but is an excise or a duty or impost. I will pay on my real property, but I will not pay and I shall appeal to the Supreme Court to free me from paying the portion of the tax that rests upon my personal property." The court certainly would overrule such a contention. I say there is not the least distinction between such a case and that presented here.

I think you will have no difficulty in coming to the conclusion that the corpus of personal property is included within the subject of a direct tax, and that a tax thereon must be apportioned. How about income derived therefrom? I am not speaking now, of the earnings and income from labor and from any calling, trade, profession, or business. I am talking about the direct income of personal property, as illustrated by the interest on bonds. Thus the United States issues certain bonds and declares that the bond shall not be subject to taxation by any State. I am looking at the question whether a tax on the interest of the bonds is the same in nature as a tax on the bond itself. A State levies a tax. The legislature recognizes that the bond itself is protected and cannot be taxed; but it attempts to circumvent that inhibition by pretending to tax only the income after it has been collected on the plea that it has lost its identity and is part of the personal property of the owner of the bond. Would you say that, although the act of Congress said the bond should not be subject to tax, all the income therefrom and all its value might be eaten out by the State putting a tax upon the income of the bond? Of course, that would be an impossibility, and it is decisive of this question. The substance is what the Constitution provides for. The substance of right is what the court is bound to protect.

Mr. Choate's Argument for Appellants.

We may proceed now to inquire how the two rules, apportionment and uniformity, were intended by the makers of the Constitution to work in practical application to their respective subjects of taxation. It was then known perfectly well that apportionment was necessarily a rule of inequality. Nobody ever supposed or could contemplate that a tax levied by the rule of apportionment would result in equality of burden as to wealth, or, to state it in other words, that it would be found that the distribution of real and personal property was according to the population of the various States, or that a tax on real and personal property apportioned according to population would not bear more heavily on some than on other States.

You remember that the confederation had no power to tax; that it had been the subject of an intense struggle since 1781, culminating finally in 1786, and that the confederation was then on the point of absolute collapse when the constitutional convention came together. The confederation had demanded the impost, it had demanded the power of taxation in some form or other to save the nation, and the States never would consent. All remember the quarrel about the impost, the getting of the impost and the not getting it, and then came the compromise in the Constitution. It is not necessary to relate the history of the compromise; how it was arrived at.

Accompanying this compromise, came the provisions in regard to the power of taxation to be vested in Congress, which we are here to-day to expound. First, there was a surrender by the States to Congress of the exclusive power to levy taxes on imports. That had been the great source of revenue to all the seaboard States; it was known to be an endless resource for Congress. The States gave it up absolutely, and with it the power to regulate foreign commerce. Then, too, the States surrendered forever afterwards the right that they had had of taxing and regulating commerce between the States. How much of revenue, how much of sources and subjects of taxing power that has amounted to, let your Honors' decisions for the last ten years on interstate commerce questions decide.

That was one part of the compromise. Then came the grant to Congress of power to lay indirect taxes, as we now call them — a grant to Congress of the power to levy, by the rule of uniformity, duties, imposts and excises.

I say that this rule of apportionment was designed to operate exactly as it eventually did. What does it result in? It results, does it not, in a law of protection for the benefit of the holders of such property as was contemplated as the subject of the direct taxes? I own a house in New York. I study the Constitution and I see that it can be made the subject only of an apportioned tax. If that apportioned tax is applied my taxes will be less by half or a quarter or a fifth or a tenth, as the case may be, than if it were a tax applied by the law of uniformity. Is not that an absolute and indefeasible right of the owner in every State just as much as if the Constitution had provided as a part of this compromise that no taxes should be levied by the Federal government upon real estate in any State?

But there is another clause providing that representation and direct taxes shall go hand in hand. What did that mean? Why was it that the framers twice said it in the Constitution? And it is the only thing that they did say twice. They said it in section 2 of article I, when they provided that representatives and direct taxes should be apportioned according to numbers, and they said it in section 9 of the same article when they prescribed that no capitation or other direct tax should be levied except according to the census. They were fresh from the struggles about representation going hand in hand with taxation, and it was for the protection of this property, this accumulated property in the States, as against the inroad of the vote of mere numbers, that they stipulated and insisted upon the guaranty of apportionment — such was the fundamental condition of the States adopting the Constitution.

The purpose was as clear as if it had been written in so many words that when the representatives of any State voted in the House of Representatives, where only a tax could originate, upon a law to impose a direct tax upon the property or the income of property in any State, they should do it under the

restraint that according as they possessed the political power to vote the tax, it should fall upon the citizens of the State that they represented.

What an object lesson this law is as to these subjects of direct tax that I have now spoken of, namely, the rents of land and the income of personal property. Here are the other forty States, all the States representing that region that has come in under the provision that new States might be carved out of the Territories, who have voted to put this direct tax under the pretence of an income tax upon these seaboard States, throwing to the winds the restraint that the Constitution placed upon them, and practically exempting their own States. They have provided that New York, Pennsylvania, Massachusetts and New Jersey shall pay, as I told you in the beginning, five times the amount they would pay if the rule of apportionment guaranteed by the Constitution had not been utterly disregarded.

This question as to a direct tax upon the income of real and personal property has never been decided. Not only that; it has never been considered; it has never been presented to this court. When my learned friends on the other side get up and say there is nothing to debate here, we answer that the question whether a tax on the rents is in real substance and effect different from a tax on the real property itself, and whether a tax on the income of personal property is different from a tax on the corpus of personal property has never been presented here.

My friends say that we are bound to lose our case *in toto* because the questions have been adjudicated adversely to our contention. There are five cases upon which they rely.

[Mr. Choate then examined the *Hylton case; Pacific Ins. Co.* v. *Soule; Veazie Bank* v. *Fenno; Scholey* v. *Rew;* and *Springer* v. *United States;* and contended that the questions in issue here had not been decided there.]

As to the rest of this law and the provisions which operate as an excise or duty upon income derived from business or work of any kind, we contend that there is a gross violation of uniformity, and therefore that the whole law is void.

What is meant in the clause "uniform throughout the United States?" It would seem that that is capable of solution without imputing heedlessness to Washington, Hamilton, Madison, Franklin, and the other men who sat with them in the convention. Clearly the word "uniform" means something and was inserted for some definite purpose.

In our view there is no mistake as to what the meaning of the word "uniform" is, as an essential quality of a duty, impost, or excise. It must operate alike upon the class of things or of persons subject to it. The class may be fixed and bounded by Congress in its discretion. It is for the courts to say whether this rule of uniformity has been applied within and throughout the class.

The contrast or antithesis between the rule of apportionment prescribed for direct taxes and the rule of uniformity prescribed for "duties, imposts, and excises" was designed. The contrast was intended to be complete and perfect between each element of the two rules.

The rule of apportionment was known and intended to be a rule of inequality. This inequality was inevitable and existed in the very nature of the compromise out of which it resulted. This inequality was recognized as certain to increase as one State grew in population faster than another; hence the requirement of a decennial census to correct this inequality, so far as that might do it. But there were features of inequality as between different States which were radical and incurable by any census. There was and there could be no such coincidence between population and wealth as the rule assumed, and the divergence from any approximate coincidence would grow, as it has grown with every census.

The rule of uniformity, on the other hand, as applied to "duties, imposts and excises," was known and intended to be a rule of approximate and reasonable equality among those embraced in the class affected by it — everywhere and at all times — and no changes of population or of wealth anywhere would or could affect its force and effect.

The constitutions of nearly all the States have adopted from the United States Constitution this rule of uniformity,

and in its practical application the courts of all speak with one voice as to its meaning, that it is exactly that for which we contend.

But there is another cardinal difference between the two rules which is even more radical and far-reaching and compels the construction of the rule of uniformity for which we contend. It must be observed that the first clause of section 8, Article I, taken by itself, gave to Congress the complete and unqualified power of taxation, only limited to national purposes, but wholly unlimited as to place. As it stood alone the power extended to every inch of the territory and to every person and every thing within the dominion of the government created by the Constitution. As it stood alone Congress could have laid and collected taxes of every kind, direct and indirect, for national purposes, without regard to population or wealth or to state boundaries, restrained only by those fundamental limitations inherent in the very power of taxation and indispensable in the government of a free people; but it was no part of the plan of any of them that this power in the new government should be absolute or unqualified, except as to place and persons. As to place and persons it should forever remain unqualified and reach as far and as wide as the territory of the United States and touch every person and every thing therein. And so they proceeded to modify and to qualify this power, except as to its extent in place or space, through the whole territory of the nation, and except as to its hold upon every person and thing by prescribing the different measures by which the burden of the different kinds of taxes, direct and indirect, should be meted out. As to indirect taxes, the modification or qualification was applied by section 8. As to direct taxes, the measure was prescribed by section 2.

Thus the Constitution, in prescribing the rule of measuring direct taxes, deals with the States and with the people therein. It allots to each State its aliquot part of the total amount to be collected according to numbers, and the quota of each is levied and collected from the property of the States, in substance though not in form, as other state taxes are collected.

But as to taxes not direct — "duties, imposts and excises —" the situation was wholly different. These, which had belonged absolutely to the States and which they had persistently refused to part with, were now surrendered to Congress — the imposts absolutely; the excises and duties on consumable commodities to a great extent — because of the impracticability of any State maintaining them against competition with other and adjoining States, and because of the "commerce" clause and the "immunities" clause in the Federal Constitution which cut them off from all manner of excises upon interstate commerce and upon incomers from other States who could no longer be treated as foreigners.

In dealing with these the Constitution no longer dealt with the States or with the citizens through the States, but directly with the individual citizen — the individual thing to be subjected to the tax. It wiped out all state lines, ignored the States entirely, and went directly for the man or the thing, and whether he or it was found in a State or in the Territories or in the District of Columbia was all one. On all these alike the purpose was to provide for the exercise of the taxing power "*throughout the United States*" whenever it should be exercised at all. In each and every part of the territory of the United States, the excise or duty laid or imposed must rest and operate.

Our construction of this clause has been acted on by the government from the beginning until now. In no tariff act — and I call especial attention to this — with all the infinite variety of classification of goods which those acts contain, never once has there been a clause in a tariff act which made the rate of duty to be paid dependent upon the person who imported the goods, whether it was a person or a corporation, whether it was a white man or a black man, whether it was a rich man or a poor man.

Rich and poor, old and young, capitalist and laborer, citizen and foreigner, corporation and individual, have been accorded the same right to import the same goods at the same rate, and we do not believe that any departure from this rule of uniformity has ever been suggested in either house of Con-

gress on the discussion of any tariff bill, and this is the rule of uniformity throughout the United States for which we contend as to all duties, excises, and imposts.

This brings me to say a few words upon a new doctrine which has been presented here by the representatives of the government and strongly urged by my friend Mr. Carter. The Attorney General says in his brief, at page 83, that the rule of uniformity has been practically violated in the act of 1894, but that the law must be regarded not as standing alone, but as a part of our general system of taxation, and that so regarded its effect is to bring about an approximation of equality of taxation. This is, as I understand it, an unequivocal admission that the law in itself is not equal or uniform in its operation, but that we may speculate that perhaps it works out uniformity of tax burden upon some theory or notion of compensation or equivalents. Has such a doctrine ever before been advanced in this court? It amounts to the claim on the part of the government that an act of Congress violating the Constitution and utterly lacking in uniformity may be upheld because some other act or the general tariff laws operate unequally. Is it true that under the Constitution you can compensate for intentional inequality of burden in one set of excises, duties, or imposts by imposing others which are inherently lacking in every essential element of uniformity? Is this court prepared to go that length and to enunciate any such construction of the Constitution? This is a doctrine worthy of a Jacobin club that proposed to govern France; it is worthy of a Czar of Russia proposing to reign with undisputed and absolute power; but it cannot be done under this Constitution.

What are the breaches of uniformity here? I shall treat them briefly in view of the clear and remarkably forcible presentation on the opening by Mr. Guthrie. In the first place, there is this exemption of everybody with an income less than $4000. What does this exemption really amount to? A man living with investments of $133,000 in bonds at 3 per cent is a subject of exemption. I hope that we shall all be able to leave our children each in as good condition

as that, and not have Congress claim that he or she should be classed among the lower middle *classes* because his or her income does not exceed $4000. My friend on the other side has made our argument easier because he has said this exemption might just as well have been $20,000, and he said it in earnest. Thus he has conceded that if this classification can stand, a man with $666,000 at 3 per cent or $500,000 at 4 per cent was a fit subject for exemption. It is, therefore, for you to decide whether that is a reasonable exemption.

If you now decline to adjudicate upon the question of reasonableness and hold that it is outside your province, no abuse hereafter when the limit is fixed at $20,000 or more can be checked. The reasonableness of the exemption is essentially a question of law. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397–399. The discretion is in Congress, but the abuse of that discretion is not remediless.

One word as to the power of the court to adjudicate upon the reasonableness of an exemption. In the *Chicago, Milwaukee, &c. Railway Company* v. *Minnesota*, 134 U. S. 418, the court said that unquestionably the rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. I need not refer to the cases there cited or those like the *Reagan case*, which have followed and applied that doctrine. We claim that this court is competent and that it is its duty to judge as to whether this is a reasonable exercise of the power of exemption or whether it is arbitrary and capricious.

The next ground of exemption of which we complain is the denial of the $4000 exemption to corporations simply because they are corporations.

Could this court justify the incorporation of a clause in a tariff act that a given brand of tea, if imported by an individual, should pay a duty of ten cents, but if imported by a corporation, twenty cents, and nothing if imported by a mutual association? I have never heard any suggestion from any liv-

ing man that it could. I believe it must be absolutely conceded by everybody that it cannot. If it cannot do it as to a tariff duty, how can it do it as to an income excise?

Now I come to another ground. It is not necessary for me to dwell very elaborately upon this, because of the very clear and forcible manner in which it was presented in the opening by Mr. Guthrie and appears upon our brief. I say here was a deliberate, arbitrary, capricious (it is entitled to infinitely worse names and epithets than capricious or arbitrary) exclusion of certain great and wealthy corporations from the operation of this law, without justification, without warrant, without any principle of public policy whatever. The Attorney General says in respect of the exemption of these favored companies that there is a humane policy always acted on by civilized states. It is very curious that these civilized states, the United States of America, did not discover it until now. None of these institutions were exempted under the previous income-tax laws. Take Trinity church, for example, in New York, with its hundreds of parcels of real property and stores and houses and millions of property, from which it receives a fabulous income. Is there any public policy in exempting that income at the expense of the poorer sections of the country?

Permit me to repeat a few of the figures: Total number of mutual savings banks exempted, 646; total stock savings banks, 378. They do the same business; they take in the money of depositors for the purpose of investing it and making it bear interest with a profit upon it in the same way, and the 646 are exempted and the 378 are taxed. Total deposits in state banks and trust companies, $1,225,000,000; total deposits of savings banks, $1,748,000,000. That will give you some idea of what this exemption covers? How are those deposits used? Are they kept in the vaults of the banks? No, they are invested like anybody else's earnings, to make interest and to make profit on the money.

Now I come to the question of mutual insurance companies. My friend, Mr. Carter, got up a new idea. He said mutual companies were organized not to save the poor, but for the sole purpose of saving expenses and dividing losses. That is

his argument, and those, I think, were his very words. We had them taken down, at any rate. Here are his very words: "An organization," he said, "to divide the losses." So, I suppose, he thinks they are benevolent and charitable organizations. I should like to have him go to his friend the president of the Mutual Life Insurance Company in New York, whose company has accumulations of property, real and personal, amounting to $204,000,000, and tell him that this was an exemption secured for the purpose of enabling them to divide the losses that came upon them in the transaction of their business. To divide the losses! Where is that phrase he uses? Mr. Carter said: "They carry on the business simply to divide the losses among themselves."

Why, if the court please, the total property exempted of these mutual companies that merely carry on their business to divide the losses among themselves appears by the census reports to be over $2,000,000,000!

Now, is that within the exercise of a reasonable discretion on grounds of public policy, or is it caprice — is it arbitrariness?

I have trespassed altogether too long upon the attention of the court. There is nothing that stands in the way of the decision of this court which we urge. I do not mean to say there are not individual dicta. If you try to drive a case through dicta it is like trying to get yourself through a barbed-wire fence without injury to your garments; but I say there has been no case decided in this court that will in the least interfere. These questions have never been weighed, have never been considered; certainly they have never been decided.

I will say just one word before I conclude about these municipal bonds, briefly to state the grounds on which we say they ought to be exempted, and that is exactly the ground on which United States bonds are exempted from a state tax. It is because it interferes with the sovereign power and the exercise of sovereign power by the States themselves. What is the answer to this? My friends on the other side say, why if you put it in a general income tax it will not be felt. So they said about the rents, if you put them into a general income tax it is not a tax on rents, it is not an unap-

portioned tax. What possible difference in principle is there between a tax on the bond and a tax on its income?

But I have more than trespassed upon the kind indulgence of the court. I have felt the responsibility of this case as I have never felt one before and never expect to again. I do not believe that any member of this court ever has sat or ever will sit to hear and decide a case the consequences of which will be so far-reaching as this — not even the venerable member who survives from the early days of the civil war, and has sat upon every question of reconstruction, of national destiny, of state destiny that has come up during the last thirty years. No member of this court will live long enough to hear a case which will involve a question of more importance than this, the preservation of the fundamental rights of private property and equality before the law, and the ability of the people of these United States to rely upon the guaranties of the Constitution. If it be true, as my friend said in closing, that the passions of the people are aroused on this subject, if it be true that a mighty army of sixty million citizens is likely to be incensed by this decision, it is the more vital to the future welfare of this country that this court again resolutely and courageously declare, as Marshall did, that it *has* the power to set aside an act of Congress violative of the Constitution, and that it will not hesitate in executing that power, no matter what the threatened consequences of popular or populistic wrath may be. With the deepest earnestness and confidence we submit that all patriotic Americans must pray that our views shall prevail. We could not magnify the scope of your decision, whatever it may be. No mortal could rise above "the height of this great argument."

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

The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge* v. *Woolsey*, 18 How. 331; *Hawes* v. *Oakland*, 104 U. S. 450.

As in *Dodge* v. *Woolsey*, this bill proceeds on the ground that the defendants would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury.

The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of the case, was explicitly waived on the argument. The relief sought was in respect of voluntary action by the defendant company, and not in respect of the assessment and collection themselves. Under these circumstances, we should not be justified in declining to proceed to judgment upon the merits. *Pelton* v. *National Bank*, 101 U. S. 143, 148; *Cummings* v. *National Bank*, 101 U. S. 153, 157; *Reynes* v. *Dumont*, 130 U. S. 354.

Since the opinion in *Marbury* v. *Madison*, 1 Cranch, 137, 177, was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly. "If," said Chief Justice Marshall, "both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." And the Chief Justice added that the doctrine "that courts must close their eyes on the Constitution, and see only the law," "would subvert the very foundation of all written constitutions." Necessarily the power to declare a law unconstitutional is always exercised with reluctance; but the duty to do so, in a proper case, cannot be declined, and must be discharged in accordance with the deliberate judgment of the tribunal in which the validity of the enactment is directly drawn in question.

The contention of the complainant is:

First. That the law in question, in imposing a tax on the income or rents of real estate, imposes a tax upon the real estate itself; and in imposing a tax on the interest or other income of bonds or other personal property held for the purposes of income or ordinarily yielding income, imposes a tax upon the personal estate itself; that such tax is a direct tax, and void because imposed without regard to the rule of apportionment; and that by reason thereof the whole law is invalidated.

Second. That the law is invalid, because imposing indirect taxes in violation of the constitutional requirement of uniformity; and therein also in violation of the implied limitation upon taxation that all tax laws must apply equally, impartially, and uniformly to all similarly situated. Under the second head it is contended that the rule of uniformity is violated in that the law taxes the income of certain corporations, companies, and associations, no matter how created or organized, at a higher rate than the incomes of individuals or partnerships derived from precisely similar property or business; in that it exempts from the operation of the act and from the burden of taxation, numerous corporations, companies, and associations having similar property and carrying on similar business to those expressly taxed; in that it denies to individuals deriving their income from shares in certain corporations, companies, and associations the benefit of the exemption of $4000 granted to other persons interested in similar property and business; in the exemption of $4000; in the exemption of building and loan associations, savings banks, mutual life, fire, marine, and accident insurance companies, existing solely for the pecuniary profit of their members; these and other exemptions being alleged to be purely arbitrary and capricious, justified by no public purpose, and of such magnitude as to invalidate the entire enactment; and in other particulars.

Third. That the law is invalid so far as imposing a tax upon income received from state and municipal bonds.

The Constitution provides that representatives and direct

taxes shall be apportioned among the several States according to numbers, and that no direct tax shall be laid except according to the enumeration provided for; and also that all duties, imposts and excises shall be uniform throughout the United States.

The men who framed and adopted that instrument had just emerged from the struggle for independence whose rallying cry had been that "taxation and representation go together."

The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression. As Burke declared, in his speech on Conciliation with America, the defenders of the excellence of the English constitution "took infinite pains to inculcate, as a fundamental principle, that, in all monarchies, the people must, in effect, themselves, mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist." The principle was that the consent of those who were expected to pay it was essential to the validity of any tax.

The States were about, for all national purposes embraced in the Constitution, to become one, united under the same sovereign authority, and governed by the same laws. But as they still retained their jurisdiction over all persons and things within their territorial limits, except where surrendered to the general government or restrained by the Constitution, they were careful to see to it that taxation and representation should go together, so that the sovereignty reserved should not be impaired, and that when Congress, and especially the House of Representatives, where it was specifically provided that all revenue bills must originate, voted a tax upon property, it should be with the consciousness, and under the responsibility, that in so doing the tax so voted would proportionately fall upon the immediate constituents of those who imposed it.

More than this, by the Constitution the States not only gave to the Nation the concurrent power to tax persons and

property directly, but they surrendered their own power to levy taxes on imports and to regulate commerce. All the thirteen were seaboard States, but they varied in maritime importance, and differences existed between them in population, in wealth, in the character of property and of business interests. Moreover, they looked forward to the coming of new States from the great West into the vast empire of their anticipations. So when the wealthier States as between themselves and their less favored associates, and all as between themselves and those who were to come, gave up for the common good the great sources of revenue derived through commerce, they did so in reliance on the protection afforded by restrictions on the grant of power.

Thus, in the matter of taxation, the Constitution recognizes the two great classes of direct and indirect taxes, and lays down two rules by which their imposition must be governed, namely: The rule of apportionment as to direct taxes, and the rule of uniformity as to duties, imposts and excises.

The rule of uniformity was not prescribed to the exercise of the power granted by the first paragraph of section eight, to lay and collect taxes, because the rule of apportionment as to taxes had already been laid down in the third paragraph of the second section.

And this view was expressed by Mr. Chief Justice Chase in *The License Tax Cases*, 5 Wall. 462, 471, when he said: "It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words "duties, imposts and excises," such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue.

The first question to be considered is whether a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution. Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes. Nevertheless, it may be admitted that although this definition of direct taxes is *prima facie* correct, and to be applied in the consideration of the question before us, yet that the Constitution may bear a different meaning, and that such different meaning must be recognized. But in arriving at any conclusion upon this point, we are at liberty to refer to the historical circumstances attending the framing and adoption of the Constitution as well as the entire frame and scheme of the instrument, and the consequences naturally attendant upon the one construction or the other.

We inquire, therefore, what, at the time the Constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?

We must remember that the fifty-five members of the constitutional convention were men of great sagacity, fully conversant with governmental problems, deeply conscious of the nature of their task, and profoundly convinced that they were laying the foundations of a vast future empire. "To many in the assembly the work of the great French magistrate on the 'Spirit of Laws,' of which Washington with his own hand had copied an abstract by Madison, was the favorite manual; some of them had made an analysis of all federal governments in ancient and modern times, and a few were well versed in the best English, Swiss, and Dutch writers on government. They had immediately before them the example of Great Britain; and they had a still better school of political wisdom in the republican constitutions of their several States, which many of them had assisted to frame." 2 Bancroft's Hist. Const. 9.

The Federalist demonstrates the value attached by Hamilton,

Madison, and Jay to historical experience, and shows that they had made a careful study of many forms of government. Many of the framers were particularly versed in the literature of the period, Franklin, Wilson, and Hamilton for example. Turgot had published in 1764 his work on taxation, and in 1766 his essay on "The Formation and Distribution of Wealth," while Adam Smith's "Wealth of Nations" was published in 1776. Franklin in 1766 had said upon his examination before the House of Commons that: "An external tax is a duty laid on commodities imported; that duty is added to the first cost and other charges on the commodity, and, when it is offered to sale makes a part of the price. If the people do not like it at that price, they refuse it; they are not obliged to pay it. But an internal tax is forced from the people without their consent, if not laid by their own representatives. The stamp act says, we shall have no commerce, make no exchange of property with each other, neither purchase nor grant, nor recover debts; we shall neither marry nor make our wills, unless we pay such and such sums; and thus it is intended to extort our money from us, or ruin us by the consequences of refusing to pay." 16 Parl. Hist. 144.

They were, of course, familiar with the modes of taxation pursued in the several States. From the report of Oliver Wolcott, when Secretary of the Treasury, on direct taxes, to the House of Representatives, December 14, 1796, his most important state paper, (Am. State Papers, 1 Finance, 431,) and the various state laws then existing, it appears that prior to the adoption of the Constitution nearly all the States imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property, and that, in addition, Massachusetts, Connecticut, Pennsylvania, Delaware, New Jersey, Virginia, and South Carolina assessed their citizens upon their profits from professions, trades, and employments.

Congress under the articles of confederation had no actual operative power of taxation. It could call upon the States for their respective contributions or quotas as previously determined on; but in case of the failure or omission of the States to furnish such contribution, there were no means of

compulsion, as Congress had no power whatever to lay any tax upon individuals. This imperatively demanded a remedy; but the opposition to granting the power of direct taxation in addition to the substantially exclusive power of laying imposts and duties was so strong that it required the convention, in securing effective powers of taxation to the Federal government, to use the utmost care and skill to so harmonize conflicting interests that the ratification of the instrument could be obtained.

The situation and the result are thus described by Mr. Chief Justice Chase in *Lane County* v. *Oregon*, 7 Wall. 71, 76: "The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States. Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: 'The Federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes.' Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of

government. It was exercised by the colonies; and when the colonies became States, both before and after the formation of the confederation, it was exercised by the new governments. Under the Articles of Confederation the government of the United States was limited in the exercise of this power to requisitions upon the States, while the whole power of direct and indirect taxation of persons and property, whether by taxes on polls, or duties on imports, or duties on internal production, manufacture, or use, was acknowledged to belong exclusively to the States, without any other limitation than that of non-interference with certain treaties made by Congress. The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent, or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like

power, *within the limits of the Constitution*, is complete in Congress."

On May 29, 1787, Charles Pinckney presented his draft of a proposed constitution, which provided that the proportion of direct taxes should be regulated by the whole number of inhabitants of every description, taken in the manner prescribed by the legislature; and that no tax should be paid on articles exported from the United States. 1 Elliot, 147, 148.

Mr. Randolph's plan declared "that the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases." 1 Elliot, 143.

On June 15, Mr. Paterson submitted several resolutions, among which was one proposing that the United States in Congress should be authorized to make requisitions in proportion to the whole number of white and other free citizens and inhabitants, including those bound to servitude for a term of years, and three-fifths of all other persons, except Indians not taxed. 1 Elliot, 175, 176.

On the ninth of July the proposition that the legislature be authorized to regulate the number of representatives according to wealth and inhabitants was approved, and on the eleventh it was voted that "in order to ascertain the alterations that may happen in the population and wealth of the several States, a census shall be taken;" although the resolution of which this formed a part was defeated. 5 Elliot (Madison Papers), 288, 295; 1 Elliot, 200.

On July 12, Gouverneur Morris moved to add to the clause empowering the legislature to vary the representation according to the amount of wealth and number of the inhabitants, a proviso that taxation should be in proportion to representation, and, admitting that some objections lay against his proposition, which would be removed by limiting it to direct taxation, since "with regard to indirect taxes on exports and imports, and on consumption, the rule would be inapplicable," varied his motion by inserting the word "direct," whereupon it passed as follows: "Provided, always, that direct taxation

ought to be proportioned to representation." 5 Elliot (Madison Papers), 302.

Amendments were proposed by Mr. Ellsworth and Mr. Wilson to the effect that the rule of contribution by direct taxation should be according to the number of white inhabitants and three-fifths of every other description, and that in order to ascertain the alterations in the direct taxation which might be required from time to time a census should be taken; the word wealth was struck out of the clause, on motion of Mr. Randolph; and the whole proposition, proportionate representation to direct taxation, and both to the white and three-fifths of the colored inhabitants, and requiring a census, was adopted.

In the course of the debates, and after the motion of Mr. Ellsworth that the first census be taken in three years after the meeting of Congress had been adopted, Mr. Madison records: "Mr. King asked what was the precise meaning of direct taxation. No one answered." But Mr. Gerry immediately moved to amend by the insertion of the clause that "from the first meeting of the legislature of the United States until a census shall be taken, all moneys for supplying the public treasury by direct taxation shall be raised from the several States according to the number of their representatives respectively in the first branch." This left for the time the matter of collection to the States. Mr. Langdon objected that this would bear unreasonably hard against New Hampshire, and Mr. Martin said that direct taxation should not be used but in cases of absolute necessity, and then the States would be the best judges of the mode. 5 Elliot (Madison Papers), 451, 453.

Thus was accomplished one of the great compromises of the Constitution, resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the States, regard should be had to their relative wealth, since those who were to be most heavily

taxed ought to have a proportionate influence in the government.

The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that as between State and State such taxation should be proportioned to representation. The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives, observed Mr. Madison in No. 54 of the Federalist, was by no means founded on the same principle, for as to the former it had reference to the proportion of wealth, and although in respect of that it was in ordinary cases a very unfit measure, it "had too recently obtained the general sanction of America, not to have found a ready preference with the convention," while the opposite interests of the States, balancing each other, would produce impartiality in enumeration. By prescribing this rule, Hamilton wrote (Federalist, No. 36) that the door was shut "to partiality or oppression," and "the abuse of this power of taxation to have been provided against with guarded circumspection;" and obviously the operation of direct taxation on every State tended to prevent resort to that mode of supply except under pressure of necessity and to promote prudence and economy in expenditure.

We repeat that the right of the Federal government to directly assess and collect its own taxes, at least until after requisitions upon the States had been made and failed, was one of the chief points of conflict, and Massachusetts, in ratifying, recommended the adoption of an amendment in these words: "That Congress do not lay direct taxes but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then until Congress shall have first made a requisition upon the States to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the States shall think best." 1 Elliot, 322. And in this South Carolina, New York, New Hampshire, and Rhode Island concurred. Id. 325, 326, 329, 336.

Luther Martin, in his well-known communication to the legislature of Maryland in January, 1788, expressed his views thus: "By the power to lay and collect taxes, they may proceed to direct taxation on every individual, either by a capitation tax on their heads, or an assessment on their property. . . . Many of the members, and myself in the number, thought that states were much better judges of the circumstances of their citizens, and what sum of money could be collected from them by direct taxation, and of the manner in which it could be raised with the greatest ease and convenience to their citizens, than the general government could be; and that the general government ought not to have the power of laying direct taxes in any case but in that of the delinquency of a State." 1 Elliot, 344, 368, 369.

Ellsworth and Sherman wrote the governor of Connecticut, September 26, 1787, that it was probable "that the principal branch of revenue will be duties on imports. What may be necessary to be raised by direct taxation is to be apportioned on the several States, according to the number of their inhabitants; and although Congress may raise the money by their own authority, if necessary, yet that authority need not be exercised, if each State will furnish its quota." 1 Elliot, 492.

And Ellsworth, in the Connecticut convention, in discussing the power of Congress to lay taxes, pointed out that all sources of revenue, excepting the impost, still lay open to the States, and insisted that it was "necessary that the power of the general legislature should extend to all the objects of taxation, that government should be able to command all the resources of the country; because no man can tell what our exigencies may be. Wars have now become rather wars of the purse than of the sword. Government must therefore be able to command the whole power of the purse. . . . Direct taxation can go but little way towards raising a revenue. To raise money in this way, people must be provident; they must constantly be laying up money to answer the demands of the collector. But you cannot make people thus provident. If you would do anything to the purpose, you must come in when they are spending, and take a part with them. . . .

All nations have seen the necessity and propriety of raising a revenue by indirect taxation, by duties upon articles of consumption. . . . In England, the whole public revenue is about twelve millions sterling per annum. The land tax amounts to about two millions; the window and some other taxes, to about two millions more. The other eight millions are raised upon articles of consumption. . . . This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who, to secure their impartiality, are to be made independent, will declare it to be void." 2 Elliot, 191, 192, 196.

In the convention of Massachusetts by which the Constitution was ratified, the second section of article I being under consideration, Mr. King said: "It is a principle of this Constitution, that representation and taxation should go hand in hand. . . . By this rule are representation and taxation to be apportioned. And it was adopted, because it was the language of all America. According to the confederation, ratified in 1781, the sums for the general welfare and defence should be apportioned according to the surveyed lands, and improvements thereon, in the several States; but that it hath never been in the power of Congress to follow that rule, the returns from the several States being so very imperfect." 2 Elliot, 36.

Theophilus Parsons observed: "Congress have only a concurrent right with each State, in laying direct taxes, not an exclusive right; and the right of each State to direct taxation is equally extensive and perfect as the right of Congress." Id. 93. And John Adams, Dawes, Sumner, King, and Sedgwick all agreed that a direct tax would be the last source of revenue resorted to by Congress.

In the New York convention, Chancellor Livingston pointed out that when the imposts diminished and the expenses of the government increased, "they must have recourse to direct

taxes; that is, taxes on land, and specific duties." 2 Elliot, 341. And Mr. Jay, in reference to an amendment that direct taxes should not be imposed until requisition had been made and proved fruitless, argued that the amendment would involve great difficulties, and that it ought to be considered that direct taxes were of two kinds, general and specific. Id. 380, 381.

In Virginia, Mr. John Marshall said: "The objects of direct taxes are well understood; they are but few; what are they? Lands, slaves, stock of all kinds, and a few other articles of domestic property. . . . They will have the benefit of the knowledge and experience of the state legislature. They will see in what manner the legislature of Virginia collects its taxes. . . . Cannot Congress regulate the taxes so as to be equal on all parts of the community? Where is the absurdity of having thirteen revenues? Will they clash with, or injure, each other? If not, why cannot Congress make thirteen distinct laws, and impose the taxes on the general objects of taxation in each State, so as that all persons of the society shall pay equally, as they ought?" 3 Elliot, 229, 235. At that time, in Virginia, lands were taxed, and specific taxes assessed on certain specified objects. These objects were stated by Secretary Wolcott to be taxes on lands, houses in towns, slaves, stud horses, jackasses, other horses and mules, billiard tables, four-wheel riding carriages, phaetons, stage wagons, and riding carriages with two wheels; and it was undoubtedly to these objects that the future Chief Justice referred.

Mr. Randolph said: "But in this new Constitution, there is a more just and equitable rule fixed — a limitation beyond which they cannot go. Representatives and taxes go hand in hand; according to the one will the other be regulated. The number of representatives is determined by the number of inhabitants; they have nothing to do but to lay taxes accordingly." 3 Elliot, 121.

Mr. George Nicholas said: "the proportion of taxes is fixed by the number of inhabitants, and not regulated by the extent of territory, or fertility of soil. . . . Each State

will know, from its population, its proportion of any general tax. As it was justly observed by the gentleman over the way, (Mr. Randolph), they cannot possibly exceed that proportion; they are limited and restrained expressly to it. The state legislatures have no check of this kind. Their power is uncontrolled." 3 Elliot, 243, 244.

Mr. Madison remarked that "they will be limited to fix the proportion of each State, and they must raise it in the most convenient and satisfactory manner to the public." 3 Elliot, 255.

From these references, and they might be extended indefinitely, it is clear that the rule to govern each of the great classes into which taxes were divided was prescribed in view of the commonly accepted distinction between them and of the taxes directly levied under the systems of the States. And that the difference between direct and indirect taxation was fully appreciated is supported by the congressional debates after the government was organized.

In the debates in the House of Representatives preceding the passage of the act of Congress to lay "duties upon carriages for the conveyance of persons," approved June 5, 1794, (1 Stat. 373, c. 45,) Mr. Sedgwick said that "a capitation tax, and taxes on land and on property and income generally, were direct charges, as well in the immediate as ultimate sources of contribution. He had considered those, and those only, as direct taxes in their operation and effects. On the other hand, a tax imposed on a specific article of personal property, and particularly if objects of luxury, as in the case under consideration, he had never supposed had been considered a direct tax, within the meaning of the Constitution."

Mr. Dexter observed that his colleague "had stated the meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizens; and that a gentleman from Virginia (Mr. Nicholas) thought the meaning was, that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just,

and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a direct tax, because it was paid without being recompensed by the consumer." Annals 3d Congress, 644, 646.

At a subsequent day of the debate, Mr. Madison objected to the tax on carriages as "an unconstitutional tax," but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as "the duty falls not on the possession but on the use." Annals, 730.

Mr. Madison wrote to Jefferson on May 11, 1794: "And the tax on carriages succeeded, in spite of the Constitution, by a majority of twenty, the advocates for the principle being reinforced by the adversaries to luxuries." "Some of the motives which they decoyed to their support ought to premonish them of the danger. By breaking down the barriers of the Constitution, and giving sanction to the idea of sumptuary regulations, wealth may find a precarious defence in the shield of justice. If luxury, *as such*, is to be taxed, the greatest of all luxuries, says Paine, is a great estate. Even on the present occasion, it has been found prudent to yield to a tax on transfers of stock in the funds and in the banks." 2 Madison's Writings, 14.

But Albert Gallatin in his "Sketch of the Finances of the United States," published in November, 1796, said: "The most generally received opinion, however, is, that by direct taxes in the Constitution, those are meant which are raised on the capital or revenue of the people; by indirect, such as are raised on their expense. As that opinion is in itself rational, and conformable to the decision which has taken place on the subject of the carriage tax, and as it appears important, for the sake of preventing future controversies, which may be not more fatal to the revenue than to the tranquility of the Union, that a fixed interpretation should be generally adopted, it will not be improper to corroborate it by quoting the author from whom the idea seems to have been borrowed." He then quotes from Smith's Wealth of Nations, and continues: "The remarkable coincidence of the clause of the Constitution with this passage in using the word 'capitation' as a generic

expression, including the different species of direct taxes, an acceptation of the word peculiar, it is believed, to Dr. Smith, leaves little doubt that the framers of the one had the other in view at the time, and that they, as well as he, by *direct* taxes, meant those paid *directly* from and falling *immediately* on the revenue; and by *indirect*, those which are paid *indirectly* out of the revenue by falling immediately upon the expense." 3 Gallatin's Writings, (Adams's ed.) 74, 75.

The act provided in its first section "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons, which shall be kept by or for any person for his or her own use, or to be let out to hire or for the conveyance of passengers, the several duties and rates following," and then followed a fixed yearly rate on every coach; chariot; phaeton and coachee; every four-wheel and every two-wheel top carriage; and upon every other two-wheel carriage; varying according to the vehicle.

In *Hylton* v. *United States*, 3 Dall. 171, decided in March, 1796, this court held the act to be constitutional, because not laying a direct tax. Chief Justice Ellsworth and Mr. Justice Cushing took no part in the decision, and Mr. Justice Wilson gave no reasons.

Mr. Justice Chase said that he was inclined to think, but of this he did not "give a judicial opinion," that "the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land;" and that he doubted "whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax." But he thought that "an annual tax on carriages for the conveyance of persons, may be considered as within the power granted to Congress to lay duties. The term duty, is the most comprehensive next to the generical term tax; and practically in Great Britain, (whence we take our general ideas of taxes, duties, imposts, excises, customs, etc.,) embraces taxes on stamps, tolls for passage, etc., and is not confined to taxes on importation only. It seems to me, that a tax on expense is an indirect

tax; and I think, an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumable commodity; and such annual tax on it, is on the expense of the owner."

Mr. Justice Paterson said that "the Constitution declares, that a capitation tax is a direct tax; and, both in theory and practice, a tax on land is deemed to be a direct tax. . . . It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps, the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it; or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. . . . Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax, and taxes on land, is a questionable point. . . . But as it is not before the court, it would be improper to give any decisive opinion upon it." And he concluded: "All taxes on expenses or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax." This conclusion he fortified by reading extracts from Adam Smith on the taxation of consumable commodities.

Mr. Justice Iredell said: "There is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases. Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or a poll tax may be considered of this description. . . . In regard to other articles, there may possibly be considerable doubt. It is sufficient, on the present occasion, for the court to be satisfied, that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment."

It will be perceived that each of the justices, while suggesting doubt whether anything but a capitation or a land tax was a direct tax within the meaning of the Constitution, distinctly avoided expressing an opinion upon that question or

laying down a comprehensive definition, but confined his opinion to the case before the court.

The general line of observation was obviously influenced by Mr. Hamilton's brief for the government, in which he said: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals, or on their whole real or personal estate. All else must of necessity be considered as indirect taxes." 7 Hamilton's Works, (Lodge's ed.) 332.

Mr. Hamilton also argued: "If the meaning of the word 'excise' is to be sought in a British statute, it will be found to include the duty on carriages, which is there considered as an 'excise.' . . . An argument results from this, though not perhaps a conclusive one, yet, where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived." Id. 333.

If the question had related to an income tax, the reference would have been fatal, as such taxes have been always classed by the law of Great Britain as direct taxes.

The above act was to be enforced for two years, but before it expired was repealed as was the similar act of May 28, 1796, c. 37, which expired August 31, 1801, 1 Stat. 478, 482.

By the act of July 14, 1798, when a war with France was supposed to be impending, a direct tax of two millions of dollars was apportioned to the States respectively, in the manner prescribed, which tax was to be collected by officers of the United States and assessed upon "dwelling houses, lands, and slaves," according to the valuations and enumerations to be made pursuant to the act of July 9, 1798, entitled "An act to provide for the valuation of lands and dwelling houses and the enumeration of slaves within the United States." 1 Stat. 597, c. 75; Id. 580, c. 70. Under these acts every dwelling house was assessed according to a prescribed value, and the sum of fifty cents upon every slave enumerated, and the residue of the sum apportioned was directed to be assessed upon the lands within each State according to the valuation

made pursuant to the prior act and at such rate per centum as would be sufficient to produce said remainder. By the act of August 2, 1813, a direct tax of three millions of dollars was laid and apportioned to the States respectively, and reference had to the prior act of July 22, 1813, which provided that whenever a direct tax should be laid by the authority of the United States the same should be assessed and laid "on the value of all lands, lots of ground with their improvements, dwelling houses, and slaves, which several articles subject to taxation shall be enumerated and valued by the respective assessors at the rate each of them is worth in money." 3 Stat. 53, c. 37; Id. 22, c. 16. The act of January 9, 1815, laid a direct tax of six millions of dollars, which was apportioned, assessed, and laid as in the prior act on all lands, lots of grounds with their improvements, dwelling houses, and slaves. These acts are attributable to the war of 1812.

The act of August 5, 1861, (12 Stat. 292, 294, c. 45,) imposed a tax of twenty millions of dollars, which was apportioned and to be levied wholly on real estate, and also levied taxes on incomes whether derived from property or profession, trade or vocation, (12 Stat. 309,) and this was followed by the acts of July 1, 1862, (12 Stat. 432, 473, c. 119;) March 3, 1863, (12 Stat. 713, 723, c. 74;) June 30, 1864, (13 Stat. 223, 281, c. 173;) March 3, 1865, (13 Stat. 469, 479, c. 78;) March 10, 1866, (14 Stat. 4, c. 15;) July 13, 1866, (14 Stat. 98, 137, c. 184;) March 2, 1867, (14 Stat. 471, 477, c. 169;) and July 14, 1870, (16 Stat. 256, c. 255). The differences between the latter acts and that of August 15, 1894, call for no remark in this connection. These acts grew out of the war of the rebellion, and were, to use the language of Mr. Justice Miller, "part of the system of taxing incomes, earnings, and profits adopted during the late war, and abandoned as soon after that war was ended as it could be done safely." *Railroad Company* v. *Collector*, 100 U. S. 595, 598.

From the foregoing it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. That under the state systems of taxation all taxes on

real estate or personal property or the rents or income thereof were regarded as direct taxes. 3. That the rules of apportionment and of uniformity were adopted in view of that distinction and those systems. 4. That whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise. 5. That the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies, and down to August 15, 1894, this expectation has been realized. The act of that date was passed in a time of profound peace, and if we assume that no special exigency called for unusual legislation, and that resort to this mode of taxation is to become an ordinary and usual means of supply, that fact furnishes an additional reason for circumspection and care in disposing of the case.

We proceed then to examine certain decisions of this court under the acts of 1861 and following years, in which it is claimed that this court has heretofore adjudicated that taxes like those under consideration are not direct taxes and subject to the rule of apportionment, and that we are bound to accept the rulings thus asserted to have been made as conclusive in the premises. Is this contention well founded as respects the question now under examination? Doubtless the doctrine of *stare decisis* is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue.

The language of Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, may profitably again be quoted: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

So in *Carroll* v. *Lessee of Carroll*, 16 How. 275, 286, where a statute of the State of Maryland came under review, Mr Justice Curtis said: "If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

Nor is the language of Mr. Chief Justice Taney inapposite, as expressed in *The Genesee Chief*, 12 How. 443, 455, wherein it was held that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted, and the preceding case of *The Thomas Jefferson*, 10 Wheat. 428, was overruled. The Chief Justice said: "It was under the influence of these precedents and this usage, that the case of *The Thomas Jefferson*, 10 Wheat. 428, was decided in this court; and the jurisdiction of the courts of admiralty of the United States declared to be limited to the ebb and flow of the tide. *The Steamboat Orleans* v. *Phoebus*, 11 Pet. 175, afterwards followed this case, merely as a point decided. It is the decision in the case of *The Thomas Jefferson* which mainly embarrasses the court in the present inquiry. We are sensible of the great weight to which it is entitled. But at the same time we are convinced that, if we follow it, we follow an erroneous decision into which the court fell, when the great importance of the question as it now presents itself could not be foreseen; and the subject did not therefore receive that deliberate consideration which at this time would have been given to it by the eminent men who presided here when that case was decided.

For the decision was made in 1825, when the commerce on the rivers of the West and on the Lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day. Moreover, the nature of the questions concerning the extent of the admiralty jurisdiction, which have arisen in this court, were not calculated to call its attention particularly to the one we are now considering."

Manifestly, as this court is clothed with the power, and entrusted with the duty, to maintain the fundamental law of the Constitution, the discharge of that duty requires it not to extend any decision upon a constitutional question if it is convinced that error in principle might supervene.

Let us examine the cases referred to in the light of these observations.

In *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, the validity of a tax which was described as "upon the business of an insurance company" was sustained on the ground that it was "a duty or excise," and came within the decision in *Hylton's case*. The arguments for the insurance company were elaborate and took a wide range, but the decision rested on narrow ground, and turned on the distinction between an excise duty and a tax strictly so termed, regarding the former a charge for a privilege, or on the transaction of business, without any necessary reference to the amount of property belonging to those on whom the charge might fall, although it might be increased or diminished by the extent to which the privilege was exercised or the business done. This was in accordance with *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; and *Hamilton Company* v. *Massachusetts*, 6 Wall. 632; in which cases there was a difference of opinion on the question whether the tax under consideration was a tax on the property and not upon the franchise or privilege. And see *Van Allen* v. *The Assessors*, 3 Wall. 573; *Home Insurance Co.* v. *New York*, 134 U. S. 594; *Pullman Co.* v. *Pennsylvania*, 141 U. S. 18.

In *Veazie Bank* v. *Fenno*, 8 Wall. 533, 544, 546, a tax was laid on the circulation of state banks or national banks paying out the notes of individuals or state banks, and it was

held that it might well be classed under the head of duties, and as falling within the same category as *Soule's case*, 8 Wall. 547. It was declared to be of the same nature as excise taxation on freight receipts, bills of lading, and passenger tickets issued by a railroad company. Referring to the discussions in the convention which framed the Constitution, Mr. Chief Justice Chase observed that what was said there "doubtless shows uncertainty as to the true meaning of the term direct tax; but it indicates also an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies." And in respect of the opinions in *Hylton's case*, the Chief Justice said: "It may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States."

In *National Bank* v. *United States*, 101 U. S. 1, involving the constitutionality of § 3413 of the Revised Statutes, enacting that "every national banking association, state bank, or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation, paid out by them," *Veazie Bank* v. *Fenno* was cited with approval to the point that Congress, having undertaken to provide a currency for the whole country, might, to secure the benefit of it to the people, restrain, by suitable enactments, the circulation as money of any notes not issued under its authority; and Mr. Chief Justice Waite, speaking for the court, said: "The tax thus laid is not on the obligation, but on its use in a particular way."

Scholey v. *Rew*, 23 Wall. 331, was the case of a succession tax which the court held to be "plainly an excise tax or duty" upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in

possession or expectancy." It was like the succession tax of a State, held constitutional in *Mager* v. *Grima*, 8 How. 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. *In re Elwes*, 3 H. & N. 719; *Attorney-General* v. *Sefton*, 2 H. & C. 362; *S. C.* (H. L.) 3 H. & C. 1023; 11 H. L. Cas. 257.

In *Railroad Company* v. *Collector*, 100 U. S. 595, 596, the validity of a tax collected of a corporation upon the interest paid by it upon its bonds was held to be "essentially an excise on the business of the class of corporations mentioned in the statute." And Mr. Justice Miller, in delivering the opinion, said: "As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action."

All these cases are distinguishable from that in hand, and this brings us to consider that of *Springer* v. *United States*, 102 U. S. 586, 602, chiefly relied on and urged upon us as decisive.

That was an action of ejectment brought on a tax deed issued to the United States on sale of defendant's real estate for income taxes. The defendant contended that the deed was void because the tax was a direct tax, not levied in accordance with the Constitution. Unless the tax were wholly invalid, the defence failed.

The statement of the case in the report shows that Springer returned a certain amount as his net income for the particular year, but does not give the details of what his income, gains, and profits consisted in.

The original record discloses that the income was not

derived in any degree from real estate but was in part professional as attorney-at-law and the rest interest on United States bonds. It would seem probable that the court did not feel called upon to advert to the distinction between the latter and the former source of income, as the validity of the tax as to either would sustain the action.

The opinion thus concludes: "Our conclusions are, that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty."

While this language is broad enough to cover the interest as well as the professional earnings, the case would have been more significant as a precedent if the distinction had been brought out in the report and commented on in arriving at judgment, for a tax on professional receipts might be treated as an excise or duty, and therefore indirect, when a tax on the income of personalty might be held to be direct.

Be this as it may, it is conceded in all these cases, from that of Hylton to that of Springer, that taxes on land are direct taxes, and in none of them is it determined that taxes on rents or income derived from land are not taxes on land.

We admit that it may not unreasonably be said that logically, if taxes on the rents, issues and profits of real estate are equivalent to taxes on real estate, and are therefore direct taxes, taxes on the income of personal property as such are equivalent to taxes on such property, and therefore direct taxes. But we are considering the rule *stare decisis*, and we must decline to hold ourselves bound to extend the scope of decisions — none of which discussed the question whether a tax on the income from personalty is equivalent to a tax on that personalty, but all of which held real estate liable to direct taxation only — so as to sustain a tax on the income of realty on the ground of being an excise or duty.

As no capitation, or other direct, tax was to be laid otherwise than in proportion to the population, some other direct tax than a capitation tax (and it might well enough be argued some other tax of the same kind as a capitation tax) must be

referred to, and it has always been considered that a tax upon real estate *eo nomine* or upon its owners in respect thereof is a direct tax within the meaning of the Constitution. But is there any distinction between the real estate itself or its owners in respect of it and the rents or income of the real estate coming to the owners as the natural and ordinary incident of their ownership?

If the Constitution had provided that Congress should not levy any tax upon the real estate of any citizen of any State, could it be contended that Congress could put an annual tax for five or any other number of years upon the rent or income of the real estate? And if, as the Constitution now reads, no unapportioned tax can be imposed upon real estate, can Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?

As according to the feudal law, the whole beneficial interest in the land consisted in the right to take the rents and profits, the general rule has always been, in the language of Coke, that "if a man seized of land in fee by his deed granteth to another the profits of those lands, to have and to hold to him and his heirs, and maketh livery *secundum formam chartæ*, the whole land itself doth pass. For what is the land but the profits thereof?" Co. Lit. 45. And that a devise of the rents and profits or of the income of lands passes the land itself both at law and in equity. 1 Jarm. on Wills, (5th ed.,) *798 and cases cited.

The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment — the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes — and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimpor-

tant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's case*, "land, independently of its produce, is of no value;" and certainly had no thought that direct taxes were confined to unproductive land.

If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court. Thus in *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: "It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Weston* v. *Charleston*, 2 Pet. 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as

such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

So in *Dobbins* v. *Commissioners*, 16 Pet. 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.

In *Almy* v. *California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 Wall. 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S. 566, that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and *Leloup* v. *Mobile*, 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. "The substance, and not the shadow, determines the validity of the exercise of the power." *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688, 698.

Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual

taxpayer in a State having the taxable subject-matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

It is not doubted that property owners ought to contribute in just measure to the expenses of the government. As to the States and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal government, it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other, the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defence and general welfare.

But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed, would have disappeared, and with it one of the bulwarks of private rights and private property.

We are of opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution, and is invalid.

Another question is directly presented by the record as to the validity of the tax levied by the act upon the income derived from municipal bonds. The averment in the bill is that the defendant company owns two millions of the municipal bonds of the city of New York, from which it derives an annual income of $60,000, and that the directors of the company intend to return and pay the taxes on the income so derived.

The Constitution contemplates the independent exercise by

the Nation and the State, severally, of their constitutional powers.

As the States cannot tax the powers, the operations, or the property of the United States, nor the means which they employ to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a State.

A municipal corporation is the representative of the State and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *Collector* v. *Day*, 11 Wall. 113, 124; *United States* v. *Railroad Company*, 17 Wall. 322, 332. In *Collector* v. *Day*, it was adjudged that Congress had no power, even by an act taxing all incomes, to levy a tax upon the salaries of judicial officers of a State, for reasons similar to those on which it had been held in *Dobbins* v. *Commissioners*, 16 Pet. 435, that a State could not tax the salaries of officers of the United States. Mr. Justice Nelson, in delivering judgment, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

This is quoted in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 178, and the opinion continues: "Applying the same principles, this court, in *United States* v. *Railroad Company*, 17 Wall. 322, held that a municipal corporation within a State could not be taxed by the United States on the dividends or interest of stock or bonds held by it in a railroad or canal company, because the municipal corporation was a representative of the State, created by the State to exercise a limited portion of its powers of government, and therefore its revenues, like those of the State itself, were not taxable by the United States. The revenues thus adjudged to be exempt from Federal taxa-

tion were not themselves appropriated to any specific public use, nor derived from property held by the State or by the municipal corporation for any specific public use, but were part of the general income of that corporation, held for the public use in no other sense than all property and income, belonging to it in its municipal character, must be so held. The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from Federal taxation, equally require the exemption of all the property and income of the national government from state taxation."

In *Mercantile Bank* v. *New York*, 121 U. S. 138, 162, this court said: "Bonds issued by the State of New York, or under its authority by its public municipal bodies, are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes."

The question in *Bonaparte* v. *Tax Court*, 104 U. S. 592, was whether the registered public debt of one State, exempt from taxation by that State or actually taxed there, was taxable by another State when owned by a citizen of the latter, and it was held that there was no provision of the Constitution of the United States which prohibited such taxation. The States had not covenanted that this could not be done, whereas, under the fundamental law, as to the power to borrow money, neither the United States on the one hand, nor the States on the other, can interfere with that power as possessed by each and an essential element of the sovereignty of each.

The law under consideration provides "that nothing herein contained shall apply to States, counties or municipalities." It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason

is given by Chief Justice Marshall in *Weston* v. *Charleston*, 2 Pet. 449, 468, where he said: "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution." Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution.

Upon each of the other questions argued at the bar, to wit, 1, Whether the void provisions as to rents and income from real estate invalidated the whole act? 2, Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3, Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? — the justices who heard the argument are equally divided, and, therefore, no opinion is expressed.

The result is that the decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree in favor of the complainant in respect only of the voluntary payment of the tax on the rents and income of the real estate of the defendant company, and of that which it holds in trust, and on the income from the municipal bonds owned or so held by it.

Mr. Justice Field.

I also desire to place my opinion on record upon some of the important questions discussed in relation to the direct and indirect taxes proposed by the income tax law of 1894.

Several suits have been instituted in state and Federal courts, both at law and in equity, to test the validity of the provisions of the law, the determination of which will necessitate careful and extended consideration.

The subject of taxation in the new government which was to be established created great interest in the convention which framed the Constitution, and was the cause of much difference of opinion among its members and earnest contention between the States. The great source of weakness of the confederation was its inability to levy taxes of any kind for the support of its government. To raise revenue it was obliged to make requisitions upon the States, which were respected or disregarded at their pleasure. Great embarrassments followed the consequent inability to obtain the necessary funds to carry on the government. One of the principal objects of the proposed new government was to obviate this defect of the confederacy by conferring authority upon the new government by which taxes could be directly laid whenever desired. Great difficulty in accomplishing this object was found to exist. The States bordering on the ocean were unwilling to give up their right to lay duties upon imports which were their chief source of revenue. The other States, on the other hand, were unwilling to make any agreement for the levying of taxes directly upon real and personal property, the smaller States fearing that they would be overborne by unequal burdens forced upon them by the action of the larger States. In this condition of things great embarrassment was felt by the members of the convention. It was feared at times that the effort to form a new government would fail. But happily a compromise was effected by an agreement that direct taxes should be laid by Congress by *apportioning them among the States according to their representation.* In return for this concession by some of the States, the other States bordering on navigable waters consented to relinquish to the new government the control of duties, imposts, and excises, and the regulation of commerce, with the condition that the duties, imposts, and excises should be *uniform throughout the United States.* So that, on the one

hand, anything like oppression or undue advantage of any one State over the others would be prevented by the apportionment of the direct taxes among the States according to their representation, and, on the other hand, anything like oppression or hardship in the levying of duties, imposts, and excises would be avoided by the provision that they should be uniform throughout the United States. This compromise was essential to the continued union and harmony of the States. It protected every State from being controlled in its taxation by the superior numbers of one or more other States.

The Constitution accordingly, when completed, divided the taxes which might be levied under the authority of Congress into those which were direct and those which were indirect. Direct taxes, in a general and large sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement. In a more restricted sense, they have sometimes been confined to taxes on real property, including the rents and income derived therefrom. Such taxes are conceded to be direct taxes, however taxes on other property are designated, and they are to be apportioned among the States of the Union according to their respective numbers. The second section of article I of the Constitution declares that representatives and direct taxes shall be thus apportioned. It had been a favorite doctrine in England and in the colonies, before the adoption of the Constitution, that taxation and representation should go together. The Constitution prescribes such apportionment among the several States according to their respective numbers, to be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.

Some decisions of this court have qualified or thrown doubts upon the exact meaning of the words "direct taxes." Thus in *Springer* v. *United States*, 102 U. S. 586, it was held that a tax upon gains, profits, and income was an excise or duty and not a direct tax within the meaning of the Constitution, and

that its imposition was not therefore unconstitutional. And in *Pacific Insurance Co.* v. *Soule*, 7 Wall. 433, it was held that an income tax or duty upon the amounts insured, renewed or continued by insurance companies, upon the gross amounts of premiums received by them and upon assessments made by them, and upon dividends and undistributed sums, was not a direct tax but a duty or excise.

In the discussions on the subject of direct taxes in the British Parliament an income tax has been generally designated as a direct tax, differing in that respect from the decision of this court in *Springer* v. *United States*. But whether the latter can be accepted as correct or otherwise, it does not affect the tax upon real property and its rents and income as a direct tax. Such a tax is by universal consent recognized to be a direct tax.

As stated, the rents and income of real property are included in the designation of direct taxes as part of the real property. Such has been the law in England for centuries, and in this country from the early settlement of the colonies; and it is strange that any member of the legal profession should, at this day, question a doctrine which has always been thus accepted by common-law lawyers. It is so declared in approved treatises upon real property and in accepted authorities on particular branches of real estate law, and has been so announced in decisions in the English courts and our own courts without number. Thus, in Washburn on Real Property, it is said that "a devise of the rents and profits of land, or the income of land, is equivalent to a devise of the land itself, and will be for life or in fee, according to the limitation expressed in the devise." Vol. 2, p. 695, § 30.

In Jarman on Wills, Vol. 1, page 740, it is laid down that "a devise of the rents and profits or of the income of land passes the land itself both at law and in equity; a rule, it is said, founded on the feudal law, according to which the whole beneficial interest in the land consisted in the right to take the rents and profits. And since the act 1 Vict. c. 26, such a devise carries the fee simple; but before that act it carried no more than an estate for life unless words of inheritance were

added." Mr. Jarman cites numerous authorities in support of his statement. *South* v. *Alleine*, 1 Salk. 228; *Doe d. Goldin* v. *Lakeman*, 2 B. & Ad. 30, 42; *Johnson* v. *Arnold*, 1 Ves. Sen. 171; *Baines* v. *Dixon*, 1 Ves. Sen. 42; *Mannox* v. *Greener*, L. R. 14 Eq. 456; *Blann* v. *Bell*, 2 De G., M. & G. 781; *Plenty* v. *West*, 6 C. B. 201.

Coke upon Littleton says: "If a man seised of lands in fee by his deed granteth to another the profit of those lands, to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe, doth passe; for what is the land but the profits thereof?" Lib. 1, cap. 1, § 1, p. 4*b*.

In *Doe d. Goldin* v. *Lakeman*, Lord Tenterden, Chief Justice of the Court of King's Bench, to the same effect said: "It is an established rule that a devise of the rents and profits is a devise of the land." And in *Johnson* v. *Arnold*, Lord Chancellor Hardwicke reiterated the doctrine that a "devise of the profits of lands is a devise of the lands themselves."

The same rule is announced in this country; the Court of Errors of New York in *Paterson* v. *Ellis*, 11 Wend. 259, 298, holding that the "devise of the interest or of the rents and profits is a devise of the thing itself, out of which that interest or those rents and profits may issue;" and the Supreme Court of Massachusetts, in *Reed* v. *Reed*, 9 Mass. 372, 374, that "a devise of the income of lands is the same in its effect as a devise of the lands." The same view of the law was expressed in *Anderson* v. *Greble*, 1 Ashmead (Penn.) 136, 138, King, the president of the court, stating: "I take it to be a well-settled rule of law, that by a devise of the rent, profits, and income of land, the land itself passes." Similar adjudications might be repeated almost indefinitely. One may have the reports of the English courts examined for several centuries without finding a single decision or even a dictum of their judges in conflict with them. And what answer do we receive to these adjudications? Those rejecting them furnish no proof that the framers of the Constitution did not follow them, as the great body of the people of the country then did. An incident which occurred in this court and room twenty

years ago, may have become a precedent. To a powerful argument then being made by a distinguished counsel, on a public question, one of the judges exclaimed that there was a conclusive answer to his position and that was that the court was of a different opinion. Those who decline to recognize the adjudications cited may likewise consider that they have a conclusive answer to them in the fact that they also are of a different opinion. I do not think so. The law as expounded for centuries cannot be set aside or disregarded because some of the judges are now of a different opinion from those who, a century ago, followed it in framing our Constitution.

Hamilton, speaking on the subject, asks: "What, in fact, is property but a fiction, without the beneficial use of it?" And adds: "In many cases, indeed, the *income or annuity* is the property itself." 3 Hamilton's Works, Putnam's ed. 34.

It must be conceded that whatever affects any element that gives an article its value, in the eye of the law affects the article itself.

In *Brown* v. *Maryland*, 12 Wheat. 419, 444, it was held that a tax on the occupation of an importer is the same as a tax on his imports, and as such was invalid. It was contended that the State might tax occupations and that this was nothing more, but the court said, by Chief Justice Marshall (p. 444): "It is impossible to conceal from ourselves, that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Weston* v. *Charleston*, 2 Pet. 449, it was held that a tax upon stock issued for loans to the United States was a tax upon the loans themselves and equally invalid. In *Dobbins* v. *Commissioners*, 16 Pet. 435, it was held that the salary of an officer of the United States could not be taxed, if the office was itself exempt. In *Almy* v. *California*, 24 How. 169, it was held that a duty on a bill of lading was the same thing as a duty on the article transported. In *Cook* v. *Pennsylvania*, 97 U. S. 566, it was held that a tax upon the amount

of sales of goods made by an auctioneer was a tax upon the goods sold. In *Philadelphia & Southern Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, and *Leloup* v. *Mobile*, 127 U. S. 640, 648, it was held that a tax upon the income received from interstate commerce was a tax upon the commerce itself, and equally unauthorized. The same doctrine was held in *People* v. *Commissioners of Taxes*, 90 N. Y. 63; *State Freight Tax*, 15 Wall. 232, 274; *Welton* v. *Missouri*, 91 U. S. 275, 278, and in *Fargo* v. *Michigan*, 121 U. S. 230.

The law, so far as it imposes a tax upon land by taxation of the rents and income thereof, must therefore fail, as it does not follow the rule of apportionment. The Constitution is imperative in its directions on this subject, and admits of no departure from them.

But the law is not invalid merely in its disregard of the rule of apportionment of the direct tax levied. There is another and an equally cogent objection to it. In taxing incomes other than rents and profits of real estate it disregards the rule of uniformity which is prescribed in such cases by the Constitution. The eighth section of the first article of the Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; *but all duties, imposts, and excises shall be uniform throughout the United States.*" Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them. The taxes created by the law under consideration as applied to savings banks, insurance companies, whether of fire, life, or marine, to building or other associations, or to the conduct of any other kind of business, are excise taxes, and fall within the requirement, so far as they are laid by Congress, that they must be uniform throughout the United States.

The uniformity thus required is the uniformity throughout the United States of the duty, impost, and excise levied. That is, the tax levied cannot be one sum upon an article at one

place and a different sum upon the same article at another place. The duty received must be the same at all places throughout the United States, proportioned to the quantity of the article disposed of or the extent of the business done. If, for instance, one kind of wine or grain or produce has a certain duty laid upon it proportioned to its quantity in New York, it must have a like duty proportioned to its quantity when imported at Charleston or San Francisco, or if a tax be laid upon a certain kind of business proportioned to its extent at one place, it must be a like tax on the same kind of business proportioned to its extent at another place. In that sense the duty must be uniform throughout the United States.

It is contended by the government that the Constitution only requires an uniformity geographical in its character. That position would be satisfied if the same duty were laid in all the States, however variant it might be in different places of the same State. But it could not be sustained in the latter case without defeating the equality, which is an essential element of the uniformity required, so far as the same is practicable.

In *United States* v. *Singer*, 15 Wall. 111, 121, a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said: "The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; *that is, it is assessed equally upon all manufacturers of spirits wherever they are.* The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In the *Head Money Cases*, 112 U. S. 580, 594, a tax was imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, and it was objected that the tax was not levied by any rule of uniformity, but the court, by Justice Miller, replied: "The tax is uniform when

it operates with the same force and effect in *every* place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this, by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed." In the decision in that case, in the Circuit Court, 18 Fed. Rep. 135, 139, Mr. Justice Blatchford, in addition to pointing out that "the act was not passed in the exercise of the power of laying taxes," but was a regulation of commerce, used the following language: "Aside from this, the tax applies uniformly to all steam and sail vessels coming to all ports in the United States, from all foreign ports, with all alien passengers. The tax being a license tax on the business, *the rule of uniformity is sufficiently observed if the tax extends to all persons of the class selected by Congress; that is, to all owners of such vessels.* Congress has the exclusive power of selecting the class. It has regulated that particular branch of commerce which concerns the bringing of alien passengers," and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified and taxed as classed, by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies.

Mr. Justice Miller, in his lectures on the Constitution, (N. Y. 1891) pp. 240, 241, said of taxes levied by Congress: "The tax must be uniform on the *particular article;* and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the *same percentage* over all the United States. That is manifestly the meaning of this word, as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenues, should not be allowed to discriminate between the *articles* which it should tax." In discussing generally the requirement of uniformity found in state constitutions, he said: "The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word

'uniform,' which has been adopted, holding that the uniformity must *refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.*"

One of the learned counsel puts it very clearly when he says that the correct meaning of the provisions requiring duties, imposts, and excises to be "uniform throughout the United States" is, that the law imposing them should "have an equal *and* uniform application in every part of the Union."

If there were any doubt as to the intention of the States to make the grant of the right to impose indirect taxes subject to the condition that such taxes shall be in all respects uniform and impartial, that doubt, as said by counsel, should be resolved in the interest of justice, in favor of the taxpayer.

Exemptions from the operation of a tax always create inequalities. Those not exempted must, in the end, bear an additional burden or pay more than their share. A law containing arbitrary exemptions can in no just sense be termed uniform. In my judgment, Congress has rightfully no power, at the expense of others, owning property of a like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine, and accident insurance companies, formed under the laws of the various States, which advance no national purpose or public interest and exist solely for the pecuniary profit of their members.

Where property is exempt from taxation, the exemption, as has been justly stated, must be supported by some consideration that the public, and not private, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretence that it is the exercise of the discretion of the legislature to exempt them. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U. S. 487; *Barbour* v. *Louisville Board of Trade*, 82 Kentucky, 645, 654, 655; *Lexington* v. *McQuillan's Heirs*, 9 Dana, 513, 516, 517; and *Sutton's Heirs* v. *Louisville*, 5 Dana, 28, 31.

Cooley, in his treatise on Taxation, (2d ed. 215,) justly

observes that: "It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretence to equality; it would lack the semblance of legitimate tax legislation."

The income tax law under consideration is marked by discriminating features which affect the whole law. It discriminates between those who receive an income of four thousand dollars and those who do not. It thus vitiates, in my judgment, by this arbitrary discrimination, the whole legislation. Hamilton says in one of his papers, (the Continentalist,) "the genius of liberty reprobates everything arbitrary or discretionary in taxation. It exacts that every man, by a definite and general rule, should know what proportion of his property the State demands; whatever liberty we may boast of in theory, it cannot exist in fact while [arbitrary] assessments continue." 1 Hamilton's Works, ed. 1885, 270. The legislation, in the discrimination it makes, is class legislation. Whenever a distinction is made in the burdens a law imposes or in the benefits it confers on any citizens by reason of their birth, or wealth, or religion, it is class legislation, and leads inevitably to oppression and abuses, and to general unrest and disturbance in society. It was hoped and believed that the great amendments to the Constitution which followed the late civil war had rendered such legislation impossible for all future time. But the objectionable legislation reappears in the act under consideration. It is the same in essential character as that of the English income statute of 1691, which taxed Protestants at a certain rate, Catholics, as a class, at double the rate of Protestants, and Jews at another and separate rate. Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose he will have a greater regard for the government and more self-respect

for himself feeling that though he is poor in fact, he is not a pauper of his government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune.

There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature. They differ in no essential characteristic in their business from "all other corporations, companies, or associations doing business for profit in the United States." Act of August 15, 1894, c. 349, § 32.

A few words as to some of them, the extent of their capital and business, and of the exceptions made to their taxation:

1st. *As to mutual savings banks.* — Under income tax laws prior to 1870, these institutions were specifically taxed. Under the new law, certain institutions of this class are exempt, provided the shareholders do not participate in the profits, and interest and dividends are only paid to the depositors. No limit is fixed to the property and income thus exempted — it may be $100,000 or $100,000,000. One of the counsel engaged in this case read to us during the argument from the report of the Comptroller of the Currency, sent by the President to Congress December 3, 1894, a statement to the effect that the total number of mutual savings banks exempted was 646, and the total number of stock savings banks was 378, and showed that they did the same character of business and took in the money of depositors for the purpose of making it bear interest, with profit upon it in the same way; and yet the 646 are exempt and the 378 are taxed. He also showed that the total deposits in savings banks were $1,748,000,000.

2d. *As to mutual insurance corporations.* — These companies were taxed under previous income tax laws. They do business somewhat differently from other companies; but they conduct a strictly private business in which the public has no interest, and have been often held not to be benevolent or charitable organizations.

The sole condition for exempting them under the present law is declared to be that they make loans to or divide their profits among their members, or depositors or policy-holders. Every corporation is carried on, however, for the benefit of its members, whether stockholders, or depositors, or policy-holders. If it is carried on for the benefit of its shareholders, every dollar of income is taxed; if it is carried on for the benefit of its policy-holders or depositors, who are but another class of shareholders, it is wholly exempted. In the State of New York the act exempts the income from over $1,000,000,000 of property of these companies. The leading mutual life insurance company has property exceeding $204,000,000 in value, the income of which is wholly exempted. The insertion of the exemption is stated by counsel to have saved that institution fully $200,000 a year over other insurance companies and associations, having similar property and carrying on the same business, simply because such other companies or associations divide their profits among their shareholders instead of their policy-holders.

3d. *As to building and loan associations.* — The property of these institutions is exempted from taxation to the extent of millions. They are in no sense benevolent or charitable institutions, and are conducted solely for the pecuniary profit of their members. Their assets exceed the capital stock of the national banks of the country. One, in Dayton, Ohio, has a capital of $10,000,000, and Pennsylvania has $65,000,000 invested in these associations. The census report submitted to Congress by the President, May 1, 1894, shows that their property in the United States amounts to over $628,000,000. Why should these institutions and their immense accumulations of property be singled out for the special favor of Congress and be freed from their just, equal, and proportionate share of taxation when others engaged under different names, in similar business, are subjected to taxation by this law? The aggregate amount of the saving to these associations, by reason of their exemption, is over $600,000 a year. If this statement of the exemptions of corporations under the law of Congress, taken from the carefully prepared briefs of counsel

and from reports to Congress, will not satisfy parties interested in this case that the act in question disregards, in almost every line and provision, the rule of uniformity required by the Constitution, then "neither will they be persuaded, though one rose from the dead." That there should be any question or any doubt on the subject surpasses my comprehension. Take the case of mutual savings banks and stock savings banks. They do the same character of business, and in the same way use the money of depositors, loaning it at interest for profit, yet 646 of them, under the law before us, are exempt from taxation on their income and 378 are taxed upon it. How the tax on the income of one kind of these banks can be said to be laid upon any principle of uniformity, when the other is exempt from all taxation, I repeat, surpasses my comprehension.

But there are other considerations against the law which are equally decisive. They relate to the uniformity and equality required in all taxation, national and State; to the invalidity of taxation by the United States of the income of the bonds and securities of the States and of their municipal bodies; and the invalidity of the taxation of the salaries of the judges of the United States courts.

As stated by counsel: "There is no such thing in the theory of our national government as unlimited power of taxation in Congress. There are limitations," as he justly observes, "of its powers arising out of the essential nature of all free governments; there are reservations of individual rights, without which society could not exist, and which are respected by every government. The right of taxation is subject to these limitations." *Loan Association* v. *Topeka*, 20 Wall. 655, and *Parkersburg* v. *Brown*, 106 U. S. 487.

The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.

This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon

similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing that the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful.

There was another position taken in this case which is not the least surprising to me of the many advanced by the upholders of the law, and that is, that if this court shall declare that the exemptions and exceptions from taxation, extended to the various corporations mentioned, fire, life, and marine insurance companies, and to mutual savings banks, building, and loan associations, violate the requirement of uniformity, and are therefore void, the tax as to such corporations can be enforced, and that the law will stand as though the exemptions had never been inserted. This position does not, in my judgment, rest upon any solid foundation of law or principle. The abrogation or repeal of an unconstitutional or illegal provision does not operate to create and give force to any enactment or part of an enactment which Congress has not sanctioned and promulgated. Seeming support of this singular position is attributed to the decision of this court in *Huntington* v. *Worthen*, 120 U. S. 97. But the examination of that case will show that it does not give the slightest sanction to such a doctrine. There the constitution of Arkansas had provided that all property subject to taxation should be taxed according to its value, to be ascertained in such manner as the general assembly should direct, making the same equal and uniform throughout the State, and certain public property was declared by statute to be exempt from taxation, which statute was subsequently held to be unconstitutional. The court decided that the unconsti-

tutional part of the enactment, which was separable from the remainder, could be omitted and the remainder enforced; a doctrine undoubtedly sound, and which has never, that I am aware of, been questioned. But that is entirely different from the position here taken, that exempted things can be taxed by striking out their exemption.

The law of 1894 says there shall be assessed, levied, and collected, "*except as herein otherwise provided*," two per centum of the amount, etc. If the exceptions are stricken out there is nothing to be assessed and collected except what Congress has otherwise affirmatively ordered. Nothing less can have the force of law. This court is impotent to pass any law on the subject. It has no legislative power. I am unable, therefore, to see how we can, by declaring an exemption or exception invalid, thereby give effect to provisions as though they were never exempted. The court by declaring the exemptions invalid cannot by any conceivable ingenuity give operative force as enacting clauses to the exempting provisions. That result is not within the power of man.

The law is also invalid in its provisions authorizing the taxation of the bonds and securities of the States and of their municipal bodies. It is objected that the cases pending before us do not allege any threatened attempt to tax the bonds or securities of the State, but only of municipal bodies of the States. The law applies to both kinds of bonds and securities, those of the States as well as those of municipal bodies, and the law of Congress, we are examining, being of a public nature, affecting the whole community, having been brought before us and assailed as unconstitutional in some of its provisions, we are at liberty, and I think it is our duty to refer to other unconstitutional features brought to our notice in examining the law, though the particular points of their objection may not have been mentioned by counsel. These bonds and securities are as important to the performance of the duties of the State as like bonds and securities of the United States are important to the performance of their duties, and are as exempt from the taxation of the United States as the former are exempt from the taxation of the States. As stated by Judge

Cooley in his work on the principles of constitutional law: "The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact, that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the Federal government does not therefore extend to the means or agencies through or by the employment of which the States perform their essential functions, since, if these were within its reach, they might be embarrassed, and perhaps wholly paralyzed, by the burdens it should impose. 'That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control, — are propositions not to be denied.' It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon state powers, and by implication forbids them."

The Internal Revenue Act of June 30, 1864, in section 122, provided that railroad and certain other companies specified, indebted for money for which bonds had been issued, upon which interest was stipulated to be paid, should be subject to pay a tax of five per cent on the amount of all such interest, to be paid by the corporations and by them deducted from the interest payable to the holders of such bonds; and the question arose in *United States* v. *Railroad Co.*, 17 Wall. 322, 327, whether the tax imposed could be thus collected from the revenues of a city owning such bonds. This court answered the question as follows: "There is no dispute about the gen-

eral rules of the law applicable to this subject. The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are excepted from the general power. The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the Federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted. Hence, the beginning of such taxation is not allowed on the one side, is not claimed on the other."

And again: "A municipal corporation like the city of Baltimore is a representative not only of the State, but it is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation."

In *Collector* v. *Day*, 11 Wall. 113, 124, the court, speaking by Mr. Justice Nelson, said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

According to the census reports the bonds and securities of the States amount to the sum of $1,243,268,000, on which the income or interest exceeds the sum of $65,000,000 per annum, and the annual tax of two per cent upon this income or interest would be $1,300,000.

The law of Congress is also invalid in that it authorizes a tax upon the salaries of the judges of the courts of the United States, against the declaration of the Constitution that their compensation shall not be diminished during their continuance in office. The law declares that a tax of two per cent shall be assessed, levied, and collected and paid annually upon the gains, profits, and income received in the preceding calendar year, by every citizen of the United States, whether said gains, profits, or income be derived from any kind of property, rents, interest, dividends, or *salaries*, or from any profession, trade, employment, or vocation, carried on within the United States or elsewhere, or from any source whatever. The annual salary of a justice of the Supreme Court of the United States is ten thousand dollars, and this act levies a tax of two per cent on six thousand dollars of this amount, and imposes a penalty upon those who do not make the payment, or return the amount for taxation.

The same objection, as presented to a consideration of the objection to the taxation of the bonds and securities of the States, as not being specially taken in the cases before us, is urged here to a consideration of the objection to the taxation by the law of the salaries of the judges of the courts of the United States. The answer given to that objection may be also given to the present one. The law of Congress being of a public nature, affecting the interests of the whole community, and attacked for its unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of counsel, that the Constitution may not be violated from the carelessness or oversight of counsel in any particular. See *O'Neil* v. *Vermont*, 144 U. S. 323, 359.

Besides, there is a duty which this court owes to the one

hundred other United States judges who have small salaries, and who having their compensation reduced by the tax may be seriously affected by the law.

The Constitution of the United States provides in the first section of article III that: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, *which shall not be diminished during their continuance in office.*" The act of Congress under discussion imposes, as said, a tax on six thousand dollars of this compensation, and therefore diminishes, each year, the compensation provided for every justice. How a similar law of Congress was regarded thirty years ago may be shown by the following incident in which the justices of this court were assessed at three per cent upon their salaries. Against this Chief Justice Taney protested in a letter to Mr. Chase, then Secretary of the Treasury, appealing to the above article in the Constitution, and adding: "If it [his salary] can be diminished to that extent by the means of a tax, it may, in the same way, be reduced from time to time, at the pleasure of the legislature." He explained in his letter the object of the constitutional inhibition thus: —

"The judiciary is one of the three great departments of the government created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that require it to be perfectly independent of the other departments. And in order to place it beyond the reach, and above even the suspicion, of any such influence, the power to reduce their compensation is expressly withheld from Congress *and excepted from their powers of legislation.*

"Language could not be more plain than that used in the Constitution. It is, moreover, one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value

without a judiciary to uphold and maintain them which was free from every influence, direct or indirect, that might by possibility, in times of political excitement, warp their judgment.

"Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges as unconstitutional and void."

This letter of Chief Justice Taney was addressed to Mr. Chase, then Secretary of the Treasury and afterwards the successor of Mr. Taney as Chief Justice. It was dated February 16, 1863, but as no notice was taken of it, on the 10th of March following, at the request of the Chief Justice, the Court ordered that his letter to the Secretary of the Treasury be entered on the records of the court, and it was so entered. See Appendix, *post*, 701. And in the Memoir of the Chief Justice it is stated that the letter was, by this order, preserved "to testify to future ages that in war, no less than in peace, Chief Justice Taney strove to protect the Constitution from violation."

Subsequently, in 1869, and during the administration of President Grant, when Mr. Boutwell was Secretary of the Treasury and Mr. Hoar, of Massachusetts, was Attorney General, there were in several of the statutes of the United States, for the assessment and collection of internal revenue, provisions for taxing the salaries of all civil officers of the United States, which included, in their literal application, the salaries of the President and of the judges of the United States. The question arose whether the law which imposed such a tax upon them was constitutional. The opinion of the Attorney General thereon was requested by the Secretary of the Treasury. The Attorney General, in reply, gave an elaborate opinion advising the Secretary of the Treasury that no income tax could be lawfully assessed and collected upon the salaries of those officers who were in office at the time the statute imposing the tax was passed, holding on this subject the views expressed by Chief Justice Taney. His opinion is published in volume XIII of the Opinions of the Attorneys General, at page 161. I am informed that it has been fol-

lowed ever since without question by the department supervising or directing the collection of the public revenue.

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. If the provisions of the Constitution can be set aside by an act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness.

"If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present government will commence." If the purely arbitrary limitation of $4000 in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of "walking delegates" may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitution which require its taxation, if imposed by direct taxes, to be apportioned among the States according to their representation, and if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

I am of opinion that the whole law of 1894 should be declared void and without any binding force — that part which relates to the tax on the rents, profits or income from real estate, that is, so much as constitutes part of the direct tax, because, not imposed by the rule of apportionment according

to the representation of the States, as prescribed by the Constitution — and that part which imposes a tax upon the bonds and securities of the several States, and upon the bonds and securities of their municipal bodies, and upon the salaries of judges of the courts of the United States, as being beyond the power of Congress; and that part which lays duties, imposts, and excises, as void in not providing for the uniformity required by the Constitution in such cases.

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

My brief judicial experience has convinced me that the custom of filing long dissenting opinions is one "more honored in the breach than in the observance." The only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusions of courts of last resort. This consideration would impel me to content myself with simply recording my dissent in the present case, were it not for the fact that I consider that the result of the opinion of the court just announced is to overthrow a long and consistent line of decisions, and to deny to the legislative department of the government the possession of a power conceded to it by universal consensus for one hundred years, and which has been recognized by repeated adjudications of this court. The issues presented are as follows:

Complainant, as a stockholder in a corporation, avers that the latter will voluntarily pay the income tax, levied under the recent act of Congress; that such tax is unconstitutional; and that its voluntary payment will seriously affect his interest by defeating his right to test the validity of the exaction, and also lead to a multiplicity of suits against the corporation. The prayer of the bill is as follows: First. That it may be decreed that the provisions known as "The Income Tax Law," incorporated in the act of Congress, passed August 15, 1894, are unconstitutional, null, and void. Second. That the defendant be restrained from voluntarily complying with the provisions of that act by making its returns and statements,

and paying the tax. The bill, therefore, presents two substantial questions for decision: the right of the plaintiff to relief in the form in which he claims it; and his right to relief on the merits.

The decisions of this court hold that the collection of a tax levied by the government of the United States, will not be restrained by its courts. *Cheatham* v. *United States*, 92 U. S. 85; *Snyder* v. *Marks*, 109 U. S. 189. See also *Elliott* v. *Swartwout*, 10 Pet. 137; *City of Philadelphia* v. *The Collector*, 5 Wall. 720; *Hornthall* v. *The Collector*, 9 Wall. 560. The same authorities have established the rule that the proper course, in a case of illegal taxation, is to pay the tax under protest or with notice of suit, and then bring an action against the officer who collected it. The statute law of the United States, in express terms, gives a party who has paid a tax under protest the right to sue for its recovery. Rev. Stat. § 3226.

The act of 1867 forbids the maintenance of any suit "for the purpose of restraining the assessment or collection of any tax." The provisions of this act are now found in Rev. Stat. § 3224.

The complainant is seeking to do the very thing which, according to the statute and the decisions above referred to, may not be done. If the corporator cannot have the collection of the tax enjoined it seems obvious that he cannot have the corporation enjoined from paying it, and thus do by indirection what he cannot do directly.

It is said that such relief as is here sought has been frequently allowed. The cases relied on are *Dodge* v. *Woolsey*, 18 How. 331, and *Hawes* v. *Oakland*, 104 U. S. 450. Neither of these authorities, I submit, is in point. In *Dodge* v. *Woolsey*, the main question at issue was the validity of a state tax, and that case did not involve the act of Congress to which I have referred. *Hawes* v. *Oakland* was a controversy between a stockholder and a corporation, and had no reference whatever to taxation.

The complainant's attempt to establish a right to relief upon the ground that this is not a suit to enjoin the tax, but

one to enjoin the corporation from paying it, involves the fallacy already pointed out — that is, that a party can exercise a right indirectly which he cannot assert directly — that he can compel his agent, through process of this court, to violate an act of Congress.

The rule which forbids the granting of an injunction to restrain the collection of a tax is founded on broad reasons of public policy and should not be ignored. In *Cheatham* v. *United States*, 92 U. S. 85, 89, which involved the validity of an income tax levied under an act of Congress prior to the one here in issue, this court, through Mr. Justice Miller, said:

"If there existed in the courts, state or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary. *Dows* v. *The City of Chicago*, 11 Wall. 108. While a free course of remonstrance and appeal is allowed within the departments before the money is finally exacted, the general government has wisely made the payment of the tax claimed, whether of customs or of internal revenue, a condition precedent to a resort to the courts by the party against whom the tax is assessed. In the internal revenue branch it has further prescribed that no such suit shall be brought until the remedy by appeal has been tried; and, if brought after this, it must be within six months after the decision on the appeal. We regard this as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is not a hard condition. Few governments have conceded such a right on any condition. If the compliance with this condition requires the party aggrieved to pay the money, he must do it." 92 U. S. 85, 89.

Again, in *Railroad Tax Cases*, 92 U. S. 575, 613, the court said: "That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense

of Congress of the evils to be feared if courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. See *Cheatham* v. *Norvell*, decided at this term; *Nicoll* v. *United States*, 7 Wall. 122; *Dows* v. *Chicago*, 11 Wall. 108."

The contention that a right to equitable relief arises from the fact that the corporator is without remedy unless such relief be granted him is, I think, without foundation. This court has repeatedly said that the illegality of a tax is not ground for the issuance of an injunction against its collection if there be an adequate remedy at law open to the payer. *Dows* v. *City of Chicago*, 11 Wall. 108; *Hannewinkle* v. *Georgetown*, 15 Wall. 547; *Board of Liquidation* v. *McComb*, 92 U. S. 531; *State Railroad Tax Cases*, 92 U. S. 575; *Union Pacific Railway* v. *Cheyenne*, 113 U. S. 516; *Milwaukee* v. *Koeffler*, 116 U. S. 219; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339 — as in the case where the state statute, by which the tax is imposed, allows a suit for its recovery after payment under protest. *Shelton* v. *Platt*, 139 U. S. 591; *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658.

The decision here is, that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States, though it has denied the existence of such a remedy in the case of a tax levied by a State.

Will it be said that, although a stockholder cannot have a corporation enjoined from paying a state tax where the state statute gives him the right to sue for its recovery, yet when the United States not only gives him such right, but, in addition, forbids the issue of an injunction to prevent the payment of Federal taxes, the court will allow to the stock-

holder a remedy against the United States tax which it refuses against the state tax?

The assertion that this is only a suit to prevent the voluntary payment of the tax suggests that the court may, by an order operating directly upon the defendant corporation, accomplish a result which the statute manifestly intended should not be accomplished by suit in any court. A final judgment forbidding the corporation from paying the tax will have the effect to prevent its collection, for it could not be that the court would permit a tax to be collected from a corporation which it had enjoined from paying. I take it to be beyond dispute that the collection of the tax in question cannot be restrained by any proceeding or suit, whatever its form, directly against the officer charged with the duty of collecting such tax. Can the statute be evaded, in a suit between a corporation and a stockholder, by a judgment forbidding the former from paying the tax, the collection of which cannot be restrained by suit in any court? Suppose, notwithstanding the final judgment just rendered, the collector proceeds to collect from the defendant corporation the taxes which the court declares, in this suit, cannot be legally assessed upon it. If that final judgment is sufficient in law to justify resistance against such collection, then we have a case in which a suit has been maintained to restrain the *collection* of taxes. If such judgment does not conclude the collector, who was not a party to the suit in which it was rendered, then it is of no value to the plaintiff. In other words, no form of expression can conceal the fact that the real object of this suit is to prevent the collection of taxes imposed by Congress, notwithstanding the express statutory requirement that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Either the decision of the constitutional question is necessary, or it is not. If it is necessary, then the court, by way of granting equitable relief, does the very thing which the act of Congress forbids. If it is unnecessary, then the court decides the act of Congress here asserted unconstitutional, without being obliged to do so by the requirements of the case before it.

This brings me to the consideration of the merits of the cause.

The constitutional provisions respecting Federal taxation are four in number, and are as follows:

1. "Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years and excluding Indians not taxed, three-fifths of all other persons." Art. I, sec. 2, clause 3. (The Fourteenth Amendment modified this provision, so that the whole number of persons in each State should be counted, "Indians not taxed" excluded.)

2. "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." Art. I, sec. 8, clause 1.

3. "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Art. I, sec. 9, clause 4.

4. "No tax or duty shall be laid on articles exported from any State." Art. I, sec. 9, clause 5.

It has been suggested that, as the above provisions ordain the apportionment of direct taxes, and authorize Congress to "lay and collect taxes, duties, imposts, and excises," therefore, there is a class of taxes which are neither direct, and are not duties, imposts, and excises, and are exempt from the rule of apportionment on the one hand or of uniformity on the other. The soundness of this suggestion need not be discussed, as the words, "duties, imposts, and excises," in conjunction with the reference to direct taxes, adequately convey all power of taxation to the Federal government.

It is not necessary to pursue this branch of the argument, since it is unquestioned that the provisions of the Constitution vest in the United States plenary powers of taxation, that is, all the powers which belong to a government as such, except

that of taxing exports. The court in this case so says, and quotes approvingly the language of this court, speaking through Mr. Chief Justice Chase, in *License Tax Cases*, 5 Wall. 462, 471, as follows:

"It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited and thus only, it reaches every subject and may be exercised at discretion."

In deciding, then, the question of whether the income tax violates the Constitution, we have to determine not the existence of a power in Congress, but whether an admittedly unlimited power to tax (the income tax not being a tax on exports) has been used according to the restrictions as to methods for its exercise, found in the Constitution. Not power, it must be borne in mind, but the manner of its use is the only issue presented in this case. The limitations in regard to the mode of direct taxation imposed by the Constitution are that capitation and other direct taxes shall be apportioned among the States according to their respective numbers, while duties, imposts, and excises must be uniform throughout the United States. The meaning of the word "uniform" in the Constitution need not be examined, as the court is divided upon that subject, and no expression of opinion thereon is conveyed or intended to be conveyed in this dissent.

In considering whether we are to regard an income tax as "direct" or otherwise, it will, in my opinion, serve no useful purpose, at this late period of our political history, to seek to ascertain the meaning of the word "direct" in the Constitution by resorting to the theoretical opinions on taxation found in the writings of some economists prior to the adoption of the Constitution or since. These economists teach that the question of whether a tax is direct or indirect, depends not upon whether it is directly levied upon a person but upon whether, when so levied, it may be ultimately shifted from the person

in question to the consumer, thus becoming, while direct in the method of its application, indirect in its final results, because it reaches the person who really pays it only indirectly. I say it will serve no useful purpose to examine these writers, because whatever may have been the value of their opinions as to the economic sense of the word "direct," they cannot now afford any criterion for determining its meaning in the Constitution, inasmuch as an authoritative and conclusive construction has been given to that term, as there used by an interpretation adopted shortly after the formation of the Constitution by the legislative department of the government, and approved by the Executive; by the adoption of that interpretation from that time to the present without question, and its exemplification and enforcement in many legislative enactments, and its acceptance by the authoritative text-writers on the Constitution; by the sanction of that interpretation, in a decision of this court rendered shortly after the Constitution was adopted; and finally by the repeated reiteration and affirmance of that interpretation, so that it has become imbedded in our jurisprudence, and therefore may be considered almost a part of the written Constitution itself.

Instead, therefore, of following counsel in their references to economic writers and their discussion of the motives and thoughts which may or may not have been present in the minds of some of the framers of the Constitution, as if the question before us were one of first impression, I shall confine myself to a demonstration of the truth of the propositions just laid down.

By the act of June 5, 1794, c. 45, 1 Stat. 373, Congress levied, without reference to apportionment, a tax on carriages "for the conveyance of persons." The act provided "that there shall be levied, collected, and paid upon all carriages for the conveyance of persons which shall be kept by, or for any person for his or her own use, or to be let out to hire, or for the conveying of passengers, the several duties and rates following;" and then came a yearly tax on every "coach, chariot, phaeton, and coachee, every four-wheeled and every

two-wheeled top carriage, and upon every other two-wheeled carriage," varying in amount according to the vehicle.

The debates which took place at the passage of that act are meagrely preserved. It may, however, be inferred from them that some considered that, whether a tax was "direct" or not in the sense of the Constitution, depended upon whether it was levied on the object or on its use. The carriage tax was defended by a few on the ground that it was a tax on consumption. Mr. Madison opposed it as unconstitutional, evidently upon the conception that the word "direct" in the Constitution was to be considered as having the same meaning as that which had been attached to it by some economic writers. His view was not sustained, and the act passed by a large majority — forty-nine to twenty-two. It received the approval of Washington. The Congress which passed this law numbered among its members many who sat in the convention which framed the Constitution. It is moreover safe to say that each member of that Congress, even although he had not been in the convention, had, in some way, either directly or indirectly, been an influential actor in the events which led up to the birth of that instrument. It is impossible to make an analysis of this act which will not show that its provisions constitute a rejection of the economic construction of the word "direct," and this result equally follows, whether the tax be treated as laid on the carriage itself or on its use by the owner. If viewed in one light, then the imposition of the tax on the owner of the carriage, because of his ownership, necessarily constituted a direct tax under the rule as laid down by economists. So, also, the imposition of a burden of taxation on the owner for the use by him of his own carriage made the tax direct according to the same rule. The tax having been imposed without apportionment, it follows that those who voted for its enactment must have given to the word direct, in the Constitution, a different significance from that which is affixed to it by the economists referred to.

The validity of this carriage tax was considered by this court in *Hylton* v. *The United States*, 3 Dall. 171. Chief Justice Ellsworth and Mr. Justice Cushing took no part in

the decision. Mr. Justice Wilson stated that he had, in the Circuit Court of Virginia, expressed his opinion in favor of the constitutionality of the tax. Mr. Justice Chase, Mr. Justice Paterson, and Mr. Justice Iredell each expressed the reasons for his conclusions. The tax though laid, as I have said, on the carriage, was held not to be a direct tax under the Constitution. Two of the judges who sat in that case (Mr. Justice Paterson and Mr. Justice Wilson) had been distinguished members of the constitutional convention. Excerpts from the observations of the justices are given in the opinion of the court. Mr. Justice Paterson, in addition to the language there quoted, spoke as follows, p. 177 (the italics being mine):

"*I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.* Local considerations, and the particular circumstances and relative situation of the States, naturally lead to this view of the subject. The provision was made in favor of the Southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other States. Congress, in such case, might tax slaves at discretion or arbitrarily, and land in every part of the Union after the same rate or measure — so much a head in the first instance and so much an acre in the second. To guard them against imposition in these particulars was the reason of introducing the clause in the Constitution, which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers."

It is evident that Mr. Justice Chase coincided with these views of Mr. Justice Paterson, though he was perhaps not quite so firmly settled in his convictions, for he said, p. 176:

"I am inclined to think, but of this I do not give a judicial

opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and the tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term 'direct tax.'"

Mr. Justice Iredell certainly entertained similar views, since he said, p. 183:

"Some difficulties may occur which we do not at present foresee. Perhaps a direct tax in the sense of the Constitution can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description . . . In regard to other articles there may possibly be considerable doubt."

These opinions strongly indicate that the real convictions of the justices were that only capitation taxes and taxes on land were direct within the meaning of the Constitution, but they doubted whether some other objects of a kindred nature might not be embraced in that word. Mr. Justice Paterson had no doubt whatever of the limitation, and Justice Iredell's doubt seems to refer only to things which were inseparably connected with the soil, and which might therefore be considered, in a certain sense, as real estate.

That case, however, established that a tax levied without apportionment on an object of personal property was not a "direct tax" within the meaning of the Constitution. There can be no doubt that the enactment of this tax and its interpretation by the court, as well as the suggestion in the opinions delivered, that nothing was a direct tax within the meaning of the Constitution but a capitation tax and a tax on land, was all directly in conflict with the views of those who claimed at the time that the word "direct" in the Constitution was to be interpreted according to the views of economists. This is conclusively shown by Mr. Madison's language. He asserts not only that the act had been passed contrary to the Constitution, but that the decision of the court was likewise in violation of that instrument. Ever since the announce-

ment of the decision in that case the legislative department of the government has accepted the opinions of the justices as well as the decision itself as conclusive in regard to the meaning of the word "direct," and it has acted upon that assumption in many instances and always with Executive endorsement. All the acts passed levying direct taxes confined them practically to a direct levy on land. True in some of these acts a tax on slaves was included, but this inclusion, as has been said by this court, was probably based upon the theory that these were in some respects taxable along with the land, and, therefore, their inclusion indicated no departure by Congress from the meaning of the word "direct," necessarily resulting from the decision in the *Hylton case*, and which, moreover, had been expressly elucidated and suggested as being practically limited to capitation taxes and taxes on real estate by the justices who expressed opinions in that case.

These acts imposing direct taxes having been confined in their operation exclusively to real estate and slaves, the subject-matters indicated as the proper object of direct taxation in the *Hylton case*, are the strongest possible evidence that this suggestion was accepted as conclusive and had become a settled rule of law. Some of these acts were passed at times of great public necessity when revenue was urgently required. The fact that no other subjects were selected for the purposes of direct taxation, except those which the judges in the *Hylton case* had suggested as appropriate therefor, seems to me to lead to a conclusion which is absolutely irresistible — that the meaning thus affixed to the word "direct" at the very formation of the government was considered as having been as irrevocably determined, as if it had been written in the Constitution in express terms. As I have already observed, every authoritative writer who has discussed the Constitution from that date down to this has treated this judicial and legislative ascertainment of the meaning of the word "direct" in the Constitution as giving it a constitutional significance without reference to the theoretical distinction between "direct" and "indirect," made by some economists prior to the Constitution, or since. This doc-

trine has become a part of the horn-book of American constitutional interpretation, has been taught as elementary in all the law schools, and has never since then been anywhere authoritatively questioned. Of course, the text-books may conflict in some particulars, or indulge in reasoning not always consistent, but as to the effect of the decision in the *Hylton case*, and the meaning of the word "direct," in the Constitution, resulting therefrom, they are a unit. I quote briefly from them.

Chancellor Kent, in his Commentaries thus states the principle:

"The construction of the powers of Congress relative to taxation was brought before the Supreme Court, in 1796, in the case of *Hylton* v. *The United States*. By the act of 5th June, 1794, Congress laid a duty upon carriages for the conveyance of persons, and the question was whether this was a *direct* tax, within the meaning of the Constitution. If it was not a direct tax, it was admitted to be rightly laid, under that part of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States; but if it was a direct tax it was not constitutionally laid, for it must then be laid according to the census, under that part of the Constitution which declares that direct taxes shall be apportioned among the several States according to numbers. The Circuit Court in Virginia was divided in opinion on the question, but on appeal to the Supreme Court it was decided that the tax on carriages was not a direct tax, within the letter or meaning of the Constitution, and was therefore constitutionally laid.

"The question was deemed of very great importance, and was elaborately argued. It was held that a general power was given to Congress to lay and collect taxes of every kind or nature, without any restraint. They had plenary power over every species of taxable property, except exports. But there were two rules prescribed for their government: the rule of uniformity, and the rule of apportionment. Three kinds of taxes, viz., duties, imposts, and excises, were to be laid by the first rule; and capitation, and other direct taxes, by the second rule. If there were any other species of taxes, as the

court seemed to suppose there might be, that were not direct, and not included within the words duties, imposts, or excises, they were to be laid by the rule of uniformity or not, as Congress should think proper and reasonable.

"The Constitution contemplated no taxes as direct taxes, but such as Congress could lay in proportion to the census; and the rule of apportionment could not reasonably apply to a tax on carriages, nor could the tax on carriages be laid by that rule without very great inequality and injustice. If two states, equal in census, were each to pay 8000 dollars by a tax on carriages, and in one state there were 100 carriages and in another 1000, the tax on each carriage would be ten times as much in one state as in the other. While A, in the one state, would pay for his carriage eight dollars, B, in the other state, would pay for his carriage eighty dollars. In this way it was shown by the court that the notion that a tax on carriages was a direct tax within the purview of the Constitution, and to be apportioned according to the census, would lead to the grossest abuse and oppression. This argument was conclusive against the construction set up, and the tax on carriages was considered as included within the power to lay duties; and the better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land." 1 Kent Com. 254, 56.

Story, speaking on the same subject, 1 Story Const. § 955, says: "Taxes on lands, houses, and other permanent real estate, or on parts or appurtenances thereof, have always been deemed of the same character, that is, direct taxes. It has been seriously doubted if, in the sense of the Constitution, any taxes are direct taxes, except those on polls or on lands. Mr. Justice Chase, in *Hylton* v. *United States*, 3 Dall. 171, said: 'I am inclined to think that the direct taxes contemplated by the Constitution are only two, viz: a capitation or poll tax simply, without regard to property, profession, or other circumstances, and a tax on land. I doubt whether a tax by a general assessment of personal property within the United States is included within the term "direct tax."' Mr. Justice Paterson in the same case said: 'It is not necessary to deter-

mine whether a tax on the produce of land be a direct or an indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as a part of the land itself. When the produce is converted into a manufacture, it assumes a new shape, etc. Whether "direct taxes," in the sense of the Constitution, comprehend any other tax than a capitation tax, or a tax on land, is a questionable point, etc. I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated, as falling within the rule of apportionment, were a capitation tax and a tax on land.' And he proceeded to state that the rule of apportionment, both as regards representatives and as regards direct taxes, was adopted to guard the Southern States against undue impositions and oppressions in the taxing of slaves. Mr. Justice Iredell in the same case said: 'Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances. A land or poll tax may be considered of this description. The latter is to be considered so, particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five. Either of these is capable of an apportionment. In regard to other articles, there may possibly be considerable doubt.' The reasoning of the Federalist seems to lead to the same result."

Cooley, in his work on Constitutional Limitations, 595, 5th ed., marginal paging *480, thus tersely states the rule: "Direct taxes, when laid by Congress, must be apportioned among the several States according to the representative population. The term 'direct taxes' as employed in the Constitution has a technical meaning, and embraces capitation and land taxes only."

Miller on the Constitution, 237, thus puts it: "Under the provisions already quoted the question came up as to what is a 'direct tax,' and also upon what property it is to be levied, as distinguished from any other tax. In regard to this it is sufficient to say that it is believed that no other than a capitation tax of so much per head and a land tax is a direct tax

within the meaning of the Constitution of the United States. All other taxes, except imposts, are properly called excise taxes. Direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

In Pomeroy's Constitutional Law (§ 281) we read as follows:

"It becomes necessary, therefore, to inquire a little more particularly: What are direct and what indirect taxes? Few cases on the general question of taxation have arisen and been decided by the Supreme Court for the simple reason that, until the past few years, the United States has generally been able to obtain all needful revenue from the single source of duties upon imports. There can be no doubt, however, that all the taxes provided for in the internal revenue acts now in operation are indirect.

"This subject came before the Supreme Court of the United States in a very early case, *Hylton* v. *The United States*. In the year 1794 Congress laid a tax of ten dollars on all carriages, and the rate was thus made uniform. The validity of the statute was disputed; it was claimed that the tax was direct and should have been apportioned among the states. The court decided that this tax was not direct. The reasons given for the decision are unanswerable, and would seem to cover all the provisions of the present internal revenue laws."

Hare, in his treatise on American Constitutional Law (vol. 1, pp. 249, 250), is to the like effect: "Agreeably to section 9 of article I, paragraph 4, 'no capitation or other direct tax shall be laid except in proportion to the census or enumeration hereinbefore directed to be taken;' while section 3 of the same article requires that representation and direct taxes shall be apportioned among the several States . . . according to their respective numbers. Direct taxes in the sense of the Constitution are poll taxes and taxes on land."

Burroughs on Taxation (p. 502) takes the same view: "*Direct taxes* — The kinds of taxation authorized are both direct and indirect. The construction given to the expression 'direct taxes,' is that it includes only a tax on land and a poll

tax, and this is in accord with the views of writers upon political economy."

Ordronaux, in his Constitutional Legislation, (p. 225), says:

"Congress having been given the power 'to lay and collect taxes, duties, imposts, and excises,' the above three provisions are limitations upon the exercise of this authority:

"1st. By distinguishing between direct and indirect taxes as to their mode of assessment;

"2d. By establishing a permanent freedom of trade between the States; and

"3d. By prohibiting any discrimination in favor of particular States, through revenue laws establishing a preference between their ports and those of the others.

"These provisions should be read together, because they are at the foundation of our system of national taxation.

"The two rules prescribed for the government of Congress in laying taxes are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes and taxes on land; in the second, duties, imposts, and excises. . . .

"The provision relating to capitation taxes was made in favor of the Southern States, and for the protection of slave property. While they possessed a large number of persons of this class, they also had extensive tracts of sparsely settled and unproductive lands. At the same time an opposite condition, both as to land-territory and population, existed in a majority of the other States. Were Congress permitted to tax slaves and land in all parts of the country at a uniform rate, the Southern Slave States must have been placed at a great disadvantage. Hence, and to guard against this inequality of circumstances, there was introduced into the Constitution the further provision that 'representatives and direct taxes shall be apportioned among the States according to their respective numbers.' This changed the basis of direct taxation from a strictly monetary standard, which could not, equitably, be made uniform throughout the country, to one resting upon population, as the measure of representation. But for this Congress might have taxed slaves arbitrarily and

at its pleasure as so much property, and land uniformly throughout the Union regardless of differences in productiveness. It is not strange, therefore, that in *Hylton* v. *United States* the court said that 'the rule of apportionment is radically wrong, and cannot be supported by any solid reasoning. It ought not, therefore, to be extended by construction. Apportionment is an operation on States and involves valuations and assessments which are arbitrary, and should not be resorted to but in case of necessity.'

"Direct taxes being now well settled in their meaning, a tax on carriages left for the use of the owner is not a capitation tax; nor a tax on the business of an insurance company; nor a tax on a bank's circulation; nor a tax on income; nor a succession tax. The foregoing are not, properly speaking, direct taxes within the meaning of the Constitution, but excise taxes or duties."

Black, writing on Constitutional Law, says: "But the chief difficulty has arisen in determining what is the difference between direct taxes and such as are indirect. In general usage, and according to the terminology of political economy, a direct tax is one which is levied upon the person who is to pay it, or upon his land or personalty, or his business or income, as the case may be. An indirect tax is one assessed upon the manufacturer or dealer in the particular commodity, and paid by him; but which really falls upon the consumer, since it is added to the market price of the commodity which he must pay. But the course of judicial decision has determined that the term 'direct,' as here applied to taxes, is to be taken in a more restricted sense. The Supreme Court has ruled that only land taxes and capitation taxes are 'direct' and no others. In 1794 Congress levied a tax of ten dollars on all carriages kept for use, and it was held that this was not a direct tax. And so also an income tax is not to be considered direct. Neither is a tax on the circulation of state banks, nor a succession tax, imposed upon every 'devolution of title to real estate.'" Opinions cited on page 162.

Not only have the other departments of the government accepted the significance attached to the word "direct" in the

Hylton case by their actions as to direct taxes, but they have also relied on it as conclusive in their dealings with indirect taxes by levying them solely upon objects which the judges in that case declared were not objects of direct taxation. Thus the affirmance by the Federal legislature and executive of the doctrine established as a result of the *Hylton case* has been twofold.

From 1861 to 1870 many laws levying taxes on income were enacted, as follows: Act of August 5, 1861, c. 45, 12 Stat. 292, 309, 311; Act of July 1, 1862, c. 119, 12 Stat. 432, 473, 475; Act of March 3, 1863, c. 74, 12 Stat. 713, 718, 723; Act of June 30, 1864, c. 173, 13 Stat. 223, 281, 285; Act of March 3, 1865, c. 78, 13 Stat. 469, 479, 481; Act of March 10, 1866, c. 15, 14 Stat. 4, 5; Act of July 13, 1866, c. 184, 14 Stat. 98, 137, 140; Act of March 2, 1867, c. 169, 14 Stat. 471, 477, 480; Act of July 14, 1870, c. 255, 16 Stat. 256, 261.

The statutes above referred to all cover income and every conceivable source of revenue from which it could result — rentals from real estate, products of personal property, the profits of business or professions.

The validity of these laws has been tested before this court. The first case on the subject was that of the *Pacific Insurance Company* v. *Soule*, 7 Wall. 433, 443. The controversy in that case arose under the ninth section of the act of July 13, 1866, 14 Stat. 137, 140, which imposed a tax on "all dividends in scrip and money, thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy holders, or depositors or parties whatsoever, including non-residents whether citizens or aliens, as part of the earnings, incomes, or gains of any bank, trust company, savings institution, and of any fire, marine, life, or inland insurance company, either stock or mutual, under whatever name or style known or called in the United States or Territories, whether specially incorporated or existing under general laws, and on all undistributed sum or sums made or added during the year to their surplus or contingent funds."

It will be seen that the tax imposed was levied on the income of insurance companies as a unit, including every possible

source of revenue, whether from personal or real property, from business gains or otherwise. The case was presented here on a certificate of division of opinion below. One of the questions propounded was "whether the taxes paid by the plaintiff and sought to be recovered in this action are not direct taxes within the meaning of the Constitution of the United States?" The issue, therefore, necessarily brought before this court was whether an act imposing an income tax on every possible source of revenue was valid or invalid. The case was carefully, ably, elaborately, and learnedly argued. The brief on behalf of the company, filed by Mr. Wills, was supported by another signed by Mr. W. O. Bartlett, which covered every aspect of the contention. It rested the weight of its argument against the statute on the fact that it included the rents of real estate among the sources of income taxed, and therefore put a direct tax upon the land. Able as have been the arguments at bar in the present case, an examination of those then presented will disclose the fact that every view here urged was there pressed upon the court with the greatest ability, and after exhaustive research, equalled but not surpassed by the eloquence and learning which has accompanied the presentation of this case. Indeed, it may be said that the principal authorities cited and relied on now can be found in the arguments which were then submitted. It may be added that the case on behalf of the government was presented by Attorney General Evarts.

The court answered all the contentions by deciding the generic question of the validity of the tax, thus passing necessarily upon every issue raised, as the whole necessarily includes every one of its parts. I quote the reasoning applicable to the matter now in hand:

"The sixth question is: 'Whether the taxes paid by the plaintiff, and sought to be recovered back in this action, are not *direct taxes*, within the meaning of the Constitution of the United States.' In considering this subject it is proper to advert to the several provisions of the Constitution relating to taxation by Congress. 'Representatives and direct taxes shall be apportioned among the several States which shall be in-

cluded in this Union according to their respective numbers,' etc. 'Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.' 'No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.' 'No tax or duty shall be laid on articles exported from any State.'

"These clauses contain the entire grant of the taxing power by the organic law, with the limitations which that instrument imposes.

"The national government, though supreme within its own sphere, is one of limited jurisdiction and specific functions. It has no faculties but such as the Constitution has given it, either expressly or incidentally by necessary intendment. Whenever any act done under its authority is challenged, the proper sanction must be found in its charter, or the act is *ultra vires* and void. This test must be applied in the examination of the question before us. If the tax to which it refers is a 'direct tax,' it is clear that it has not been laid in conformity to the requirements of the Constitution. It is, therefore, necessary to ascertain to which of the categories named in the eighth section of the first article it belongs.

"What are *direct taxes* was elaborately argued and considered by this court in *Hylton* v. *United States*, decided in the year 1796. One of the members of the court, Justice Wilson, had been a distinguished member of the convention which framed the Constitution. It was unanimously held by the four justices who heard the argument that a tax upon carriages kept by the owner for his own use was not a *direct tax*. Justice Chase said: 'I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and a tax on land.' Paterson, Justice, followed in the same line of remark. He said: 'I never entertained a doubt that the principal — I will not say

the only — object the framers of the Constitution contemplated as falling within the rule of apportionment was a capitation tax or a tax on land. . . . The Constitution declares that a capitation tax is a direct tax; and both in theory and practice a tax on land is deemed to be a direct tax. In this way the terms "direct taxes" and "capitation and other direct taxes" are satisfied.'

"The views expressed in this case are adopted by Chancellor Kent and Justice Story, in their examination of the subject. Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'

"Impost is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from custom, 'because custom is rather the profit which the prince makes on goods shipped out.' Mr. Madison considered the terms 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, "taxes and excises."'

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are: That *direct taxes*, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which a tax upon the business of an insurance company can be held to belong to that class of revenue charges.

"It has been held that Congress may require direct taxes to

be laid and collected in the Territories as well as in the States.

"The consequences which would follow the apportionment of the tax in question among the States and Territories of the Union, in the manner prescribed by the Constitution, must not be overlooked. They are very obvious. Where such corporations are numerous and rich, it might be light; where none exist, it could not be collected; where they are few and poor, it would fall upon them with such weight as to involve annihilation. It cannot be supposed that the framers of the Constitution intended that any tax should be apportioned, the collection of which on that principle would be attended with such results. The consequences are fatal to the proposition.

"To the question under consideration it must be answered, that the tax to which it relates is not a direct tax, but a duty or excise; that it was obligatory on the plaintiff to pay it.

"The other questions certified up are deemed to be sufficiently answered by the answers given to the first and sixth questions."

This opinion, it seems to me, closes the door to discussion in regard to the meaning of the word "direct" in the Constitution, and renders unnecessary a resort to the conflicting opinions of the framers, or to the theories of the economists. It adopts that construction of the word which confines it to capitation taxes and a tax on land, and necessarily rejects the contention that that word was to be construed in accordance with the economic theory of shifting a tax from the shoulders of the person upon whom it was immediately levied to those of some other person. This decision, moreover, is of great importance because it is an authoritative reaffirmance of the *Hylton case*, and an approval of the suggestions there made by the justices, and constitutes another sanction given by this court to the interpretation of the Constitution adopted by the legislative, executive, and judicial departments of the government, and thereafter continuously acted upon.

Not long thereafter, in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 541, 546, the question of the application of the word "direct" was again submitted to this court. The issue there was whether a tax on the circulation of state banks was "direct" within

the meaning of the Constitution. It was ably argued by the most distinguished counsel; Reverdy Johnson and Caleb Cushing representing the bank, and Attorney General Hoar the United States. The brief of Mr. Cushing again presented nearly every point now urged upon our consideration. It cited copiously from the opinions of Adam Smith and others. The constitutionality of the tax was maintained by the government on the ground that the meaning of the word "direct" in the Constitution, as interpreted by the *Hylton case*, as enforced by the continuous legislative construction, and as sanctioned by the consensus of opinion already referred to, was finally settled. Those who assailed the tax there urged, as is done here, that the *Hylton case* was not conclusive, because the only question decided was the particular matter at issue, and insisted that the suggestions of the judges were mere *dicta*, and not to be followed. They said that *Hylton* v. *United States* adjudged one point alone, which was that a tax on a carriage was not a direct tax, and that from the utterances of the judges in the case it was obvious that the general question of what was a direct tax was but crudely considered. Thus the argument there presented to this court the very view of the *Hylton case* which has been reiterated in the argument here, and which is sustained now. What did this court say then, speaking through Chief Justice Chase, as to these arguments? I take very fully from its opinion:

"Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words 'direct taxes' in the Constitution.

"We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority.

"And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

"It is, as we think, distinctly shown in every act of Congress on the subject.

"In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

"In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars; in 1813, the amount of the second direct tax was fixed at three millions; in 1815, the amount of the third at six millions, and it made an annual tax; in 1816, the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars. No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual; but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates on the subjects of the tax. These subjects, in 1798, 1813, 1815, 1816, were lands, improvements, dwelling houses, and slaves, and in 1861 lands, improvements, and dwelling houses only. Under the act of 1798 slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors.

"This review shows that personal property, contracts, occupations, and the like have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves

were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property they were, by the laws of some, if not most, of the States classed as real property, descendible to heirs. Under the first view they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts, after 1798, becomes highly probable, when it is considered that, in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

"The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purposes of taxation, as realty.

"It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.

"And this construction is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the convention which framed and of the conventions which ratified the Constitution. . . .

"This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*."

The court then reviews the *Hylton case*, repudiates the attack made upon it, reaffirms the construction placed on it by the legislative, executive, and judicial departments, and expressly adheres to the ruling in the insurance company case, to which I have referred. Summing up, it said:

"It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Company* v. *Soule*, held not to be a direct tax."

This case was, so far as the question of direct taxation is concerned, decided by an undivided court; for, although Mr. Justice Nelson dissented from the opinion, it was not on the ground that the tax was a direct tax, but on another question.

Some years after this decision the matter again came here for adjudication, in the case of *Scholey* v. *Rew*, 23 Wall. 331, 346. The issue there involved was the validity of a tax placed by a United States statute on the right to take real estate by inheritance. The collection of the tax was resisted on the ground that it was direct. The brief expressly urged this contention, and said the tax in question was a tax on land, if ever there was one. It discussed the *Hylton case*, referred to the language used by the various judges, and sought to place upon it the construction which we are now urged to give it, and which has been so often rejected by this court.

This court again by its unanimous judgment answered all these contentions. I quote its language:

"Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those

provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defence and general welfare. . . .

"Indirect taxes, such as duties of impost and excises and every other description of the same, must be uniform, and direct taxes must be laid in proportion to the census or enumeration as remodelled in the Fourteenth Amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category, but it never has been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid.

"Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

What language could more clearly and forcibly reaffirm the previous rulings of the court upon this subject? What stronger endorsement could be given to the construction of the Constitution, which had been given in the *Hylton case*, and which had been adopted and adhered to by all branches of the government, almost from the hour of its establishment? It is worthy of note that the court here treated the decision in the *Hylton case* as conveying the view that the only direct taxes were "taxes on land and appurtenance." In so doing it necessarily again adopted the suggestion of the justices there made, thus making them the adjudged conclusions of this court. It is too late now to destroy the force of the opinions in that case by qualifying them as mere *dicta* when they have again and again been expressly approved by this court.

If there were left a doubt as to what this established con-

struction is, it seems to be entirely removed by the case of *Springer* v. *United States*, 102 U. S. 586, 602. Springer was assessed for an income tax on his professional earnings and on the interest on United States bonds. He declined to pay. His real estate was sold in consequence. The suit involved the validity of the tax, as a basis for the sale. Again every question now presented was urged upon this court. The brief of the plaintiff in error, Springer, made the most copious references to the economic writers, Continental and English. It cited the opinions of the framers of the Constitution. It contained extracts from the journals of the convention, and marshalled the authorities in extensive and impressive array. It reiterated the argument against the validity of an income tax which included rentals. It is also asserted that the *Hylton case* was not authority, because the expressions of the judges, in regard to anything except the carriage tax, were mere *dicta*.

The court adhered to the ruling announced in the previous cases and held that the tax was not direct within the meaning of the Constitution. It reëxamined and answered everything advanced here, and said, in summing up the case:

"Our conclusions are that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complained is within the category of an excise or duty."

The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word "direct." The controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion, made use of language which clearly showed that he thought the word "direct" in the Constitution applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definitive. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the *Hylton case* were adopted here, and,

in the last case here decided, reviewing all the others, this court said that direct taxes within the meaning of the Constitution were only taxes on land and capitation taxes. And now, after a hundred years, after long-continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word "direct" in its economic sense, instead of in accordance with its meaning in the Constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever.

The injustice and harm which must always result from overthrowing a long and settled practice sanctioned by the decisions of this court, could not be better illustrated than by the example which this case affords. Under the income tax laws which prevailed in the past for many years, and which covered every conceivable source of income, rentals from real estate, and everything else, vast sums were collected from the people of the United States. The decision here rendered announces that those sums were wrongfully taken, and thereby, it seems to me, creates a claim in equity and good conscience against the government for an enormous amount of money. Thus, from the change of view by this court, it happens that an act of Congress, passed for the purpose of raising revenue, in strict conformity with the practice of the government from the earliest time and in accordance with the oft-repeated decisions of this court, furnishes the

occasion for creating a claim against the government for hundreds of millions of dollars; I say, creating a claim, because if the government be in good conscience bound to refund that which has been taken from the citizen in violation of the Constitution, although the technical right may have disappeared by lapse of time, or because the decisions of this court have misled the citizen to his grievous injury, the equity endures, and will present itself to the conscience of the government. This consequence shows how necessary it is that the court should not overthrow its past decisions. A distinguished writer aptly points out the wrong which must result to society from a shifting judicial interpretation. He says:

"If rules and maxims of law were to ebb and flow with the taste of the judge, or to assume that shape which in his fancy best becomes the times; if the decisions of one case were not to be ruled by, or depend at all upon former determinations in other cases of a like nature, I should be glad to know what person would venture to purchase an estate without first having the judgment of a court of justice respecting the identical title which he means to purchase? No reliance could be had upon precedents; former resolutions upon titles of the same kind could afford him no assurance at all. Nay, even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security; the principle upon which it was founded might, in the course of a few years become antiquated; the same title might be again drawn into dispute; the taste and fashion of the times might be improved, and on that ground a future judge might hold himself at liberty (if not consider it his duty) to pay as little regard to the maxims and decisions of his predecessor as that predecessor did to the maxims and decisions of those who went before him." Fearne on Contingent Remainders, London ed. 1801, p. 264.

The disastrous consequences to flow from disregarding settled decisions thus cogently described must evidently become greatly magnified in a case like the present, when the opinion of the court affects fundamental principles of the government by denying an essential power of taxation

long conceded to exist and often exerted by Congress. If it was necessary that the previous decisions of this court should be repudiated, the power to amend the Constitution existed and should have been availed of. Since the *Hylton case* was decided the Constitution has been repeatedly amended. The construction which confined the word "direct" to capitation and land taxes was not changed by these amendments, and it should not now be reversed by what seems to me to be a judicial amendment of the Constitution.

The finding of the court in this case, that the inclusion of rentals from real estate in an income tax makes it direct to that extent is, in my judgment, conclusively denied by the authorities, to which I have referred, and which establish the validity of an income tax in itself. Hence, I submit, the decision necessarily reverses the settled rule which it seemingly adopts in part. Can there be serious doubt that the question of the validity of an income tax, in which the rentals of real estate are included, is covered by the decisions which say that an income tax is generically indirect, and that therefore it is valid without apportionment? I mean, of course, could there be any such doubt were it not for the present opinion of the court? Before undertaking to answer this question I deem it necessary to consider some arguments advanced or suggestions made.

1st. The opinions of Turgot and Smith and other economists are cited, and it is said their views were known to the framers of the Constitution; and we are then referred to the opinions of the framers themselves. The object of the collocation of these two sources of authority is to show that there was a concurrence between them as to the meaning of the word "direct." But, in order to reach this conclusion, we are compelled to overlook the fact that this court has always held, as appears from the preceding cases, that the opinions of the economists threw little or no light on the interpretation of the word "direct" as found in the Constitution. And the whole effect of the decisions of this court is to establish the proposition that the word has a different significance in the Constitution from that which Smith and Turgot have given to it when used in a general economic sense. Indeed, it seems to me

that the conclusion deduced from this line of thought itself demonstrates its own unsoundness. What is that conclusion? That the framers well understood the meaning of "direct."

Now, it seems evident that the framers, who well understood the meaning of this word, have themselves declared in the most positive way that it shall not be here construed in the sense of Smith and Turgot. The Congress which passed the carriage-tax act was composed largely of men who had participated in framing the Constitution. That act was approved by Washington, who had presided over the deliberations of the convention. Certainly Washington himself, and the majority of the framers, if they well understood the sense in which the word "direct" was used, would have declined to adopt and approve a taxing act, which clearly violated the provisions of the Constitution, if the word "direct" as therein used, had the meaning which must be attached to it, if read by the light of the theories of Turgot and Adam Smith. As has already been noted, all the judges who expressed opinions in the *Hylton case* suggested that "direct," in the constitutional sense, referred only to taxes on land and capitation taxes. Could they have possibly made this suggestion if the word had been used as Smith and Turgot used it? It is immaterial whether the suggestions of the judges were *dicta* or not. They could not certainly have made this intimation, if they understood the meaning of the word "direct," as being that which it must have imported if construed according to the writers mentioned. Take the language of Mr. Justice Paterson: "*I never entertained a doubt that the principal, I will not say the only, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.*" He had borne a conspicuous part in the convention. Can we say that he understood the meaning of the framers, and yet after the lapse of a hundred years, fritter away that language, uttered by him from this bench in the first great case in which this court was called upon to interpret the meaning of the word "direct?" It cannot be said that his language was used carelessly or without a knowledge of its great import. The debate upon the passage

of the carriage-tax act had manifested divergence of opinion as to the meaning of the word "direct." The magnitude of the issue is shown by all contemporaneous authority to have been deeply felt and its far-reaching consequence was appreciated. Those controversies came here for settlement and were then determined with a full knowledge of the importance of the issues. They should not be now reopened.

The argument, then, it seems to me, reduces itself to this: That the framers well knew the meaning of the word "direct;" that so well understanding it they practically interpreted it in such a way as to plainly indicate that it had a sense contrary to that now given to it in the view adopted by the court. Although they thus comprehended the meaning of the word and interpreted it at an early day, their interpretation is now to be overthrown by resorting to the economists whose construction was repudiated by them. It is thus demonstrable that the conclusion deduced from the premise that the framers well understood the meaning of the word "direct," involves a fallacy. In other words, that it draws a faulty conclusion, even if the predicate upon which the conclusion is rested be fully admitted. But I do not admit the premise. The views of the framers cited in the argument conclusively show that they did not well understand, but were in great doubt as to the meaning of the word "direct." The use of the word was the result of a compromise. It was accepted as the solution of a difficulty which threatened to frustrate the hopes of those who looked upon the formation of a new government as absolutely necessary to escape the condition of weakness which the Articles of Confederation had shown. Those who accepted the compromise viewed the word in different lights and expected different results to flow from its adoption. This was the natural result of the struggle which was terminated by the adoption of the provision as to representation and direct taxes. That warfare of opinion had been engendered by the existence of slavery in some of the States, and was the consequence of the conflict of interest thus brought about. In reaching a settlement, the minds of those who acted on it were naturally concerned in the main with the cause of the

contention and not with the other things, which had been previously settled by the convention. Thus, whilst there was in all probability clearness of vision as to the meaning of the word "direct," in relation to its bearing on slave property, there was inattention in regard to other things, and there were, therefore, diverse opinions as to its proper signification. That such was the case in regard to many other clauses of the Constitution has been shown to be the case by those great controversies of the past which have been peacefully settled by the adjudications of this court. Whilst this difference undoubtedly existed, as to the effect to be given the word "direct," the consensus of the majority of the framers as to its meaning was shown by the passage of the carriage-tax act. That consensus found adequate expression in the opinions of the justices in the *Hylton case*, and in the decree of this court there rendered. The passage of that act, those opinions and that decree, settled the proposition that the word applied only to capitation taxes and taxes on land.

Nor does the fact that there was difference in the minds of the framers as to the meaning of the word "direct" weaken the binding force of the interpretation placed upon that word from the beginning. For, if such difference existed, it is certainly sound to hold that a contemporaneous solution of a doubtful question, which has been often confirmed by this court, should not now be reversed. The framers of the Constitution, the members of the earliest Congress, the illustrious man first called to the office of Chief Executive, the jurists who first sat in this court, two of whom had borne a great part in the labors of the convention, all of whom dealt with this doubtful question, surely occupied a higher vantage ground for its correct solution than do those of our day. Here then is the dilemma: if the framers understood the meaning of the word "direct" in the Constitution, the practical effect which they gave to it should remain undisturbed; if they were in doubt as to the meaning, the interpretation long since authoritatively affixed to it should be upheld.

2d. Nor do I think any light is thrown upon the question of whether the tax here under consideration is direct or indi-

rect, by referring to the principle of "taxation without representation," and the great struggle of our forefathers for its enforcement. It cannot be said that the Congress which passed this act was not the representative body fixed by the Constitution. Nor can it be contended that the struggle for the enforcement of the principle involved the contention that representation should be in exact proportion to the wealth taxed. If the argument be used in order to draw the inference that, because in this instance, the indirect tax imposed will operate differently through various sections of the country, therefore that tax should be treated as direct, it seems to me it is unsound. The right to tax, and not the effects which may follow from its lawful exercise, is the only judicial question which this court is called upon to consider. If an indirect tax, which the Constitution has not subjected to the rule of apportionment, is to be held to be a direct tax, because it will bear upon aggregations of property in different sections of the country, according to the extent of such aggregations, then the power is denied to Congress to do that which the Constitution authorizes, because the exercise of a lawful power is supposed to work out a result which, in the opinion of the court, was not contemplated by the fathers. If this be sound, then every question which has been determined in our past history is now still open for judicial reconstruction. The justness of tariff legislation has turned upon the assertion on the one hand, denied on the other, that it operated unequally on the inhabitants of different sections of the country. Those who opposed such legislation have always contended that its necessary effect was not only to put the whole burden upon one section, but also to directly enrich certain of our citizens at the expense of the rest, and thus build up great fortunes to the benefit of the few and the detriment of the many. Whether this economic contention be true or untrue is not the question. Of course, I intimate no view on the subject. Will it be said that if to-morrow the personnel of this court should be changed, it could deny the power to enact tariff legislation which has been admitted to exist in Congress from the beginning, upon the ground that such legislation beneficially affects one section or set of people

to the detriment of others, within the spirit of the Constitution, and therefore constitutes a direct tax?

3d. Nor, in my judgment, does any force result from the argument that the framers expected direct taxes to be rarely resorted to, and, as the present tax was imposed without public necessity, it should be declared void.

It seems to me that this statement begs the whole question, for it assumes that the act now before us levies a direct tax, whereas the question whether the tax is direct or not is the very issue involved in this case. If Congress now deems it advisable to resort to certain forms of indirect taxation which have been frequently, though not continuously, availed of in the past, I cannot see that its so doing affords any reason for converting an indirect into a direct tax in order to nullify the legislative will. The policy of any particular method of taxation, or the presence of an exigency which requires its adoption, is a purely legislative question. It seems to me that it violates the elementary distinction between the two departments of the government to allow an opinion of this court upon the necessity or expediency of a tax to affect or control our determination of the existence of the power to impose it.

But I pass from these considerations to approach the question whether the inclusion of rentals from real estate in an income tax renders such a tax to that extent "direct" under the Constitution, because it constitutes the imposition of a direct tax on the land itself.

Does the inclusion of the rentals from real estate in the sum going to make up the aggregate income from which (in order to arrive at taxable income) is to be deducted insurance, repairs, losses in business, and four thousand dollars exemption, make the tax on income so ascertained a direct tax on such real estate?

In answering this question we must necessarily accept the interpretation of the word "direct" authoritatively given by the history of the government and the decisions of this court just cited. To adopt that interpretation for the general purposes of an income tax, and then repudiate it because of one of the elements of which it is composed, would violate every

elementary rule of construction. So, also, to seemingly accept that interpretation and then resort to the framers and the economists in order to limit its application and give it a different significance is equivalent to its destruction and amounts to repudiating it without directly doing so. Under the settled interpretation of the word we ascertain whether a tax be direct or not by considering whether it is a tax on land or a capitation tax. And the tax on land, to be within the provision for apportionment, must be direct. Therefore we have two things to take into account: is it a tax on land and is it direct thereon or so immediately on the land as to be equivalent to a direct levy upon it? To say that any burden on land, even though indirect, must be apportioned is not only to incorporate a new provision in the Constitution, but is also to obliterate all the decisions to which I have referred, by construing them as holding that although the Constitution forbids only a direct tax on land without apportionment, it must be so interpreted as to bring an indirect tax on land within its inhibition.

It is said that a tax on the rentals is a tax on the land, as if the act here under consideration imposed an immediate tax on the rentals. This statement, I submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response. Indeed, I do not see how the issue can be stated precisely and logically without making it apparent on its face that the inclusion of rental from real property in income is nothing more than an indirect tax upon the land.

It must be borne in mind that we are dealing not with the want of power in Congress to assess real estate at all; on

the contrary, as I have shown at the outset, Congress has plenary power to reach real estate both directly and indirectly. If it taxes real estate directly, the Constitution commands that such direct imposition shall be apportioned. But because an excise or other indirect tax, imposed without apportionment, has an indirect effect upon real estate, no violation of the Constitution is committed, because the Constitution has left Congress untrammelled by any rule of apportionment as to indirect taxes — imposts, duties, and excises. The opinions in the *Hylton case*, so often approved and reiterated, the unanimous views of the text-writers, all show that a tax on land, to be direct, must be an assessment of the land itself, either by quantity or valuation. Here there is no such assessment. It is well also to bear in mind, in considering whether the tax is direct on the land, the fact that if land yields no rental it contributes nothing to the income. If it is vacant, the law does not force the owner to add the rental value to his taxable income. And so it is if he occupies it himself.

The citation made by counsel from Coke on Littleton, upon which so much stress is laid, seems to me to have no relevancy. The fact that where one delivers or agrees to give or transfer land with all the fruits and revenues, it will be presumed to be a conveyance of the land, in no way supports the proposition that an *indirect* tax on the rental of land is a *direct* burden on the land itself.

Nor can I see the application of *Brown* v. *Maryland*, 12 Wheat. 419; *Weston* v. *Charleston*, 2 Pet. 449; *Dobbins* v. *Erie County Commissioners*, 16 Pet. 435; *Almy* v. *California*, 24 How. 169; *Cook* v. *Pennsylvania*, 97 U. S. 566; *Railroad Co.* v. *Jackson*, 7 Wall. 262; *Philadelphia &c. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326; *Leloup* v. *Mobile*, 127 U. S. 640; *Postal Telegraph Co.* v. *Adams*, 155 U. S. 688. All these cases involve the question whether, under the Constitution, if no power existed to tax at all, either directly or indirectly, an indirect tax would be unconstitutional. These cases would be apposite to this if Congress had no power to tax real estate. Were such the case, it might be that the imposition of an excise by Congress which reached real estate indirectly would

necessarily violate the Constitution, because as it had no power in the premises, every attempt to tax direct or indirectly would be null. Here, on the contrary, it is not denied that the power to tax exists in Congress, but the question is, is the tax direct or indirect in the constitutional sense?

But it is unnecessary to follow the argument further; for, if I understand the opinions of this court already referred to, they absolutely settle the proposition that an inclusion of the rentals of real estate in an income tax does not violate the Constitution. At the risk of repetition, I propose to go over the cases again for the purpose of demonstrating this. In doing so, let it be understood at the outset that I do not question the authority of *Cohens* v. *Virginia*, or *Carroll* v. *Lessee of Carroll*, or any other of the cases referred to in argument of counsel. These great opinions hold that an adjudication need not be extended beyond the principles which it decides. Whilst conceding this, it is submitted that, if decided cases do directly, affirmatively, and necessarily, in principle, adjudicate the very question here involved, then under the very text of the opinions referred to by the court, they should conclude this question. In the first case, that of *Hylton*, is there any possibility by the subtlest ingenuity to reconcile the decision here announced with what was there established?

In the second case, *Insurance Company* v. *Soule*, the levy was upon the company, its premiums, its dividends, and net gains from all sources. The case was certified to this court, and the statement made by the judges in explanation of the question which they propounded says: "The amount of said premiums, dividends, and net gains were truly stated in said lists or returns." Original Record, p. 27.

It will thus be seen that the issue there presented was not whether an income tax on business gains was valid, but whether an income tax on gains from business and all other net gains was constitutional. Under this state of facts the question put to the court was: "Whether the taxes paid by the plaintiff, and sought to be recovered back, in this action, are not direct taxes within the meaning of the Constitution of the United States."

This tax covered revenue of every possible nature, and it therefore appears self-evident that the court could not have upheld the statute without deciding that the income derived from realty, as well as that derived from every other source, might be taxed without apportionment. It is obvious that if the court had considered that any particular subject-matter which the statute reached was not constitutionally included, it would have been obliged by every rule of safe judicial conduct to qualify its answer as to this particular subject.

It is impossible for me to conceive that the court did not embrace in its ruling the constitutionality of an income tax which included rentals from real estate, since, without passing upon that question, it could not have decided the issue presented. And another reason why it is logically impossible that this question of the validity of the inclusion of the rental of real estate in an income tax could have been overlooked by the court is found in the fact to which I could have already adverted, that this was one of the principal points urged upon its attention, and the argument covered all the ground which has been occupied here — indeed, the very citation from Coke upon Littleton, now urged as conclusive, was there made also in the brief of counsel. And although the return of income involved in that case was made "in block," the very fact that the burden of the argument was that to include rentals from real estate, in income subject to taxation, made such tax *pro tanto* direct, seems to me to indicate that such rentals had entered into the return made by the corporation.

Again, in the case of *Scholey* v. *Rew*, the tax in question was laid directly on the right to take real estate by inheritance, a right which the United States had no power to control. The case could not have been decided, in any point of view, without holding a tax upon that right was not direct, and that, therefore, it could be levied without apportionment. It is manifest that the court could not have overlooked the question whether this was a direct tax on the land or not, because in the argument of counsel it was said, if there was any tax in the world that was a tax on real estate which was

direct, that was the one. The court said it was not, and sustained the law. I repeat that the tax there was put directly upon the right to inherit, which Congress had no power to regulate or control. The case was therefore greatly stronger than that here presented, for Congress has a right to tax real estate directly with apportionment. That decision cannot be explained away by saying that the court overlooked the fact that Congress had no power to tax the devolution of real estate, and treated it as a tax on such devolution. Will it be said of the distinguished men who then adorned this bench, that although the argument was pressed upon them that this tax was levied directly on the real estate, they ignored the elementary principle that the control of the inheritance of realty is a state and not a Federal function? But even if the case proceeded upon the theory that the tax was on the devolution of the real estate and was therefore not direct, is it not absolutely decisive of this controversy? If to put a burden of taxation on the right to take real estate by inheritance reaches realty only by indirection, how can it be said that a tax on the income, the result of all sources of revenue, including rentals, after deducting losses and expenses, which thus reaches the rentals indirectly, and the real estate indirectly through the rentals, is a direct tax on the real estate itself?

So, it is manifest in the *Springer case* that the same question was necessarily decided. It seems obvious that the court intended in that case to decide the whole question, including the right to tax rental from real estate without apportionment. It was elaborately and carefully argued there that as the law included the rentals of land in the income taxed, and such inclusion was unconstitutional, this, therefore, destroyed that part of the law which imposed the tax on the revenues of personal property. Will it be said, in view of the fact that in this very case four of the judges of this court think that the inclusion of the rentals from real estate in an income tax renders the whole law invalid, that the question of the inclusion of rentals was of no moment there, because the return there did not contain a mention of such rentals? Were

the great judges who then composed this court so neglectful that they did not see the importance of a question which is now considered by some of its members so vital that the result in their opinion is to annul the whole law, more especially when that question was pressed upon the court in argument with all possible vigor and earnestness? But I think that the opinion in the *Springer case* clearly shows that the court did consider this question of importance, that it did intend to pass upon it, and that it deemed that it had decided all the questions affecting the validity of an income tax in passing upon the main issue, which included the others as the greater includes the less.

I can discover no principle upon which these cases can be considered as any less conclusive of the right to include rentals of land in the concrete result, income, than they are as to the right to levy a general income tax. Certainly, the decisions which hold that an income tax as such is not direct, decide on principle that to include the rentals of real estate in an income tax does not make it direct. If embracing rentals in income makes a tax on income to that extent a direct tax on the land, then the same word, in the same sentence of the Constitution, has two wholly distinct constitutional meanings, and signifies one thing when applied to an income tax generally, and a different thing when applied to the portion of such a tax made up in part of rentals. That is to say, the word means one thing when applied to the greater and another when applied to the lesser tax.

My inability to agree with the court in the conclusions which it has just expressed causes me much regret. Great as is my respect for any view by it announced, I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and is therefore fraught with danger to the court, to each and every citizen, and to the republic. The conservation and orderly development of our institutions rests on our acceptance of the results of the past, and their use as lights to guide our steps in the future. Teach the lesson that settled principles may be overthrown

at any time, and confusion and turmoil must ultimately result. In the discharge of its function of interpreting the Constitution, this court exercises an august power. It sits removed from the contentions of political parties and the animosities of factions. It seems to me that the accomplishment of its lofty mission can only be secured by the stability of its teachings and the sanctity which surrounds them. If the permanency of its conclusions is to depend upon the personal opinions of those who, from time to time, may make up its membership, it will inevitably become a theatre of political strife, and its action will be without coherence or consistency. There is no great principle of our constitutional law, such as the nature and extent of the commerce power, or the currency power, or other powers of the Federal government, which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudications. If these are to be assailed and overthrown, as is the settled law of income taxation by this opinion, as I understand it, the rights of property, so far as the Federal Constitution is concerned, are of little worth. My strong convictions forbid that I take part in a conclusion which seems to me so full of peril to the country. I am unwilling to do so, without reference to the question of what my personal opinion upon the subject might be if the question were a new one, and was thus unaffected by the action of the framers, the history of the government, and the long line of decisions by this court. The wisdom of our forefathers in adopting a written Constitution has often been impeached upon the theory that the interpretation of a written instrument did not afford as complete protection to liberty as would be enjoyed under a Constitution made up of the traditions of a free people. Writing, it has been said, does not insure greater stability than tradition does, while it

destroys flexibility. The answer has always been that by the foresight of the fathers the construction of our written Constitution was ultimately confided to this body, which, from the nature of its judicial structure, could always be relied upon to act with perfect freedom from the influence of faction and to preserve the benefits of consistent interpretation. The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people.

In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed. The authorities cited in the opinion are decisive of this question. They are relevant to one case and not to the other, because, in the one case, there is full power in the Federal government to tax, the only controversy being whether the tax imposed is direct or indirect; while in the other there is no power whatever in the Federal government, and, therefore, the levy, whether direct or indirect, is beyond the taxing power.

Mr. Justice Harlan authorizes me to say that he concurs in the views herein expressed.

Mr. Justice Harlan further dissenting.

I concur so entirely in the general views expressed by Mr. Justice White in reference to the questions disposed of by the

opinion and judgment of the majority, that I will do no more than indicate, without argument, the conclusions reached by me after much consideration. Those conclusions are:

1. Giving due effect to the statutory provision that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," Rev. Stat. § 3224, the decree below dismissing the bill should be affirmed. As the Farmers' Loan and Trust Company could not itself maintain a suit to restrain either the assessment or collection of the tax imposed by the act of Congress, the maintenance of a suit by a stockholder to restrain that corporation and its directors from voluntarily paying such tax would tend to defeat the manifest object of the statute, and be an evasion of its provisions. Congress intended to forbid the issuing of any process that would interfere in anywise with the prompt collection of the taxes imposed. The present suits are mere devices to strike down a general revenue law by decrees, to which neither the government nor any officer of the United States could be rightfully made parties of record.

2. Upon principle, and under the doctrines announced by this court in numerous cases, a duty upon the gains, profits, and income derived from the rents of land is not a "direct" tax on such land within the meaning of the constitutional provisions requiring capitation or other direct taxes to be apportioned among the several States, according to their respective numbers determined in the mode prescribed by that instrument. Such a duty may be imposed by Congress without apportioning the same among the States according to population.

3. While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defence and the general welfare of the United States, the instrumentalities employed by the States in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the States; and any tax imposed directly upon interest derived from bonds issued by a municipal corporation

for public purposes, under the authority of the State whose instrumentality it is, is a burden upon the exercise of the powers of that corporation which only the State creating it may impose. In such a case it is immaterial to inquire whether the tax is, in its nature or by its operation, a direct or an indirect tax; for the instrumentalities of the States — among which, as is well settled, are municipal corporations, exercising powers and holding property for the benefit of the public — are not subjects of national taxation, in any form or for any purpose, while the property of private corporations and of individuals is subject to taxation by the general government for national purposes. So it has been frequently adjudged, and the question is no longer an open one in this court.

Upon the several questions about which the members of this court are equally divided in opinion, I deem it appropriate to withhold any expression of my views, because the opinion of the Chief Justice is silent in regard to those questions.

HYDE *v.* CONTINENTAL TRUST COMPANY. No. 894. Appeal from the Circuit Court of the United States for the Southern District of New York.

THE CHIEF JUSTICE: This case differs in no essential respect from that just decided, and must be disposed of in the same way.

Decree accordingly.

The opinion of MR. JUSTICE FIELD was entitled in this case as well as in *Pollock* v. *Farmers' Loan & Trust Company.*

MR. JUSTICE WHITE and MR. JUSTICE HARLAN dissented from the decree in this case for the reasons given in their dissenting opinions in *Pollock* v. *Farmers' Loan and Trust Company.*

BERGEMANN v. BACKER.

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

No. 709. Submitted March 5, 1895. — Decided April 1, 1895.

When a prisoner is indicted in a state court for murder, it is for the courts of the State to decide whether the indictment sufficiently charges that crime in the first degree.

In view of the decisions by the highest court of New Jersey, referred to in the opinion, declaring the meaning and scope of the statutes of that State under which the accused was prosecuted, it cannot be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the Fourteenth Amendment to the Constitution.

The refusal by the state court to grant a writ of error to a person convicted of murder, or to stay the execution of a sentence, will not warrant a court of the United States in interfering in his behalf by writ of *habeas corpus*.

When a state court has jurisdiction of the offence and the accused under an indictment found under statutes of the State not void under the Constitution of the United States, and proceeds to judgment under such statutes, a Circuit Court of the United States has no authority to interfere with the execution of the sentence by means of a writ of *habeas corpus*.

THE case is stated in the opinion.

Mr. William D. Daly, *Mr. Thomas J. O'Brien*, and *Mr. James J. Furey* for appellant.

Mr. J. S. Salmon for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellant, August Bergemann, was convicted in the Court of Oyer and Terminer of Morris County, New Jersey, of the crime of murder in the first degree under an indictment, charging that, on a day and within the county named, he "did wilfully, feloniously, and of his malice aforethought kill and murder" one Julius Bergemann, "contrary to the form of the

statute in such case made and provided, and against the peace of the State, the government and dignity of the same."

Being in custody of the sheriff, awaiting the time fixed for his execution under a sentence of death, he presented his petition to the Circuit Court of the United States for the District of New Jersey, representing that he had applied to all the courts of the State having power in the premises to stay his said execution, and for a writ of error to review the judgment of conviction, but his application had been denied; that the indictment against him charged the crime of murder of the second degree, and not murder of the first degree; that he was not informed of the crime of murder of the first degree by any indictment, "as by the Constitution and laws of the land he should have been so charged before he could have been convicted thereof;" that "he ought not to have been sentenced to death, as the said court was without jurisdiction in the premises, and could not have imposed said judgment under said indictment according to the Constitution and law of the land;" and that "the said conviction and the judgment of said court thereon was in violation of the Fourteenth Amendment of the Constitution of the United States, in that he was denied the equal protection of the laws, as contemplated by said amendment, and the Sixth Amendment, which requires that the defendant shall be informed of the nature and cause of the accusation made against him."

Upon these grounds he prayed that a writ of *habeas corpus* be issued. The application for the writ having been denied, he prayed, and was allowed, an appeal pursuant to the statute.

The application for the writ of *habeas corpus* was properly denied. The Court of Oyer and Terminer had jurisdiction both of the offence charged and of the accused. Rev. Stats. N. J. 1877, 272, § 30.

Whether the indictment sufficiently charged the crime of murder in the first degree was for that court to determine. *Caldwell* v. *Texas*, 137 U. S. 692, 698.

Nor is there any ground for the contention that the laws of New Jersey prescribing the form of indictments in cases of murder or manslaughter are inconsistent with the due process

of law, or the equal protection of the laws required by the Fourteenth Amendment of the Constitution of the United States. By the sixty-eighth section of the New Jersey Crimes Act it is provided: "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 attempting to perpetrate, any arson, rape, sodomy, robbery or burglary, shall be deemed murder of 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." Rev. Stats. N. J. 1877, 239, § 68. And by the forty-fifth section of the Criminal Procedure Act it is provided: "In any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which, or the means by which, the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did wilfully, feloniously, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased." Rev. Stats. N. J. 1877, 275, § 45.

In *Graves* v. *State*, 45 N. J. Law, 203, it was held that an indictment charging, in a general form, the perpetration of a murder, without indicating which of the two felonies into which that offence was divided by the statute, was sufficient to fulfil the constitutional requirement of informing the defendant of the nature and cause of the accusation against him. The effect of the statute, Chief Justice Beasley said, was neither to add any case to nor take any case from the class of crimes which, at common law, was denominated murder, for every act that was murder at common law was still murder in New Jersey. What the statute effected, he said, was to distribute the offence into two classes for the sake of adjusting the punishment. In the same case in the Court of Errors and Appeals, 45 N. J. Law, 347, 358, Chancellor Runyon, after observing that the legislature, in declaring what shall constitute murder

in the first degree, and what murder of the second, created no new crimes, but merely made a distinction with a view to a difference in the punishment between the most heinous and the less aggravated grades of the crime of murder, said: "When the legislature, commendably simplifying the form of the indictment, provided that in charging the crime it should not be necessary to set forth the manner in which or the means whereby the death was caused, but that it should be sufficient to charge that the defendant wilfully, feloniously and of his malice aforethought, killed and murdered the deceased, it merely provided that in a charge of murder, a crime well understood and defined in the law, it should be enough to charge the crime in language sufficient to designate it. . . . According as he shall or shall not be proved to have committed the crime of murder, he shall be convicted or acquitted; and if convicted, according as it shall be proved that he committed it under the circumstances which characterize the one degree or the other, so it will be found or adjudged with a view to his punishment, and he will be punished accordingly. No right of the defendant was violated, nor any privilege of his disregarded or contravened by convicting him of murder of the first degree on an indictment which described the crime according to the statutory form." Substantially the same views were expressed by this court in respect of a similar statute in force in the Territory of Utah. *Davis* v. *Utah Territory*, 151 U. S. 262, 266, *et seq.*

In view of these decisions, declaring the meaning and scope of the statutes under which the accused was prosecuted, it cannot be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the Fourteenth Amendment of the Constitution of the United States.

It is equally clear that the refusal of the courts of New Jersey to grant the accused a writ of error or to stay the execution of the sentence passed upon him constituted no reason for interference in his behalf by a writ of *habeas corpus* issued by a court of the United States.

Syllabus.

If the proceedings in the Court of Oyer and Terminer could not, under the laws of New Jersey, be reviewed in a higher court of that State, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the State in which a determination of the case could be had, and such judgment could have been, upon writ of error, reëxamined here, if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States. *Gregory* v. *McVeigh*, 23 Wall. 294, 306; *Fisher* v. *Perkins*, 122 U. S. 522, 526.

If an indictment in a state court, under statutes not void under the Constitution of the United States be defective, according to the essential principles of criminal procedure, an error in rendering judgment upon it — even if the accused at the trial objected to it as insufficient — should not be made the basis of jurisdiction in a court of the United States to issue a writ of *habeas corpus*. The court below having had jurisdiction of the offence and of the accused, and having proceeded under a statute not repugnant to the Constitution of the United States, the Circuit Court of the United States had no authority to interfere, by means of a writ of *habeas corpus*, with the execution of the sentence. *Andrews* v. *Swartz*, 156 U. S. 272; *New York* v. *Eno*, 155 U. S. 89, 98.

The judgment is

Affirmed.

KEELER *v.* STANDARD FOLDING BED COMPANY.

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

No. 52. Submitted March 20, 1894. — Decided April 8, 1895.

One who buys patented articles of manufacture from one authorized to sell them at the place where they are sold becomes possessed of an absolute property in such articles, unrestricted in time or place.

Argument for Appellees.

Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before the court and upon which it expresses no opinion.

The complainants were assignees, for the State of Massachusetts, of certain letters patent granted to one Welch, for an improvement in wardrobe bedsteads. The Welch Folding Bed Company owned the patent rights for the State of Michigan. The defendants purchased a carload of said beds from the Welch Folding Bed Company, at Grand Rapids, Michigan, for the purpose of selling them in Massachusetts, and afterwards sold them there and were still engaged in selling such beds in Boston. *Held*, that the defendants having purchased the patented articles in Michigan from the assignee of the patent for the territory included in that State, had a right to sell them anywhere within the United States, including Massachusetts, where the patent rights had been assigned to another assignee.

The previous cases bearing on this point considered and reviewed.

The Standard Folding Bed Company, a corporation of the State of New York, filed in the Circuit Court of the United States for the District of Massachusetts a bill of complaint against Keeler & Brother, partners doing business in the city of Boston.

By an agreed state of facts it appears that the complainants are assignees, for the State of Massachusetts, of certain letters patent granted to one Lyman Welch, for an improvement in wardrobe bedsteads; that the Welch Folding Bed Company own the patent rights for the State of Michigan, and that the defendants purchased a carload of said beds from the Welch Folding Bed Company, at Grand Rapids, Michigan, for the purpose of selling them in Massachusetts, and that they afterwards sold and are now engaged in selling the said beds in Boston.

The conclusion in the court below was that the defendants were not protected from the claim of the Massachusetts assignee by having purchased the patented articles from the Michigan assignee, and accordingly there was an injunction and final decree in favor of the complainants, from which an appeal was taken to this court.

Mr. Causten Browne and *Mr. J. Henry Taylor* for appellants.

Mr. Edwin T. Rice for appellees.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

It is provided in section 4884 of the Revised Statutes that "every patent shall contain . . . a grant to the patentee, his heirs, or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and Territories thereof;" and in section 4898 that "every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States."

Where the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, unless restrained by contract with the patentee, can sell or dispose of the same. It has passed outside of the monopoly, and is no longer under the peculiar protection granted to patented rights. As was said by Mr. Justice Clifford, in *Goodyear* v. *Beverly Rubber Co.* (1 Cliff. 348, 354): "Having manufactured the material and sold it for a satisfactory compensation, whether as material or in the form of a manufactured article, the patentee, so far as that quantity of the product of his invention is concerned, has enjoyed all the rights secured to him by his letters patent, and the manufactured article, and the material of which it is composed, go to the purchaser for a valuable consideration, discharged of all the rights of the patentee previously attached to it, or impressed upon it, by the act of Congress under which the patent was granted."

Suppose, however, the patentee has exercised his statutory right of assigning by conveying to another an exclusive right under the patent to a specified part of the United States,

what are the rights of a purchaser of patented articles from the patentee himself within the territory reserved to him? Does he thereby obtain an absolute property in the article, so that he can use and vend it in all parts of the United States, or, if he take the article into the assigned territory, must he again pay for the privilege of using and selling it? If, as is often the case, the patentee has divided the territory of the United States into twenty or more "specified parts," must a person who has bought and paid for the patented article in one part, from a vendor having an exclusive right to make and vend therein, on removing from one part of the country to another, pay to the local assignee for the privilege of using and selling his property, or else be subjected to an action for damages as a wrongdoer? And is there any solid distinction to be made, in such a case, between the right to use and the right to sell? Can the owner of the patented article hold and deal with it the same as in case of any other description of property belonging to him, and, on his death, does it pass, with the rest of his personal estate, to his legal representatives, and thus, as a part of the assets to be administered, become liable to be sold?

These are questions which, although already in effect answered by this court in more cases than one, are now to be considered in the state of facts disclosed in this record.

In *Wilson* v. *Rousseau*, 4 How. 646, 688, and in *Bloomer* v. *McQuewan*, 14 How. 539, it was held that the purchasers of patented machines had the right to continue the use of such machines, without again paying royalty, although the patent was twice extended. In the latter case it appeared that McQuewan, the defendant, had purchased his machines, not from the original patentee or from a territorial assignee, but from a purchaser from the latter. Therefore that case is authority for the proposition that the purchaser of a patented machine has not only the right to continue the use of the machine as long as it exists, but to sell such machine, and that his vendee takes the right to use.

The scope and effect of those decisions were thus expressed by Mr. Justice Clifford, in *Mitchell* v. *Hawley*, 16 Wall. 544,

546, 547: "Patentees acquire by their letters patent the exclusive right to make and use their patented inventions and to vend to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee, when he has himself constructed a machine and sold it without any conditions, or authorized another to construct, sell, and deliver it, or to construct, use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established that the patentee must be understood to have parted to that extent with all his exclusive right, and that he ceases to have any interest whatever in the patented machine so sold and delivered or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee or his assigns."

These cases were followed, and a step further taken, in the case of *Adams* v. *Burke*, 17 Wall. 453, 456. There Lockhart and Seelye owned, by assignment, all the right, title, and interest which patentees had in a certain patented coffin lid, in a circular district of a diameter of ten miles, whereof the city of Boston was the centre. Adams, also by assignment, was the owner of all other rights under the patent. Burke, an undertaker, carried on his business at Natick, and within the territory covered by the patent as owned by Adams. To a bill for an infringement, filed by Adams in the Circuit Court of the United States for the District of Massachusetts, Burke pleaded that the patent coffins used by him in his business were purchased by him from Lockhart and Seelye, and were sold to him without condition or restriction.

The validity of his plea was sustained by the Circuit Court, and its decree dismissing the bill was affirmed by this court.

Opinion of the Court.

Mr. Justice Miller, in giving the opinion of the court, said: "In the essential nature of things, when the patentee, or the person having his right, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee, or his assignee, having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentee. . . . A careful examination of the plea satisfies us that the defendant, who, as an undertaker, purchased each of these coffins, and used it in burying the body which he was employed to bury, acquired the right to this use of it, freed from any claim of the patentee, though purchased within the ten-mile circle and used without it."

It is obvious that necessarily the use made by Burke of these coffins involved a sale in every case. He did not put them to his personal use, unless we are permitted to suppose that he was himself buried in each one of the coffins. He bought the coffins for the purpose of selling them to others, and the legal significance of the decision upholding his defence is that a person who buys patented articles from a person who has a right to sell, though within a restricted territory, has a right to use and sell such articles in all and any part of the United States; that when the royalty has once been paid to a party entitled to receive it, the patented article then becomes the absolute, unrestricted property of the purchaser, with the right to sell it as an essential incident of such ownership.

That this was the meaning of this decision, not only appears from the language used, and from the necessary legal effect of the conclusion reached as between the parties, but from the dissenting opinion of Justice Bradley, whose reasoning went wholly upon the assumption that such was its meaning.

Boesch v. *Gräff*, 133 U. S. 697, is cited by the defendant in error. But it is not out of line with the previous cases. The exact question presented was whether a dealer residing in the

United States could purchase in another country articles patented there from a person authorized there to sell them, and import them to and sell them in the United States without the license or consent of the owners of the United States patent, and the court held that the sale of articles in the United States under a United States patent cannot be controlled by foreign laws. In this case neither the patentee or any assignee had ever received any royalty or given any license to use the patented article in any part of the United States.

Hobbie v. *Jennison*, 149 U. S. 355, is interesting as the last opinion delivered by Mr. Justice Blatchford.

The facts were these: An assignee for Michigan, of a patent for an improvement in pipes for conveying gas, water, and other fluids, made, sold and delivered in Michigan pipes made according to the patent, knowing that they were to be laid in the streets of a city in Connecticut, a territory the right for which the seller did not own under the patent, and they were laid in that city. An action at law was brought in the Circuit Court of the United States for the Eastern District of Michigan by Hobbie, who was the owner, by assignment, of the patent for the State of Connecticut, against Jennison, who, under his rights as assignee for Michigan, made and sold patented pipes to the Hartford Steam Supply Company, which had a contract to lay pipes in Hartford, Connecticut. A jury was waived, and the cause was tried before Judge Brown, the District Judge, now a member of this court. The decision and judgment of the Circuit Court were in favor of the defendant, and that judgment was affirmed here.

What was principally discussed was the true interpretation of *Adams* v. *Burke*, and an attempt was made to distinguish the case in hand by the fact, made affirmatively to appear, that the sale was made with the knowledge and intention on the part of the defendant that the use would be at Hartford.

But this court was of the opinion that the case of *Adams* v. *Burke* was applicable; that the sale was a complete one in Michigan, and that neither the actual use of the pipes in Connecticut, nor a knowledge on the part of the defendant

that they were intended to be used there, would make him liable.

This brief history of the cases shows that in *Wilson* v. *Rousseau*, 4 How. 646, and cases following it, it was held that, as between the owner of a patent on the one side, and a purchaser of an article made under the patent on the other, the payment of a royalty once, or, what is the same thing, the purchase of the article from one authorized by the patentee to sell it, emancipates such article from any further subjection to the patent throughout the entire life of the patent, even if the latter should be by law subsequently extended beyond the term existing at the time of the sale, and that in respect of *the time* of enjoyment, by those decisions the right of the purchaser, his assigns or legal representatives, is clearly established to be entirely free from any further claim of the patentee or any assignee; that in *Adams* v. *Burke*, 17 Wall. 453, it was held that, as respects *the place* of enjoyment, and as between the purchaser of patented articles in one specified part of the territory and the assignee of the patent of another part, the right once legitimately acquired to hold, use, and sell will protect such purchaser from any further subjection to the monopoly; that in *Hobbie* v. *Jennison*, 149 U. S. 355, it was held that, as between assignees of different parts of the territory, it is competent for one to sell the patented articles to persons who intend, with the knowledge of the vendor, to take them for use into the territory of the other.

Upon the doctrine of these cases we think it follows that one who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before us, and upon which we express no opinion. It is, however, obvious that such a question would arise as a question of contract, and not as one under the inherent meaning and effect of the patent laws.

The conclusion reached does not deprive a patentee of his just rights, because no article can be unfettered from the claim

of his monopoly without paying its tribute. The inconvenience and annoyance to the public that an opposite conclusion would occasion are too obvious to require illustration.

These views render it unnecessary to consider other features of the case.

The decree of the court below is reversed, and the cause remanded with directions to dismiss the bill.

Reversed.

MR. JUSTICE BROWN, with whom concurred THE CHIEF JUSTICE and MR. JUSTICE FIELD, dissenting.

The exact question presented by the record in this case is, whether a dealer in patented articles, doing business in Massachusetts, and knowing that the right to manufacture, use, and sell such articles within that State belongs to another, may purchase such articles of the patentee in Michigan, in the ordinary course of trade, for the purpose of resale in Massachusetts, and may sell them there in defiance of the rights of the licensee.

The right to do this is supposed to arise from the fact that the defendants, having once paid tribute to the patentee by purchasing the patented articles of him, thereby acquired the right to deal with such articles as they please, notwithstanding that another has bought and paid for the exclusive right to manufacture and sell them within their territory. The cases in this court which are supposed to justify, or at least to lead up to this conclusion, seem to me to fall far short of this somewhat startling result.

In *Wilson* v. *Rousseau*, 4 How. 646, it was decided, (1) that the patent act of 1836 authorized an extension of a patent to be granted to the administrator of the patentee, and that such extension inured to the benefit of such administrator, and not to an assignee under the original patent; (2) that the plaintiff, claiming title under the extension to the administrator, could maintain an action for infringement of the patent within the territory specified in the assignment, against any person not claiming under such assignment; and (3) that an

assignee who had purchased the right and was in use of the patented machine at the time of the renewal had the right to continue such use during the extension. Although cited in the opinion of the court, I am unable to see that it has any bearing upon the case under consideration.

The case of *Bloomer* v. *McQuewan*, 14 How. 539, 549, did not differ materially from the prior one, although the Chief Justice draws a distinction between the grant of a right to make and sell the machine, and the grant of a right to use it; and in this connection makes use of an expression which has been freely quoted in subsequent cases, and is now employed in a way which seems to me destructive of the rights of the licensee: "But the purchaser of the implement or machine for the purpose of using it in the ordinary pursuits of life stands on different ground. In using it he exercises no rights created by the act of Congress, nor does he derive title to it by virtue of the franchise or exclusive privilege granted to the patentee. . . . And when the machine passes to the hands of the purchaser" (for such use) "it is no longer within the limit of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress." The question in that case, however, concerned only the rights of an assignee of a patent which had been extended, and the point decided was that the assignee was entitled to continue to use the patent during the extended period. In this connection there can be no question of the propriety of the language quoted. It would indeed be a strange principle to hold, that a party who had bought a patented article during the original term of the patent, should be obliged to pay an additional royalty for its use, if that term were extended.

In *Mitchell* v. *Hawley*, 16 Wall. 544, the patentee assigned to another the right to make and use, and to license others to make and use, four of his machines during the original term of the patent, with the express provision that the grantee should not dispose of, sell, or license any one to use such machine *beyond* the said term. The patent was extended for seven years, and a grant to use the machines for the two States in question during the extended term was made to

another. In delivering the opinion of the court, Mr. Justice Clifford quoted liberally the general language of the prior cases, but held that the grantor, under whom the defendants claimed, never acquired the right to sell the machines, and give their purchasers the right to use them, beyond the term of the original patent; and that notice to the defendants, who had purchased their rights from the grantee of the original term, was not required, as the law imposed the risk upon the purchaser, as against the real owner, of ascertaining whether the title of the seller was such that he could make a valid conveyance. In this case, the purchaser from the original grantee of the term was held affected with knowledge of the terms of the grant from the patentee, which expressly took from the assignee the right to sell or grant any license to use the machines *beyond* the expiration of the original term. This case seems to be a limitation upon the general doctrine of the prior cases, that, by a purchase of the patentee, the patented article is thereby taken out of the monopoly. So far as the case is pertinent at all to the instant case, it favors the position taken by the court below.

There are but three cases that have any direct bearing upon the one under consideration, namely, *Adams* v. *Burke*, 17 Wall. 453; *Boesch* v. *Gräff*, 133 U. S. 697; and *Hobbie* v. *Jennison*, 149 U. S. 355. In *Adams* v. *Burke* the original patentees assigned to a firm in Cambridge, Massachusetts, all their right in the invention to a circular territory extending ten miles from the city of Boston. Defendant, an undertaker doing business at Natick, outside of this territory, bought certain coffins of the Cambridge firm, and used them in burying the dead, but sold none, except so far as the use of the coffins in his business could be considered as a sale. It was held that the defendant, having purchased the coffins of one who had a lawful right to sell them, had a right to *use* them anywhere; that the patentee, having received his consideration, the patented articles were no longer within the monopoly of the patent. The case was treated both in the opinion of the court and in the dissent, in which three Justices concurred, as a case of *use* and not of sale, and Mr. Justice Miller in delivering the

opinion observed: "Whatever, therefore, may be the rule when patentees subdivide territorially their patents, as to the exclusive right to *make* or to *sell* within a limited territory, we hold that in the class of machines or implements we have described, when they are once lawfully made and sold, there is no restriction on their *use* to be implied for the benefit of the patentee or his assignees or licensees." The dissenting Justices were of opinion that the assignment did not confer upon the assignee the right to sell the patented article to be used outside of his territory. There was no suggestion in either opinion that a purchaser from the assignee had or could have the right to deal in the patented article outside of the territory in which the purchase was made.

In *Hobbie* v. *Jennison* an assignee for the State of Michigan sold and delivered in that State certain patented gas and water pipes, knowing that they were to be laid in the streets of Hartford, Connecticut, a territory, the right for which the seller did not own under the patent. The pipes were laid in that city. It was held, following *Adams* v. *Burke*, that the seller was not liable, in an action for infringement, to the owner of the patent for Connecticut. The action in this case was brought not against the user, but against the manufacturer and vendor of the patented article, and it was held that, as the sale was completed in Michigan, neither the actual use of the pipes in Connecticut, nor the knowledge on the part of the defendants that they were intended to be used there, could make them liable. This case also involved the right to use and not to sell, and was held to be indistinguishable from *Adams* v. *Burke*. It differed from that only in the fact that the action was brought against the vendor.

The machines or implements thus referred to in these cases are such articles as are exhausted or consumed in their use; that is, where articles are of no value after a single use, there is no restriction on their further use in favor of the patentee or assignee. When a patented article of that kind, the whole value of which consists in its use for a particular purpose, and which value ceases when its capability of use for that purpose is gone, the monopoly of the patentee or his

assignee over it must necessarily cease upon its sale to the purchaser.

Upon the other hand, in *Boesch* v. *Gräff*, 133 U. S. 697, it was held that one who purchased articles covered by a patent in a foreign country, and imported them into the United States, could not sell them here without the license or consent of the owner of the American patent, although they were purchased in a foreign country from a person authorized to sell them. This is the only case decided by this court in which the right of a purchaser to *sell* patented articles outside of the territory of his vendor has been drawn in question, and I see no reason why the arguments, which moved the court in that case to hold that this could not be done, do not apply with equal cogency to a case where the patented articles are bought within the United States. In both cases a tribute has once been paid to the patentee, and the fact that that tribute was paid in a foreign country works no apparent difference in the principle.

In this connection the following decisions of the Circuit Courts, though not binding upon us as authority, are at least entitled to respectful consideration: In *Hatch* v. *Adams*, 22 Fed. Rep. 434, it was held by Judge McKennan that a purchaser of patented articles from a territorial assignee of the patent does not acquire the right to sell the articles, in the course of trade, outside of the territory granted to his vendor. A like ruling was made in the Southern District of New York by Judge Wheeler, in *Hatch* v. *Hall*, 22 Fed. Rep. 438, and 30 Fed. Rep. 613, and in the Circuit Court for the Northern District of California in the *California Electrical Works* v. *Finck*, Judge Hawley, 47 Fed. Rep. 583.

In view of the cases of *Adams* v. *Burke* and *Hobbie* v. *Jennison*, this court must be considered as committed to the doctrine that a vendee, purchasing a patented article of the patentee or his licensee, has a right to make use of the same wherever he may take it, notwithstanding the fact that the purchase be made with the knowledge of the vendor that the article is to be used in the territory of another, and with the knowledge of the vendee that the territory in which he pro-

poses to use it is owned by another. We are now asked to take another step in advance, and hold that a rival dealer, with notice of the territorial rights of a licensee or assignee, may purchase any quantity of patented articles of the patentee, and sell them in his own territory in defiance of the right of the assignee in such territory. To this proposition I am unable to give my assent.

By Rev. Stat. sec. 4898, "Every patent, or any interest therein, shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States." The object of this statute is to vest in the licensee the exclusive right of the original patentee to make, use, and sell the invention or discovery within the territory assigned, and to take to himself the profit upon every article sold in such territory. This right is presumed to be a valuable one, and is entitled to the protection of the courts and to a reasonable construction, in so far as it does not infringe upon the rights of others, who may have purchased the patented articles of one who had a lawful right to sell them. That one who makes use of or sells a patented article in ignorance of the fact that it is patented, is liable as an infringer, is entirely well settled. (Walker on Patents, secs. 377, 569; 3 Robinson on Patents, sec. 901.) Yet we are asked to hold in this case that one, who is fully informed of the rights of a territorial assignee, may deal in the patented articles in defiance of such assignee, upon the ground that he has once submitted to the exactions of the patentee by purchasing the article of one who had a right to sell it. There is reason for saying that a person who has once paid tribute to the patentee shall not be called upon to pay tribute a second time, by reason of using the article elsewhere, but to say that he may purchase such articles for the deliberate purpose of entering into competition with a local licensee, is utterly destructive of the right of the latter to deal in the patented article. Under this rule a patentee may assign his right to make and sell the patented article in every State in the Union except his own; may there establish a manufactory, and may, by his superior

facilities, greater capital, more thorough knowledge of the business, or more extensive acquaintance, undersell his own licensees, drive them out of business, and utterly destroy the value of their licenses. In my view this cannot be done, and I am, therefore, compelled to dissent from the opinion of the court.

I am authorized to state that The Chief Justice and Mr. Justice Field concur in this dissent.

DAVIS AND RANKIN BUILDING AND MANUFACTURING COMPANY *v.* BARBER.

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

No. 818. Submitted March 25, 1895. — Decided April 8, 1895.

On the authority of *Maynard* v. *Hecht*, 151 U. S. 324, and *Colvin* v. *Jacksonville*, 157 U. S. 368, this case is dismissed for want of a certificate from the Circuit Court certifying the question of its jurisdiction for decision here.

MOTION to dismiss. The case is stated in the opinion.

Mr. George A. Knight and *Mr. J. A. McNutt* for the motion.

Mr. L. T. Michener and *Mr. George Shirts* opposing.

THE CHIEF JUSTICE: This was an action brought against certain subscribers to a contract to recover damages for its breach. Defendants demurred upon the grounds that the court had no jurisdiction over the subject-matter of the action, and that the complaint did not state facts sufficient to constitute a cause of action against them. The demurrers were sustained and judgment rendered in favor of defendants on June 28, 1892. The writ of error from this court was sued

out February 16, 1894. It does not appear by the record, but is conceded by counsel, that a writ of error was taken to the Circuit Court of Appeals for the Seventh Circuit, and dismissed for want of jurisdiction. 60 Fed. Rep. 465. The jurisdiction of this court is invoked upon the ground that the only question in the case was as to the jurisdiction of the Circuit Court, but that question was not certified to this court by the Circuit Court for decision, and the writ of error must be dismissed upon the authority of *Maynard* v. *Hecht*, 151 U. S. 324; *Colvin* v. *Jacksonville*, *ante*, 368, and cases cited.

Writ of error dismissed.

TREAT MANUFACTURING COMPANY *v.* STANDARD STEEL AND IRON COMPANY.

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

No. 353. Submitted March 25, 1895. — Decided April 8, 1895.

Where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant, and in such case no constitutional question arises; but if the court errs as matter of law in so doing, the remedy lies in a review in the appropriate court.

MOTION to dismiss. The case is stated in the opinion.

Mr. Charles W. Needham, *Mr. William G. Beale*, and *Mr. Edward S. Isham* for the motion.

Mr. John S. Cooper and *Mr. George H. Shields* opposing.

THE CHIEF JUSTICE: This was an action of trespass on the case. At the conclusion of the trial defendants moved the court to charge the jury to find the issues for defendants, which motion was granted, and the jury was directed, upon the whole case, to return a verdict for defendants, plaintiff duly excepting. Thereupon the jury returned a verdict accordingly; plaintiff moved for a new trial, which was denied,

and judgment was given against plaintiff on the verdict. This judgment was rendered December 3, 1890. The writ of error from this court was brought November 24, 1891. The only ground relied on to sustain the jurisdiction of this court is that the case "involves the construction or application of the Constitution of the United States;" because plaintiff in error was deprived of the right of trial by jury. But it is well settled that where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant. *Grand Chute* v. *Winegar*, 15 Wall. 355; *Marion County* v. *Clark*, 94 U. S. 278; *Herbert* v. *Butler*, 97 U. S. 319.

If the court errs as matter of law in so doing, the remedy lies in a review in the appropriate court.

Writ of error dismissed.

ALLEN v. UNITED STATES.

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

No. 788. Submitted March 4, 1895. — Decided April 8, 1895.

In a trial for murder by shooting with a pistol it appeared that the accused and the deceased had had difficulties; that the accused, knowing that he was to meet the deceased, had armed himself with a pistol; that when they met the deceased and his companions were armed with sticks; that an altercation ensued which resulted in the shooting; and the evidence was conflicting as to who had made the first attack. The court, under exception, instructed the jury as follows: "Now, gentlemen, these are the three conditions which I give you in the case. I have told you that if it is true that this defendant went up on one side of the fence and when there struck Philip Henson in the mouth and then shot him, that is murder. On the other hand, if it is true that Henson and the other boys attacked him with sticks, and while that attack was going on and in the heat of that affray, and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed Philip Henson, that would be manslaughter; but if there was an absence of that condition, then there is no manslaughter in it, nor could there be any self-defence in it. There could be nothing else but this distinct grade of crime known as murder; because self-defence, as I have before defined

Statement of the Case.

to you, contemplates the doing of something upon the part of the one slain, or the ones acting with him, that was either actually and really so apparently of a deadly character, or which threatened great violence to the person, or that which seemed to do so. If they assaulted him with these sticks, and they were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot Philip Henson, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defence, because the injury received would not be of that deadly character or that dangerous nature that could give a man the right to slay another because of threatened deadly injury or actual great bodily injury received." *Held*, that this instruction was erroneous in withdrawing from the jury the question of self-defence, and likewise in telling them that the intentional arming himself with a pistol by the defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of necessary self-defence.

In the Circuit Court of the United States for the Western District of Arkansas, at the May term, 1894, Alexander Allen was tried, and found guilty of the murder of one Philip Henson.

The evidence certified by the bill of exceptions shows that Philip Henson, a white boy, about seventeen years old, was shot and killed by the defendant, a colored boy, about fifteen years old, on May 15, 1892. It appears that two or three days before these boys, with several companions, had met and had a difficulty. James Marks testified that, on that occasion, Henson and his party followed them and threw sticks at them, and said: "We will be over Saturday to settle with you." Allen, testifying in his own behalf, said that the first time he ever saw deceased, Philip Henson, was two days before the killing; that James Marks, on whose farm defendant was working, and defendant were out hunting horses when he saw Henson and other boys; that he made inquiry of them about the horses, and that he and Jim Marks started to go across a creek, and Henson and his companions followed them and threw sticks at them, and said they would kill that nigger the first chance they got, and said they would settle it on Saturday.

The scene of the shooting was at or near a hog pen on

Marks' farm. There was a wire fence separating the Marks place from an adjacent field. The testimony is contradictory as to whether Henson and his companions crossed the fence into the Marks farm. The Henson party had freshly cut sticks in their hands. An altercation took place. Young Marks testified that Henson said, when the defendant asked them what they came after, they came to kill a nigger. The story told by Willie Erne, one of the Henson party, a boy of thirteen years of age, was the clearest statement on behalf of the prosecution of what took place. It was as follows:

"On Saturday, Philip, George, and I started to go fishing; we had some willow sticks to kill frogs with for bait. We went a little over half way and saw some one behind Marks' hog pen, and when we got up about the length of the court-room [about seventy feet] from the fence, and defendant got up and walked along the fence, and we kept walking the same way we had been walking, that is, we were walking not towards the Marks house, but northeast the yard fence, behind which was the defendant, walked north. We were not intending to go into the yard; we intended to cross north of the yard, because that was nearest to the lake and defendant said, 'Hello, George, where are you going?' and George said, 'Going fishing,' and defendant said, 'Well, hold on; I heard you said I told a lie on you;' defendant pulled his pistol out at that time, and George said, 'Maybe I did.' Defendant pulled scabbard off pistol and handed it to the Marks boy, and got through the fence and walked up to Philip Henson and hit him in the mouth with his left hand and pulled down the pistol with his right hand, and Philip grabbed it, and it shot into the ground; then Philip dropped the pistol, and he shot Philip under the arm, and when he turned around he shot him in the back, and then he shot at George twice, and hit George in the back; he then snapped the pistol at me. I was running when he snapped at me. . . . When defendant shot Philip once Philip raised his stick, and I think he hit defendant with it. Defendant put the pistol on top wire of the fence and pointed it at us while we were about thirty yards away. He told us to stop, and we stood there till he got through the fence, and

he then pulled pistol out of the scabbard and gave it to the Marks boy, and came on up to us. We did not move; none of us said a word to him. The Marks boy was standing at the fence, looking through the wire, during the shooting. We did not go over on the side next to Marks — none of us. At the time defendant came out towards us Philip Henson was nearer to the defendant than George and I, and he bet Philip was larger than George."

The testimony of young Marks and of the defendant was to the effect that the Erne boy and Philip Henson crossed over the fence into the Marks yard and made the first assault, and that defendant did not draw his pistol or shoot until he had been knocked down and when three of the assailants were on him.

No appearance for plaintiff in error.

Mr. Solicitor General for defendants in error submitted on his brief.

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

The facts, as made to appear by the testimony on both sides, were substantially these:

The difficulty was between boys; the oldest, Philip Henson, was about seventeen; Alexander Allen, the defendant, about fifteen, and the other participants were about twelve and thirteen years of age. The first encounter was on Thursday, when a quarrel took place, sticks were thrown, and threats made. On Saturday there was another meeting, when hostilities were renewed. The evidence is conflicting as to whether Henson and his party crossed the fence into the Marks yard, and as to which party made the first assault. An undeniable incident was that Philip Henson was fatally shot by a pistol in the hands of Allen.

In this condition of the evidence the court gave under exception the following instruction:

"Now, gentlemen, these are the three conditions which I give

you in the case. I have told you that if it is true that this defendant went up on one side of the fence and when there struck Philip Henson in the mouth and then shot him, that is murder. On the other hand, if it is true that Henson and the other boys attacked him with sticks, and while that attack was going on and in the heat of that affray, and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed Philip Henson, that would be manslaughter; but if there was an absence of that condition, then there is no manslaughter in it, nor could there be any self-defence in it. There could be nothing else but this distinct grade of crime known as murder; because self-defence, as I have before defined to you, contemplates the doing of something upon the part of the one slain, or the ones acting with him, that was either actually and really so apparently of a deadly character, or which threatened great violence to the person, or that which seemed to do so. If they assaulted him with these sticks, and they were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot Philip Henson, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defence, because the injury received would not be of that deadly character or that dangerous nature that could give a man the right to slay another because of threatened deadly injury or actual great bodily injury received."

By this instruction the jury were shut up, in effect, to find either manslaughter or murder — the claim of self-defence was excluded. Or, rather, self-defence was eliminated if the sticks were not "deadly weapons." In this we think there was error. In one sense it may be true that sticks or clubs are not deadly weapons. Carrying them does not import any hostile intent, nor, even in view of an expected affray, a design to take life. But when a fight is actually going on sticks and clubs may become weapons of a very deadly character. Life may be endangered or taken by blows from them as readily as by

balls from a pistol. Hence we think that the jury ought not to have been told that there "could not be any self-defence in it;" and that "it could not be self-defence because the injury received would not be of that deadly character or that dangerous nature that would give a man the right to slay another because of threatened deadly injury or great bodily injury received." Such a question as that was one peculiarly for the jury, and we think that they should have been left free to say whether the accused had not a right, when defending himself from an attack made by several persons using sticks, to consider himself in danger of life or limb. The verdict found, that of murder, is, we think, convincing that the jury were misled by this instruction.

But we think there was another substantial error in the instruction complained of. The jury were told that if "in that conflict the defendant shot Philip Henson, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter and could not be self-defence."

This was objectionable, not only on the ground already considered, that it shut out from the consideration of the jury the claim of self-defence, but because of the assumption that if the defendant, in view of the previous threats that he was to be killed, and that Saturday had been fixed for the purpose, had armed him with a pistol and subsequently used it when attacked, it would have been not only not a case of self-defence, but not even of manslaughter, but of murder. The instruction was that using a deadly weapon, not previously selected with a purpose to use it, was, when used in circumstances of the kind shown, a case of manslaughter. Thus there was a necessary implication that, if the pistol had been previously procured, with a view to using it in self-defence, the defendant would be guilty of murder, if he discharged the pistol with fatal effect, even while defending himself from an attack threatening his life.

In this respect the instruction involved the same error which we considered in the case of *Gourko* v. *United States*,

153 U. S. 183, and where it was held that a person who has an angry altercation with another person, such as to lead him to believe that he may require the means of self-defence in case of another encounter, may be justified, in the eye of the law, in arming himself for self-defence; and if, on meeting his adversary, on a subsequent occasion, he kills him, but not in necessary self-defence, his crime may be that of manslaughter or murder, as the circumstances, on the occasion of the killing, make it the one or the other; and that if, looking alone at those circumstances, his crime be that of manslaughter, it is not converted into murder by reason of his having previously armed himself. In the case of *Thompson* v. *United States*, 155 U. S. 271, the same view was taken by this court, and the judgment of the court below was reversed because, at the trial, the jury was instructed that "the previous selection, preparation, and subsequent use of a deadly weapon shows that there was a purpose to kill contemplated before that affray existed, and whenever that exists, when it is done improperly and unlawfully so that there is no law of self-defence in it, the fact that they may have been in an actual affray with hands or fists would not reduce the grade of the crime to manslaughter." This language was regarded by this court as erroneous because it involved the assumption that the act of the defendant in arming himself showed a purpose to kill, formed before the actual affray.

Being, then, of opinion that the instruction was erroneous in withdrawing from the jury the question of self-defence, and likewise in telling them that the intentional arming himself with a pistol by the defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of necessary self-defence, we reverse the judgment of the court below, and remand the case, with directions to set aside the verdict and award a new trial.

Reversed.

Mr. Justice Brewer dissented.

JONES *v.* EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

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

No. 253. Argued April 4, 1895. — Decided April 8, 1895.

The record showed that plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three except as covered by the general charge. The whole charge was contained in the bill of exceptions, which thus concluded: "To which refusal and charge of the court and the exclusion of evidence offered, and to the action of the court in refusing a new trial, plaintiff excepted and tendered this bill of exceptions, which was signed and sealed by the court and ordered to be made a part of the record in this cause." *Held*, that this exception was insufficient.

THE case is stated in the opinion.

Mr. Henry H. Ingersoll for plaintiff in error.

Mr. Leon Jourolmon appeared for defendant in error, but the court declined to hear him.

THE CHIEF JUSTICE: This was an action on the case to recover damages for injuries received through the alleged negligence of the defendant. Ten errors were assigned, two of which relate to the exclusion of evidence. As to one of these, it was properly admitted at the bar that the evidence in question was not excluded, and that so much of the record as showed the contrary was taken from the record of a former trial of the case. As to the other, no exception to the action of the court was preserved. The remaining errors assigned relate to the refusal to give certain instructions requested by plaintiff, and to parts of the charge. The record shows that plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three except as covered by the general charge. The whole charge is contained in the bill of exceptions, which thus concludes:

Syllabus.

"To which refusal and charge of the court and the exclusion of evidence offered, and to the action of the court in refusing a new trial, plaintiff excepted and tendered this bill of exceptions, which was signed and sealed by the court and ordered to be made a part of the record in this cause." This exception was insufficient. Rule 4; *Rogers* v. *The Marshal*, 1 Wall. 644; *Harvey* v. *Tyler*, 2 Wall. 328; *Insurance Co.* v. *Sea*, 21 Wall. 158; *Beaver* v. *Taylor*, 93 U. S. 46; *Block* v. *Darling*, 140 U. S. 234, 238.

Judgment affirmed.

LAST CHANCE MINING COMPANY *v.* TYLER MINING COMPANY.

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

No. 831. Argued March 6, 7, 1895. — Decided April 15, 1895.

When the course of a mineral vein is across a claim, instead of in the direction of its length, the side lines of the location of the claim become, in law, the end lines, and the end lines become the side lines.

When the jurisdiction of a controversy by a court is unquestioned, and the cause proceeds to final judgment, and no review is sought for, the judgment is conclusive upon the parties to the suit as to the matters decided, but not as to matters which might have been decided, but were not.

In an action, brought under the provisions of Rev. Stat. §§ 2324, 2325, by an adverse claimant to a part of a mineral claim as located, the plaintiff alleged a priority of location, and rested his right to recover upon it. The defendant answered, but subsequently and before judgment withdrew his answer, and amended his application for a patent so as to exclude the tract in controversy. At the trial the defendant did not appear, but the plaintiff introduced evidence, oral and documentary. The court made a finding of fact that the tract in controversy had already been located by the plaintiff as a part of his mining claim when the defendant located his claim upon it, and that, consequently, it was not subject to location by the defendant. Upon that finding it was adjudged that, by reason of the law and premises, the plaintiff was the owner of the disputed tract, that he was entitled to the possession of it, and that he recover possession of it from the defendant. *Held*,

(1) That it appeared by the record that the court had in that case passed upon and determined the question of priority of location,

Statement of the Case.

and upon such determination had given judgment in favor of the plaintiff;

(2) That the defendant's withdrawal of his answer did not operate to take the complaint out of the case, or the allegations of fact contained in it, or to prevent a judicial determination of those facts;

(3) That the abandonment of his claim by the defendant did not take the jurisdiction for the settlement of the question out of the hands of the court, or restore it to the Land Department;

(4) That the judgment of the court was in all respects regular; was conclusive as to the particular ground in controversy; and was binding by way of estoppel as to every fact necessarily determined by it, including the question of priority of location.

Findings of fact in such cases, even when no statute provides for making them, are a declaration by the court of the matter which it determines, and are conclusive as to it in subsequent controversies between the parties.

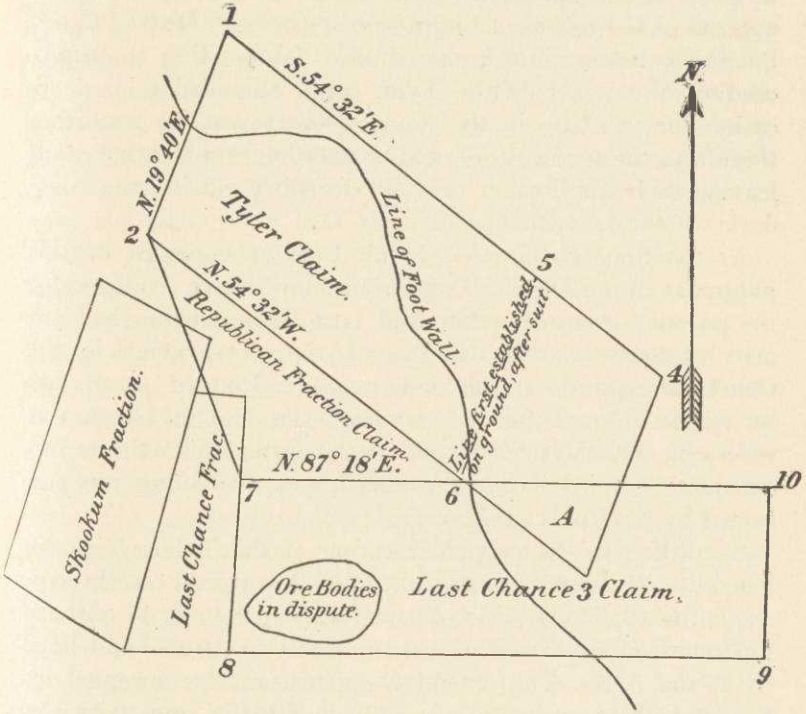
A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment, as one rendered after answer and contest; and in such case facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings.

In view of the conclusions reached, it is not necessary to consider what extra-territorial rights (if any) exist when a vein enters at an end line, and passes out at a side line.

On August 8, 1891, the Tyler Mining Company brought its action in the Circuit Court of the United States for the District of Idaho to recover of the Last Chance Mining Company and others the possession of a certain portion of a mineral vein, as well as the value of the ores theretofore taken from the vein by the defendants. After disclaimer by two and answer by the Last Chance Mining Company and other defendants, the case came on for trial. In this there was a verdict and judgment for the defendants. This judgment was reversed on error by the Court of Appeals of the Ninth Circuit, and a new trial ordered. 7 U. S. App. 463; 54 Fed. Rep. 284. At the February term, 1893, of the Circuit Court for the District of Idaho the new trial directed by the Court of Appeals was had, and resulted in a verdict and judgment for the plaintiff. On error to the Court of Appeals this judgment was, on April 2, 1894, affirmed, 61 Fed. Rep. 557, whereupon, on application of the defendants, the case was brought to this court by writ of *certiorari*.

Statement of the Case.

The following diagram, taken substantially from the first opinion of the Court of Appeals, fully illustrates the situation of the respective claims:



Direction of dip is to south.

The controversy is between the owners of the Tyler claim and those of the Last Chance claim. As appears from the diagram the Tyler claim as originally located (1, 2, 3, 4) conflicts with the Last Chance claim (7, 8, 9, 10) in the triangular piece marked "A." On April 19, 1887, the owners of the Tyler claim made application for a patent for the entire claim as thus originally located. To this application the owners of the Last Chance claim filed, under the authority of sections 2324 and 2325, Revised Statutes, an adverse claim to the conflicting ground "A," and thereafter commenced the required action in the District Court of the First Judicial District of

Counsel for Defendant in Error.

Idaho Territory. In that action the owners of the Tyler claim appeared and filed answer, but when the case was called for trial the answer was withdrawn and a judgment entered in favor of the plaintiffs. No reason for this withdrawal appears in the record of the proceedings of the District Court, but the testimony in this case shows that pending those proceedings the owners of the Tyler claim amended their application for purchase in the Land Department by excluding therefrom the territory marked on the diagram 3, 4, 5, 6, thus leaving their application only for territory outside the boundaries of the Last Chance claim.

At the first trial in the Circuit Court the record of this judgment in the District Court was admitted in evidence for the purpose of showing that the Last Chance claim had priority of location over the Tyler claim. On review in the Court of Appeals its admission was adjudged error, and by reason thereof the judgment of the Circuit Court was reversed. On the second trial in the latter court the record was again offered but was excluded, and this ruling was sustained by the Court of Appeals.

According to the original location of the Tyler claim the lode entered through an end line (1, 2), but passed out through a side line (2, 3), and did not touch the end line (3, 4). Under the amended location it passed through two parallel end lines (1, 2, and 5, 6). The amended application was accepted by the land office, and a final certificate for the tract with the reduced boundaries was issued to the owners of the claim. Within the vertical planes of the end lines (1, 2, and 5, 6) extended, the ore bodies in dispute are found, and the dip of the vein being in that direction it was held that the owners of the Tyler claim were entitled to follow the vein on its dip beyond the side line (2, 6), and took these ore bodies as a part of the vein thus followed.

Mr. W. B. Heyburn and *Mr. C. S. Voorhees* for plaintiffs in error.

Mr. Arthur Brown and *Mr. John R. McBride* for defendant in error.

Opinion of the Court.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The course of this vein is across the Last Chance claim instead of in the direction of its length. Under those circumstances the side lines of that location become the end lines, and the end the side lines. *Mining Company* v. *Tarbet*, 98 U. S. 463; *Argentine Mining Company* v. *Terrible Mining Co.*, 122 U. S. 478; *King* v. *Amy &c. Mining Co.*, 152 U. S. 222.

On the assumption that the action of the owners of the Tyler claim, in excluding from their application a portion of their claim, was legal, obviously the priority of location becomes a pivotal question. For, while the disputed ore is on the dip of the vein within the extended vertical planes of the end lines of the Tyler claim, it is also within the legal end lines of the Last Chance claim, and on the dip of the vein as it passes through that claim. Naturally, therefore, the controversy in the Circuit Court was upon the priority of location. The judgment of the District Court in the adverse suit having been excluded from evidence, parol testimony was admitted for the purpose of determining this priority, and the question of fact arising on such parol testimony was settled by the jury in favor of the owners of the Tyler claim. Was the judgment of the District Court in the adverse suit properly excluded? The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as to matters which were in fact decided. *Hopkins* v. *Lee*, 6 Wheat. 109; *Smith* v. *Kernochen*, 7 How. 198; *Pennington* v. *Gibson*, 16 How. 65; *Stockton* v. *Ford*, 18 How. 418; *Washington &c. Steam Packet Co.* v. *Sickles*, 24 How. 333; *S. C.* 5 Wall. 580; *Lessee of Parrish* v. *Ferris*, 2 Black, 606; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Davis* v. *Brown*, 94 U. S. 423; *Russell* v.

Place, 94 U. S. 606; *Campbell* v. *Rankin*, 99 U. S. 261; *Lumber Co.* v. *Buchtel*, 101 U. S. 638; *Stout* v. *Lye*, 103 U. S. 66; *Nesbit* v. *Riverside Independent District*, 144 U. S. 610: *Johnson Company* v. *Wharton*, 152 U. S. 252.

The action in the District Court was brought in compliance with the express provisions of the act of Congress. The jurisdiction of the court is unquestioned, and the parties to the controversy are the same. The question then is, what was in fact decided in that action? Turning to the complaint we find that it states the boundaries of the Last Chance claim; alleges that on September 17, 1885, certain named parties duly located such claim, and that at the time of and prior to such location the ground described "was vacant and unoccupied and a part of the public domain of the United States, and the mineral lands thereof." It further describes the particular acts which were done in making the location; avers the conveyance of the title by the locators to the plaintiffs; their continued performance of the necessary work; the application on April 19, 1887, of the Tyler Mining Company for a patent for the Tyler claim; the conflict between the two claims in respect to the triangular piece of ground; the filing of an adverse claim by plaintiffs; that "said adverse claim was duly allowed by the register of said land office, and all proceedings on said application for patent on the part of the claimants therefor were by the register ordered to be stayed until the controversy as to the right of possession shall have been settled by a court of competent jurisdiction;" and that the action was "brought in support of the protest and adverse claim so filed by the plaintiffs to determine the right of possession of the tract of ground by metes and bounds last hereinbefore described." The prayer was that the plaintiffs "be adjudged to be owners of and entitled to the possession of the said tract of mining ground by metes and bounds last hereinbefore described as a part of the hereinbefore mentioned and described Last Chance mining claim," and for costs.

The scope of the answer filed by the owners of the Tyler claim is not disclosed. It only appears that having filed an answer they withdrew it. When the case came on for trial,

the defendants not appearing, the plaintiffs, as the record shows, introduced evidence, oral and documentary. The court made certain findings of fact, which findings corresponded generally with the allegations of the complaint. Among them was this, "that at the time the said Tyler mining claim was located that portion of the ground so in conflict as aforesaid had been located as a part of the Last Chance mining claim, and was not subject to location by the locators of the Tyler mining claim;" and as a conclusion of law it ruled "that the plaintiff above named, the Last Chance Mining Company, is the owner of the ground and a portion of the mining claim described in the complaint herein as in conflict between the said Last Chance mining claim and the Tyler mining claim, by virtue of a valid location of the said Last Chance mining claim made by John Flaherty, J. L. Smith, M. Carlin, and John M. Burke on the 17th day of September, 1885; and that the plaintiff is entitled to the possession of the said ground so in conflict as aforesaid by virtue of such valid location."

Upon these findings and conclusion a judgment was entered, which recites: "Therefore, by reason of the law and premises aforesaid, it is ordered, adjudged, and decreed that the Last Chance Mining Company, the plaintiff above named, is the owner of, and, by virtue of a valid location of a mining claim called the Last Chance, made on the (17th) seventeenth day of September, A.D. 1885, by John Flaherty, J. L. Smith, M. Carlin, and John M. Burke, is entitled to the possession and the right of possession of all that piece or portion of said mining claim in the complaint herein described," (here follows a description of the triangular piece "A") "containing an area of 1.474 acres of ground, and the plaintiff do have and recover the possession and right of possession of said premises from defendant, the Tyler Mining Company."

Thus it appears that the complaint alleges a priority of location, and upon that rests the right to recover. The existence of the Tyler location as a location is not challenged either expressly or by implication. Indeed, the complaint

proceeds upon the assumption of its validity. The findings are express as to priority, and contain no suggestion of any defect in the Tyler claim, or any fact in favor of plaintiff's right other than that of priority of location, while the conclusion of law and the judgment recite and adjudge a valid location of the Last Chance mining claim on September 17, 1885, and a right of possession by virtue thereof. Upon the record taken as a whole there can be no escape from the conclusion that the court determined the question of priority of location, and upon this rendered judgment for the plaintiffs. What is there to impeach this conclusion?

It is said that the statutes of Idaho do not provide for findings of fact in a case like this, and that therefore the recitals in such findings must be ignored. If it be true that the statutes of Idaho do not authorize findings of fact, it is none the less true that such findings are a declaration by the court of the matter it determines. Even if not conclusive as against all testimony, they are certainly very persuasive evidence of what the court did in fact decide. In *Lumber Company* v. *Buchtel*, *supra*, the judgment relied upon as an estoppel was based upon a finding of a referee, and it was said: "This finding having gone into the judgment is conclusive as to the fact found in all subsequent controversies between the parties on the contract. Every defence requiring the negation of this fact is met and overthrown by that adjudication." In *Legrand* v. *Rixey's Administrators*, 83 Virginia, 862, 877, it appeared that the pleadings and judgment left a doubt as to the precise matter decided. Reference to an opinion of the trial court, for the purpose of making certain that which otherwise was uncertain, was approved. We quote from the Supreme Court of Appeals:

"In the case at bar, the trial judge *filed with the papers in the cause* his reasons for his decision, which the decree itself shows was done for the express purpose of explaining his decision. This being the case, the opinion of the trial judge thus referred to in the decree becomes a part of the record, and may be looked to, and is even more reliable to explain, in doubtful cases, what was *in issue* and what was determined,

than mere extrinsic evidence to the same end. We do not mean that the mere opinion of the trial judge, which may happen to be in writing and copied into the record, constitutes a part thereof; but we do say that where the decree — as in this case — refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to to explain what was *in issue* and what was determined by the judgment or decree in question. See *Burton* v. *Mills*, 78 Virginia, 468, at p. 470."

But if we ignore the findings altogether and look simply at the judgment and the complaint, this will appear: The single ground stated in the complaint upon which superiority of right is claimed is priority of location. A judgment for the plaintiffs upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it can rest. It is doubtless true, as suggested, that other questions may be litigated in an adverse suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. The only pleading upon which the case passed to trial and judgment was the complaint, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location.

It is said that the defendants did not contest; that they withdrew their answer, and that there was only a judgment by default. But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination, and not upon what evidence or by what means was it reached. A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission. Suppose the defendant files a denial, and

on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered. Is it any the less a judicial determination because resting simply upon proof of the defendant's admission, and yet in principle what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference in what form that admission is presented to the judge? In 1 Freeman on Judgments, 4th ed., section 330, the author says, citing many authorities in support thereof: "Upon principle, we think that the denial of a fact subsequently judicially established ought not to impart to an adjudication any greater effect than if all the parties had expressly or impliedly admitted the fact to be beyond controversy when such adjudication was made; and this is the view taken by the greater portion of the American courts." Among the authorities cited is *Nashville &c. Railway* v. *United States*, 113 U. S. 261, in which a decree in equity by consent of parties was held to bar a subsequent suit on any claim included in the decree. Bigelow, in his work on Estoppel (p. 77), closes a discussion of the question with this observation: "The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings." *Brown* v. *Mayor*, 66 N. Y. 385; *Blair* v. *Bartlett*, 75 N. Y. 150; *Nemetty* v. *Naylor*, 100 N. Y. 562; *Orr* v. *Mercer County Ins. Co.*, 114 Penn. St. 387.

The withdrawal by defendants of their answer may have prevented any judicial determination as to the special facts set up therein in defence or avoidance of plaintiff's claim. *Finnegan* v. *Campbell*, 74 Iowa, 158. But such withdrawal was not operative to take out of the case the complaint, or the allegations of fact therein contained, or to prevent a judicial determination of those facts.

But further, it is contended that the action of the owners of the Tyler claim in amending their application, coupled with

the withdrawal of their answer, took them entirely out of the case in the District Court. It is said that they had abandoned all claim to the property theretofore in controversy: that they were really no longer parties to the action, and that it remained simply a case pending between the owners of the Last Chance and the United States. Such seems to have been the view taken by the Court of Appeals when it held that the judgment was improperly admitted in evidence. We are unable to concur in this view. It may well be doubted whether the amendment filed in the land office had any force or effect during the pendency of the action in the District Court. Section 2326 provides that after the filing of the adverse claim, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." As said by this court in *Richmond Mining Company* v. *Rose*, 114 U. S. 576, 585, referring to the action of the officers of the department pending proceedings in court, "after the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended."

It is suggested by counsel that the abandonment by the owners of the Tyler location of any claim to the disputed territory was in effect a waiver of the adverse claim within the language of the statute, on the happening of which the right of the land office to proceed was restored. But that is not within the letter, even if within the spirit of the statute. The adverse claim is the claim made by the party opposing the application, and the party to waive a claim is the one who makes it. The obvious meaning is that when an adverse claim is filed — that is, a claim filed by some one opposing the application in whole or in part — the proceedings in the land office shall be stayed until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall have in some way waived his opposition to the application. There was no waiver on the part of the parties who filed this adverse claim, and the only

way in which any waiver is claimed to have been made was by a proceeding on the part of the applicants in the land office, and every proceeding there was, as we have seen, directed to be stayed. It is doubtless true that if, notwithstanding the pendency of such an action, the land office accepts a reduced application for ground, no part of which is covered by the adverse claim and in respect to which there is no opposition, and proceeds subsequently upon such amended application to grant a patent, there is no one who can object, for the matter is one wholly of procedure between the United States and the applicant, and the former, by granting the patent, waive any irregularity in the procedure.

But whatever may have been the effect of the amended application of the owners of the Tyler claim in this respect, they were not thereby taken out of the jurisdiction of the District Court, neither was the action in that court abated, nor was it left as one only between the owners of the Last Chance claim and the government. There is no provision in the statute for an action of this kind simply against the government. An applicant for public lands cannot have his right thereto as against the government determined by the courts in a suit against the latter. *United States* v. *Jones*, 131 U. S. 1. The only jurisdiction which the District Court could have was of a controversy between individual claimants, and though its judgment is by statute made conclusive upon the government of the rights of the party in whose favor the judgment goes, it is none the less true that the condition of jurisdiction is a controversy between individual claimants. When an action has been instituted in the court to determine such a controversy, it is not within the competency of the defendant to take himself out of court. A defendant may withdraw his answer and thus let judgment go by default, but he does not thereby deprive the court of a jurisdiction which has been once established. The rule applicable here is no different from that which applies in any other case. When a defendant has by personal service or appearance once been brought into a court, having jurisdiction of the subject-matter, he cannot at his election oust the court of jurisdiction, or prevent the case from

passing to judgment. Whether he confesses plaintiff's right or defaults in answer, or files a denial or a disclaimer, is alike immaterial. In each and all of these cases the jurisdiction remains and the court may enter the appropriate judgment. Where the defendant simply withdraws his answer, as was this case, the court is under no obligations to inquire whether he has lost all interest, but may proceed to judgment, and its judgment is an adjudication of the rights of the plaintiff, as shown by the complaint and testimony. Can it for a moment be supposed that after the entry of this judgment the defendants, treating it as a nullity, could again amend their application so as to include all the ground covered by the original application, and thus the disputed territory, and if such amendment were permitted by the land office, press the application to success and obtain a patent for the entire claim? And yet, if the judgment be a nullity and the defendants out of the District Court, why might not this be done? The defendants by the proceedings which they initiated in the land office compelled the plaintiffs to institute a suit in a court of competent jurisdiction to enforce their rights. After such suit has been commenced and the defendants have been made parties thereto, and the court has proceeded to judgment, will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion that this cannot be tolerated, that the judgment was in all respects regular, that it was conclusive as to the particular ground in controversy, and binding by way of estoppel as to every fact necessarily determined by it, and that priority of location was one fact so determined. There was error, therefore, in excluding the record of that judgment.

Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end lines. Of course, if the latter is a valid location the owner of the claim would unquestionably have the right to follow

the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited that where the course of a vein is across instead of lengthwise of the location, the side lines become the end lines and the end the side lines; but there has been no decision as to what extra-territorial rights exist if a vein enters at an end and passes out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine and give to the owner of the vein the right to pursue it on its dip in whatever direction that may go, within the limits of some equitably created end lines?

If the common law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical plane of any of its boundary lines; and even if the amended application was perfectly valid the question would arise whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question it is unnecessary to consider this.

For the reason given the judgments of the Court of Appeals and of the Circuit Court are

Reversed and the case is remanded to the latter court with instructions to grant a new trial.

LAMBERT *v.* BARRETT.

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

No. 928. Submitted March 25, 1895. — Decided April 15, 1895.

The contention that petitioner cannot be made to pay the penalty for the crime of which he was adjudged guilty, because he was not executed at the time originally designated, was not sustained by the chief justice of the State nor by the associate justice of its Supreme Court, to whom, severally, he applied, and their action is not open to review here.

An appeal will not lie from an order of a Circuit Judge at chambers.

THEODORE LAMBERT presented to one of the judges of the Circuit Court of the United States for the third circuit, at chambers, on December 28, 1894, his petition for *habeas corpus*, which alleged that he was restrained of his liberty by the sheriff of Camden County, New Jersey, under a reprieve granted by the governor of that State December 4, 1894, whereby the execution of a certain judgment of the Court of Oyer and Terminer and general jail delivery of the county aforesaid, entered October 13, 1894, was suspended until January 3, 1895. The petitioner alleged that he was convicted June 15, 1894, of the murder of William Kairer in said court, and on October 13 was sentenced to be hanged December 13; that, afterwards, on November 19, application was made to the chancellor of the State of New Jersey for a writ of error to remove the judgment and the proceedings therein to the Supreme Court of New Jersey, which was denied; that December 4, application was made to the governor for a reprieve to suspend the execution of the judgment, which reprieve was granted on that day, and thereby the execution of the mandate of the court was suspended until January 3. Petitioner further showed that on the twenty-second day of December the governor issued a death warrant to the sheriff of Camden County, commanding him to execute petitioner on the third day of January next; and charged that his imprisonment was illegal in that the governor had no jurisdiction, warrant, or

authority under the laws of the State to grant said reprieve, and that the day and time having passed for the execution of the sentence of the court, "it is supposed to have been done in law, and if not, then said judgment and execution is nil, illegal, and cannot now be lawfully carried into effect."

The petition further alleged that by the judgment and sentence of the court, petitioner had been and was now under sentence of death and unlawfully restrained of his liberty and detained in jail; that under section 9 of article V of the Constitution of that State, the governor had no prerogative, right, or authority to grant the reprieve or issue the death warrant, and that the same was illegal and unlawful, and in violation of the Constitution of the United States and of the State of New Jersey; but that by virtue of the death warrant the sheriff intended to execute petitioner on the third day of January next. And it was futher averred that on the twenty-second day of December application was made to one of the justices of the Supreme Court of Judicature of the State of New Jersey for a writ of *habeas corpus*, to be relieved of the unlawful restraint of his liberty, and that the application was denied, and petitioner was refused an appeal from the same contrary to the Federal and state constitutions; that on the twenty-fourth of December an application was made to the chief justice of said Supreme Court for a writ of *certiorari* to review the death warrant issued by the governor, and that the same was refused, and an appeal from said refusal and a hearing therein was denied, contrary to and in violation of said constitutions. And petitioner alleged that by the action of said justices of the Supreme Court of the State in refusing him relief in the premises he had been deprived of his rights as a citizen of the United States and the protection of its laws, and in like manner deprived of his liberty and was about to be deprived of his life. Petitioner, therefore, prayed that he might be forthwith brought before the Circuit Court by virtue of the writ of *habeas corpus* and be discharged from custody.

The Circuit Judge to whom the petition was presented, upon consideration thereof and the matters therein set forth, refused

to issue the writ; whereupon an appeal from the order denying the application was allowed.

Mr. John L. Sample for appellant.

Mr. Wilson H. Jenkins for appellee.

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

This appeal must be dismissed for want of jurisdiction. The constitution of New Jersey provides that the governor shall have power "to grant reprieves to extend until the expiration of a time not exceeding ninety days, after conviction." Art. V, § 9; 2 Charters and Constitution, 1318. The verdict was returned June 15. Sentence was passed October 13, and a reprieve for thirty days was granted December 4, 1894. Appellant contends that the word "conviction" relates to the verdict of the jury and not to the sentence of the court, and that, therefore, the governor had no power to grant the reprieve, nor subsequently to issue the warrant of execution. But the contention that petitioner cannot be made to pay the penalty for the crime of which he was adjudged guilty, because he was not executed at the time originally designated, by reason of the interposition of the governor at his instance, which petitioner alleges was, as matter of construction of the state constitution, unauthorized, was not sustained by the chief justice of the State nor by the associate justice of its Supreme Court, to whom, severally, he applied, and their action is not open to review here. With the disposition of state questions by the appropriate state authorities, it is not the province of this court to interfere, and there is no basis for the suggestion of any violation of the Constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immunity secured to him by the Constitution or laws of the United States. *Hallinger* v. *Davis*, 146 U. S. 314; *In re Kemmler*, 136 U. S. 436; *Caldwell* v. *Texas*, 137 U. S. 692; *In re Converse*, 137 U. S. 624; *McNulty* v. *California*, 149 U. S. 645.

Moreover, the order from which the appeal was taken was

not a final decision of the Circuit Court of the United States for the District of New Jersey, but was an order of the circuit judge at chambers, and an appeal from such an order will not lie. Rev. Stat. §§ 763, 764; Act of March 3, 1885, c. 353, 23 Stat. 437; *Carper* v. *Fitzgerald*, 121 U. S. 87; *In re Lennon*, 150 U. S. 393; *McKnight* v. *James*, 155 U. S. 685.

Appeal dismissed.

APPENDIX.

CHIEF JUSTICE TANEY TO MR. CHASE.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1862.

ORDER OF COURT.

TUESDAY, MARCH 10, 1863.

Ordered, upon the request of the Chief Justice, that the following letter from him to the Secretary of the Treasury be entered on the records of the court:

WASHINGTON, FEBRUARY 16, 1863.

SIR: I find that the act of Congress of the last session imposing a tax of three per cent on the salaries of all officers in the employment of the United States, has been construed in your department to embrace Judicial Officers, and the amount of the tax has been deducted from the salaries of the judges.

The first section of the third article of the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as Congress may from time to time ordain and establish. The judges of both the Supreme and Inferior Courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

The act in question, as you interpret it, diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature.

The Judiciary is one of the three great departments of the government, created and established by the Constitution. Its duties and powers are specifically set forth, and are of a character that requires it to be perfectly independent of the two other departments, and in order to place it beyond the reach and above even the suspicion of any such influence, the power to reduce their compensation is expressly withheld from Congress, and excepted from their powers of legislation.

Language could not be more plain than that used in the Constitution. It is moreover one of its most important and essential provisions. For the articles which limit the powers of the legislative and executive branches of the government, and those which provide safeguards for the protection of the citizen in his person and property, would be of little value without a judiciary to uphold and maintain them, which was free from every influence, direct or indirect, that might by possibility in times of political excitement warp their judgments.

Upon these grounds I regard an act of Congress retaining in the Treasury a portion of the compensation of the judges, as unconstitutional and void; and I should not have troubled you with this letter, if there was any mode by which the question could be decided in a judicial proceeding. But all of the judges of the courts of the United States have an interest in the question, and could not therefore with propriety undertake to hear and decide it. I am, however, not willing to leave it to be inferred from my silence that I admit the right of the legislature to diminish in this, or any other mode, the compensation of the judges when once fixed by law; and my silence would naturally — perhaps necessarily — be looked upon as acquiescence on my part in the power claimed and exercised under this act of Congress; and would be regarded as a precedent, establishing the principle that the legislature may at its pleasure regulate the salaries of the judges of the courts of the United States, and may reduce their compensation whenever Congress may think proper.

Having been honored with the highest judicial station under the Constitution, I feel it to be more especially my duty to uphold and maintain the constitutional rights of that department of the government, and not by any act or word of mine, leave it to be supposed that I acquiesce in a measure that displaces it from the independent position assigned it by the statesmen who framed the Constitution; and in order to guard against any such inference,

I present to you this respectful but firm and decided remonstrance against the authority you have exercised under this act of Congress, and request you to place this protest upon the public files of your office as the evidence that I have done everything in my power to preserve and maintain the Judicial Department in the position and rank in the government which the Constitution has assigned to it.

I am, sir, very respectfully yours,

R. B. TANEY.

HON. S. P. CHASE,
Secretary of the Treasury.

INDEX.

ADMIRALTY.

1. A statement that a steamship, in the harbor of New York, with no fog, meeting a tug with a tow, starboards after receiving two whistles from the tug and subsequently ports and attempts to pass between the tug and her tow, is grossly improbable. *The Ludvig Holberg*, 60.
2. A steamship, running in a fog at dead slow and coming in contact with a tug, cannot be held responsible simply because, a few minutes before the collision, she had been running full speed. *Ib.*
3. A steamer running in a fog is not obliged to stop at the first signal heard by her unless its proximity be such as to indicate immediate danger. *Ib.*
4. The remarks of the court in *The Colorado*, 91 U. S. 692, 698, held not to apply to this case. *Ib.*
5. The findings show that the tug was in fault in failing to send three blasts of whistle, in quick succession. *Ib.*
6. When, in a collision case, uncontradicted testimony establishes fault on the part of one vessel, the mere raising a doubt touching the conduct of the other will not overcome its effect. *Ib.*
7. For reasons stated in the opinion, the court regrets that the tug could not be brought into this case, and it affirms the decree of the court below. *Ib.*
8. In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy; and this being so, his undertaking is not discharged because the want of fitness is the result of latent defects. *The Caledonia*, 124.
9. A bill of lading whereby a steamship owner undertakes to deliver live cattle at a foreign port, loss or damage from delays, steam boilers and machinery or defects therein excepted, does not exempt him from liability under such warranty for injury happening to the cattle through an unexpected prolongation of the voyage, in consequence of a breaking of the shaft caused by a latent defect in it, which existed before and at the commencement of the voyage. *Ib.*
10. Exceptions in a bill of lading are to be construed most strongly

against the shipowner; and when they form, in the contract, part of long enumerations of excepted causes of damage, all the rest of which relate to matters subsequent to the beginning of the voyage, they must be treated as equally limited in their scope. *Ib.*

11. As between the shipper and the shipowner, the bill of lading only can be considered as the contract. *Ib.*

See GENERAL AVERAGE.

AMENDMENT.

See WRIT OF ERROR, 1.

APPEAL.

An appeal will not lie from an order of a Circuit Judge at chambers. *Lambert* v. *Barrett*, 697.

CASES AFFIRMED OR FOLLOWED.

United States v. *Piatt and Salisbury*, 157 U. S. 113, followed. *United States* v. *Salisbury*, 121.

See CRIMINAL LAW, 17;
JURISDICTION, B, 7, 10;
STATUTE, A, 2.

CASES DISTINGUISHED.

Pennsylvania Co. v. *Roy*, 102 U. S. 451, distinguished from this case. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.

CONSPIRACY.

See CRIMINAL LAW, 10.

CONSTITUTIONAL LAW.

1. The act of the legislature of Louisiana of July 12, 1888, No. 133, authorizing the enforcement by mandamus without a jury of contracts by corporations with municipal corporations in that State with reference to the paving, grading, repairing, etc., of streets, highways, bridges, etc., simply gives an additional remedy to the party entitled to the performance, without impairing any substantial right of the other party; does not impair the obligation of the contract sought to be enforced; and is not in conflict with the Constitution of the United States. *New Orleans City and Lake Railroad Co.* v. *Louisiana ex rel. New Orleans*, 219.
2. The denial by a state court of an application to amend a petition for the removal of the cause to a Federal court is not the denial of a right secured by the Constitution of the United States. *Stevens' Administrator* v. *Nichols*, 370.
3. In the cases referred to in the opinion of the court in this case, begin-

ning with *Hylton* v. *United States*, 3 Dall. 171, (February Term, 1796,) and ending with *Springer* v. *United States*, 102 U. S. 586, (October Term, 1880,) taxes on land are conceded to be direct taxes, and in none of them is it determined that a tax on rent or income derived from land is not a tax on land. *Pollock* v. *Farmers' Loan & Trust Company*, 429.

4. A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States. *Ib.*
5. A tax upon income derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States. *Ib.*
6. So much of the act "to reduce taxation, to provide revenue for the government, and for other purposes," 28 Stat. 509, c. 349, as provides for levying taxes upon rents or income derived from real estate, or from the interest on municipal bonds, is repugnant to the Constitution of the United States and is invalid. *Ib.*
7. Upon each of the other questions argued at the bar, to wit: 1, Whether the void provision as to rents and income from real estate invalidates the whole act? 2, Whether as to the income from personal property as such, the act is unconstitutional as laying direct taxes? 3, Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested? — the justices who heard the argument are equally divided, and, therefore, no opinion is expressed. *Ib.*
8. When a prisoner is indicted in a state court for murder, it is for the courts of the State to decide whether the indictment sufficiently charges that crime in the first degree. *Bergemann* v. *Backer*, 655.
9. In view of the decisions by the highest court of New Jersey, referred to in the opinion, declaring the meaning and scope of the statutes of that State under which the accused was prosecuted, it cannot be held that he was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the Fourteenth Amendment to the Constitution. *Ib.*

See STARE DECISIS.

CONTRACT.

In June, 1887, the Pullman Car Company of Chicago wrote to the Metropolitan Street Railway Company of Kansas City, proposing to build for it 25 cable cars according to specifications attached, and to deliver them free on board at Pullman Junction in Illinois, the cars to be inspected and accepted at the Pullman works, and to be paid for on delivery, the written acceptance of the railway company to constitute a contract mutually binding. Nothing was said about brakes, except

that they were to be operated by gripmen with lever, both trucks. The railway company accepted in writing. The details of construction were then considered and agreed upon between the two companies. Nothing further was said about brakes except that the railway company required them to be heavy and extra powerful. Brakes were then designed by the car company, but no designs of them were furnished to the railway company. When 12 cars were finished, but before any had been delivered, the agent of the railway company went, at the request of the car company, to the shops of the latter in Illinois, and there made a thorough examination of the 12 cars, working the brakes and carefully watching their operation. He expressed himself entirely satisfied with them, and ordered the others to be finished in the same way, and all to be forwarded. This was done in five shipments between February 24 and March 30, 1888. Before the last shipment was made the railway company, on the 23d of March, tried the cars and found that the brakes would not work satisfactorily. They notified the car company at once, and it sent its engineer to Kansas City. When he left Kansas City he claimed that he had remedied the trouble. On the 5th of April the car company presented its bill for payment. On the 11th the railway company declined to pay it unless the brakes were first made right, and asked the car company to send a man to make the necessary changes, adding that if this were not done it would make the changes itself and charge the car company with the expense of them. The car company did send a man, who worked upon the brakes for some time, but without remedying the difficulty. On the 12th of May the railway company declined to accept the cars, and so notified the car company. It stored the 25 cars in Kansas City, and ordered a supply of cars elsewhere. The car company thereupon sued the railway company, to recover the contract price for the cars. *Held*, (1) That the title to the first 12 cars passed to the railway company when its agent inspected and accepted them at the shops of the car company; (2) that the title to the remainder passed to the railway company when they were put on cars at Pullman Junction, to be forwarded to that company; (3) that under the circumstances the most that the railway company could claim was the reasonable cost of obtaining new brakes adapted for use on the cars constructed under the contract. *Pullman's Palace Car Company* v. *Metropolitan Street Railway Company*, 94.

See POST OFFICE DEPARTMENT.

CORPORATION.

1. A corporation, acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it, in order to induce a continuance of

that credit, and to obtain renewals of maturing paper at a time when the corporation, although it may not be then in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue in business. *Sanford Fork & Tool Co.* v. *Howe, Brown & Co., Limited*, 312.

2. Under the circumstances detailed in the statement of facts and in the opinion of the court in this case, it is *held*, that the mortgage given by the Sanford Fork and Tool Company, by special direction of its stockholders, to its directors to secure them for indorsing and for continuing to indorse the paper of the company, is valid. *Ib.*

COSTS.

See REMOVAL OF CAUSES.

COURT AND JURY.

1. Where the evidence is conflicting, and no reasonable or proper inference can be drawn from it as matter of law, the case should be left to the jury. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.
2. Where the trial judge is satisfied upon the evidence that the plaintiff is not entitled to recover, and that a verdict, if rendered for plaintiff, must be set aside, the court may instruct the jury to find for the defendant, and in such case no constitutional question arises; but if the court errs as a matter of law in so doing, the remedy lies in a review in the appropriate court. *Treat Manufacturing Co.* v. *Standard Steel and Iron Co.*, 674.

CRIMINAL LAW.

1. The omission of the formal indorsement of an indictment as "a true bill," signed by the foreman of the grand jury, is not necessarily and under all circumstances fatal, although it is advisable that the indictment should be endorsed. *Frisbie* v. *United States*, 160.
2. Such a defect is waived if the objection be not made in the first instance and before trial. *Ib.*
3. Pleading to an indictment admits its genuineness as a record. *Ib.*
4. The provision in the act of June 27, 1890, c. 634, 26 Stat. 182, forbidding an agent, attorney, or other person engaged in preparing, presenting, or prosecuting a claim for a pension under that act from demanding or receiving a greater fee than ten dollars for his services is constitutional. *Ib.*
5. An indictment for violating that provision which describes the defendant as a "lawyer" is sufficient. *Ib.*
6. The offence against that act is committed when a sum greater than ten dollars has been taken, without regard to the fact whether the pension money has or has not been received. *Ib.*
7. When the amount of the excess so taken is unknown to the grand jury, it is proper to allege that fact in the indictment. *Ib.*

8. It is unnecessary to aver a demand for the return of the money wrongfully taken. *Ib.*
9. The omission to charge that the offence was "contrary to the form of the statutes in such case made and provided and against the peace and dignity of the United States" is immaterial. *Ib.*
10. In an indictment and prosecution under Rev. Stat. § 5480, as amended by the act of March 2, 1889, c. 393, for a conspiracy to defraud by means of the post office, three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged devised a scheme to defraud; (2) that they intended to effect this scheme by opening or intending to open correspondence with some other person through the post office establishment or by inciting such other person to open communication with them; (3) and that in carrying out such scheme such person must have either deposited a letter or packet in the post office, or taken or received one therefrom. *Stokes* v. *United States*, 187.
11. An objection to the admissibility of an envelope against the defendant in such a case upon the ground that it was not shown to be in his handwriting is not sustained, as the bill of exceptions did not purport to contain all the evidence. *Ib.*
12. Other objections to the admissibility of evidence considered and held to be without merit. *Ib.*
13. When a paper admitted to be in the handwriting of a defendant in a criminal prosecution is admitted in evidence for another purpose, it is competent for the jury to compare it with the handwriting of a letter which he is accused of, and indicted for, writing, for the purpose of drawing their own conclusions respecting the latter. *Ib.*
14. The first count in an indictment containing three counts charged the accused with "having counterfeit coin in his possession, with intent to defraud certain persons to this grand inquest unknown." The jury found him "guilty in the first count for having in possession counterfeit minor coin. Not guilty as to second and third counts." *Held*, that the verdict was a general verdict of guilty under the first count, and that the words attached did not qualify the conclusion of guilt. *Statler* v. *United States*, 277.
15. Several objections to the admissibility of evidence considered and disposed of. *Cochran and Sayre* v. *United States*, 286.
16. Some objections to the charge considered and disposed of. *Ib.*
17. The defendants requested the court to charge the jury as follows: "You are further instructed that the defendants are presumed to be innocent until the contrary appears beyond a reasonable doubt, and that every reasonable doubt or presumption arising from the evidence must be construed in their favor." The court refused to give this instruction, but instead thereof gave a carefully prepared definition of reasonable doubt, without referring to the presumption of innocence which attends an accused at every stage of the proceeding. *Held*,

following *Coffin* v. *United States*, 156 U. S. 432, that this was error, as the defendants were entitled to an instruction upon the point of the presumption of innocence, if requested. *Ib.*

18. The offence of knowingly smuggling or clandestinely introducing goods, etc., subject to duty into the United States without paying such duty, in violation of the provisions of Rev. Stat. § 2865, and of concealing such smuggled goods is only a misdemeanor, and the defendant is only entitled to three peremptory challenges. *Reagan* v. *United States*, 301.

19. At the request of the defendant, in a murder case, the court instructed the jury that where the evidence showed that the defendant did not commit the actual killing, and it was uncertain whether he did participate in it, the jury might regard the absence of any proof of motive for the killing in finding their verdict; but the court further added that the absence or presence of motive is not a necessary requisite to enable the jury to find the guilt of a party, because it is frequently impossible for the government to find a motive. *Held*, that, in thus qualifying the instruction the judge committed no error. *Johnson, alias Overton* v. *United States*, 320.

20. Though the examination of the evidence leaves on this court the impression that there was reasonable doubt of the guilt of the accused, the verdict of the jury to the contrary and the action of the court below in overruling a motion for a new trial shows that the trial court was satisfied with the verdict, and, there being no error in the rulings, it is not disturbed. *Ib.*

21. In a trial for murder by shooting with a pistol it appeared that the accused and the deceased had had difficulties; that the accused, knowing that he was to meet the deceased, had armed himself with a pistol; that when they met the deceased and his companions were armed with sticks; that an altercation ensued which resulted in the shooting; and the evidence was conflicting as to who had made the first attack. The court, under exception, instructed the jury as follows: "Now, gentlemen, these are the three conditions which I give you in the case. I have told you that if it is true that this defendant went up on one side of the fence and when there struck Philip Henson in the mouth and then shot him, that is murder. On the other hand, if it is true that Henson and the other boys attacked him with sticks, and while that attack was going on and in the heat of that affray, and the sticks were not of a dangerous or deadly character, and under such circumstances he shot and killed Philip Henson, that would be manslaughter; but if there was an absence of that condition, then there is no manslaughter in it, nor could there be any self-defence in it. There could be nothing else but this distinct grade of crime known as murder; because self-defence, as I have before defined to you, contemplates the doing of something upon the part of the one slain, or the ones acting with him, that was either actually and really so apparently

of a deadly character, or which threatened great violence to the person, or that which seemed to do so. If they assaulted him with these sticks, and they were not deadly weapons, and they were engaged in a conflict, and in that conflict the defendant shot Philip Henson, without previous preparation, without previous deliberation, without previous selection of a deadly weapon, without a contemplated purpose to use that deadly weapon in a dangerous way, then that would be manslaughter, and it could not be self-defence, because the injury received would not be of that deadly character or that dangerous nature that could give a man the right to slay another because of threatened deadly injury or actual great bodily injury received." *Held*, that this instruction was erroneous in withdrawing from the jury the question of self-defence, and likewise in telling them that the intentional arming himself with a pistol by the defendant, even if with a view to self-defence, would make a case of murder unless the actual affray developed a case of necessary self-defence. *Allen* v. *United States*, 675.

See INDICTMENT;
WITNESS.

CUSTOMS DUTIES.

1. Under Schedule K, clause 2, of the tariff act of March 3, 1883, c. 120, all hair of the alpaca, goat, and other like animals, is subjected to a uniform duty of ten cents a pound; and goat's hair is not comprehended in the clause relating to hair "not specially provided for." *Cooper* v. *Dobson*, 148.
2. Under the tariff act of March 3, 1883, c. 120, rugs made as rugs, and distinguishable as such by reason of their process of manufacture, size, shape, pattern, etc., were subject to the duty imposed upon rugs; and rugs made from pieces of carpets or carpetings, to the rate imposed upon the carpet from which they were made. *Beuttell* v. *Magone*, 154.
3. An importer of flaxseed, containing an ascertainable percentage of impurities, composed of clay, sand, and gravel, is entitled to an allowance of that percentage in assessing duties upon the gross weight of the goods. *Seeberger* v. *Wright & Lawther Oil and Lead Manufacturing Co.*, 183.
4. Under the act of February 26, 1845, c. 22, 5 Stat. 727, a protest against the exaction of duties on imported goods, in order to be available for recovering the amount of duties illegally exacted, must be made at or before their actual payment; and when the importer deposits with a collector an amount supposed to be sufficient to pay the duties, subject to future liquidation, and receives the goods, and on such liquidation an amount is found to be due the importer as overpayment and is refunded to him, a protest made after the deposit and receipt of the goods, but before the liquidation, is too late and is of no avail. *Barney* v. *Rickard*, 352.

5. In an action, tried in 1890, to recover duties alleged to have been illegally exacted in 1861 on an importation of bareges, grenadines, maretz, and merinos, the plaintiff introduced no samples of the imported goods, nor any evidence as to their loss or destruction, and gave no reasons why they were not preserved and produced. He showed to one of his witnesses samples of grenadines, bareges, etc., but without connecting them in any way with the importations, and questioned the witness concerning them. *Held*, that their admission tended to mislead the jury, and was error; and that such evidence came within the rule that "a fact which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto, and not by reason of its being connected therewith, is deemed not to be relevant to such fact." *Ib.*

DEMURRER.

See POST OFFICE DEPARTMENT.

ESTOPPEL.

1. If, in an action at law upon a written contract, oral evidence offered by the defendant that the writing signed by the parties was not intended as a contract, nor understood by either party to be binding as such, is excluded by the court, upon the plaintiff's objection, as incompetent to control the written contract, he is estopped, at the hearing of a bill in equity thereupon filed by the defendant for an injunction against the prosecution of the action at law, to object that the evidence was admissible at law only. *Michels* v. *Olmstead*, 198.
2. In determining whether the judgment plaintiff and real owner of an assigned judgment is estopped to assert his ownership as against a second assignee, on the ground that the second assignee occupies the position of a purchaser for value in good faith and without notice and in reliance on the apparent ownership, the amount of the consideration paid by him is an important fact. *Baker* v. *Wood*, 212.
3. When such amount is greatly disproportionate to the true value of the judgment, that fact may authorize the inference that the claim to have paid value is a pretence; and it is further important, as bearing on the questions of notice and of good faith. *Ib.*
4. In such case the interest of the second assignee of the judgment, if recognized, should be limited to the amount he actually paid and the measure of the estoppel also limited accordingly. *Ib.*

See FINDINGS OF FACT; JUDGMENT; MINERAL LAND, 2; POST OFFICE DEPARTMENT.

EVIDENCE.

See CRIMINAL LAW, 10, 11, 12, ,13 51.

EXCEPTION.

1. When an instruction to the jury embodies several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects, in order to avail himself of the objection. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.
2. The record showed that plaintiff asked six instructions, of which the court gave two, declined to give one, and declined to give the other three except as covered by the general charge. The whole charge was contained in the bill of exceptions, which thus concluded: "To which refusal and charge of the court and the exclusion of evidence offered, and to the action of the court in refusing a new trial, plaintiff excepted and tendered this bill of exceptions, which was signed and sealed by the court and ordered to be made a part of the record in this cause." *Held*, that this exception was insufficient. *Jones* v. *East Tennessee, Virginia & Georgia Railroad Co.*, 682.

FINDINGS OF FACT.

Findings of fact in such cases, even when no statute provides for making them, are a declaration by the court of the matter which it determines, and are conclusive as to it in subsequent controversies between the parties. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 683.

GENERAL AVERAGE.

1. The scuttling of a ship by the municipal authorities of a port, without the direction of her master or other commanding officer, to extinguish a fire in her hold, is not a general average loss. *Ralli* v. *Troop*, 386.
2. If the cargo in the hold of a ship moored in a port takes fire, and the port authorities come on board with fire-engines, take charge of her, pump steam and water into the hold, and move her and put her aground without any objection by the master; and the master successfully removes part of the cargo, and desires, and believes it to be prudent and feasible, to remove more; but the port authorities forbid and prevent his doing so, because of the danger of increasing the fire, and themselves extinguish the fire by scuttling the ship, whereby she becomes a wreck, not worth repairing; the loss of the ship is not a subject of contribution in general average against the owners of the cargo, although the court is of opinion that the measures taken by the port authorities were the best available to save the cargo from greater loss. *Ib.*

GUARDIAN AND WARD.

1. A guardian of an infant, appointed in one State, cannot maintain a suit in the Circuit Court of the United States held within another

State, to set aside the appointment or to compel an account of a guardian previously appointed in the latter State, except so far as authorized to do so by its laws. *Morgan* v. *Potter*, 195.

2. In a suit by an infant, by his next friend, the infant, and not the next friend, must be made the plaintiff. *Ib.*

HABEAS CORPUS.

1. The refusal by the state court to grant a writ of error to a person convicted of murder, or to stay the execution of a sentence, will not warrant a court of the United States in interfering in his behalf by writ of *habeas corpus*. *Bergemann* v. *Backer*, 655.

2. When a state court has jurisdiction of the offence and the accused under an indictment found under statutes of the State not void under the Constitution of the United States, and proceeds to judgment under such statutes, a Circuit Court of the United States has no authority to interfere with the execution of the sentence by means of a writ of *habeas corpus*. *Ib.*

INCOME TAX.

See CONSTITUTIONAL LAW, 3, 4, 5, 6, 7;
JURISDICTION, B, 9.

INDICTMENT.

1. In an indictment against the president and the assistant cashier of a national bank for making a false entry in a report, under Rev. Stat. § 5209, the report need not be described with technical accuracy; nor is it necessary to allege that the report in which the false entry was made was verified by the oath or affirmation of the president or cashier, or attested by the signature of the directors. *Cochran and Sayre* v. *United States*, 286.

2. In such an indictment the true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offence intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. *Ib.*

See CRIMINAL LAW.

INSOLVENT DEBTOR.

See CORPORATION.

JUDGMENT.

1. When the jurisdiction of a controversy by a court is unquestioned, and the cause proceeds to final judgment, and no review is sought for, the judgment is conclusive upon the parties to the suit as to the matter decided, but not as to matters which might have been decided, but were not. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 683.

2. A judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment, as one rendered after answer and contest; and in such case facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings. *Ib.*

See MINERAL LAND, 2.

JURISDICTION.

A. GENERALLY.

A question of jurisdiction cannot be waived. *Mexican National Railroad Co.* v. *Davidson*, 201.

B. JURISDICTION OF THE SUPREME COURT.

1. The court below, in its order granting the appeal, said: "This appeal is granted solely upon the question of jurisdiction" and made further provisions for determining what parts of the record should be certified to this court under the appeal, under which it subsequently directed the portions of the record to be certified to this court, and the record was prepared accordingly. *Held*, that this was a sufficient certificate of a question of jurisdiction under the provisions of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, 827. *Shields* v. *Coleman*, 168.
2. This court has no original jurisdiction of a suit between a State on the one side, and citizens of another State and citizens of the same State on the other side. *California* v. *Southern Pacific Company*, 229.
3. When an original cause is pending in this court, to be disposed of here in the first instance and in the exercise of an exceptional jurisdiction, it does not comport with the gravity and the finality which should characterize such an adjudication, to proceed in the absence of parties whose rights would be in effect determined, even though they might not be technically bound in subsequent litigations in some other tribunal. *Ib.*
4. The city of Oakland and the Oakland Water Front Company are so situated in respect of this litigation, that the court ought not to proceed in their absence; and as, if they were brought in, the case would then be between the State of California, on the one hand, and a citizen of another State and citizens of California on the other, this court cannot, under such circumstances, take original jurisdiction of it. *Ib.*
5. The finding of the Maryland Court of Appeals, that there was no fund in the state treasury upon which the Comptroller could lawfully draw his warrant, because there had been no appropriation made by the state legislature for the payment of the commissions here claimed, was decisive of this case, and involved no Federal question. *Wailes* v. *Smith*, 271.
6. It being settled that by the joint resolution of March 3, 1891, 26 Stat. 1115, the jurisdiction of this court was preserved as to pending cases,

and cases wherein the writ of error on appeal should be sued out, or taken before July 1, 1891, the court has jurisdiction of this case, the writ of error having been allowed and sealed June 5, 1891. *Gulf, Colorado & Sante Fé Railway Co.* v. *Shane*, 348.

7. *Maynard* v. *Hecht*, 151 U. S. 324, affirmed to the point that, "Where an appeal or writ of error is taken from a District or a Circuit Court in which the jurisdiction of the court alone is in issue, a certificate from the court below of the question of jurisdiction to be decided is an absolute prerequisite for the exercise of jurisdiction here; and if it be wanting this court cannot take jurisdiction." *Colvin* v. *Jacksonville*, 368.
8. For the reasons stated in the opinion of the court it is *held*, (1) that this court has no jurisdiction to review the judgment of the Circuit Court in this case, and (2) that the writ of error was brought too late. *Lutcher* v. *United States*, 427.
9. A court of equity has jurisdiction to prevent a threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits; and such a bill being filed by a stockholder to prevent a trust company from voluntarily making returns for the imposition and payment of a tax claimed to be unconstitutional, and on the further ground of threatened multiplicity of suits and irreparable injury, and the objection of adequate remedy at law not having been raised below or in this court, and the question of jurisdiction having been waived by the United States, so far as it was within its power to do so, and the relief sought being to prevent the voluntary action of the trust company and not in respect to the assessment and collection of the tax, this court will proceed to judgment on the merits. *Pollock* v. *Farmers' Loan & Trust Company*, 429.
10. On the authority of *Maynard* v. *Hecht*, 151 U. S. 324, and *Colvin* v. *Jacksonville*, 157 U. S. 368, this case is dismissed for want of a certificate from the Circuit Court certifying the question of its jurisdiction for decision here. *Davis & Rankin Building Co.* v. *Barber*, 673.
11. The contention that petitioner cannot be made to pay the penalty for the crime of which he was adjudged guilty, because he was not executed at the time originally designated, was not sustained by the chief justice of the State nor by the associate justice of its Supreme Court, to whom, severally, he applied, and their action is not open to review here. *Lambert* v. *Barrett*, 697.
12. An appeal will not lie from an order of a Circuit Judge at chambers. *Ib.*

C. Of Circuit Courts of the United States.

1. Under § 2 of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 886, 25 Stat. 433, the jurisdiction of a Circuit Court of the United States, on removal by the defendant of an action from a state court, is limited to such suits as might have been

brought in that court under the first section. *Mexican National Railroad Co.* v. *Davidson*, 201.

2. Although section 3186 of the Revised Statutes of Wisconsin may have enlarged the ordinary equitable action to quiet title and remove a cloud, the Circuit Court of the United States, sitting in that District, may take jurisdiction of a bill properly brought under its provisions. *Bardon* v. *Land and River Improvement Company*, 327.
3. A person in possession, claiming under a tax deed, under which he had obtained title, may institute such a suit. *Ib.*
4. The jurisdiction of a suit so instituted is not affected by the provision in section 1197 of the Revised Statutes of Wisconsin of 1878 conferring for three years a right of action by the grantee in a tax deed against the owner to bar him and his grantees from claiming the land, nor by the provisions of § 22, c. 138, of the Revised Statutes of 1858. *Ib.*

JURY.

Under the act of May 2, 1890, c. 182, providing a temporary government for the Territory of Oklahoma, the provisions of the statutes of Arkansas, that if either party shall desire a panel, the court shall cause the names of 24 competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of 18 shall be drawn and entered on a list in the order in which they are drawn and numbered, and that each party shall be furnished with a copy of that list, from which each may strike the names of three jurors, and return the list so struck to the judge, who shall strike from the original list the names so stricken from the copies, and the first twelve names remaining in the original list shall constitute the jury, are mandatory, and no rule or custom of the court can override them. *Gulf, Colorado & Santa Fé Railway Co.* v. *Shane*, 348.

LIMITATION, STATUTE OF.

See TAX SALE, 2.

LOCAL LAW.

Wisconsin. See JURISDICTION, C, 2, 3, 4; TAX SALE.

LONGEVITY PAY.

In computing the time of service which entitles an officer in the army to longevity pay, service in a volunteer regiment is not service "in the army of the United States" within the meaning of the 15th section of the act of July 5, 1838, c. 162, 5 Stat. 256. *United States* v. *Sweeny*, 281.

MINERAL LAND.

1. When the course of a mineral vein is across a claim, instead of in the direction of its length, the side lines of the location of the claim

become, in law, the end lines, and the end lines become the side lines. *Last Chance Mining Co.* v. *Tyler Mining Co.*, 683.

2. In an action, brought under the provisions of Rev. Stat. §§ 2324, 2325, by an adverse claimant to a part of a mineral claim as located, the plaintiff alleged a priority of location, and rested his right to recover upon it. The defendant answered, but subsequently and before judgment withdrew his answer, and amended his application for a patent so as to exclude the tract in controversy. At the trial the defendant did not appear, but the plaintiff introduced evidence, oral and documentary. The court made a finding of fact that the tract in controversy had already been located by the plaintiff as a part of his mining claim when the defendant located his claim upon it, and that, consequently, it was not subject to location by the defendant. Upon that finding it was adjudged that, by reason of the laws and premises, the plaintiff was the owner of the disputed tract, that he was entitled to the possession of it, and that he recover possession of it from the defendant. *Held*, (1) That it appeared by the record that the court had in that case passed upon and determined the question of priority of location, and upon such determination had given judgment in favor of the plaintiff; (2) that the defendant's withdrawal of his answer did not operate to take the complaint out of the case, or the allegations of fact contained in it, or to prevent a judicial determination of those facts; (3) that the abandonment of his claim by the defendant did not take the jurisdiction for the settlement of the question out of the hands of the court, or restore it to the Land Department; (4) that the judgment of the court was in all respects regular; was conclusive as to the particular ground in controversy; and was binding by way of estoppel as to every fact necessarily determined by it, including the question of priority of location. *Ib.*
3. In view of the conclusions reached, it is not necessary to consider what extra-territorial rights (if any) exist when a vein enters at an end line, and passes out at a side line. *Ib.*

NATIONAL BANK.

A note whose payment is guaranteed by a national bank is a liability of the bank which is required by law (Rev. Stat. § 5211) to be shown in the report to the Comptroller of the Currency. *Cochran and Sayre* v. *United States*, 286.

See INDICTMENT.

NEW TRIAL.

Ambiguous or too forcible expressions in a charge may be explained or qualified by other parts of it, and if the charge does not, as a whole, work injustice to the party objecting, the use of such expressions will not be cause for granting a new trial. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.

PATENT FOR INVENTION.

1. The provision in Rev. Stat. § 4887 respecting a "patent granted for an invention which has been previously patented in a foreign country" refers to foreign patents granted previously to the issue of letters patent for the same invention by the United States, and not to foreign patents granted previously to the application for the American letters. *Bate Refrigerating Company* v. *Sulzberger*, 1.
2. When such foreign letters issue before the United States letters issue, the American patent is so limited as to expire at the same time with the foreign patent having the shortest term, but in no case is it to be in force more than seventeen years. *Ib.*
3. One who buys patented articles of manufacture from one authorized to sell them becomes possessed of an absolute property in such articles, unrestricted in time or place. *Keeler* v. *Standard Folding Bed Company*, 659.
4. Whether a patentee may protect himself and his assignees by special contracts brought home to the purchasers is not a question before the court and upon which it expresses no opinion. *Ib.*
5. The complainants were assignees, for the State of Massachusetts, of certain letters patent granted to one Welch, for an improvement in wardrobe bedsteads. The Welch Folding Bed Company owned the patent rights for the State of Michigan. The defendants purchased a carload of said beds from the Welch Folding Bed Company, at Grand Rapids, Michigan, for the purpose of selling them in Massachusetts, and afterwards sold them there and were still engaged in selling such beds in Boston. *Held*, that the defendants having purchased the patented articles in Michigan from the assignee of the patent for the territory included in that State, had a right to sell them anywhere within the United States, including Massachusetts, where the patent rights had been assigned to another assignee. *Ib.*
6. The previous cases bearing on this point considered and reviewed. *Ib.*

POST OFFICE DEPARTMENT.

In March, 1878, P. contracted to carry the mails three times a week for four years on route 36,107, commencing July 1, 1878, and entered on the performance of his contract. On the 5th day of the following December, in consequence of false and fraudulent sworn statements made by him concerning the number of horses and men that would be required to expedite the service by reducing the time, a large additional compensation was allowed him by the Postmaster General for that purpose. On the 13th of the same December he sublet his contract to S. with the consent of the Department, and the service was from that time performed by S. Further increased allowances, based on like fraudulent statements by P., were made in January and July, 1879, and assented to by P. and S. The amount so fraudulently received during the term of service was $99,556.20. The govern-

ment sued P. and S. to recover back that sum. In the first count the above facts were set forth and it was alleged that the false statements were designed to mislead and did mislead the Post Office Department. A second count was for money had and received. A third count set forth the same facts and averred that the money had been paid in mistake of fact, and had been received contrary to the provisions of Rev. Stat. § 3961. No process was served upon P., and he did not appear. S. appeared and demurred, and the demurrer was sustained. Each was cited in the writ of error, and service acknowledged by the attorney for both. *Held*, (1) That the statements regarding the "horses and men" required for the expedited service came within the statement as to "stock and carriers" required therefor, as provided in Rev. Stat. § 3961; (2) that P. and S. were bound by these statements and were estopped from asserting that it was not intended thereby to bring the contract within the statute; (3) that the demurrer admitted the fact that the increase had been allowed on the basis of the false representation; (4) that the court below erred in sustaining the demurrer to the third count; (5) that the defendants having each participated in the transaction, were properly sued jointly; (6) that the demurrer should have been overruled. *United States* v. *Piatt and Salisbury*, 113.

See CRIMINAL LAW, 10, 11, 12, 13.

PRACTICE.

1. The plaintiff's declaration claimed $10,000. He obtained a judgment in the trial court for $8000. The appellate court affirmed this judgment, and ordered that he recover "as in his declaration claimed." *Held*, that these words did not have the effect of increasing the sum actually recovered in the special term, and that the inaccuracy was not sufficient ground for reversal. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.
2. A request made to the court by each party to instruct the jury to render a verdict in his favor, is not equivalent to the submission of the case to the court without the intervention of a jury, within the intent of Rev. Stat. §§ 649, 700. *Beuttell* v. *Magone*, 154.
3. When each party asks the court to instruct a verdict in his favor, it is equivalent to a request for a finding of facts, and if the court directs the jury to find a verdict for one of them, both are concluded on the finding of facts. *Ib.*

See CRIMINAL LAW, 20; REMOVAL OF CAUSES; JURISDICTION, B, 1; WRIT OF ERROR, 2.

PREFERENCES.

See CORPORATION.

PUBLIC LAND.

1. In view of the treaties between the United States and the Osage Indians, and the laws affecting their lands, enacted prior to December 15, 1880,

it must be *held* that the lands which were, by the act of that date, 21 Stat. 311, directed to be opened for entry under the homestead laws, were lands within the abandoned Fort Dodge military reservation, subject to disposition under general laws relating to "other public lands," and not lands of an exceptional class, that were affected with a trust established for the benefit of Indians by treaty. *Frost* v. *Wenie*, 46.

2. The Commissioner of the General Land Office may direct the proper local land officer to hear and pass upon charges of fraud in the final proof of a preëmption claim upon which the requisite cash entry has been paid, and has jurisdiction to review the judgment of the local land officer in respect thereof; and the Secretary of the Interior has jurisdiction to review such judgment of the Commissioner, and to order such an entry, shown to be fraudulent, to be cancelled. *Orchard* v. *Alexander*, 372.

See MINERAL LAND.

RAILROAD.

1. Knowledge of a defect in a car brake cannot be imputed to the employé charged with keeping it in order, when he has had no opportunity to see it. *Baltimore & Potomac Railroad Co.* v. *Mackey*, 72.
2. A railroad company, receiving the cars of other companies to be hauled in its trains, is bound to inspect such cars before putting them in its trains, and is responsible to its employés for injuries inflicted upon them in consequence of defects in such cars which might have been discovered by a reasonable inspection before admitting them to a train. *Ib.*
3. In an action by an executor of a deceased person against a railroad company to recover damages for the killing of the intestate, an employé of the company, brought under the act of February 17, 1885, c. 126, 23 Stat. 307, which provides that "the damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed, according to the provisions of the statute of distributions," it is not error to charge the jury that in estimating damages they may take into consideration the age of the deceased, his health and strength, his capacity to earn money as disclosed by the evidence, his family, who they are and what they consist of, and from all the facts and all the circumstances make up their minds how much the family would probably lose by his death. *Ib.*
4. A bridge carpenter, employed by a railroad company, who is injured through the negligence of employés of the company while assisting in loading lumber, taken from an old bridge, on a car for transportation over the road, is an employé of the company within the meaning of § 93, c. 23, of the General Statutes of Kansas which makes a railroad company in that State liable to its employés for damage done them

through the negligence of its agents or the mismanagement of its employés. *Chicago, Kansas & Western Railroad Co.* v. *Pontius*, 209.

5. The Pennsylvania Company notified the Wabash Company that after a date named no ticket sold by that company would be recognized as entitling the holder to pass over the Pennsylvania road. The Wabash Company after that date sold a ticket for a passage over the Pennsylvania road. When the purchaser reached that road he offered his ticket to the conductor. The conductor refused to take it, and, when the holder of it declined to pay his fare, caused him to be put off the train. *Held*, That the refusal to recognize the ticket was within the right of the Pennsylvania Company, and that that closed the matter, as between the two companies in respect of the unauthorized sale; but that the ejection from the train was done by the Pennsylvania Company on its own responsibility, and was not made legally necessary by anything done by the Wabash Company which the Pennsylvania Company was bound to recognize or respect. *Pennsylvania Railroad Co.* v. *Wabash, St. Louis & Pacific Railway Co.*, 225.

REASONABLE DOUBT.

See CRIMINAL LAW, 17.

RECEIVER.

1. A Circuit Court of the United States has not the power to appoint a receiver of property already in the possession of a receiver duly and previously appointed by a state court, and cannot rightfully take the property out of the hands of the receiver so appointed by the state court. *Shields* v. *Coleman*, 168.
2. The mere forcible continuance of possession wrongfully acquired by the Federal court does not transform that which was in the first instance wrongful, into a rightful possession. *Ib.*

REMOVAL OF CAUSES.

When a defendant in a state court removes the cause to a Circuit Court of the United States on the ground of diverse citizenship, and the Circuit Court gives judgment for the defendant, and the plaintiff below brings the case here, and it appears, on examining the record, that the pleadings do not disclose of what State the plaintiff was a citizen, this court will of its own motion reverse the judgment, remand the cause to the Circuit Court, with costs against the defendant in error, and further adjudge that defendant must also pay costs in this court. *Neel* v. *Pennsylvania*, 153.

SMUGGLING.

See CRIMINAL LAW, 18;
WITNESS, 2.

STARE DECISIS.

The doctrine of *stare decisis* is a salutary one, and is to be adhered to on proper occasions, in respect of decisions directly upon points in issue; but this court should not extend any decision upon a constitutional question, if it is convinced that error in principle might supervene. *Pollock* v. *Farmers' Loan & Trust Company*, 429.

STATUTE.

A. Construction of Statutes.

1. When the language used in a statute is plain and unambiguous, a refusal to recognize its natural obvious meaning may be justly regarded as indicating a purpose to change the law by judicial action, based upon some supposed policy of Congress. *Bate Refrigerating Company* v. *Sulzberger*, 1.
2. *United States* v. *Bowen*, 100 U. S. 508, cited approvingly to the point that "the Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the first day of December, 1873," and that "when the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress." *Ib.*
3. Where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both. *Frost* v. *Wenie*, 46.

See Tax Sales, 1, 4.

B. Statutes of the United States.

See Criminal Law, 4, 10, 18;
Customs Duties, 1, 2, 4, 5;
Indictment, 1;
Jurisdiction, B, 1, 6; C, 1;
Jury;
Longevity Pay;
Mineral Land, 2;
National Bank;
Post Office Department;
Practice, 2;
Public Land, 1;
Railroad, 3.

C. Statutes of States and Territories.

Kansas. *See* Railroad, 4.
New Jersey. *See* Constitutional Law, 9.
Oklahoma. *See* Jury.
Wisconsin. *See* Jurisdiction, C, 2, 4;
Tax Sale, 4, 5.

TAX.

See Constitutional Law, 3, 4, 5, 6, 7;
Jurisdiction, B, 9;
Tax Sale.

TAX SALE.

1. Questions affecting the validity of a tax deed of real estate in a State must be disposed of in accordance with the interpretation of the statutes of the State by its highest judicial tribunal. *Bardon* v. *Land & River Improvement Co.*, 327.
2. In Wisconsin when a tax deed is in due form and recorded in the proper office, and the lands described therein remain vacant and unoccupied for three years or more after the recording thereof, the tax title claimant is deemed to be in constructive possession, the statute of limitations runs in his favor, and the original owner is barred from attacking the validity of the tax deed. *Ib.*
3. The introduction of certain evidence by the appellee held not to be a waiver of its right to rely on the statute of limitations. *Ib.*
4. In considering the acts and proceedings of county boards acting under Rev. Stats. Wis. of 1858, c. 13, § 28, they must be liberally construed. *Ib.*
5. The Revised Statutes of Wisconsin of 1858 provided that the register of deeds should keep a general index, each page of which should be divided into eight columns, with heads to the respective columns, as follows: "Time of reception. Name of grantor. Name of grantee. Description of land. Name of instrument. Volume and page where recorded. To whom delivered. Fees received;" that such register should make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order; and should immediately, upon the receipt of any such instrument or writing for record, enter in the appropriate column and in the order in which it was received the day, hour, and minute of its reception, and the same should be considered as recorded at the time so noted. By section 759 of the Revised Statutes of 1878 it is directed that the division shall be into nine columns, the first column being headed: "Number of instrument," and the others as in the act of 1858. In this case the tax deed was entered in the index under the name of Douglas County by which it was issued, although running in the name of the State as well as of the county. The original index had the eight divisions required by the statute, but the fourth column, under the heading "Description," was subdivided as shown in the opinion. This index becoming dilapidated was laid aside, and a new one was prepared under the provisions of the laws of 1860, c. 201, which complied with the provisions of the statute in that respect, and was substituted for the original. *Held*, (1) That it was not necessary to insert in the index the name of the State as a grantor; (2) that taking the page of the original index as a whole, no one could be misled by it who was not wilfully misled, and it was sufficient to set the statute of limitations in operation; (3) that the new

and correct index, having been properly certified to according to law, was from that date as effective as the original; (4) that the appellant could not question the complainant's title on the ground of informality in the original. *Ib.*

VERDICT.

See CRIMINAL LAW, 14.

WITNESS.

1. When a person accused of crime offers himself as a witness in his own behalf, the court is not at liberty to charge the jury directly or indirectly that the defendant is to be disbelieved because he is a defendant; but, on the other hand, the court may, and sometimes ought to, remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation; and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. *Reagan* v. *United States*, 301.
2. In this case the defendant, accused of the offence of smuggling, was a witness on his own behalf. The court instructed the jury thus: "You should especially look to the interest which the respective witnesses have in the suit or in its result. Where the witness has a direct personal interest in the result of the suit the temptation is strong to color, pervert, or withhold the facts. The law permits the defendant, at his own request, to testify in his own behalf. The defendant here has availed himself of this privilege. His testimony is before you and you must determine how far it is credible. The deep personal interest which he may have in the result of the suit should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit." *Held*, that there was, in this instruction, nothing of which complaint could reasonably be made. *Ib.*
3. The accused was a witness in his own behalf. The court instructed the jury: "The defendant goes upon the stand before you and he makes his statement; tells his story. Above all things, in a case of this kind you are to see whether that statement is corroborated substantially and reliably by the proven facts; if so, it is strengthened to the extent of its corroboration. If it is not strengthened in that way you are to weigh it by its own inherent truthfulness, its own inherent proving power that may belong to it." *Held*, that, taken in connection with the rest of the charge, there was no error in this. *Johnson, alias Overton*, v. *United States*, 320.

WRIT OF ERROR.

1. A writ of error, which names, as the plaintiff in error, a certain person as administrator of a certain estate, may be amended by substituting

the name of another person who appears by the accompanying record to have claimed to succeed him as such administrator, tendered the bill of exceptions, and given bond to prosecute the writ of error. *Walton* v. *Marietta Chair Company*, 342.

2. A writ of error should state the Christian name of the plaintiff in error, and not the initial letter thereof only. *Ib.*