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UNITED STATES REPORTS

VOLUME 159

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1894

AND

OCTOBER TERM, 1895

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1896

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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.
EDWARD DOUGLASS WHITE, Associate Justice.

RICHARD OLNEY, Attorney General.[2]
JUDSON HARMON, Attorney General.
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

---

[1] Mr. Justice Jackson died at his residence, near Nashville, Tennessee, August 8, 1895.

[2] Mr. Olney, having been commissioned as Secretary of State, resigned the office of Attorney General. Mr. Harmon was commissioned as his successor, June 8, 1895

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I.

OCTOBER TERM, 1894.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1894.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

WHITE *v.* VAN HORN.

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

No. 261. Submitted April 5, 1895. — Decided June 3, 1895.

It is competent to explain by proof declarations of a privy in interest, admitted in evidence without objection, although they might have been found inadmissible, if objected to.

An objection going to the effect, and not to the admissibility of evidence, should be disregarded.

A request to instruct a verdict for the defendant should be disregarded when the evidence is conflicting.

A request to charge may be disregarded when the court has already fully instructed the jury on the point.

The court should refuse to charge upon a purely hypothetical statement of facts, calculated to mislead the jury.

The law of Texas in regard to forgery considered.

An objection to one of a number of charges is unavailable when the charge, taken as a whole, fairly states the question which the jury is to decide by preponderance of proof.

When the defendant in an action of ejectment in Texas sets up that his title was founded on a warranty deed, and has the warrantor summoned in to defend, and the plaintiff recovers judgment, the defendant may have judgment against the warrantor for the amount of the purchase money, with interest from the day of the sale.

Statement of the Case.

On the 2d of October, 1889, widow Martha Ann Van Horn, Elizabeth Evans, and her husband, David B. Evans, all three citizens of the State of Missouri, and Mary Ann Boling, and her husband, W. W. Boling, citizens of the State of Kentucky, brought an action against Joseph L. White, a citizen of Hill County, State of Texas. The action was one of ejectment to recover a certain tract of land, situated in Hill County. The plaintiffs claimed to be the owners of an undivided third each of the land for which they sued.

The defendant excepted to the petition upon the ground that it set out no cause of action, and then filed a general denial. He next pleaded limitations, under the law of Texas, of 1, 3, and 5 years; he averred his purchase and possession of the property in good faith, and alleged that he had put improvements thereon worth $1125, for the value of which improvements he prayed judgment in the event of his eviction. In addition, he averred that he and George G. White, on the 20th day of May, 1882, purchased the property in controversy under a warranty deed from W. R. Baker for $1230 cash, and their note, due on the first day of December, 1882, for $2460, bearing ten per cent interest from date until paid; that they paid this note before maturity, with interest amounting to the sum of $2570; that one-half of the total sum of the purchase money, or $1900, was paid by him, and that Baker, as his warrantor, was liable, in the event of his eviction, to refund the same, with eight per cent interest from the date of the respective payments. He further alleged that on the 6th day of October, 1883, he bought from George G. White, for $3789, the undivided half which had been acquired by the latter as above stated, and that George G. White also warranted the title, and would therefore be obliged to repay him, if the plaintiffs recovered, the amount of the purchase price, with interest. The prayer was that Baker and White be called in warranty to defend the suit, and that if it was decided that the plaintiffs were the rightful owners of the property, there might be a judgment over against Baker for the amount of the price paid him, with interest at the rate of eight per cent from the dates of the payments, and a like judgment against White, with interest from the 6th of October, 1883.

Statement of the Case.

Baker, in response to the call in warranty, filed a plea to the jurisdiction of the court, on the ground that he was not, at the time of the service of the petition, an inhabitant of the Northern District of Texas. Subsequently, the death of Baker being suggested, his executors were made parties defendant to the call in warranty, and the same judgment was prayed against them which had been asked against him. The executors reiterated the plea to the jurisdiction filed by Baker, and in addition, demurred on the ground (1) of no cause of action; (2) because the defendant could not sue them on the warranty until actually evicted; and (3) because a call in warranty could not be engrafted on an action of ejectment, the sole purpose of which was the settlement of the controversy between the parties plaintiff and defendant, in regard to their title to the property. The executors also insisted that, even if they should be held liable, under the call in warranty, they owed no interest from the date of the sale, because White had been in the enjoyment of the property from the time of his purchase. George G. White submitted his rights to the court with consent that if the case should be decided in favor of the plaintiffs, judgment should be entered against him for such amount as the court might deem proper. On the 25th of April, 1890, the plaintiffs filed their replication to the defendant's plea of limitations, in which they set out that they, the plaintiffs, claimed the property in controversy as the heirs at law of J. H. Chism, and that at the time of the taking of possession of the land in controversy, by the defendant, and those under whom he claimed, two of the plaintiffs, Mrs. Boling and Mrs. Evans, were married women, and consequently the statute of limitations did not run against them. The replication contained the further averment: "Said plaintiffs further show that the defendants, on their claim of title to the land in controversy, deraign their title through a forged pretended deed of conveyance, to wit, a pretended deed which defendants claim is a transfer of the head-right certificate, by virtue of which the land in controversy was patented by the State of Texas to J. H. Chism, and, therefore, in law said pleas of three and five years' limitations cannot prevail."

The demurrer to the jurisdiction of the court to entertain the call in warranty was overruled, and the case was tried by a jury, resulting in a verdict for the plaintiffs for the whole amount of the land claimed and $350 rent. There was also a verdict in favor of the defendant for $750, as an allowance for improvements, and against the estate of Baker, under the calls in warranty, for $3690, with interest at eight per cent from October 2, 1887, and against George W. White for the sum of $3789, with interest from October 6, 1883, at eight per cent. After an ineffectual effort to obtain a new trial, the defendant, Joseph L. White, brought the case by error here, making as parties, defendants in error, the original plaintiffs, the executors of Baker, and George G. White.

The undisputed facts were as follows: The plaintiffs are the sole legal heirs of James Harvey Chism, who served in the army of Texas during her war with Mexico. In reward for his services there were two land certificates issued to him in the name of "J. H. Chism." The first, known as "a bounty certificate," numbered 4298, was certified on the 15th day of September, 1838, and covered 1280 acres of land. The other was "a head-right certificate," issued by the Board of Land Commissioners of Harrisburg County, in the following form:

"The Republic of Texas,
"County of Harrisburg.
"No. 990. Class 2.

"This is to certify that J. H. Chism has appeared before us, the Board of Land Commissioners for the county aforesaid, and proved according to law that he arrived in this Republic subsequent to the declaration of independence and previous to August, 1836, and that he is a single man, and produced an honorable discharge, is entitled to one-third of a league of land to be surveyed after the 1st day of August, 1838.

"Given under our hands, at Houston, this 1st day of November, 1838.

"J. G. Hutchinson, *President.*
"John Woodruff, *Associate Commissioner.*

"Attest: Thos. Wm. Ward, *Clerk.*"

Statement of the Case.

On the 31st day of October, 1838, J. H. Chism, by a deed drawn in the county of Harrisburg, sold to R. B. Dobbins, for the sum of $500, the bounty certificate for 1280 acres of land first above mentioned. The clerk of the Board of Land Commissioners for Harrisburg County, in the performance of his duty under the Texas law, made a return of the issue of the head-right certificate, describing it as "a second class certificate, No. 990, issued in November, 1838, to J. H. Chism for one-third of a league of land." In 1840, Texas created a "Travelling Board," whose duty it was to inspect the records of all the Boards of Land Commissioners, "and ascertain by satisfactory testimony what certificates for lands had been issued by the respective boards to legal claimants, and report as soon thereafter as practicable to the Commissioner of the General Land Office such certificates as they find to be genuine, setting forth in their reports the number and date of the certificates, the quantity of the land, and the name of the person to whom it was issued." 1 Sayles' Early Laws of Texas, 385. In June, 1841, this Board made its report to the General Land Office, and described the head-right certificate here involved, as follows: "Second class certificate, No. 701, issued November 1, 1838, for one-third of a league of land to J. H. Chisholm." On the 27th of October, 1852, the following document was recorded in Harris County, Texas — W. R. Baker being at that time the clerk of said county:

"Know all men by these presents, that I, J. H. Chisholm, for the sum of $150 to me paid by E. M. Robinson, do hereby sell, transfer, and convey to the said Robinson, his heirs and assigns forever, my head-right for one-third of a league of land, No. ——, dated November, 1838, issued by the Board of Land Commissioners for Harrisburg County, together with the land upon which the same may be located, to have and to hold the same to him, the said Robinson, his heirs and assigns forever, and I agree to warrant and defend the said claim against all claims whatsoever.

"Witness my hand and seal, at Houston, December 2, 1838.

"Witnesses: GEORGE W. LIVELY. "J. H. CHISHOLM.

"J. H. SOUTHMAYD.

"REPUBLIC OF TEXAS,
"COUNTY OF HARRISBURG.

"Before me, Andrew Briscoe, Chief Justice of Harrisburg County, came J. H. Chisholm, the grantor above, and acknowledged to me that he signed and executed the foregoing deed for the uses and purposes therein contained; to certify which I have hereunto set my hand and seal of the county, at Houston, December 2, 1838."

On January 2, 1858, J. M. Steiner deposited in the General Land Office of Texas the certificate No. 990, for one-third of a league of land, issued, as above stated, to J. H. Chism, and lands were taken up thereunder in Hill County, Texas, and patent was issued therefor. On the 25th of July, 1888, a copy of the paper which had been recorded in the county of Harrisburg was placed on record in Hill County.

The plaintiffs, as heirs of J. H. Chism, claimed the land covered by the patent issued under this head-right certificate. Their case substantially depended upon testimony tending to show that, after serving in the army of Texas, Chism returned to Kentucky, and stated that he was entitled to certain lands in Texas, and had with him papers so showing; that he subsequently went again to Texas for the purpose of looking after his land claims, and returned to Kentucky about November, 1838; that on his second return he also stated that he had land in Texas, and had sold some; and that he then had papers indicating his ownership of land in that State. The testimony of his sisters and others tended to identify one of the papers which he had with him on this last occasion with the land certificate No. 990. There was testimony to the effect that he was a good penman, that he signed his name J. H. or J. Harvey Chism, and his name appeared as such on the army rolls and other official documents of the Republic of Texas. He died in 1839. After his death, in 1850 or 1851, his father placed the papers relating to the claim of the son for Texas lands in the hands of Augustin Moreman, and gave him a power of attorney, in order that he might visit Texas and perfect the claim. Moreman, with the papers in his possession,

proceeded to Texas for the purpose of executing his agency. On arriving there, he went to the land office and exhibited the papers. The officers of the land office pronounced the claim valid and in all respects regular, but declined to act upon it because there was a defect in the power of attorney, it having been acknowledged by a Kentucky official and not by a commissioner of the State of Texas. In consequence of this fact, Moreman was unable to obtain the patent for the land, and left the papers with a Mr. Fergerson, in Austin, Texas, and returned to Kentucky. Before a new power of attorney could be executed the father of Chism died, and Moreman's arrangements with him were thus terminated. Subsequently, on the request of the mother of Chism, Moreman wrote to Fergerson for the papers, and they were returned in an envelope. Moreman handed over this envelope as he received it at the post office, without examination, to Mrs. Chism. There was also testimony tending to show that after this date the heirs of Chism sent the papers thus received (which are not very accurately identified) to Texas for the purpose of obtaining the land, and that the papers thus sent, whatever they were, were burned by accident.

The deposition of Moreman was taken; annexed to it was a certified copy of the original certificate No. 990, issued to J. H. Chism. This was shown to him, and he was asked whether the original, of which it was a copy, was among the papers which were turned over to him in 1850 or 1851 by the father of J. H. Chism, and in connection with which his power of attorney was given. Mr. Moreman answered: "I have examined the above copy, and should say that the original of which it is a copy was among the papers turned over to me by the father of J. H. Chism. The language seems familiar, and I recognize some of the terms, as having an honorable discharge, and being a single man. The original paper was folded twice, and the folds were somewhat frayed with handling, looking like an old paper; the writing was remarkably effeminate. I cannot say definitely whether the original paper was returned to the father or mother of J. H. Chism or not; the last time I ever saw them was in Austin, Texas, in 1850

or 1851, in the month of May." The witness then proceeded to state the facts connected with his employment, his journey to Texas, his going to the land office, and his failure because of the defect in his power of attorney.

The defendant's case was supported by the testimony of Baker, who said that he bought the certificate as the agent of one Robinson, and that at the time the transfer was drawn the certificate was delivered to him by the seller. Describing the seller, he said: "He represented that he had been serving in the Army, and I have an indistinct memory that I called his attention to a discrepancy or difference in the spelling of the name, and that the explanation was that some people spelled it as it was pronounced, according to the sound." He then testified that the original transfer was lost, and that the witnesses whose names purported to be affixed to it and the officer before whom it purported to have been acknowledged were dead; and that Robinson, the principal for whom he claimed to have acted in buying the certificate, lived in the State of New York, and was known to nobody in Texas, except himself and family. His testimony in regard to Robinson was indefinite. He said that the man was alive some few years before and was in New York, but gave no address by which he might be found. He further testified that he had sold this certificate, along with others, as the agent of Robinson, to J. De Cordova, and that De Cordova had resold it to him. That, as the owner of this certificate, he had employed a man by the name of Steiner to apply for and enter land thereunder.

Mr. E. H. Graham for plaintiff in error.

Mr. Morgan H. Beach (with whom was *Mr. T. W. Gregory* on the brief), for defendant in error.

No appearance for warrantor.

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

Opinion of the Court.

The assignments of error are addressed, first, to the alleged illegal admission of evidence; secondly, to the refusal of the court to give certain charges; and, thirdly, to the charges actually given.

1st. The defendant objected to the introduction of the deed of sale made by J. H. Chism on October 31, 1838, of his bounty certificate, because it was *res inter alios* and irrelevant. The objection was untenable. The issue of forgery *vel non* of the deed from which the title in controversy was deraigned clearly made the proof relevant. The evidence tended to show the manner in which J. H. Chism signed his name at or about the time it was contended that the transfer signed by J. H. Chisholm had been executed. It was also admissible as tending to show how J. H. Chism then valued Texas land, and thus to disprove the claim that he had sold a certificate entitling him to 1400 acres at $150 at just about the same time he had obtained $500 for a certificate for a less quantity. Irrespective of this, testimony had been elicited without objection to the effect that J. H. Chism had declared, on his second return to Kentucky, that he had sold land in Texas, and this deed was competent to explain that statement. It is a matter of no moment whether testimony as to these declarations of J. H. Chism was admissible or not, since it was admitted without objection, and it was competent to offer evidence to throw light upon and explain them.

2d. The objection taken to the statement of the witness Moreman, that "he should say" that the original, of which the certificate produced was a copy, was among the papers turned over to him by the father of J. H. Chism, went, obviously, to the effect and not to the admissibility of that statement. Besides, the objection separates the words "I should say" from the whole context of the witness' testimony; whereas the context makes it clear that those words, instead of being the expression of a conjecture, were simply a form of speech, for, after using them, the witness proceeded to furnish the basis for his statement by describing the original document in such a way as to give emphasis to his identification of the copy.

3d. The court refused to instruct the jury, at defendant's request, as follows: "The uncontroverted evidence in this cause shows that the certificate by virtue of which the land in controversy was located came into the hands of W. R. Baker, as agent of E. M. Robinson, as a purchaser, in December, 1838, and that it was thereafter located on the land by Steiner as the agent of Baker, who had acquired the title of Robinson in the same, and if the person who sold the same to Robinson through Baker, under whatever name, was, at the time of the sale to Baker, the owner of the certificate, you will find a verdict for defendant; and in this connection you are instructed that it is a presumption of fact that a person in possession of a certificate is the owner in the absence of evidence to the contrary, whether he have a written assignment or not, and it is shown by the evidence that the certificate in question was in possession of a person who sold it to him for Robinson recently after it was issued, it having been issued in November, 1838; if you should believe such person was not the same to whom it was issued, yet, unless the evidence shows that the person to whom it issued had not sold it, you would be authorized to find for the defendant."

This charge was rightly refused. It practically requested the court to disregard the proof, and amounted to a request to instruct a verdict for the defendant. The very issue in the case was whether the certificate did or did not come into the hands of Baker, as agent, in 1838. The reliance of the defendant was on the testimony of Baker, and the fact that the name J. H. Chisholm and the name J. H. Chism were *idem sonans*. But Baker's testimony was directly contradicted by that of Moreman, and it is impossible to reconcile the two. If the certificate was in Moreman's hands as testified to by him, it could not have been in the hands of Baker, in 1838, as sworn to by him. There were, besides Moreman's testimony, many circumstances tending to refute Baker's statements. These were the fact that the transfer from Robinson was not put on record until 1852, when Baker was clerk, and therefore himself made the record; the loss of the original; the fact that the transfer was made in the name of Robinson, whose exist-

ence and whereabouts were so meagrely disclosed as to render it impossible from the testimony to discover him; that, although the first transfer in 1838 purported to have been made in the name of Baker as agent, there was a subsequent transfer by Baker to De Cordova, and yet, a third transfer from De Cordova back to Baker; that the patent for the land was not obtained until 1858, many years after Baker claimed that he was in possession of the certificate; and, finally, that the transfer itself, when examined by the light of surrounding facts, affords some ground for the claim that Baker could not have had the certificate in his possession in 1838, when the transfer was made.

The certificate contained six statements: First, its class; second, the quantity of the land for which it issued; third, its number; fourth, the date of its issue; fifth, the name of the person to whom it was issued; sixth, the county from which it was issued. The transfer, in describing the certificate, states it as having been issued to J. H. Chism; makes no mention of day or number. It says, "No. ——," and that the certificate was "dated November, 1838," giving no day of the month, and it is signed "J. H. Chisholm." The failure in the transfer to give either the number of the certificate or the day of the month on which it was issued, as also the mention of the name of J. H. Chism in its body, coupled with the signature "J. H. Chisholm," were in themselves claimed to be, as they undoubtedly were, circumstances tending to show that the party who wrote the transfer could not have been in possession of the certificate.

It was contended that this inference was further strengthened by the public records. Thus, the return to the General Land Office by the county clerk gave the number 990, corresponding with that of the certificate itself, and gave the month as November, 1838, without giving any day of the month. The report of the Travelling Board described the certificate by a wrong number, 701, instead of 990; it gave the date thereof as November 1, 1838, and the name of the grantee as J. H. Chisholm. The fact is that the transfer seemed to have been drawn with reference to these public records, and, in order not

to conflict with either of them, it uses the name J. H. Chism in the body and the name J. H. Chisholm in the signature, and it omits the number of the certificate altogether, and mentions no day of the month, the day being also omitted in one of the records. Under this condition of the proof, the court was obviously correct in not taking the question of fact from the consideration of the jury.

4th. The court refused to charge as follows at the request of the defendant:

"The certificate was issued to a person whose name was spelled therein Chism. The transfer in evidence shows that the person who transferred the same spelled his name Chisholm. Now, if the person who so transferred the certificate was the same to whom it issued, it is not material in what form he signed it, you will find for the defendant; and in determining whether he was the same person you may consider the fact, if a fact, that the person who sold to Baker was a soldier, the date of his certificate, the whereabouts of J. H. Chism about the time, and the evidence introduced by plaintiffs that J. H. Chism was in Texas about the time of the transfer."

This charge was also correctly refused. In some particulars it assumed the existence of facts not proven by asking the court to state to the jury that Chism was in Texas about the time of the transfer, December 2, 1838, whilst there was evidence that he returned to Kentucky in November, 1838. Besides, we think the charge of the court, as actually given to the jury, furnished all that the defendant was entitled to on this point. It was as follows:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed J. H. Chisholm, and in order for this transfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the land sued for; and on this issue as to the person who made the transfer being the same person

to whom said certificate No. 990 issued the burden of proof is on the defendant; and if the proof does not so satisfy you, the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of five-year limitation, as to Mrs. Van Horn's one-third interest therein."

5th. The court refused to give, at defendant's request, the following charge:

"It is shown by the evidence that the certificate has been in the land office since 1857, and is now there, and if the certificate or paper about which plaintiffs testify was burned in Dallas or elsewhere, then the paper testified about by them is not this certificate."

This charge was also correctly refused. It asked the court to instruct upon a purely hypothetical statement of fact and was calculated to confuse, and was, moreover, fully covered by the charges actually given.

6th. The court refused to give the following requested charge:

"The transfer introduced by the defendant to the certificate is not a forgery in law, whether signed by the person who was the owner of said certificate acquired from the person to whom it issued or by the person to whom it issued, and you are instructed that if in this case you should find for the plaintiffs, in any event you will find for the defendant one-third of the land as against M. S. Van Horn, and for the other plaintiffs only two-thirds of the land."

This charge was correctly refused. There was no evidence tending to show that the transfer was made by any person claiming to have acquired the certificate from Chism; on the contrary, the testimony of Baker and all the testimony in the case on both sides presented the issue of whether Chism, the person to whom the certificate had been issued, signed the transfer. There was no proof in any way to indicate that Chism had transferred to some one else his certificate, and that this other person had signed J. H. Chisholm in the alleged transfer to Baker. That portion of the charge which asked that the jury be instructed that if the transfer was signed by Chism, to whom the certificate issued, it was not a forgery, was fully covered by the charge given.

7th. The court gave the following charge, and exception was taken thereto:

"If you believe from the evidence that W. R. Baker falsely made or caused or procured to be made falsely, or in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm, and purporting to convey the land certificate 990, issued to J. H. Chism, with intent to make valuable thing or money thereby, or with intent to set up a claim or title or to aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owner of the land, then the said transfer is a forgery, and you will find for plaintiffs for the land in controversy."

It is claimed that this charge was erroneous, because it submitted issues not raised by the evidence, and was calculated to impress the jury with the belief that there was some proof of such action on the part of Baker, and thus prejudice the defendant's case. But this objection takes it for granted that there was nothing in the testimony indicating that Baker made the false endorsement, if one was made. We have already stated the tendency of the testimony on both sides, and that the very nature of the direct, as well as the circumstantial, evidence necessarily raised the question of forgery *vel non*, and of Baker's connection with the forgery, if there was any. Nor is this charge amenable to the criticism that it assumes the fact that the transfer was false. It is true that the court used the words "in any way aided, assisted, advised, or encouraged the false making of the transfer to E. M. Robinson, signed J. H. Chisholm." But it is manifest from the connection in which these words were used, and from the entire charge given, that the court left to the jury the question of whether the transfer was forged or not, without expressing any opinion thereon. Indeed, it was expressly charged that on the issue of the forgery the burden of proof was on the plaintiffs.

8th. The following charge was also objected to:

"If you believe from the evidence that a man of the name of J. H. Chisholm or of any other name who was not the iden-

tical party to whom the certificate No. 990, issued to J. H. Chism, did falsely make the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money, or other valuable thing thereby, or with intent to set up a claim or title, or aid or assist any one else in setting up a claim or title to the land in controversy, or in any way to injure, obtain the advantage of, or prejudice the rights or interest of the true owners of the land, or with any fraudulent intent whatever, then said instrument you will find to be a forgery, and you will bring a verdict for plaintiffs for the land in controversy. If you believe from the evidence that J. H. Chisholm or any other person not being the identical person to whom certificate No. 990, in the name of J. H. Chism issued, did falsely counterfeit the original grantee in making the transfer to E. M. Robinson, signed J. H. Chisholm, with the intent to make money or other valuable thing thereby, or with the intent to set up a claim or title, or aid or assist any one else in setting up a claim or title, to the land in controversy, or to cast a cloud upon the title, or in any way injure, obtain the advantage of, or prejudice the rights of the true owner of the land, or with any fraudulent intent whatever, then you will find said instrument a forgery, and will find for plaintiffs for the land in controversy."

This charge, it is said, is erroneous, (*a*) because it presents an issue not raised by the evidence; and (*b*) because it excludes the hypothesis that a person to whom J. H. Chism may have transferred the certificate by delivery was the person who signed the transfer "J. H. Chisholm;" and (*c*) because if such person signed his own name "J. H. Chisholm," his signature was not a forgery under the law then existing in Texas.

There was, as we have already said, no evidence tending to show a transfer by J. H. Chism, the grantee, to another person, and an assignment by such person to Baker. The entire proof on both sides was addressed to the question of whether the certificate was in the possession of Chism at the time that Baker claimed that it was delivered to him, and so remained thereafter. The whole case turned upon this question, and the issue of whether the transfer was a forgery or not in a large

measure depended on the conclusions formed by the jury as to this fact. But the claim that if the name of J. H. Chisholm was signed by one bearing that name, the writing of this signature could not under any circumstances constitute a forgery, is unsound. It is asserted by the plaintiff in error that the law of Texas as to forgery prior to 1876 was as follows:

"He is guilty of forgery who, without lawful authority, and with intent to injure and defraud, shall make a false instrument in writing, purporting to be the act of another, in such manner that the false instrument so made would (if the same be true) have created, increased, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever." Art. 2093, Paschal's Digest of Laws.

Clearly, if one whose name was J. H. Chisholm took a certificate issued to J. H. Chism, and, falsely personating J. H. Chism, signed his name as J. H. Chisholm, intending thereby to counterfeit the signature of J. H. Chism, and, by reason of the fact that the names were *idem sonans*, to produce the impression that the name signed was that of J. H. Chism, this act would have been a forgery under this statute. The case of *Commonwealth* v. *Baldwin*, 11 Gray, 197, cited to the contrary, sustains this view.

9th. The ninth assignment is covered by what we have already said.

10th. The court gave the following charge, which was objected to:

"The defendants have offered what purports to be a transfer of the certificate granted J. H. Chism to one E. M. Robinson, which transfer is signed 'J. H. Chisholm,' and in order for this tranfer to convey title to said certificate the proof must satisfy you that the person who made said transfer was the same man to whom said certificate was issued, and unless it does so satisfy you the defendant cannot defeat the plaintiffs' recovery of two-thirds of the lands sued for; and on this issue, as to the person who made the said transfer being the same person to whom said certificate No. 990 issued, the burden of proof is on the defendant; and if the proof does not so

satisfy you the plaintiffs are entitled to recover the whole land unless defeated by the defendant's plea of five years' statutes of limitation as to Mrs. Van Horn's one-third interest therein."

It is contended that the word "satisfy" exacted a greater degree of proof than the law required, and we are referred to cases in Texas which, it is claimed, hold that an instruction unless the party on whom the burden of proof rests establishes his case by "satisfactory evidence," the jury must find for the other side, exacts from the first party an undue degree of proof. Whatever, abstractly speaking, may be the merits of this objection, it is unavailable here. The charge objected to was only one of a number, and, we think, taking all the instructions together, they fairly stated to the jury that their conclusions were to depend on their belief as to the preponderance of proof.

11th. This assignment of error is addressed to the charge of the court in regard to the controversy between White and his warrantors. This charge is thus set out in the record:

"The court instructed the jury that if they found for the plaintiff for the whole of the land in controversy, they would find for the defendant White, against the executors of Baker, the sum of $3960, with 8 per cent interest from October 2, 1887 (it being in evidence that that was the amount of the purchase money paid by White to Baker, and this suit having been filed on the 2d day of October, 1889); and the court also instructed the jury to find for the defendant White the value of his improvements made in good faith, and that if the amount exceeded the value of use and occupation of the premises from the 2d day of October, 1887, they would find the value of the use and occupation from the time said White took possession, not to exceed the value of the improvements, and deduct it from the value of the improvements."

It is contended that to allow the defendant interest only from October 2, 1887, instead of from the date of the sale, in 1882, was erroneous. The Texas statute limits the right to recover, in an ejectment suit, for use and occupation, to a period of two years prior to the commencement of the suit. 2 Sayles' Tex. Civ. St. art. 4809.

The court evidently had this statute in view, and considered that as the plaintiffs' right to recover for use and occupation was restricted to two years, the defendant's claim against the warrantor for interest should be confined to the same period, upon the theory that as long as the possessor enjoyed the fruits, he was not entitled to recover interest on the price. This view, however, overlooked another provision of law, which allows the plaintiff in ejectment to recover for use and occupation for a longer period than two years, prior to the bringing of the action, where the defendant in ejectment sets up a claim for improvements. In such a case the law allows a claim for use and occupation beyond the period of two years, and to the extent necessary to offset the claim for improvement. 2 Sayles' Tex. Civ. St. arts. 4810, 4815. Here the defendant made a claim for improvements, and the claim for use and occupation was allowed beyond two years, and to the extent necessary to offset the improvements. As the claim for use and occupation did not equal the claim for improvements, the former must necessarily have extended to the full period of defendant's occupancy. To limit the defendant's recovery of interest against the warrantor to the period of two years was, therefore, to deprive him of interest on the price from the day of the sale, although he was held accountable for use and occupation from that date. He ought, therefore, to have been allowed interest against the estate of Baker from the day of the sale.

Error in this regard, however, in no way concerns the controversies between the plaintiffs and the defendant. The judgment will therefore be

Affirmed except in regard to the issues between the defendant and the executors of Baker, defendants in the call in warranty; in this particular, the case is remanded with directions to grant, on application of defendant, a new trial; in all other respects the judgment is affirmed.

TOWNSEND *v.* ST. LOUIS AND SANDOVAL COAL AND MINING COMPANY.

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

No. 308. Argued April 25, 1895. — Decided June 3, 1895.

The issues in this case were substantially decided in the suit between the same parties in the state courts of Illinois decided in the Circuit Court of Marion County August 9, 1883, and affirmed by the Supreme Court of the State, January 25, 1888; and, so far as the plaintiff sets up a new claim here, it is, if not barred by the statute of limitations, too stale to receive favor from a court of equity.

Ozias Townsend, a citizen of the State of Missouri, brought his bill in equity in the Circuit Court of the United States for the Southern District of Illinois on November 30, 1887, against the St. Louis and Sandoval Coal and Mining Company, and the Sandoval Coal and Mining Company, corporations created under the laws of the State of Illinois, and Isaac Main, Lambert Noland, Frank Seymour, Charles Reinhardt, Jacob Lichty, Margaret E. Edwards, executrix of Francis H. Edwards, deceased, and Lucinda N. Rockwell, executrix of C. N. Rockwell, deceased, all citizens of the State of Illinois. A demurrer to this bill having been sustained, the complainant brought an amended bill against the same defendants on August 14, 1888, which began with averments of the following facts:

On December 12, 1877, the St. Louis and Sandoval Coal and Mining Company was duly incorporated and organized under the laws of the State of Illinois. The purpose of its incorporation was the mining and selling of coal, and the term of its existence was to be ninety-nine years. Its principal office was at the town of Sandoval, Marion County, Illinois, and near that town it was to carry on its mining operations. The capital stock of the company was fixed at $50,000, divided into 500 shares of $100 each. The directors were five

in number, namely: Isaac Main, John B. Mears, Henry Wellhoener, James Sheals, and Ozias Townsend, the complainant. Among others, the testators of the said defendants Margaret E. Edwards and Lucinda N. Rockwell, and the defendants Isaac Main, Lambert Noland, Charles Reinhardt, and Jacob Lichty were subscribers to the stock. All the said directors were stockholders. The complainant's subscription to the stock was 391 shares, of which he was to hold 380 shares as trustee for the company, and to sell the same for its benefit. The complainant attended to the incorporation and organization of the company, secured to himself as its trustee 436 coal mining rights, and purchased with his own money four acres of land to be used for mining purposes, and through which, by means of a shaft and drifts, the coal underlying the lands in respect of which he had secured the mining rights could be reached and utilized. On January 9, 1878, he conveyed the said four acres of land to the company in fee simple. In the work thus done by him in the interests of the company he was continually engaged from July 1, 1877, to January 1, 1878, and besides paying $200 for the land, he expended in connection with the incorporation of the company and the securing of the mining rights the sum of $200. After the organization of the company a regular meeting of its board of directors was held on December 20, 1877, in the city of St. Louis, at which all the members were present, and at which meeting the salary of the complainant as president and *ex officio* superintendent of the company was fixed at $150 per month, to commence on January 1, 1878, and provision made that all his necessary expenses of travel in the interests of the company should be repaid to him. In such action of the directors the complainant did not participate. The complainant at once entered upon the duties of his said office, and continued faithfully to perform them until the dissolution of the company on January 25, 1886. In March, 1878, a duly called meeting of the directors was held in East St. Louis, Illinois, for the purpose, among others, of auditing an account which the complainant had against the company for securing for it the said mining rights, and for money expended by him

as aforesaid. All the directors were present at this meeting except Isaac Main. James Sheals resigned as a director, and True N. Blackman was duly chosen a director to fill his place, and participated in the proceedings had. At this meeting the complainant presented to the board his account in the sum of $12,050 for compensation for his services and for money expended as before stated, and then retired from the board and took no part in its deliberations. Thereupon, Mr. Mears, one of the directors, offered a resolution, which stated in the preamble thereof that the complainant had devoted a large share of his time for the past year to the organization of the company, and had freely expended his money in promoting its interests, in securing for it large and very valuable mining privileges, and in travel, for all of which he had received no compensation; and provided as follows:

"*Be it resolved*, 1st, That in full satisfaction for such services and expenditures and for his attention to the business of this company up to and prior to the 1st day of January, 1878, the said Ozias Townsend is hereby allowed and this company binds itself to pay to him the sum of ten thousand dollars, the same to be receipted for by him as in full compensation for said services as aforesaid; and if he shall wish to be endorsed upon the stock held by him as a member of the association as so much paid on account of calls made and to be made on such of the stock as may be held or indicated by him, and such endorsement by the secretary and treasurer of this company shall be held and accounted for as a receipt in full from him for calls on said stocks to the amount of ten thousand dollars as aforesaid.

"*Be it resolved*, 2d, The secretary and treasurer is hereby authorized and directed to endorse upon the stock held by said Townsend, as he shall indicate, payments of calls on the same to the extent aforesaid, and, in the event of such endorsement failing, then he shall have a valid claim against this company to that extent for such services hereby acknowledged to be rendered, but not otherwise."

This resolution the members of the board who were present adopted unanimously. The complainant accepted this settle-

ment of his claim, and the resolution was duly signed by each member of the board present, being a majority of all the directors.

After presenting the averments, of which the foregoing statement is the substance, and averring that the amount so allowed him was fair and reasonable compensation for the time and labor which he had devoted to the interests of the company, the complainant alleged that the defendant Main, with intent to defraud the complainant and to prevent his collecting the said amount allowed him by the board of directors, and the said salary and travelling expenses, combined and confederated with the other stockholders residing in Marion County, Illinois, to wreck the corporation by the process of the courts, and to buy in all its assets at a sum greatly below their real value, so that ostensibly the assets would all be gone when the complainant should take steps to collect the said debts; that with this end in view, on June 27, 1878, a bill in equity was filed in the Circuit Court of Marion County, Illinois, by Isaac Main, Frank Seymour, Francis H. Edwards, Lambert Noland, Charles Reinhardt, Jacob Lichty, C. N. Rockwell, and Henry Wellhoener (the latter of whom, as the complainant averred, withdrew from the suit upon learning the animus thereof) against the said company, Ozias Townsend, of St. Louis, Missouri, (the present complainant,) and all the other subscribers to the capital stock who resided out of the State of Illinois.

The complainant showed that the said bill alleged, among other things, that on January 10, 1878, the company had entered into a contract with the said Frank Seymour (a defendant in the present suit) to sink a shaft on the said land down to the coal thereunder; that Seymour, in pursuance of that contract, had sunk a shaft to the depth of about 114 feet, when he stopped work for the reason that the company had failed to perform its part of the contract; that the corporation was indebted to Seymour on account of the said work in the sum of about $1700, and owed other persons about $1300 (not mentioning, however, the company's said alleged indebtedness to the complainant Townsend); that the whole cost

of sinking the shaft down to the coal would be about $10,800; that on February 14, 1878, an assessment of five per cent on the capital stock had been made; that the said plaintiffs Isaac Main, Lambert Noland, Jacob Lichty, C. N. Rockwell, Charles Reinhardt, Francis H. Edwards, and Henry Wellhoener paid their assessments, but that all the other stockholders of the company failed to pay; that, by reason of such failure, the stock of all the other stockholders except three (who do not appear in the present suit) was, on April 29, 1878, forfeited, but that the holders thereof were still liable for their indebtedness to the company; that some time, between March 3 and April 6, (the year not being given,) the directors of the company, with the exception of Isaac Main, fraudulently and without consideration acknowledged, by resolution, an indebtedness of $10,000 to the said Ozias Townsend for services claimed to have been rendered and money expended for the company; that such services were never rendered, and that no money was expended by Townsend for which the company was liable; that, according to the provision of the said resolution, that if Townsend so desired the said $10,000 should be endorsed upon the stock held by him as a member of the company, he had issued, of paid-up stock, to his wife $5000, to George W. Wharton $4000, and to True N. Blackman $1000, which stock those persons pretended to hold as paid-up stock, but for which they had paid nothing to the company; that the said mining rights were conveyed to Townsend in trust for the company, with a condition that a shaft should be sunk upon the land within two years from November 6, 1877; that those rights were valuable, provided the shaft should be sunk within the said time, but that in the then unfinished condition of the shaft the mining rights and the land were not worth enough to pay the company's debts; that such property and the buildings upon the land were all the effects the company owned; that nearly all the stockholders of the company were insolvent; and that in the then present condition of the company it would be useless to attempt to continue its business. The complainant showed that the prayers of that bill were that the affairs of the company might be wound

up, a receiver be appointed, the property of the company be sold, the proceeds of the sale thereof be applied to the payment of the company's debts, and that, if the same should be insufficient to pay the debts, then the stockholders might be assessed to pay the balance, and that the corporation might be dissolved.

The complainant averred that, as a defendant in the said bill so described by him, no summons was served upon him either in his individual capacity or as president of the company, and that neither he nor the company appeared, but that summons was served upon said Isaac Main as a director; that, at the August term, 1878, of the said Circuit Court of Marion County a decree *pro confesso* against the defendants in the aforesaid bill was entered, finding the facts alleged in that bill to be true, and granting the relief therein prayed for; that the court appointed a receiver of the company's property, and directed him to sell the same; that on September 28, 1878, the receiver sold at public sale all the property belonging to the company to the said Isaac Main, who was the only bidder, for the sum of $200, and executed and delivered to him a properly acknowledged deed for the same; that the sale was reported to the court, and that the court, on February 11, 1879, confirmed the same; that at that time the property thus sold was worth $20,000; that on March 24, 1881, an appeal was taken to the Supreme Court of the State, and was there reversed on the ground that the service upon Main as a director of the corporation when he was one of the plaintiffs in the case was not legal service upon the corporation, and that the Circuit Court of Marion County had had no jurisdiction over it.

The complainant further averred that the cause having been remanded to the said court, he and the other defendants therein filed their answer to the bill, denying that the board of directors of the company wrongfully acknowledged an indebtedness to him; that the company in its answer to the said bill denied that it fraudulently acknowledged an indebtedness to him or issued paid-up stock to him or to any one else without consideration, and that such allegations were the only ones in the

said bill and answers in regard to the company's indebtedness to him.

He showed that the case was heard in that court in July, 1883, upon bill, answers, and evidence, and that the court found that the company had, on March 10, 1878, ceased to prosecute the work for which it was organized, leaving debts unpaid to the said Frank Seymour and others (but making no finding with relation to the complainant's claim); that the business of the company had been mismanaged by its officers; that the company was insolvent and that it would be useless for it to resume business; and decreed that the corporation be dissolved and that the appointment of the receiver be confirmed, and ordered the receiver to make a further report.

It was further averred by the complainant that in pursuance of the fraudulent scheme to prevent the collection of his claim against the company, Isaac Main and some of the plaintiffs in the above-described suit organized a new corporation under the laws of the State of Illinois, having its principal office at Sandoval, called the Sandoval Coal and Mining Company, for the purpose of having the property of the old company conveyed to it; that Main, in the year 1879, conveyed to the new company the said land and mining rights and all the assets of the company for the nominal sum of $200, but really upon the consideration that the new company should pay all the debts of the old company, except the said debts of Townsend, the present complainant; that the new company took the property with knowledge and notice of those debts, and also of such scheme to prevent their collection; that the property was charged with a trust in favor of the complainant as a creditor of the old company; that at the time the property was transferred by Main to the new company it was worth at least $20,000, and that that company was not a *bona fide* purchaser of the same.

The complainant showed that at the February term, 1885, of the said court the plaintiffs in the aforesaid bill filed a supplemental bill in the cause, making the new company a party defendant, and that the new company filed an answer thereto, and at same time filed its cross-bill, in which it alleged that

it had bought the said property from Main in good faith and had paid all the debts of the old company, amounting to $2465.30; that it had made valuable improvements under and upon the said land; that the plaintiffs in the said bill against the old company and others were the only legal stockholders in the old company; that the complainant Townsend and others, defendants in that bill, were not *bona fide* stockholders in the old company; and prayed that a conveyance might be made to it of the said property of the old company, and that the old company might be restrained from prosecuting an ejectment suit against the new company, and also from prosecuting an action of trespass against its officers. The complainant showed that an answer was filed by him to the said cross-bill, and that the case was heard by the Circuit Court of Marion County, and a decree entered therein in August, 1885, granting the relief prayed for in the cross-bill, and that thereupon he and the old company and other defendants in the said original, supplemental, and cross-bills appealed to the Supreme Court of the State, where the decree was affirmed.

It was alleged by the complainant that since the original decree *pro confesso* had been held void by the Supreme Court for want of proper service on the old company, and since there was no new sale of the property under the decree entered after the remanding of the cause, it followed that the sale to Main under the former decree was also void. He further alleged that the question whether the old company, if it had not been dissolved, would have been liable to him for his said services, and for money expended by him for its benefit, was not in issue in either of the said cases and was not determined therein; and that, therefore, he was not estopped by the decrees entered in those cases from asserting in his present bill his rights as a creditor of the old company.

The complainant finally averred that the new company, pretending that in the suit to dissolve the old corporation his said debts due by it were considered, and that the decree entered therein was a final adjudication of his account, had never paid those debts or any part thereof, and refused to

do so. He stated his willingness to contribute his proportionate part toward the payment of his debts if the court should be of opinion that he was a stockholder. He prayed that the defendants might answer his bill, but not under oath; that the court might require the individual defendants, holders of stock in the old company, to pay the balance which, as he alleged, was due thereon; and might decree that the sale by the receiver to Main was void; that the new company was a trustee of the property for the payment of the debts due to the complainant; and that if the new company should persist in its refusal to pay the same its property, or as much as might be necessary to pay the said debts, be sold and the debts be paid with the proceeds.

The Sandoval Coal and Mining Company filed its answer to the complainant's amended bill on August 28, 1888, in which it denied on information and belief that the complainant had performed the alleged services or expended money for the old company's benefit, or had purchased the said land with his own money, and averred the fact to be that the land was paid for by the new company; denied that the complainant obtained any valid title to the said mining rights, and averred that those rights were conveyed on condition that the old company would sink a shaft to a paying vein of coal, and work the same, within two years from the conveyance of such rights, and that the shaft not having been sunk to the coal within the time limited, the rights were forfeited; and denied on information and belief that the complainant had performed the duties of president of the company for the time stated in the bill, or for any time. The defendant alleged that anything which might have been done at the meeting described in the bill at which, as averred therein, the complainant's salary as president and superintendent of the company was fixed at $150 per month, was void for the reason that the meeting was not authorized nor its acts legally ratified; and that the aforesaid action of the board of directors at the meeting in East St. Louis, Illinois, when Main was not present, by which one-fifth of the capital stock of the company was voted to

the complainant, was illegal and void, and was one of the causes which led to the company's dissolution.

The defendant stated that the complainant had correctly presented the allegations of the bill filed for the purpose of dissolving the old company, and averred that, although no summons to that proceeding was served upon the complainant herein, yet he was served by publication, under the statute of Illinois. It was denied by the defendant that the said property was worth $20,000 at the time it was sold by the receiver to Main, and it was averred that the property was not worth more than Main paid for it.

The defendant showed that, although, as was stated in the bill, the aforesaid decree dissolving the old company was reversed by the Supreme Court of Illinois, it was reversed in part only, and that so much thereof as related to the appointment of the receiver was affirmed. It was, therefore, asserted by the defendant that the judgment of the said Supreme Court did not affect the decree entered in the Circuit Court of Marion County after the remanding of the cause, and that the reasons for the Supreme Court's partial reversal did not apply to the complainant herein, because he answered the said bill before the second hearing.

It was averred that by virtue of the decree entered upon the second hearing the master in chancery of the Circuit Court of Marion County executed and delivered to the defendant company a valid deed to the said property; and that under that deed it held the property by an absolute title, and not in trust for the complainant, as alleged in his bill. The defendant denied that it took the property from Main with knowledge of the complainant's debts against the old company; averred that, on the contrary, it knew nothing of such debts or claims, and insisted that so far as it and the complainant were concerned, all business matters between them were finally settled in the second decree of August, 1885. The defendant prayed that the complainant's amended bill might be dismissed.

The other defendants, on the same day, filed their joint and several answer to the complainant's amended bill, denying the same allegations of the bill that were denied in the answer of

the defendant company, and averring, among other things, that the stock of the old company, taken by the complainant, was taken for himself and not in trust for the company. They showed that the said property was in the hands of the receiver from August, 1878, to some time in the year 1885, and averred that in all that time the complainant had not presented to the receiver his said claim or any claim. They stated that they relied upon the aforesaid decrees and orders of the Circuit Court of Marion County as a complete defence to the complainant's amended bill, and denied that any debt was due by them or by the old or new company to the complainant as alleged in the bill, or that the complainant was entitled to the relief which he prayed for, or to any relief. The dismissal of the amended bill was prayed for by them also.

Replication was duly made by the complainant, and a large amount of testimony taken, on which, and on the amended bill, the answers, and the record of the proceedings had in the state court, the cause was heard in the Circuit Court, and a decree entered therein on February 7, 1889, by which the amended bill was dismissed. From that decree the complainant appealed to this court.

Mr. Upton M. Young for appellant.

Mr. Green B. Raum for appellee.

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

Our examination of this case has not been aided by any findings of fact or law by the court below. It has, hence, been necessary to make a very full statement of the facts as disclosed in the pleadings and evidence. That statement when made, however, does not disclose a case calling for extended treatment.

The present bill of complaint filed in the Circuit Court of the United States, as finally amended, was met by answers, in which, among other matters of defence, it was alleged that, in proceedings instituted in the Circuit Court of Marion

County, Illinois, on June 27, 1878, by Isaac Main and others against the St. Louis and Sandoval Coal and Mining Company, and against Ozias Townsend, (the appellant in the present case,) and which proceedings resulted in a final decree, on August 9, 1883, in favor of the complainants, which final decree was affirmed by the Supreme Court of Illinois on January 25, 1888, the same claims and matters of controversy set up in the present bill were litigated and adjudicated in favor of the appellees and against the appellant in the present case.

Of course, if this were so, such final judgment of the courts of Illinois would be a conclusive bar when pleaded to the present bill, and it is so conceded, as necessarily it must be, by the counsel of the appellant in his argument and brief in this case.

It is, however, contended that the issues involved in this suit were not the same with those involved and adjudicated in the state court. The first question, then, for our determination is whether the matters tried and adjudged in the state courts were the same with those which the appellant sought to have considered in the Circuit Court in the present case.

This question is readily determined by an inspection of the records in the respective cases.

As above stated, the bill as originally filed in the Circuit Court of Marion County, Illinois, alleges the insolvency of the St. Louis and Sandoval Coal and Mining Company, and that Ozias Townsend's claim against that company was without consideration and fraudulent, and asked for the appointment of a receiver and for a sale of the company's property. Upon a decree *pro confesso*, a receiver was appointed and a sale ordered. This decree was on appeal reversed by the Supreme Court of Illinois for want of proper service of process, and the cause was remanded for further proceedings, the receiver being continued. In the court below, when the cause came back, a supplemental bill was filed making the Sandoval Coal and Mining Company a party defendant. The latter company then filed an answer admitting all the allegations in the original and supplemental bills filed by Main and others,

and also filed a cross-bill, in which were recited the facts of the organization and insolvency of the St. Louis and Sandoval Coal and Mining Company, and alleging that it had in good faith bought the coal property and fixtures of the old company from Isaac Main, who had purchased them under the original decree of sale; that Ozias Townsend and his assignees were not *bona fide* stockholders in the old company, and praying the court to so decree, and that the complainants in the original bill were the only valid and legal stockholders in said old company, and that the original complainant be ordered to convey, in the name of the St. Louis and Sandoval Coal and Mining Company by valid conveyance to the said Sandoval Coal and Mining Company, the tract of land on which the shaft was sunk and all mining rights held by said first-named company, and also praying that the St. Louis and Sandoval Coal and Mining Company should be restrained from prosecuting an ejectment suit and a trespass suit that had been brought against the Sandoval Coal and Mining Company. As already stated, this litigation terminated in a decree declaring that the material allegations in the cross-bill were true; that Isaac Main and the other appellees in the present case were the only stockholders in the St. Louis and Sandoval Coal and Mining Company who had paid anything on their stock, and that they were the only parties or stockholders who had any interest in or right to determine how the assets of said company, which had been dissolved by the decree of the court, should be disposed of, to whom, and for what consideration. The decree further declared that Ozias Townsend and his assignees, defendants in the cross-bill, never had paid anything for their supposed stock in said St. Louis and Sandoval Coal and Mining Company, and that if any such stock had been issued to them it was wrongfully and fraudulently done, and that neither of them had any interest in the assets of said company, nor any right to interfere with the disposition of such assets. The decree further adjudged that Isaac Main had bought the property of the St. Louis and Sandoval Coal and Mining Company, at the instance and request of all the valid stockholders therein, for the purpose of selling the same for enough to pay

off the indebtedness of that company, which then amounted to over two thousand dollars, and that Main afterwards, at their instance and request, sold and conveyed all said property in consideration of the sum of $2465, paid by the complainants in the cross-bill, which sum was all the property was worth; and it was further decreed that a deed of conveyance, in the name of the St. Louis and Sandoval Coal and Mining Company, should be made of said property.

As already stated, Ozias Townsend and others appealed from this decree to the Supreme Court of Illinois, where the same was affirmed.

To escape from the conclusive effect of this decree, the complainant in the present bill asserts that his claims for services and for money expended by him for the St. Louis and Sandoval Coal and Mining Company were not in issue in said cases, and that as a creditor he can now assert such claim against the assets of that company now in the possession of the new company.

It may not be said that, in no case or in no circumstances, can a creditor of a company dissolved by legal proceedings assert a claim against its assets in the hands of a new company organized on its ruins, but it is clear that this complainant is in no condition to maintain such a claim in the present instance. Not only did the original bill against Townsend and others allege that the stock held by him and by others to whom he had caused stock to be issued had been fraudulently issued, but the cross-bill directly charged that the credit of ten thousand dollars, for which said stock had been issued on account of said Townsend, was fraudulently voted for pretended labor and money furnished and performed by him, when no such labor had ever been performed by him nor any money furnished or expended by him for such company. These allegations were traversed by answers, denying that the company "fraudulently acknowledged an indebtedness to the said Townsend or issued paid-up stock to him without a sufficient consideration or anybody else."

In the present bill Townsend alleges that by his agreement with the St. Louis and Sandoval Coal and Mining Company

he was to have a right to be credited on stock with ten thousand dollars for his services, and in his testimony he says that he gave of this paid-up stock $5000 worth to his wife, $4000 worth to George Wharton, and $1000 worth to True N. Blackman. This stock so issued by Townsend to his wife, Elizabeth Townsend, to Wharton and Blackman, was part of the very stock declared by the Circuit Court of Marion County, in its decree sustaining the cross-bill, to have been invalid as issued without consideration.

The manifest purpose and aim of the present bill are to go back of this decree, and to assert his original claim for services against the new company. We are of opinion that the invalidity of his claim for services was substantially established by the decree that the stock issued therefor was invalid, because issued without anything having been paid for it; and we are also of opinion that even if Townsend's original claim for services had not been merged in stock, but had remained as a valid and unsatisfied claim, no ground has been shown upon which the court below could have declared that such claim could be asserted at law or in equity against the Sandoval Coal and Mining Company or its stockholders. Even if the complainant's claim had been a conceded and *bona fide* claim against the St. Louis and Sandoval Coal and Mining Company, yet, as it had accrued to him, according to his own showing, on January 1, 1878, it could not be successfully asserted in a court of equity against purchasers at a judicial sale made in August, 1878, by a bill filed November 30, 1885. If, as he now is obliged to contend, Townsend did not assert his claim for personal services during the long litigation in the state courts, such claim, if not barred by the statute of limitations, was too stale to receive favor from a court of equity.

The decree of the court below is

Affirmed.

WHITE *v.* EWING.

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

No. 913. Submitted May 20, 1895. — Decided June 3, 1895.

A Circuit Court of the United States has "jurisdiction, in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claims the right to recover from any one debtor a sum not exceeding $2000."

THIS case arose upon a certificate of the Court of Appeals for the Sixth Circuit, based upon the following facts:

The Cardiff Coal and Iron Company, a corporation of Tennessee, becoming insolvent, a creditors' bill was filed in the Circuit Court for the Eastern District of Tennessee by George F. Bosworth, a citizen of Massachusetts, and a judgment creditor of the company, setting forth the insolvency of the company, the wasting of its assets, etc., and praying for a sale of the property, the collection of its choses in action, the appointment of a receiver, and for an injunction. In pursuance of the prayer of this bill the appellee, Ewing, was appointed receiver of the company, ordered to take possession of its assets, and to manage and protect the same for the benefit of the creditors under orders from the court. All creditors were ordered to file their claims.

Subsequently the receiver filed a petition stating that a large proportion of the company's assets consisted of promissory notes, amounting to about $225,000, given for land purchased from the company, upon which liens had been retained to secure their payment. These notes were executed by 130 different persons and were for various amounts, many of them for less than $2000. The receiver petitioned for authority from the court to institute suits for the collection of such notes, stating that, in order to save costs and expense, he had

been advised that it was proper, if it might be done, to bring in all the debtors by bill or petition and join them as defendants in one suit; that he was requested by the creditors to proceed in this manner; and that to sue the debtors separately would require more than one hundred suits with the enormous expense incident thereto.

In compliance with this petition, the court made an order that the receiver be directed to institute suit by proper bill or petition in the pending case against all persons indebted to the defendant company, (the Cardiff Coal and Iron Company,) by note or account, as set forth in his petition.

In pursuance of this order, the receiver filed his bill in the Circuit Court against 130 persons, of whom thirty were alleged to be citizens of Tennessee, and the remainder citizens of other States, all of whom were joined as defendants, and the amounts alleged to be due from them, respectively, were in most cases less than $2000. It was also alleged that special liens were retained in each case in the deed to the purchaser, to secure the deferred payments of the purchase money, and the court was asked to enforce such liens by sale of the lands, for the satisfaction of the balance of the purchase money due separately from each and all said defendants, upon their respective notes.

The resident defendants were personally served with subpœna, and an order of publication made against the non-resident defendants. No exception was taken to the form of the bill by demurrer or otherwise; and the defendants nearly all answered, denying their liability. The case was referred to a master, and on his report decrees were entered against those found to be indebted; such decrees being in a majority of instances for sums less than $2000. The lots were ordered to be sold to pay the amounts so found due. Appeals from these decrees were duly taken to the Circuit Court of Appeals, and perfected by the appellants in this case.

Upon this statement of facts, the Circuit Court of Appeals certified the following question to this court for its determination:

"Had the Circuit Court of the United States in a general

creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, the jurisdiction to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claimed the right to recover from any one debtor a sum not exceeding $2000."

Mr. Heber J. May, *Mr. John W. Yoe*, *Mr. John F. McNutt*, and *Mr. Tully R. Cornick* for appellants.

Mr. Robert Pritchard, *Mr. Foster V. Brown*, and *Mr. Frank Spurlock* for appellee.

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

While the receiver prayed in his petition to bring in all the debtors by bill or petition in one suit, alleging that it was so requested by creditors, in order to avoid the expense of a separate suit against each; and the bill was brought in that form against 130 defendants, who were charged to be severally indebted upon notes given for lots of land purchased from the company, no exception was taken to the form of the bill by demurrer or otherwise, but the defendants answered, denying their liability. The question certified does not, as we understand it, demand the opinion of this court as to whether a single bill against all these defendants would lie for the amounts severally due by them (upon which point we do not feel called upon to express an opinion); but whether so far as in said suit the receiver claimed the right to recover from any one debtor a sum not exceeding $2000, the court had jurisdiction to render a judgment against them.

This question must be answered in the affirmative. As was observed by this court in *Porter* v. *Sabin*, 149 U. S. 473, 479: "When a court exercising a jurisdiction in equity appoints a receiver to hold the property of a corporation that court assumes the administration of the estate; the possession of the

receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it."

The Circuit Court obtained jurisdiction over the Cardiff Coal and Iron Company by the filing of the original creditor's bill by Bosworth, a citizen of Massachusetts, and by the appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets or for the defence of its property rights, must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court, regardless either of the citizenship of the parties, or of the amount in controversy. *Freeman* v. *Howe*, 24 How. 450, 460; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Dewey* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329; *In re Tyler*, 149 U. S. 164, 181; *Root* v. *Woolworth*, 150 U. S. 401, 413; *Rouse* v. *Letcher*, 156 U. S. 47, 49.

Indeed, it was conceded that where an insolvent corporation is placed in the hands of a receiver of the Circuit Court, such appointment draws to the jurisdiction of that court the control of its assets, so far as persons having claims to participate in the distribution of such assets are concerned, and that parties must go into that court in order to assert their rights, prove their demands, and receive whatever may be due them, or their share or interest in the estate. But it is insisted that there is a distinction between cases where parties are brought before the court for the purpose of the payment to them of claims they may hold against the estate, and cases where it is sought to recover of them claims which the receiver insists they owe the estate; that the receiver stands in the shoes of the company, and has no higher rights than the corporation, and having sued for less than the jurisdictional amounts, that as to them the cases must be dismissed.

This position is entirely correct, so far as the right of the receiver to recover upon the merits is concerned; but it has no bearing whatever upon the question of the jurisdiction of the court to pass upon such merits. The receiver does not take his authority as an ordinary endorsee of the paper, and

subject to the disability to sue in the Federal court, which attaches to such endorsee, but he takes title by operation of law, and as an instrument of the court which appointed him. The cases upon which the appellant relies of the *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, and *Walter* v. *Northeastern Railroad*, 147 U. S. 370, were both original bills, over which jurisdiction could only be acquired upon proper allegations of citizenship and amount. In this case, however, the court proceeds upon its own authority to collect the assets of an estate, with the administration of which it is charged; and, if the receiver in such cases appears as a party to the suit, it is only because he represents the court in its inherent power to wind up the estate of an insolvent corporation, over which it has by an original bill obtained jurisdiction. In this particular, the jurisdiction of the Circuit Court does not materially differ from that of the District Court in bankruptcy, the right of which to collect the assets of a bankrupt estate we do not understand ever to have been doubted. There is just as much reason for questioning the jurisdiction of the court in this case upon the ground of the want of diverse citizenship, as upon the ground that the requisite amount is not involved.

Two cases decided by Justices of this court are directly in point. *Price* v. *Abbott*, 17 Fed. Rep. 506; *Armstrong* v. *Trautman*, 36 Fed. Rep. 275.

The question certified will, therefore, be answered in the affirmative.

HORNE v. SMITH.

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

No. 341. Submitted May 2, 1895. — Decided June 3, 1895.

In this case the United States Surveyors obviously surveyed the plaintiff's lot only to a bayou which they called the Indian River, leaving a tract between the bayou and that river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the bayou was not the Indian River or a proper water line on which to bound the lots.

Opinion of the Court.

THE case is stated in the opinion.

Mr. H. Bisbee for plaintiff in error.

Mr. George M. Robbins for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On September 27, 1890, plaintiff in error, as plaintiff, commenced an action to recover possession of lot 7, section 23, (except thirty acres on the north side,) and lots 1 and 2, section 26, all in township 29 south, range 38 east, in the county of Brevard, State of Florida. The defendants answered, denying possession of the property described in the plaintiff's complaint. A trial was had, which resulted, on January 14, 1891, in a verdict for the defendants, upon which verdict, on June 30, 1891, judgment was entered. Thereupon plaintiff brought this writ of error.

But a single question needs consideration. The title of the plaintiff to the property described in his complaint is not challenged, but the contention of the defendants is that the land which confessedly they occupy is not a part of the land so described. In other words, the only question involved is one of description and boundary.

Plaintiff's title rests on a patent from the United States, dated March 20, 1885, conveying "lot numbered seven of section twenty-three, and the lots numbered one and two of section twenty-six, in township twenty-nine south, of range thirty-eight east of Tallahassee meridian in Florida, containing one hundred and seventy acres and forty-two hundredths of an acre, according to the official plat of the survey of the said lands, returned to the General Land Office by the surveyor-general." The official plat of township 29 was in evidence, which showed that sections 23 and 26 were fractional sections bordering on the Indian River. On this plat a meander line runs through the sections from north to south, the Indian River being on the west thereof. The east line of the sections is, so far as these lots are concerned, the ordinary straight line of government surveys. In the south half of the southeast

quarter of section 23 is lot 7. The area of that lot is given as 73.06 acres. The northeast quarter of section 26 is divided into lots 1 and 2. The area of lot 1 is 54.90 acres, and of lot 2, 42.53 acres. The boundary lines of these three lots are all straight with the exception of the meander line on the west. The length of the section line between lot 7 and lot 1, extending from the east section line to the meander line on the west, is stated to be 30.55 chains. Along the course of this meander line, as shown on the plat, runs, according to the testimony, a bayou or savannah opening into Indian River, and west of this bayou, and between it and the main waters of the river, is a body of land extending in width a distance of a mile or a mile and a quarter, and amounting to some 600 acres. This is a body of low land, in some places however from four to six feet above the level of the river, and covered with a growth of live-oak trees, many of them three and four feet in diameter. It was not land formed by accretion since the survey.

The contention of the plaintiff is that, inasmuch as this body of land is not shown upon the official plat, and although the boundaries and areas of the three lots are given, the latter aggregating only 170 acres, the patent for the lots conveys all the land to the main body of the river. In other words, a patent for 170 acres conveys over 700. The basis of this contention is the familiar rule that a meander line is not a line of boundary, and that a patent for a tract of land bordering on a river conveys the land, not simply to the meander line, but to the water line, and hence, as claimed in this case, carries it to the water line of the main body of the river. The testimony is apparently not all in the record, nor are all the instructions, but this presents the ruling of the court, "it is the rule that the meander line is not the boundary line; they are run, not as boundaries of the tract, but for the purpose of finding the sinuosities of the bank of the stream. Fractional divisions made so by the water are designated and sold by the numbers attached to and reference is always had to the notes and maps of the survey. The water in the notes is the boundary, and when there exists a difference between the meander line as run and the actual margin of the stream or lake, the water is

the true boundary; but the rule has its limitations, as, for instance, a case in Polk County, with which I am familiar, where there is fifteen miles intervening between the meander line and the margin of a lake. This breaks the rule, and I charge you that when, as in this case, there is from three-fourths of a mile to a mile and a quarter between the meander line and the actual margin of the river, and when for half a mile in width this land has upon it oak trees, some of which are from three to four feet in diameter, especially where the waters of the river make up, forming a bayou which conforms substantially to the meander line of the government survey, this is not within the rule."

Whatever criticisms may be placed upon this instruction, we think that, as applied to the facts of this case, the ruling of the court was substantially correct. It is undoubtedly true that official surveys are not open to collateral attack in an action at law. *Stoneroad* v. *Stoneroad*, 158 U. S. 240; *Russell* v. *Maxwell Land Grant Company*, 158 U. S. 253. It is also true that the meander line is not a line of boundary, but one designed to point out the sinuosities of the bank of the stream, and as a means of ascertaining the quantity of land in the fraction which is to be paid for by the purchaser. *Railroad Co.* v. *Schurmeir*, 7 Wall. 272; *Hardin* v. *Jordan*, 140 U. S. 371, 380. It is also true that metes and bounds in the description of premises control distance and quantities when there is any inconsistency between them. *Morrow* v. *Whitney*, 95 U. S. 551, 555.

But the question in this case is whether the boundary of these lots is the bayou or the main body of the river. That a water line runs along the course of the meander line cannot, of course, in the face of the plat and survey, be questioned, but that the meander line of the plat is the water line of the bayou rather than that of the main body of the river, is evident from these facts. In the first place, the area of the lots is given, and when that area is stated to be 170 acres, it is obvious that no survey was intended of over 700 acres. In the second place, the meander line, as shown on the plat, is, so far as these lots are concerned, wholly within the east half

of sections 23 and 26, while the water line of the main body of the river is a mile or a mile and a quarter west thereof, in sections 22 and 27. Again, the distance from the east line of the section to the meander line is given, which is less than a quarter of a mile, while the distance from such east line to the main body of the river must be in the neighborhood of a mile and a half. Further, the description in the patent is of certain lots in sections 23 and 26, and, manifestly, that was not intended to include land in sections 22 and 27.

These considerations are conclusive that the water line which was surveyed, and made the boundary of the lots, was the water line of the bayou or savannah, and there has been simply an omission to make any survey of the tract west of the bayou, and between it and the main body of the Indian River. It is unnecessary to speculate why it was that it was not surveyed. It may have been a mere oversight, or it may have been because the surveyors thought that the action of the water would soon wash the low land away; but whatever the reason the fact is obvious that no survey was made of that body of land, and the boundary line fixed was the water line of the bayou.

The rule of public surveys, as prescribed by c. 9, sec. 2395, Title 32, Rev. Stat. page 438, and following pages, requires that they be surveyed into townships of six miles square, with subsequent subdivisions into thirty-six sections of a mile square, except where the line of an Indian reservation or of tracts of land theretofore surveyed or patented, or the course of navigable rivers, renders this impracticable, with a proviso that "in that case this rule must be departed from no further than such particular circumstances require." Now, if this tract west of the bayou and between it and the Indian River was intended to be surveyed, obviously all the lines of sections 23 and 26 would have been run along straight lines, and so as to make complete sections and quarter sections. But such lines, at least those on the west side, were not run, and, whatever the reason, the survey stopped at the water line of the bayou, and left this body of land west thereof wholly unsurveyed.

Although it was unsurveyed it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it. Cases of this nature are naturally few in number. *Lammers* v. *Nissen*, 4 Nebraska, 245, is somewhat in point. In that case it appeared that between the meander line as run and the Missouri River was a tract of several hundred acres, and the court held that as that body of land had not been surveyed it did not pass by a patent of a lot which on the government plat extended to the meander line. A similar ruling was made in *Glenn* v. *Jeffrey*, 75 Iowa, 20. *Whitney* v. *Detroit Lumber Co.*, 78 Wisconsin, 240, was a case in which the meander line shown in government surveys was a half a mile or more from the real borders of a lake, and the court, in a very careful opinion, discusses the law of official surveys and holds that as the meander line was a mistake, the patent did not carry the land to the actual boundary of the lake, but only to the straight line which would have been the boundary of the quarter section if accurately surveyed. And the same doctrine is reaffirmed in *Lally* v. *Rossman*, 82 Wisconsin, 147.

But it is said that because the water mentioned on the plat is called Indian River the boundary must be taken as the water line of the river, and cannot be that of any intermediate bayou. *Bates* v. *Illinois Central Railroad Company*, 1 Black, 204, 208, is instructive upon this. In that case a patent had been granted for 102.29 acres lying north of the Chicago River, bounded by it on the south and by Lake Michigan on the east. The contention was that the main channel of the river entered the lake much below the line shown on the plat, and so the patent carried a larger tract than that described therein. It appeared that there were two channels of the river, and the court said in reference to this:

"The mouth of the river being found, establishes the southeast corner of the tract. The plat of the survey, and a call

for the mouth of the river in the field-notes, show that the survey made in 1821 recognized the entrance of the river into the lake through the sand bar in an almost direct line easterly, disregarding the channel west of the sand bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land."

So, in the case before us, obviously the surveyors surveyed only to this bayou, and called that the river. The plaintiff has no right to challenge the correctness of their action, or claim that the bayou was not Indian River or a proper water line upon which to bound the lots.

We are of the opinion, therefore, that no substantial error was committed by the Circuit Court, and the judgment is

Affirmed.

WISCONSIN CENTRAL RAILROAD COMPANY *v.* FORSYTHE.

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

No. 238. Argued March 28, 29, 1895. — Decided June 3, 1895.

The land in controversy in this case is within the place limits of the road of the plaintiff in error, and was subject to the full control of Congress at the time of the grant made by § 3 of the act of May 5, 1854, c. 80, 13 Stat. 66, and it passed by operation of that grant, notwithstanding the fact that it was withdrawn by the Land Department in 1856 and 1859, in order to satisfy the grant made by the act of June 3, 1856, c. 43, 11 Stat. 20.

Every act of Congress making a grant of public land is to be treated both

Statement of the Case.

as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law.

When Congress makes a grant of a specific number of sections of public land in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land; and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that, if possible, the beneficiary shall receive those particular sections.

The courts are not concluded by a decision of the Land Department on a question of law.

The facts set up by the defendant as an estoppel suggest the rule "*de minimis non curat lex.*"

THIS was an action of ejectment, commenced on April 5, 1890, by the Wisconsin Central Railroad Company against William O. Forsythe in the Circuit Court of the United States for the Western District of Wisconsin, to recover possession of the southwest quarter of section 11, township 47 north, of range 4 west, in the county of Ashland, Wisconsin. At the trial, on April 16, 1891, the court instructed the jury to render a verdict for the defendant. Judgment having been entered on such verdict, the railroad company brought the case here on this writ of error.

The title of the plaintiff rested on these facts: By the act of June 3, 1856, c. 43, 11 Stat. 20, the United States made a grant of land to the State of Wisconsin. The first and fourth sections of the act making the grant were as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City to the St. Croix River or Lake between townships twenty-five and thirty-one, and from thence to the west end of Lake Superior; and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers for six sections in width on each side of said roads respectively. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of preëmption

has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, so much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which preëmption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the State of Wisconsin for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the roads in each case, and selected for and on account of said roads: *Provided further*, That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever: *And provided further*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

"SEC. 4. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the Governor of said State shall certify to the Secetary of the Interior that any twenty continuous miles of either of said roads are completed, then another like quantity of land hereby granted may be sold;

and so from time to time until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States."

We are concerned in this case with only the first of the two lines of road named and shall therefore treat the act as referring to it alone. On June 12, 1856, a withdrawal of the lands deemed necessary for the satisfaction of this grant was made by the land department. The grant was accepted by the State of Wisconsin on October 8, 1856, Laws of Wisconsin, 1856, c. 118, p. 137, and on October 11, 1856, the State conferred the benefit of it upon the La Crosse and Milwaukee Railroad Company, Laws of Wisconsin, 1856, c. 122, p. 217. Under authority of an act, of date March 5, 1857, Laws of Wisconsin, 1857, c. 230, p. 530, the La Crosse and Milwaukee Railroad Company conveyed to the St. Croix and Lake Superior Railroad Company so much of the grant as was north of the St. Croix River or Lake, and was to aid in constructing the road from that point to the west end of Lake Superior and to Bayfield. On March 2, 1858, the St. Croix and Lake Superior Railroad Company filed in the Land Department at Washington its map of definite location of the road from the St. Croix River or Lake to the west end of Lake Superior, and on July 17, 1858, a like map of definite location of the branch to Bayfield. On March 1, 1859, the Commissioner of the General Land Office forwarded to the local land officers a plat showing these locations, together with the six and fifteen-mile limits thereof, and directed them to continue to reserve all vacant tracts outside of the six and within the fifteen-mile limits from sale or location for any purpose whatever. In the letter conveying this direction it was stated that the agent of the State had selected all the vacant lands between the six and fifteen-mile limits in lieu of the lands within the six-mile limits already sold and pre-empted.

Nothing was done towards the construction of the road and branch from the St. Croix River or Lake northward until after the passage by Congress of the act of May 5, 1864, c. 80, 13

Stat. 66. The first, third, fifth, and sixth sections of this act are as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix River or Lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said State, to Bayfield, every alternate section of public land designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose, by the act of Congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the State of Wisconsin, to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line of route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of preëmption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the Secretary of the Interior, from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preemption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which preëmption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said

grant of June 3, 1856, but such selection and location may be made for the benefit of said State, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist."

"SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior on Lake Superior, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections or parts thereof, granted as aforesaid, or that the right of preëmption or homestead has attached to the same, that it shall be lawful for any agent or agents of said State, appointed by the governor thereof, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, as much public land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which the right of preëmption or homestead has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said State, or by the company to which she may transfer the same, for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than twenty miles from the line of said road."

"SEC. 5. *And be it further enacted*, That the time fixed and limited for the completion of said roads in the act aforesaid of

June three, eighteen hundred and fifty-six, be, and the same is hereby, extended to a period of five years from and after the passage of this act.

"SEC. 6. *And be it further enacted*, That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, and all mineral lands be, and the same are hereby, reserved and excluded from the operation of this act, except so far as it may be found necessary to locate the route of such railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

On March 20, 1865, Wisconsin conferred upon the St. Croix and Lake Superior Railroad Company the full benefit of the grant made by the first section of this act. Laws of Wisconsin, 1865, c. 175, p. 154. On April 22, 1865, the St. Croix and Lake Superior Railroad Company accepted this grant, and at the same time adopted the definite location theretofore made as shown by the maps on file in the Land Office at Washington. In 1869 the legislature of Wisconsin passed an act, Laws 1869, c. 90, p. 85, repealing said chapter 175 of the laws of 1865, and in 1874, Laws of 1874, c. 126, p. 186, conferred the benefit of the grant on the North Wisconsin Railroad Company, which company afterwards by consolidation became merged in the Chicago, St. Paul, Minneapolis and Omaha Railroad Company (hereafter called the Omaha company). This company constructed, and now owns and operates, the road from St. Croix River or Lake to Superior, on Lake Superior, and also the branch to Bayfield.

The grant made by section three of the act of Congress of 1864, was transferred by the State to the Portage, Winnebago and Lake Superior Railroad Company, whose name was afterwards changed to that of the Wisconsin Central Railroad Company, the plaintiff herein. Laws of Wisconsin, 1866, p. 720, c. 314; c. 362, p. 869; 1869, c. 257, p. 578; 1871, c. 27, p. 42. The map of definite location of the road thus aided was filed on November 10, 1869. Prior to December 31, 1876, the plaintiff had constructed, and now owns and operates, the road as far north

Counsel for Parties.

as Ashland, on Lake Superior. The Bayfield branch of the Omaha road also touches Ashland, and the land in controversy is within ten miles of the plaintiff's road and between ten and fifteen miles of the Omaha road.

On February 12, 1884, the Omaha company and the plaintiff, in consequence of the overlapping of their grants at and near the city of Ashland, entered into an agreement, which provided, among other things: "The Omaha company consents that the Central company [plaintiff] shall take patents for all lands in the overlap lying east of the easterly ten-mile limit of the Bayfield branch of the Omaha company, and north and east of the westerly ten-mile limit of the Central company, and agrees to assist the Central company to get such patents from the State of Wisconsin."

On February 25, 1884, the State of Wisconsin issued to the plaintiff a patent for a large quantity of land, including therein the tract in controversy, and on February 19, 1887, the Omaha company executed a further instrument of release to the plaintiff, by which it surrendered and waived all right of whatsoever nature to any lands east of a line therein described, which was so drawn as to include the lands in dispute. On July 2, 1887, the plaintiff filed in the Land Office at Washington lists of land, including the land in dispute, claiming them as part of its grant. The Commissioner of the General Land Office rejected these lists, holding that the plaintiff had no title to the lands, and, on appeal, the Secretary of the Interior, on January 24, 1890, affirmed this decision. After this the defendant took proceedings to enter the land under the laws of the United States, went into possession, built a residence, and made certain improvements, at an expense of more than $200.

Mr. Louis D. Brandeis for plaintiff in error. *Mr. Edwin H. Abbot*, *Mr. Howard Morris*, and *Mr. William H. Dunbar* were on his brief.

Mr. William F. Vilas, by leave of court, for plaintiff in error.

Mr. George G. Greene and *Mr. A. B. Browne* for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The land in controversy is within the place limits of the plaintiff's road. Confessedly, therefore, the title passed to the plaintiff, provided the land was subject to the operation of the grant made by the third section of the act of 1864. The contention is that it was not subject thereto by reason of the fact that it was withdrawn by the land department in 1856 and 1859 in order to satisfy the grant made by the act of 1856. It was within the indemnity and not within the place limits of the grant in aid of the Bayfield road.

It is curious to note that in the communication made in 1859 by the land department to the local land officers it is stated that all the unsold lands within the indemnity limits along the line of that road had been selected by the agent of the State in lieu of the lands sold and preëmpted within the place limits. If this selection was in fact made and was needed to satisfy the deficiency in the amount of lands within the place limits, and was approved by the land department, it would avoid the necessity for further inquiry; for whatever of right there was in the St. Croix and Lake Superior Railroad Company passed to the Omaha Company, and was by it, under the agreements of February 12, 1884, and February 19, 1887, transferred to the plaintiff, and this was long anterior to any claim on the part of the defendant.

But assuming, in the absence of any direct evidence thereof, that no such selection was made, we pass to an inquiry as to the respective rights of the parties. The title of the plaintiff, as we have seen, can only be defeated by reason of the land not being within the scope of the grant made by the third section of the act of 1864, and it is only excluded therefrom by the grant of 1856 and the reservation made in pursuance thereof. The reliance of defendant is on the long-established rule, often affirmed by this court and recognized in section six of the act of 1864, to the effect that a grant by Congress does not operate upon lands theretofore reserved for any purpose whatsoever. There can be no doubt as to this rule, or as to

the fact that lands withdrawn from sale by the land department are considered as reserved within its terms.

But it is a rule of equal if not higher significance that every act of Congress making a grant is to be treated both as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law.

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together." *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625. See also *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 497; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 597; *United States* v. *Denver & Rio Grande Railway*, 150 U. S. 1.

In order to determine the intent of Congress we must look at the situation at the time the act of 1864 was passed. The alternate sections within the six and fifteen-mile limits of the Bayfield road were not granted by the act of 1856. They were simply withdrawn from preëmption and sale by the action of the land department in order that the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. We do not mean that they were not reserved lands; on the contrary, as stated above, they were. Such is the uniform ruling of this court in interpreting like action on the part of the land department. Nevertheless, not being granted lands, they were still within the disposing power of Congress. There would be no question of the title of one to whom Congress had in terms granted them. "Until selection was made the title remained in the government, subject to its disposal at its pleasure." *Kansas Pacific Railroad* v. *Atchison &c. Railroad*, 112 U. S. 414, 421; *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720,

732; *United States* v. *McLaughlin*, 127 U. S. 428, 450, 455; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496, 511; *United States* v. *Missouri, Kansas & Texas Railway*, 141 U. S. 358, 374.

The land was, therefore, subject to the full control of Congress at the time of the passage of the act of 1864. What did Congress intend by that act? It had in 1856 granted to the State of Wisconsin six sections per mile to aid it in the construction of a road from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, and thence to the west end of Lake Superior, and to Bayfield, with a proviso that if the road was not completed within ten years the unsold lands should revert to the United States. Wisconsin had accepted this grant, and thus impliedly undertaken to construct the road. It made the La Crosse and Milwaukee Railroad Company the beneficiary of this grant. Subsequently, with the assent of the State, that company had transferred to the St. Croix and Lake Superior Railroad Company so much of the grant as was designed to aid in the construction of that part of the road from the St. Croix River or Lake northward to Lake Superior, with the branch to Bayfield. Eight years had passed, and only two years more remained until the expiration of the time fixed for the completion of the road. Only a short distance had in fact been built, to wit, 61 miles from Portage to Tomah, and that by the St. Croix and Milwaukee company in the spring of 1858. It was evident that the inducement of six sections per mile had not been sufficient to secure the construction of the road in the comparatively uninhabited portions in the northwestern part of the State, and so Congress determined to enlarge its grant in order to secure the accomplishment of the desired end. At the same time it perceived that the public interests required an additional road running through the central portion of the State northward to the two termini on Lake Superior, named for the road from St. Croix Lake or River.

And so it passed the act of 1864. This made a grant to the same grantee, to wit, the State of Wisconsin, but expressed the terms and purposes in three separate sections.

Congress evidently knew that at the time two companies had been named by the State of Wisconsin as the parties to construct the road provided for by the act of 1856. So, in the first section, it made a grant of ten sections per mile to aid in the construction of a road from St. Croix River or Lake to the west end of Lake Superior, with a branch to Bayfield; in the second, a grant in substantially like terms for a road from Tomah to the St. Croix River or Lake; and in the third, a grant also of ten sections per mile to aid in the construction of a road from Portage City, Berlin, Doty's Island, or Fond du Lac, as the State should determine, in a northwesterly direction to Bayfield, and then to Superior, on Lake Superior. In each of these three sections it named the State of Wisconsin as the grantee. Although it knew that the State had made two separate companies the beneficiaries of the act of 1856, it made no grant to those companies. It dealt in all three sections with the State, relying upon the State as the party to see that the roads were completed, and to use its own judgment as to the manner of securing such construction. The act of 1864 was, therefore, a mere enlargement of the act of 1856, was made to the same grantee, was *in pari materia*, and is to be construed accordingly. It is not to be treated as an independent grant to a different party, and, therefore, liable to come in conflict with the rights of the first grantee.

For whose benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: we do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any preëmption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of nine miles on either side that within those nine miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent act, makes a new and absolute grant to the same

grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands?

Kansas City &c. Railroad v. *Attorney General*, 118 U. S. 682, is in point. On July 26, 1866, 14 Stat. 289, Congress passed an act granting to the State of Kansas five alternate sections per mile to aid the Union Pacific Railroad Company, Southern Branch, in constructing a railroad from Fort Riley, upon the valley of the Neosho River, to the southern line of the State of Kansas. This corporation (its name having been changed to that of the Missouri, Kansas and Texas Railroad Company) constructed the road, and received patents for the land. The object of that suit was to vacate and declare void these patents, and the principal ground relied on for maintaining it was that, by an act of March 3, 1863, 12 Stat. 772, and a supplemental act of July 1, 1864, 13 Stat. 339, the lands had been appropriated to aid another company in building a road along the same line. The act of 1866 had the ordinary reservation clause, similar to that found in section six of the act of 1864 before us, and the contention was that the effect of this reserving clause was to except all the lands covered by the grants of 1863 and 1864 from the operation of the grant of 1866. It was conceded that if the intent of Congress was to aid in the construction of two separate lines of road the contention would have to be sustained, the court saying: "As the lands granted by the prior acts of 1863 and 1864 had, by the act of the legislature of Kansas, been granted to the Atchison, Topeka and Santa Fé Railroad Company, a then existing corporation of that State, for the purpose of building a road, with the same general description as to its course down the valley of the Neosho River, which might have run through these same lands if it had been built by the latter company, it is argued with great earnestness that these lands were necessarily reserved, under this clause of the act of 1866, from the grant, as being reserved by the authority of Congress for the purpose of aiding in that object of internal improvement. If the A., T. & S. F. R. R. Co. had built a line of road along the same general course and through the same lands, twenty miles

in width, that the M., K. & T. R. R. Co. has occupied with its road, and asserted a claim to these lands, or to any of them, the argument would be almost irresistible." But it was held, in view of certain arrangements made between the two companies, (not then ratified by the State of Kansas, but expected to be, and, in fact, subsequently so ratified,) that it was the intent of Congress simply to aid in the construction of one road, and that the Missouri, Kansas and Texas Railroad Company was entitled to the full benefit of the three acts. The court thus looked beyond the letter of the statutes to the intent of Congress, and upon that intent denied what would otherwise be a technical ground for relief.

But we need not go outside of this act of 1864 for a clear disclosure of a like intent on the part of Congress. The act of 1856 granted six sections per mile to aid in the construction of a road from St. Croix River or Lake to Bayfield. The lands between the six and fifteen-mile limits of the line of that road as located were withdrawn by the action of the land department. They were thus reserved lands. Now the first section of the act of 1864 granted ten alternate sections to aid in the construction of a road along the same line. Can there be any doubt that this grant of four additional sections operated upon the land thus reserved between the six and fifteen-mile limits? Yet if the act of 1864 is to be taken as making a grant entirely independent from that of 1856, it could not be enforced as to lands between the six and fifteen-mile limits reserved under that prior grant. It will be noticed that the act of 1864 makes no grant directly to the St. Croix and Lake Superior Railroad Company, but only to the State of Wisconsin, and the latter could, if it had seen fit, have made some other company the beneficiary; and yet can there be any doubt that Congress intended by this first section of the act of 1864 merely an enlargement of the grant made by the act of 1856 from six to ten sections, and also intended that as to the four extra sections the grant should operate upon lands reserved between the six and fifteen-mile limits? If this be true as to one part of the grant of 1864, why is it not equally true as to another portion of the grant, all of it being to the same grantee?

When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land, and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that if possible the beneficiary shall receive those particular sections. So far as railroads are concerned, it is the thought not merely that the general welfare will be subserved by the construction of the road along the lines indicated, but further, that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits. The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the lands taken by the company shall be as near to the line of the road as possible; and so, while selection of remote lands is permitted, it is only when and because there is a necessity of such selection to make good the amount of the grant. Obviously, therefore, an act must be construed to realize, so far as is possible, this intent and to accomplish the desired result.

Still, again, it must be noticed that the State of Wisconsin, the grantee named in both the acts of 1856 and 1864, the plaintiff within whose place limits the land in controversy is situated, and the Omaha company, within whose indemnity limits it is, all three long since agreed that the land passed by this grant, and dealt with it as belonging to the plaintiff. Both roads have been constructed, and, undoubtedly largely through the instrumentality of their construction, population has poured into that part of the State, and the value of all real estate so increased that this particular tract is found by the jury to be worth $8000. After years have passed, and all the parties interested in the matter, other than the United States, have treated it as the property of the plaintiff, the defendant, relying upon a technical construction of the statutes,

seeks to enter the tract, and thus, for no more than the paltry sum of $400, two dollars and a half per acre being the double minimum price of land within the limits of railroad grants, to obtain title to property worth, as we have seen, at least $8000. The railroad company, under this construction, loses the land it supposed it was entitled to, which it has treated as its own, and has helped to make valuable; the government does not receive the $8000, nor indeed anything if the land be entered under the homestead laws, but a stranger comes in, who has done nothing to create that value, and appropriates it to his own benefit. The iniquity of such a result is at least suggestive.

But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon a construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department. *Johnson* v. *Towsley*, 13 Wall. 72; *Shepley* v. *Cowan*, 91 U. S. 330; *Quinby* v. *Conlan*, 104 U. S. 420; *Doolan* v. *Carr*, 125 U. S. 618, 624; *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 354.

Defendant also claims an estoppel by reason of these facts set up as a third defence in his answer, the truth of which was on the trial admitted by the plaintiff. The final decision of the Secretary adversely to the claim of the plaintiff was on or about the 10th day of January, 1890. (The testimony in this case shows that it was made on January 24, 1890.) Subsequent to that decision the defendant entered upon the premises, built a residence, and made other improvements, at a cost of more than $200. The plaintiff knew of his possession and of the making of such improvements, but took no action until the commencement of this suit, on April 9, 1890. It seems to us that the claim of an estoppel can hardly be seriously made. The plaintiff had been contesting for these lands in the land department for a series of years. Some time after the final decision therein the defendant enters upon the land and commences making improvements, and in making such improve-

ments expends the paltry sum of $200, and the plaintiff fails to file a complaint in ejectment for two months and a half after the decision of the land department, and perhaps, nearly that time after the defendant had entered into possession. Surely the defendant had no reason to believe that the plaintiff had abandoned its claim to the land. Both the time of plaintiff's delay and the amount of his expenditures suggest the rule *de minimis non curat lex.* The title of $8800 worth of land is not lost in such a way.

For these reasons we are of the opinion that the Circuit Court erred in its decision, and its judgment is, therefore, *Reversed, and a new trial ordered.*

Mr. Justice Harlan dissented.

The Chief Justice took no part in the consideration and decision of this case.

SPENCER *v.* McDOUGAL.

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

No. 245. Argued April 3, 1895. — Decided June 3, 1895.

By the order of the Commissioner of the General Land Office of June 12, 1856, the land in controversy in this case was withdrawn from preëmption or sale; and the validity of that order was not affected by the fact that the order covered more land than was included in the grant by Congress which caused its issue.

The case is stated in the opinion.

Mr. Louis D. Brandeis for plaintiff in error. *Mr. Edwin H. Abbot*, *Mr. Howard Morris*, and *Mr. William H. Dunbar* were on his brief.

Mr. George G. Greene and *Mr. A. B. Browne* for defendant in error.

Opinion of the Court.

MR. JUSTICE BREWER delivered the opinion of the court.

This was an action of ejectment brought by the plaintiff in error, plaintiff below, in the Circuit Court of the United States for the Western District of Wisconsin, to recover possession of the east half of the southwest quarter and the east half of the northwest quarter of section number seven (7), in township number forty-seven (47) north, of range number four (4) west, in the county of Ashland and State of Wisconsin.

The land, found by the jury to be worth sixteen thousand dollars, is situated within the limits of the city of Ashland, more than six and less than ten miles from the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, and also within ten miles of the Wisconsin Central Railroad Company. The title of the plaintiff rests upon an agreement between the two railroad companies settling all differences between themselves as to the lands within the place limits of each road, a patent from the State of Wisconsin to the Omaha company in pursuance of such agreement, and a deed from the latter to himself.

The same questions arise in this case as in that just decided, *Wisconsin Central Railroad Co.* v. *Forsythe*, *ante*, p. 46, and it is unnecessary to enter into any detailed statement of the facts concerning the two land grants, or a discussion of the questions arising thereon. Obviously, as the land in controversy was within the place limits of each road, it either passed wholly to the Omaha company or in equal moieties to the two, and in the latter event the agreement referred to transferred all rights to the Omaha company.

As against this, the defendant offered evidence that on May 3, 1858, and June 16, 1858, respectively, two preëmption declaratory statements were filed in the local land office, one in respect to one-half of the tract and the other in respect to the remainder, and contends that up to those dates there had been no valid withdrawals of any lands by the land department, and, as a consequence, that these preëmption claims attached to the land and excluded it from the operation of the grant. It may be remarked, in passing, that it does not appear that

any attempt was ever made to prove up or acquire title under and in accordance with these declaratory statements. But the contention is that, by the simple filing of the statements, the land was excluded from the operation of the grant made by either act.

We are unable to assent to this contention. On May 29, 1856, the Commissioner of the General Land Office telegraphed to the local land officers of the district in which the land is situated to suspend from sale and location all lands in the district. This was prior to the passage of the act of 1856. On June 12, nine days after its passage, the Commissioner wrote to the same officers, referring to his telegraphic despatch, and saying that the object of the withdrawal thus ordered was to protect from sale the lands granted to the State by a bill which had passed both houses of Congress, though not then approved by the President. But, it having been approved on June 3, he directs the continuance of the withdrawal. On October 26, 1856, he again wrote to the local land officers that upon the filing in their office of a duly certified map of the line of route as definitely fixed they "will, without waiting for further instructions from this office, cease to permit locations by entries or preemption, or for any purpose whatever of the lands within fifteen miles of said route," and on March 1, 1859, which was after the filing of these declaratory statements, he sent a letter, enclosing a diagram of the lands in their district with the line of route as definitely selected designated thereon, and again notified them to withhold from sale all lands within the indemnity limits. The only objection which can be made to the order of June 12, 1856, which was after the passage of the act, is that the Commissioner withdrew too much land, to wit, all land in the district, but that was a matter for the determination of the land department, and cannot be revised or disregarded by the courts.

Walcott v. *Des Moines Co.*, 5 Wall. 681, is in point. In August, 1846, Congress granted to the Territory of Iowa five alternate sections of the public lands, on each side of the Des Moines River, to aid in improving its navigation. It was a disputed question whether the grant terminated at the mouth

of the Raccoon Fork, or extended along the whole length of the river to the northern boundary of the State. The land department ordered that lands the whole length of the river within the State should be withdrawn from sale. In the course of subsequent litigation it was decided by this court that the grant terminated at the mouth of the Raccoon River. But in the case cited it was held that the withdrawal by the land department of lands above the mouth of the Raccoon River was valid, and that a subsequent railroad grant, with the ordinary reservation clause in it, did not operate upon lands so withdrawn. If a withdrawal of land beyond the terminus of a grant can be sustained, as it was in that case, equally so should be one made in anticipation of the locations of two lines of road, which locations were as yet undetermined, and might be such as to bring almost any portion of the lands withdrawn within the indemnity limits of the grant.

The order of June 12, 1856, was never set aside. The letter of October 26, 1856, simply gave authority for a reduction in the area of the withdrawn territory upon the filing of a map of definite location, and that of March 1, 1859, forwarded a diagram showing the line of definite location of a part of one of the roads aided, and directed the continued withdrawal of land within the indemnity limits as disclosed thereby, but neither of them set aside the withdrawal of June 12, 1856, or in any other way affected it. These declaratory statements were of no validity; the land was then withdrawn from preemption or other sale, and withdrawn for the purpose of satisfying the grant to the State of Wisconsin.

The judgment of the Circuit Court will, therefore, be reversed, and a new trial ordered.

The CHIEF JUSTICE took no part in the consideration and decision of this case.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* SMITH.

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

Argued and submitted December 19, 1894. — Decided June 3, 1895.

When the receipt given by a local land office to a preëmptionist, acknowledging the payment of the preëmption money, is sufficient on its face to transfer the full equitable title to him and does not disclose when his rights to the land were initiated, his vendees are not chargeable, as matter of law, with knowledge of the fact that the land at the time was not subject to preëmption or homestead.

THE facts in this case were as follows: On May 14, 1853, William W. Smith purchased from the State of Louisiana a tract known as Cross Lake, in section 25, township 18, range 14, containing twenty-one and eighteen one-hundredths acres. The title of the State rested on the claim that the land was swamp and overflowed, and passed to it under the acts of Congress granting such lands to the States. On December 3, 1857, the State filed a petition in the District Court of the parish of Caddo to set aside such purchase and cancel the certificate of entry. While this action was pending, and before any trial, William W. Smith died, and the action was revived in the name of John W. Smith, administrator of his succession. Such administrator appeared and answered. The heirs of William W. Smith were not made parties, but upon the petition of the State and the answer of the administrator the action was tried before a jury, and a verdict returned in favor of the State, annulling the sale and cancelling the certificate. A judgment was, on November 20, 1860, entered upon this verdict, from which the administrator took an appeal to the Supreme Court of the State, but such appeal was afterwards and on August 11, 1869, dismissed by the consent of counsel.

On February 24, 1872, at the local land office of the United States, W. D. Wylie entered as a homestead the same tract

under the description of lot 15, in section 25, etc. On October 19 of that year he changed his homestead to a preëmption entry, paid the government price for the land, and received a final receipt therefor. This receipt was recorded in the recorder's office of the parish of Caddo on November 20, 1872, and on the same day he conveyed a two-thirds interest in the land to Hotchkiss & Tomkies. On December 1, 1874, a United States patent was issued to Wylie for the land. Prior to his homestead entry, and on April 27, 1871, an act was passed by the State of Louisiana incorporating the city of Shreveport, and the tract in controversy was within the boundaries of that city as defined in the act of incorporation. In the spring of 1872 Wylie went into actual possession of the premises, and such possession has continued in him and his grantees up to the present time. By sundry mesne conveyances the title of Wylie passed to plaintiff in error.

This action was commenced in the Circuit Court on May 1, 1886, by the defendants in error, as heirs of William W. Smith, to recover possession of the land. Among the defences set up by the railway company was that of the statute of limitations, or prescription as it is called in the legislation of Louisiana. The case came on for trial on February 28, 1891, and resulted in a verdict and judgment for plaintiffs. Thereupon the defendant sued out this writ of error.

Mr. W. W. Howe for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* were on his brief, on which they submitted.

Mr. A. H. Leonard for defendants in error submitted on his brief.

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

It is unnecessary to consider any questions other than those which arise upon the instructions of the court in respect to the matter of prescription. The possession of the defendant

and its grantors had continued from the spring of 1872 until the commencement of this action — about fourteen years — four years longer than the time named in the statute. And the title under which this possession commenced was under instruments in legal form, executed by the proper officers of the United States, and apparently conveying full title. The receiver's receipt issued to Wylie was in these words:

"No. 17,830.

"RECEIVER'S OFFICE AT NATCHITOCHES, LA., *Oct.* 19, 1872.

"Received from William D. Wylie, of Caddo Parish, Louisiana, the sum of forty-seven dollars and forty cents, being in full for the lot No. 15 south of the bayou, of section No. 25, in township No. eighteen (18), of range No. fourteen (14) west, containing eighteen acres and ninety-six hundredths, at $2.50 per acre.

"47.40. J. JULES BOSSIER."

There is nothing on the face of this receipt or in the deed made on November 20 following by Wylie to Hotchkiss & Tomkies to indicate that the land was swamp or overflowed, or that it was within the corporate limits of the city of Shreveport, or tending to show when Wylie first entered upon it and initiated the right of homestead or preëmption. And the same is true of the patent issued two years thereafter. Such a title is the "just title" which, within the terms of the Louisiana statutes, is the beginning of a right by prescription. And this is true whether we regard simply the receiver's receipt or the patent. Indeed, a patent from the United States is the highest evidence of title. As said by Mr. Justice Catron, in *Hooper* v. *Scheimer*, 23 How. 235, 249: "This court held, in the case of *Bagnell et al.* v. *Broderick*, 13 Pet. 450, 'that Congress had the sole power to declare the dignity and effect of a patent issuing from the United States; that a patent carries the fee, and is the best title known to a court of law.' Such is the settled doctrine of this court."

There may be a question whether the patent in this case was not something more than the "just title" needed in prescrip-

tion, and whether it was not conclusive as to the full title upon all the parties to this litigation. But that matter we shall not stop to consider, as it does not seem to have been discussed by counsel. It is enough for the purposes of this case if it be only a "just title." Articles (3447) 3481, (3448) 3482, and (3450) 3484 of the Louisiana Civil Code are as follows:

"Article (3447) 3481. Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor must prove it."

"Article (3448) 3482. It is sufficient if the possession has commenced in good faith; and if the possession should have afterwards been held in bad faith, that shall not prevent the prescription."

"Article (3450) 3484. By the term just title, in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property."

This matter has been frequently considered by the Supreme Court of that State. See among other the following cases: *Carrel's Heirs* v. *Cabaret*, 7 Martin, O. S. 375, 406; *Fort* v. *Metayer*, 10 Martin, O. S. 436, 439; *Dufour* v. *Camfranc*, 11 Martin, O. S. 675, 715; *Frique* v. *Hopkins*, 4 Martin, N. S. 212, 225; *Eastman* v. *Beiller*, 3 Robinson, La. 220, 223; *Hall* v. *Mooring*, 27 La. Ann. 596; *Giddens, Executor*, v. *Mobley*, 37 La. Ann. 417, 419; *Barrow* v. *Wilson*, 38 La. Ann. 209, 213; *Pattison* v. *Maloney*, 38 La. Ann. 885, 888.

In the first of these cases the court said: "When the law says that a title defective in point of form shall not be the basis of prescription, what does it mean? A title, which, though apparently good, has some latent defect? Certainly not. A title, which, though apparently clothed with all the formalities required by law, may be proved defective by extensive evidence? No. It means a title, on the face of which the defect is stamped. And why? Because the holder of such a

title cannot pretend that he possesses in good faith; for he is supposed to know the defect of form which his title shows, and cannot plead ignorance of law. But admit latent nullities, unknown in point of fact to the possessor to prevent prescription, and what does good faith avail him? Or, rather, what becomes of the whole doctrine of prescription?" In the second: "He who alleges ill faith, is bound to the strictest proof, for the presumption is against him." In the third case the title relied on was a sheriff's deed, and in respect to this the court observed: "The title presented here is perfect as it respects form; it pursues the very words of the statute; the defect is a want of right or authority in the sheriff to make such a conveyance, not a defect in the manner he made it. As nothing, therefore, appears on the face of the deed which is defective, the knowledge of want of right, in the person who sold, is not brought home to the vendee, and his error was one of fact, not of law. It is difficult to see where is the difference between this case and an ordinary one of sale, where the purchaser acquires, from a person who has no title, by a regularly executed act, before a notary public; p. 715. In such case the buyer acquires none, but he has that good faith which enables him to plead prescription." In *Eastman* v. *Beiller* we find this language: "A title defective in point of form cannot be a basis for prescription. By this the law means a title, on the face of which some defect appears, and not one that may be proved defective by circumstances, or evidence *dehors* the instrument." In *Hall* v. *Mooring* the title of the defendant was a patent from the United States and a deed from one apparently the agent of the heirs of the patentee. It was objected that the agent did not in fact have authority, but, nevertheless, the deed made by him was held sufficient for the purposes of prescription, the court saying, p. 597: "The want of authority in Wright [the agent] to sell the lands is the only defect in defendant's title. If that defect did not exist, his title would be perfect without the help of prescription. The defendant's title is apparently perfect; so is the mandate of Wright. The defect complained of is *dehors* both acts, and was only made manifest on the

trial of this case." In *Giddens, Executor*, v. *Mobley*, a tax deed was shown, and it was held sufficient for the purpose of prescription, the court saying: "Where the deed is perfect in form, and the defect is want of right or authority in the officer to make it and not in the manner of making it, the knowledge that the officer had no right to make the sale is not brought home to the buyer." In *Barrow* v. *Wilson* the defendant claimed two tracts, and the title under which he claimed prescription was as to one, a patent from the State for land as swamp land, and the other, a tax deed, and the conclusions were as in the other cases, the court saying, in reference to the patent from the State: "Upon its face that muniment of title is transferable of the ownership of the property which it purports to convey."

These authorities sufficiently disclose the rule of law recognized in the State of Louisiana, and, of course, are controlling in the Federal courts. The learned circuit judge deemed that the principles sustained by these decisions were inapplicable on the ground that this land was swamp and overflowed land, and was also within the limits of an incorporated city, and that knowledge of these facts was chargeable to the parties in the chain of title. We quote from the bill of exceptions:

"As to Wylie, I charged that his title was a nullity, and, under the undisputed facts in relation to the land lying within the city limits, and as to its character being that of swamp and overflowed land in 1849 and continuously afterwards, and under the law forbidding public lands to be sold when lying within a city's limits, and the law of Congress of 1849 donating such swamp and overflowed lands to the State, Wylie is charged with knowledge of such facts and law, and the certificate given to him cannot be taken as a basis for the beginning or recurring in his favor of the prescription of ten years.

"I charged further in relation to testing the good faith of Wylie and vendors, Hotchkiss & Tomkies, that they should be charged with such knowledge as is shown to have been in the common knowledge of the men and community of Shreveport, their place of residence, as to the land being swamp and overflowed land in 1849 and continuously thereafter, unless

the jury from other evidence in the case should believe otherwise as to such knowledge in them; that they should be charged with knowledge of the fact that the land was in the city limits by the description of the land in the certificate under which Wylie sold, and which was recited in the act of sale to them, and they should be charged with knowledge of the act limiting the swamp and overflowed lands in 1849 to the State and of the law forbidding public lands of the United States lying within city limits to be sold to any one under the homestead or general land laws."

We think there was error in these instructions. Neither the fact that this was swamp and overflowed land, nor that it was within the limits of the city of Shreveport, appear upon the face of the receipt or patent. They are facts *dehors* those instruments. So far as respects the character of the land as swamp and overflowed land, it must be assumed from the statement made by the judge that the testimony showed that it was of such character in 1849 and continuously afterward. It must have been so in 1849 or no title passed to the State; but the fact that it was swamp and overflowed land in 1872 when Wiley entered it as a homestead does not prove that it was of similar character in 1849, nor that the title passed to the State under the act of Congress. It is a well known fact that land, by subsidence or elevation or through other causes, in a series of years may change its character, at one time being swamp and overflowed and at another dry upland. If it be conceded that Wylie was charged with knowledge of the fact that in 1872 it was swamp and overflowed, it does not follow that he is also chargeable with knowledge of the fact that twenty years before it was in like condition. No patent or conveyance had been made from the United States to the State. No selection or identification of the land as swamp land had ever been made by the land department of the government, and when Wylie's application to enter it as a homestead was recognized in that department he had a right to assume that it was land which did not pass by the act of 1849 to the State. At least, he is not chargeable as a matter of law with knowledge of its condition in 1849, or that by reason

of such condition it was among the lands granted by act of Congress to the State.

With reference to its location within the limits of an incorporated town, even if it be true that Wylie, as the party entering, was charged with knowledge of the territorial limits of the town, and that this tract was within such limits at that time, (a matter upon which we deem it unnecessary to express an opinion,) it must be borne in mind that neither the receiver's receipt nor the patent disclosed when Wylie first entered upon the land for the purposes of making it his homestead, or when he first initiated his rights in respect thereto. The city was incorporated in 1871, the receiver's receipt was issued in October, 1872. Wylie might have been in occupation of the land years before the incorporation of the city, might have made application to enter it as a homestead before such incorporation, and a right thus initiated would not be defeated by the subsequent act of the State in incorporating the city. It follows, therefore, that as the receipt, which was upon its face sufficient to transfer the full equitable title to Wylie, did not disclose when his rights to the land were initiated, his vendees, Hotchkiss & Tomkies, were not chargeable as matter of law with knowledge of the fact that the land was, at that time, not subject to preëmption or homestead. In other words, upon the face of the papers a good title was transferred to Wylie, and the matters upon which the learned judge relied were not such as of law the purchasers were charged with knowledge of. Other circumstances must appear to show knowledge and a want of good faith on their part, or else the title presented must be held a "just title" upon which to rest the claim of prescription.

For the error in these respects the judgment is

Reversed, and a new trial ordered.

Mr. Justice White concurs in the judgment, but not in the reasons given therefor.

GRAY *v.* CONNECTICUT.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

No. 258. Submitted April 4, 1895. — Decided June 3, 1895.

A license to pursue any business or occupation, from the governing authority of any municipality or State, can only be invoked for the protection of one in the pursuit of such business or occupation so long as the same continues unaffected by existing or new conditions, which it is within the constitutional power of the legislature to enact.

The provisions in the statutes of Connecticut that a person selling or offering for sale, or owning or keeping with intent to sell or exchange, spirituous liquors, without having a license therefor, and that the granting of such license to a druggist shall be discretionary with the county commissioners, are not in conflict with any of the provisions contained in the Fourteenth Amendment to the Constitution of the United States.

THE plaintiff in error was charged before a justice of the peace for the county of New London, in the town of Groton, State of Connecticut, with keeping a place in that town, on the 1st day of January, 1890, and on divers days subsequently, previous to the time of making the complaint, where it was reputed that intoxicating and spirituous liquors were kept for sale; and also of selling on the 1st day of January, 1890, and at divers days between that date and the time of making the complaint, in that town and county, without having a license therefor, to persons to the prosecuting agent unknown, spirituous and intoxicating liquors, on the premises, in quantities less than one gallon to be delivered at one time; and also with keeping on the 1st day of January, 1890, and at divers days between that date and the time of making the complaint, at that town and county without having a license therefor, spirituous and intoxicating liquors, with intent to sell the same, all of which acts are alleged to have been done against the peace of the State, to be of evil example and contrary to the statute in such case made and provided.

The plaintiff in error, who was thus charged, was arrested,

and on his plea of not guilty was tried and found guilty before the justice of the peace, and was ordered to pay a fine of eighty dollars and costs, and to stand committed until the judgment was paid.

The accused moved for an appeal from the judgment to the next session of the criminal court of Common Pleas for New London County, which was granted, to be held on the second Tuesday of September, 1890, at Norwich, the accused then and there to answer the complaint, at which time he appeared, and, a *nolle prosequi* being entered upon the first count, for his plea to the other counts he said "not guilty." After a full hearing of the cause on a new trial in the criminal court of Common Pleas the accused was found guilty and sentenced to pay a fine of fifty dollars and the costs of the prosecution, and to stand committed until the judgment was complied with.

Upon the trial in that court the counsel of the appellant contended that the court should charge the jury —

1st. That if they found "that the defendant did not sell nor keep with intent to sell, spirituous and intoxicating liquors as such, but kept such liquors to be used in compounding medicines and in dispensing the prescriptions of physicians, it was their duty to acquit him."

2d. "That the defendant as a licensed pharmacist had the right to use in the compounding of his medicines and tinctures all ingredients necessary to their proper preparation, whether such ingredients or any of them were spirituous or intoxicating or otherwise."

3d. "That the State having licensed the accused to pursue his business and occupation as a pharmacist, the board of commissioners for New London County could not by any action of theirs deprive him of the right to pursue his said business in all its branches."

4th. That section 3087 of the Revised Statutes of Connecticut, which declares "that any person who, without having a license therefor, shall sell or exchange, or shall offer or expose for sale or exchange, or shall own or keep with intent to sell or exchange, any spirituous and intoxicating liquors, shall be fined," and section 3067 of such Revised Statutes, which pro-

vides "that a license to a druggist shall not be granted unless upon application made in the manner prescribed, and that the granting of such license shall be *discretionary with the county commissioners*," — were contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States, because they abridged his privileges and immunities as a citizen of the United States, and deprived him of his property without due course of law.

But the court refused so to charge the jury, and on the judgment rendered upon the verdict, the case was taken to the Supreme Court of Errors of Connecticut, in which court it was insisted that the court below had erred in instructing the jury that the only question for them to determine was whether the prisoner had complied with the regulations of the law, and in conducting his business had used liquors in compounding prescriptions, without having a license therefor from the board of pharmacy and the county commissioners; and that the court had erred in directing the jury that if it was necessary that a man should use liquor in compounding medicines in the State and could not practise the business of druggist without it, then the law made it a prerequisite to obtain not only a license from the board of pharmacy, but also from the county commissioners; and that the court had erred in not charging that sections 3087 and 3067 were contrary to the provisions of the constitution of the State and the Fourteenth Amendment to the Constitution of the United States. The court affirmed the judgment, from which the case was brought to this court on writ of error, the plaintiff in error assigning the same errors which were assigned in the Supreme Court of Errors of Connecticut.

Mr. H. C. Robinson for plaintiff in error.

Mr. Solomon Lucas for defendant in error.

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

A license to pursue any business or occupation, from the governing authority of any municipality or State, can only be

invoked for the protection of one in the pursuit of such business or occupation, so long as the same continues unaffected by existing or new conditions. The degree of care and scrutiny which should attend the pursuit of the business or occupation practised will necessarily depend upon the safety and freedom from injurious or dangerous conditions attending the prosecution of the same.

In the preparation of medicinal compounds, intoxicating liquors and even still more dangerous ingredients are often properly used; but the protecting care of the government, municipal or state, in their use, should never be relaxed beyond the bounds of absolute safety. The responsibility of the legal authority, municipal or state, cannot be stipulated or bartered away. Whatever provisions were prescribed by the law previous to 1890, in the use of spirituous liquors in the medicinal preparations of pharmacists, they did not prevent the subsequent exaction of further conditions which the lawful authority might deem necessary or useful.

For reasons which were deemed sufficient after 1890, by the authorities of Connecticut, the use of spirituous liquors in the preparation of pharmacists' compounds required still further provisions than those previously existing, and it was provided that such liquors could not be subsequently used in their preparation without the pharmacist's first procuring a druggist's license from the county commissioners.

The imposition by the court of a fine upon the accused for a disregard of this requirement trespassed in no way upon any of his rights under the constitution of the State, or under the Fourteenth Amendment to the Federal Constitution.

Judgment affirmed.

Statement of the Case.

UNITED STATES *v.* BURR.

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

No. 1021. Submitted May 20, 1895. — Decided June 3, 1895.

Goods arriving at the port of New York August 7, 1894, entered at the custom house and duties paid August 8, 1894, and the entry liquidated as entered at the custom house August 28, 1894, on which day the tariff act of August, 1894, became a law without the signature of the President, were subject to duty under the act of October 1, 1890, and not to duty under the act of August 28, 1894.

The provision in § 1 of the tariff act of 1894, which took effect August 28 of that year, that from and after the first day of August, 1894, there shall be levied, collected, and paid upon articles imported from foreign countries the rates of duty prescribed by that act, does not apply to transactions completed when the act became a law.

The third question from the Circuit Court of appeals is too general and need not be answered.

Burr and Hardwick, importers, made an importation of cotton laces, per the La Navarre, from Havre. The vessel arrived on August 7, 1894, and the goods were entered by them for consumption at the port of New York on August 8, 1894. Duty thereon was levied and assessed by the collector of customs at sixty per cent *ad valorem* under the provisions of Schedule J, paragraph 373, of the tariff act of October 1, 1890, which was then in force. The duty was paid by the importers on August 8, and the goods were delivered to them on August 11, 1894. On August 28, 1894, the entry of the merchandise was liquidated at the custom house as entered, that is to say, without any change of the duties from those assessed at the time of entry.

On that day the tariff act of that year became a law, and on September 7, 1894, the importers filed their protest, claiming that said cotton laces were dutiable at fifty per cent *ad valorem* under paragraph 276 of Schedule J of the act of August, 1894, and were not dutiable under the act of October 1, 1890.

The board of general appraisers affirmed the decision of the collector, General Appraiser Somerville delivering the opinion.

The importers appealed to the Circuit Court, and the return of the board was therein duly filed with the record and evidence taken by them, together with a certified statement of the facts involved in the case and their decision thereon. Evidence was taken in the Circuit Court before one of the general appraisers as an officer of the court, as to the legislative history of the act of August 28, 1894, from which it appeared:

"(*a*) That the bill was introduced in the House of Representatives on December 19, 1893, House bill, H. R., 4864.

"(*b*) That it passed the House of Representatives on February 1, 1894.

"(*c*) That as it then passed the House of Representatives the date in sections 1 and 2 was as follows: 'On and after the first day of June, 1894, unless otherwise specially provided for in this act,' etc.

"(*d*) That the bill was laid before the Senate February 2, 1894, and referred to the Finance Committee.

"(*e*) That the bill was reported by the Finance Committee on March 20, 1894.

"(*f*) That sections 1 and 2 of said bill, when so reported, contained the date of the 30th day of June, 1894, instead of the 1st day of June, 1894.

"(*g*) That said bill as amended by the Senate passed the Senate on July 3, 1894.

"(*h*) That when it passed the Senate the date contained in the first and second sections thereof was August 1, 1894, instead of the 30th day of June, 1894.

"(*i*) That the bill as amended in the Senate finally passed the House on August 13, 1894, without change, after a long discussion and deliberation by the committees of conference.

"(*j*) That on August 15, 1894, having received the signatures of the presiding officers of both Houses, the bill was sent to the President of the United States.

"(*k*) That on August 28, 1894, the bill was sent by the President to the Secretary of State, and the following endorsement was made thereon:

"'Note by the Department of State. — The foregoing act having been presented to the President of the United States

for his approval, and not having been returned by him to the House of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.

"'H. R. No. 4864. — An act to reduce taxation, to provide revenue for the government, and for other purposes.

"'August 28, 1894.'"

It was stipulated in the Circuit Court that the persons composing the firm of Burr & Hardwick, the importers, were James M. Burr and Charles C. Hardwick; that the merchandise in controversy consisted of "cotton laces;" that the merchandise, if dutiable under the act of October 1, 1890, was dutiable at sixty per cent *ad valorem* under the provision for cotton laces contained in paragraph 373 of Schedule J of that act; and that if the merchandise was dutiable under the act of August 28, 1894, it was dutiable at fifty per cent *ad valorem* under the provision for cotton laces in paragraph 276 of Schedule J of the latter act. The cause thereafter came on to be tried in the Circuit Court, and the judge holding that court, after hearing the argument, gave an opinion January 15, 1895, 66 Fed. Rep. 742, reversing the decision of the board of general appraisers, and entered judgment January 16, 1895, holding that there was error in the decision of the board of general appraisers, and that the merchandise was properly dutiable as cotton laces at fifty per cent *ad valorem* under paragraph 276 of Schedule J of the act of August 28, 1894, and that the entry be reliquidated accordingly. From this judgment or decree an appeal was taken to the Circuit Court of Appeals for the Second Circuit, and thereupon that court, desiring the instruction of this court, made its certificate, embodying the foregoing facts, and submitting the following questions:

"(1) Should the assessment for duty of the merchandise described in the foregoing statement of facts, under paragraph 373 of the act of October 1, 1890, be sustained, notwithstanding the provisions of the tariff act of August 28, 1894?

"(2) Should the said merchandise described in the foregoing statement of facts be assessed for duty under para-

graph 276, Schedule J, of the tariff act of August 28, 1894?

"(3) Should the rates of duty prescribed by the first section of the tariff act of August, 1894, (unless otherwise specially provided for in said act,) be levied, collected, and paid upon all articles imported from foreign countries or withdrawn for consumption on and after August 1, 1894, and prior to August 28, 1894?"

Mr. Wallace MacFarlane for appellants.

Mr. Charles Curie, *Mr. David Ives Mackie* and *Mr. W. Wickham Smith* for appellees.

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

The act of October 1, 1890, c. 1244, 26 Stat. 567, was in force until August 28, 1894, when it was repealed by section 72 of the latter act, 28 Stat. 509, c. 349, which reads as follows:

"All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before the said repeal or modifications; but all rights and liabilities under said law shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offences committed and all penalties or forfeitures or liabilities incurred prior to the passage of this act under any statute embraced in or changed, modified, or repealed by this act may be prosecuted or punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings or to the prosecution of offences or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this act shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of

this act, may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed: *And provided further*, That nothing in this act shall be construed to repeal the provisions of section three thousand and fifty-eight of the Revised Statutes as amended by the act approved February twenty-third, eighteen hundred and eighty-seven, in respect to the abandonment of merchandise to underwriters or the salvors of property, and the ascertainment of duties thereon."

By section 54 of the act of October 1, 1890, it was provided: "That any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of the original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

This merchandise was entered for consumption, and delivered after August 1 and before August 28, 1894, when the act in question became a law. It was subject then to the rates of duty imposed by the law in force at that time, namely, the act of October 1, 1890, and the duties were properly assessed by the collector under that law, unless some provision to the contrary is to be found in the act of August 28, 1894.

The first section of the act of 1894 reads: "That on and after the first day of August, eighteen hundred and ninety-four, unless otherwise specially provided for in this act, there shall be levied, collected, and paid upon articles imported from foreign countries or withdrawn for consumption, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules and paragraphs, respectively prescribed, namely:"

The contention is that the language of that section being free from all obscurity and ambiguity, there is no room for construction, and that the court is imperatively required to conclude that it was the intention of Congress that the act should have a retrospective operation as of August 1, 1894, although it did not become a law until after that date. It is conceded that the general rule is, as stated in *United States* v. *Heth*, 3 Cranch, 398, 413, that "words in a statute ought not to have a retrospective application unless they are so clear,

strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied;" and that the usual course in tariff legislation has been, inasmuch as some time is necessary to enable importers and business men to act understandingly, to fix a future date at which the statutes are to become operative. The question is not one of construction but of intention as to the operative effect of this act because of the existence of the particular date in section 1.

In view of the general rule and the admitted policy in respect of such laws, is there anything on the face of the act which raises such a doubt in the matter as justifies the court in considering whether the language used in that particular section must be literally applied in the case before it?

And upon the threshold we are met with the fact that the act of October 1, 1890, was not repealed in terms until August 28, 1894; and that the repealing section of the latter act kept in force every right and liability of the government or of any person, which had been incurred or accrued prior to the passage thereof, and thereby every such right or liability was excepted out of the effect sought to be given to the first section.

The right of the government to duties under the tariff law which existed between August 1 and August 28 was a right accruing prior to the passage of the act of 1894 (that is, the date when the bill became a law); and the obligation of the importers between August 1 and August 28 to pay the duties on their entries under the existing tariff law was a liability under that law arising prior to the passage of the act of 1894; and if Congress intended that section 1 should relate back to August 1, still the intention is quite as apparent that the act of October, 1890, should remain in full force and effect until the passage of the new act on August 28, and that all acts done, rights accrued, and liabilities incurred under the earlier act, prior to the repeal, should be saved from the effect thereof, as to all parties interested, the United States included.

The duties under consideration were paid August 8, and the merchandise delivered on August 11, but it was not until

August 28 that the fact was stamped on the entry that the goods were liquidated as entered. There was no change in the classification, and no additional duty was demanded or collected, and the payment made at the time of entering the merchandise for consumption was the payment of duties. *Barney* v. *Rickard*, 157 U. S. 352. The original assessment of duty was right, and the final liquidation was the same, and there was no specific provision in the act of 1894 requiring a liquidation at the rates under that act. How then can it be held that the act of October 1, 1890, was intended to be repealed by retroaction?

Moreover, in arriving at the true intention of Congress, we cannot treat section 1 as if it constituted the entire act, but must deduce the intention from a view of the whole statute and from the material parts of it.

By section 2 it was provided that certain enumerated articles should be exempt from duty "on and after the first day of August, eighteen hundred and ninety-four, unless otherwise provided for in this act," and as to those which were dutiable under the act of October 1, 1890, the question arises whether Congress intended such duties should be collected, and refunded after the act of August 28, 1894, went into effect?

By section 23 a license was provided for, and that "from and after the first day of August, eighteen hundred and ninety-four, no person shall transact business as a custom-house broker without a license granted in accordance with this provision." Since there was no law prior to this, which authorized the collector to require a license from a custom-house broker, it was manifestly anticipated, in using the words, the first day of August, that the bill would become a law before that day.

By section 38, it was provided that on and after the first day of August, 1894, there "shall be levied, collected, and paid by adhesive stamps, a tax of two cents for and upon every pack of playing cards;" and sections 43 and 45 impose a penalty of fifty dollars for every violation of the law incurred by making or selling such cards without affixing the stamps prescribed. Every dealer, if the act were treated as operating retrospec-

tively, would not only be liable for a tax of two cents a pack on every pack of playing cards manufactured or sold or removed from the place of manufacture, and upon every pack of playing cards in stock on and after August 1, but to an *ex post facto* penalty of fifty dollars for every pack of playing cards that he had sold or removed between August 1 and August 28. Of course these sections cannot be given a retroactive effect according to the terms employed. Again, a higher rate of duty was imposed on many articles by the act of 1894 than under the prior act, and a lower rate of duty on others, while some that were free were made dutiable, as, for instance, the article of sugar. Must duties paid between August 1 and August 28 be refunded where the rate was lowered, and assessed where the rate was raised, or a duty imposed where none existed? Clearly not.

These considerations lead to the conclusion that the act ought not to be construed to operate retrospectively contrary to the general rule, and so as to turn what was intended to secure a period of time to enable business men to act understandingly under the new law into a source of confusion and mischief to the contrary.

In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford. By section 895 of the Revised Statutes it is provided that "extracts from the Journals of the Senate, or of the House of Representatives, and of the Executive Journal of the Senate when the injunction of secrecy is removed, certified by the Secretary of the Senate or by the Clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court."

The certificate shows that the bill passed the House of Representatives February 1, 1894, and that its first section provided that the rates of duty prescribed should be levied "on and after the first day of June," while the second section provided that on and after that day certain articles named, when imported, should be exempt from duty.

The bill was reported to the Senate by the finance committee, (to which it had been referred,) on March 20, 1894, and "the thirtieth day of June" was substituted in sections one and two for the first day of June. The bill, as amended in the Senate, passed that body July 3, 1894, and sections one and two were amended by substituting the first day of August for the thirtieth day of June. The conference committee of the House agreed to the bill as passed by the Senate without any further amendment, on August 13, and it was sent to the President on August 15. It thus appears that at every stage of its progress the intention of Congress was that the tariff provisions of the bill should operate prospectively, and that as by the concurrence of the House in the Senate amendments the bill did not go back to the Senate, the first day of August remained in the bill as originally fixed in the Senate, July 3, 1894.

Both houses intended that the duties imposed by section one, and the additions made to the free list in section two, should not take effect except at a point of time after the passage of the act. And the Senate endeavored to effectuate that intention by its action on the third of July, but, because of the differences between the two bodies, the passage of the act was delayed, which delay was terminated by the House finally accepting the changes made by the Senate, so that no new date in the future was specifically assigned for section one to go into effect, although the intention that the act should not operate retrospectively was palpable throughout.

And as the act of October 1, 1890 was not repealed by the act of August, 1894 until the latter act became a law, when inconsistent laws were declared thereby repealed, we think it cannot be doubted that Congress intended the rates of duty prescribed by the act of 1894 to be levied on the first day of August, if the bill should then be a law, and if not, then as soon after that date as it should become a law. On the first day of August the duties prescribed by the first section of the act of 1894 could not be lawfully levied, and so far as the importations in this case are concerned and others similarly situated, the law required the exaction of the duties prescribed

by the act of 1890. As to such importations the first section of the act of 1894 could not be literally carried out, unless by holding it to operate as a retroactive repeal, notwithstanding the saving clause, and this we consider altogether inadmissible. The language of section one was that on and after the first of August there *shall* be levied, and of the second section, that on and after the first day of August certain enumerated articles when imported *shall* be exempt from duty. In our judgment, the word "shall" spoke for the future and was not intended to apply to transactions completed when the act became a law.

We regard the third question as too general and unnecessary to be answered, but

Answer the first question in the affirmative, and the second in the negative, and it will be so certified.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY *v.* BUTLER.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 198. Argued and submitted January 29, 1895. — Decided June 3, 1895.

The decision by a state court that the pleadings were sufficient to permit the examination and determination of the case presents no Federal question.

While the rule is that this court, upon a writ of error to the highest court of a State, in an action at law, cannot review its judgment upon a question of fact, it is unnecessary to consider the extent of the power of the court in that particular in chancery cases, as this court concurs with the result reached by the state court that when the survey was made of the land in controversy, there was no reservation made of the island, and no act on the part of the government showing any intention to reserve it.

In Michigan a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the centre of the thread thereof.

The court has no doubt, upon the evidence, that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey the tract in controversy as an island ; that there is noth-

ing to indicate mistake or fraud, and the government has taken no steps predicated on that theory; and that the judgment of the Supreme Court of the State of Michigan was right.

This was a bill filed by John Butler in the Circuit Court of the county of Kent, in the State of Michigan, against the Grand Rapids and Indiana Railroad Company and others, to quiet title to certain land in that county, resulting in a decree in complainant's favor, which was afterwards affirmed by the Supreme Court of the State, to review whose judgment this writ of error was sued out. The case is reported 85 Michigan, 246.

Mr. T. J. O'Brien for plaintiffs in error submitted on his brief.

Mr. Willard F. Keeney, (with whom was *Mr. Roger W. Butterfield* on the brief,) for defendant in error.

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

The fractional north half of the southeast quarter of section 25, township 7 north, range 12 west, is located on the east bank of Grand River, and early in 1831 that part of the town lying east of the river was surveyed and subdivided, and the east bank of the river was meandered and surveyed. In 1837 the west bank of the river was meandered and surveyed, as were also four islands in the stream, designated as Islands Nos. 1, 2, 3, and 4; and that part of the town lying west of the river was surveyed and subdivided.

The north fractional half of the southeast quarter of section 25 was entered by Lyon and Hastings, September 25, 1832, and patent therefor issued to them November 5, 1833. Butler derived title under Lyon and Hastings, and claimed the land in dispute by virtue of riparian ownership, as taking, under the laws of Michigan, the bed of the stream to the thread thereof.

In 1855 a piece of ground in the river lying opposite land of which Butler's formed a part was surveyed and marked by the deputy surveyor Island No. 5 in Grand River. This sur-

vey purported to be made in pursuance of instructions given May 24, 1854, by the surveyor-general for Ohio, Indiana, and Michigan, whereby the deputy was authorized to survey the islands in certain lakes and in Grand River, Michigan, and was made in the third quarter of 1855. The verification by the deputy was in February, 1856, and by the chainmen November 22, 1856.

In 1871 the Grand Rapids and Indiana Railroad Company procured from the General Land Office a patent, which, with many thousand acres of land, covered Island No. 5 in Grand River, containing 2.56 acres, but this patent was not recorded until August 9, 1887, and on September 9 following this bill was filed.

Complainant put himself upon these two propositions: "First. At the time of the survey and sale of the lands on the bank the spot in question was not an island in fact, and was not treated by the authorities as such. Second. Whatever its character, inasmuch as it was not meandered or set apart as an island, it passed to the riparian proprietor as appurtenant to the grant of the lands on the bank."

The Supreme Court of Michigan said (p. 250): "A large mass of testimony was taken as to the character of this so called island at the time of the original surveys and for some years subsequent, the complainant's testimony tending to show that it was at first a low sand bar, covered a good part of the year with water, and the defendant's testimony tending to show that it was then a well-defined island. It is immaterial to determine what the facts are as to the condition of this land in those early days, for in our judgment it is of no consequence whether it was what might be termed 'an island' or a 'sand bar' or a 'piece of low, wet ground.' The law is the same in either case."

The court called attention to the surveys of 1831 and 1837, in neither of which was any island meandered or surveyed on the site of Island No. 5, and to the fact that in the survey of 1837 the acreage of the four islands and of the mainland was given, and observed: "In surveying Island No. 3 the surveyor began at the lower end of the island. The eleventh course

took him 'to maple on the head of island.' After taking his next course from the maple he made the following record: 'Channel between this and low willow isle 75 lks. wide and 3 feet deep opposite ft. of willow isle on left, 250 of low, wet ground on left to channel.' This 'low willow isle' is evidently what is now known as Island No. 5 as changed by the action of the water."

It was further stated: "The channel between the islands and the east bank was from seventy-five to one hundred feet wide. The channel between the islands and the west bank was several times wider. The depth of the water in each was about the same. The middle thread of the river was therefore west of the islands. About the year 1836 steamboats were placed on the river and docks were erected on the east bank nearly opposite Island No. 1. The principal business by boat was with the east side, where the city of Grand Rapids was situated. Steamboats also ran up the west channel to a steamboat warehouse on the west side of the river. About the year 1870 the east channel opposite Islands Nos. 1 and 2 was filled up, and the city constructed a sewer into and through that channel. The upper part of this channel was gradually filled, mainly by the owners of land upon the east bank. By these fillings this island has for some time been connected with and become a part of the mainland. The channel has been dredged out east of Island No. 3, and a steamboat slip and landing constructed, the upper end of which is a considerable distance below Island No. 5."

The court also found that Butler's possession of the premises was sufficient to maintain his suit, and some other matters were considered not necessary to be adverted to.

The court held that the well-recognized rule in Michigan was that a grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the thread of the stream in the absence of an express reservation; that reservation cannot be implied; that when the government has surveyed its lands along the bank of a river and has sold and conveyed such lands by government subdivisions, its patent conveys the title to all islands lying between the meander line

and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions or expressly reserves them when not surveyed; that the grant to Lyon and Hastings was made under the survey of 1831, by which, as the court found, "both banks of Grand River were meandered and by which the middle thread of the river was fixed west of this island;" and that the grant clearly vested in them title to the land in controversy, of which no subsequent survey by the government could deprive them; that there was no force in the objection that this was equivalent to a proceeding to cancel the patent, since in this or any similar action, what was involved was the establishment of the fact that the title had passed by a former grant, and, therefore, that the government had no title to convey; in which cases courts protect purchasers from subsequent surveys.

The errors assigned are grouped by counsel, and stated thus: That the point that the land in question, even though an island, passed to Lyon and Hastings under their patent, if not reserved, was not properly before the court under the pleadings; that "the court erred in holding as matter of fact, on this record, that the island was not reserved in the Lyon and Hastings patent;" and that "the court erred in holding, upon this record, that Island 5 passed to Lyon and Hastings under the patent to them in 1833 of the north fraction of the southeast $\frac{1}{4}$ of section 25, township 7–12."

The state court held, however, the pleadings sufficient to permit of the examination and determination of the point on which its decision turned, and that conclusion involved no Federal question.

And as to the second proposition, it may be said that while the rule is that this court, upon a writ of error to the highest court of a State, in an action at law, cannot review its judgment upon a question of fact, *Dower* v. *Richards*, 151 U. S. 658, it is unnecessary to consider the extent of the power of this court, in that particular, in chancery cases, as we entirely concur in the result reached by the state court that there was no such reservation, and in its findings as follows: "In the present case there is no act on the part of the government

showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region."

The inquiry is reduced then to this, did the court err in holding as matter of law, upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?

In *Hardin* v. *Jordan*, 140 U. S. 371, it was held that grants by the United States of its public lands bounded on streams and other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the State in which the land lies, and the following from the opinion of Scates, J., in *Middleton* v. *Pritchard*, 3 Scammon, 510, 520, was quoted with approval: "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass, then, by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it were a stream not navigable, the rights of the riparian owner extended to the centre thread of the current. . . . At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law. To these riparian proprietors, bounded on or by the river, could acquire exclusive ownership of the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation. And this latter, Chancellor Kent says, bears a perfect resemblance to public highways. The consequence of

this doctrine is, that all grants bounded upon a river not navigable by common law, entitle the grantee to all islands lying between the mainland and the centre thread of the current. And we feel bound so to construe grants by the government, according to the principles of the common law, unless the government has done some act to qualify or exclude the right. . . . The United States have not repealed the common law as to the interpretation of their own grants, nor explained what interpretation or limitation should be given to, or imposed upon the terms of the ordinary conveyances which they use, except in a few special instances; but these are left to the principles of law, and rules adopted by each local government, where the land may lie. We have adopted the common law, and must, therefore, apply its principles to the interpretation of their grant."

Hardin v. *Jordan* was a case from Illinois, and the question was as to the effect of the title granted by the United States along a small lake, in respect of the bed of the lake in front of the land actually described in the grant, and we said, p. 380: "This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois. If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the State, extending either to the margin or centre of the stream, according to the rules of that law. It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines." And see *Packer* v. *Bird*, 137 U. S. 661; *St. Louis* v. *Rutz*, 138 U. S. 226; *Shively* v. *Bowlby*, 152 U. S. 1.

In Michigan the common law prevails, and the rule is sustained by an unbroken line of authorities that a grant of land

bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the centre of the thread thereof. *Norris* v. *Hill*, 1 Michigan, 202; *Lorman* v. *Benson*, 8 Michigan, 18; *Rice* v. *Ruddiman*, 10 Michigan, 125; *Ryan* v. *Brown*, 18 Michigan, 196; *Watson* v. *Peters*, 26 Michigan, 508; *Père Marquette Boom Co.* v. *Adams*, 44 Michigan, 403; *Fletcher* v. *Thunder Bay Co.*, 51 Michigan, 277; *Turner* v. *Holland*, 65 Michigan, 453; *City of Grand Rapids* v. *Powers*, 89 Michigan, 94, and many other cases.

In *Mitchell* v. *Smale*, 140 U. S. 406, 412, 413, 414, a similar question to that disposed of in *Hardin* v. *Jordan* arose, and Mr. Justice Bradley, speaking for the court, said: "We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be. It is nothing more nor less than taking from the first grantee a most valuable, and often *the* most valuable, part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned. . . . We do not mean to say that, in running a pretended meander line, the surveyor may not make a plain and obvious mistake, or be guilty of a palpable fraud; in which case the government would have the right to recall the survey, and have it corrected by the courts, or in some other way. Cases have happened in which, by mistake, the meander line described by a surveyor in the field-notes of his survey did not approach the water line intended to be portrayed. Such mistakes, of course, do not bind the government. Nor do we mean to say that, in granting lands bordering on a non-navigable lake or stream, the authorities might not formerly, by express words, have limited the granted premises to the water's edge, and reserved the right to survey and grant out the lake or river bottom to other

parties. But since the grant to the respective States of all swamp and overflowed lands therein, this cannot be done. In the present case it cannot be seriously contended that any palpable mistake was made, or that any fraud was committed by the surveyor who made the survey of 1834–5."

We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so called Island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837.

Although the facts were wholly different in *Horne* v. *Smith*, *ante*, 40, that case will be found instructive in connection with the questions arising here.

The Supreme Court of Michigan was right in holding that whatever there was of this conformation passed under the grant to Lyon and Hastings.

Judgment affirmed.

In re BELT, Petitioner.

ORIGINAL.

No number. Submitted April 29, 1895. — Decided June 3, 1895.

The Supreme Court of the District of Columbia had jurisdiction and authority to determine the validity of the act of July 23, 1892, c. 236, which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offence, and this being so, this court cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*.

The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors.

Ordinarily a writ of *habeas corpus* will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists.

Opinion of the Court.

THE case is stated in the opinion.

Mr. George Kearney and *Mr. Perry Allen* for petitioner.

Mr. Solicitor General, opposing.

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

This is an application for leave to file a petition for the writ of *habeas corpus* directed to the superintendent of the Albany County penitentiary, in the State of New York, for the discharge of petitioner now held in the custody of said superintendent under sentence of the Supreme Court of the District of Columbia. The case is thus stated by the Court of Appeals for the District of Columbia on affirming the judgment below: "The appellant, William Belt, alias William Jones, was indicted in the Supreme Court of the District of Columbia, holding a criminal court, and convicted on the twentieth day of February, A.D. 1894, of a second offence of larceny, and sentenced to three years' imprisonment in the penitentiary. The conviction was under section 1158 of the Revised Statutes of the United States for the District of Columbia, which provides that 'Every person convicted of feloniously stealing, taking, and carrying away any goods or chattels, or other personal property, of the value of thirty-five dollars or upwards, . . . shall be sentenced to suffer imprisonment and labor, for the first offence for a period not less than one nor more than three years, and for the second offence for a period not less than three nor more than ten years.' At the trial of the case, after proof of the special offence charged against the defendant, the prosecution proceeded to prove that it was the defendant's second offence of the kind by offering in evidence the record of his previous conviction of the crime of larceny in the police court of the District of Columbia on April 8, 1893. To the admission of this record in evidence objection was made on the ground that it showed on its face a waiver of the right of trial by jury on the part of the prisoner and a trial and conviction by the court alone

without a jury, a method of procedure claimed to be in violation of the Constitution of the United States and therefore null and void. The objection was overruled, and exception taken; and upon that exception the case has been brought by appeal to this court."

The opinion of the Court of Appeals will be found reported 22 Wash. Law Rep. 447. The court held that the act of Congress of July 23, 1892, c. 236, 27 Stat. 261, providing that in prosecutions in the police court of the District, in which, according to the Constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial should be by the judge, and the judgment and sentence should have the same force and effect as if entered and pronounced upon the verdict of a jury, was constitutional and valid; and that the record of a trial, conviction, and sentence by a judge under such a waiver was competent evidence on an indictment for a similar offence to prove that it was the defendant's second offence of the same kind.

It is contended that the sentence as for a second offence under which petitioner is held is void because the first conviction of petitioner was void and of no effect in law, inasmuch as the constitutional requirement of trial by jury in criminal cases could not be waived by the accused person though in pursuance of a statute that authorized such waiver.

Does the ground of this application go to the jurisdiction or authority of the Supreme Court of the District, or rather is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. *In re Schneider*, 148 U. S. 162, and cases cited.

In *Ex parte Bigelow*, 113 U. S. 328, 330, which was a motion for leave to file a petition for *habeas corpus*, the petitioner had been convicted and sentenced in the Supreme Court of the District to imprisonment for five years under an indictment for embezzlement. It appeared that there were pending before that court fourteen indictments against the petitioner for embezzlement, and an order of the court had directed that they be consolidated under the statute and tried together. A

jury was empanelled and sworn, and the district attorney had made his opening statement to the jury, when the court took a recess, and, upon reconvening a short time afterwards, the court decided that the indictments could not be well tried together, and directed the jury to be discharged from the further consideration of them, and rescinded the order of consolidation. The prisoner was thereupon tried before the same jury on one of the indictments and found guilty. All of this was against his protest and without his consent. The judgment on the verdict was taken by appeal to the Supreme Court of the District in general term, where it was affirmed. It was argued here, as it was in the court in general term, that the empanelling and swearing of the jury and the statement of his case by the district attorney put the prisoner in jeopardy in respect of all the offences charged in the consolidated indictment, within the meaning of the Fifth Amendment, so that he could not be again tried for any of these offences, and Mr. Justice Miller, delivering the opinion of the court, after remarking that if the court of the District was without authority in the matter, this court would have power to discharge the prisoner from confinement, said: "But that court had jurisdiction of the offence described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defences offered by him. The matter now presented was one of those defences. Whether it was a sufficient defence was a matter of law on which that court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal — a much stronger case than this — the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offence, and if the identity of the offence were in dispute, it might be necessary on such a plea to submit that question to the jury on the issue raised by

the plea. The same principle would apply to a plea of a former conviction. Clearly in these cases the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial it is error which may be corrected by the usual modes of correcting such errors, but that the court had jurisdiction to decide upon the matter raised by the plea both as matter of law and of fact cannot be doubted. . . . It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity. But the general rule is that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities." And the application was denied.

In *Hallinger* v. *Davis*, 146 U. S. 314, 318, it was said by this court: "Upon the question of the right of one charged with crime to waive a trial by jury, and elect to be tried by the court, when there is a positive legislative enactment, giving the right so to do, and conferring power on the court to try the accused in such a case, there are numerous decisions by state courts, upholding the validity of such proceeding. *Dailey* v. *The State*, 4 Ohio St. 57; *Dillingham* v. *The State*, 5 Ohio St. 280; *People* v. *Noll*, 20 California, 164; *State* v. *Worden*, 46 Connecticut, 349; *State* v. *Albee*, 61 N. H. 423, 428." And see *Edwards* v. *State*, 45 N. J. L. 419, 423; *Ward* v. *People*, 30 Michigan, 116; *Connelly* v. *State*, 60 Alabama, 89; *Murphy* v. *State*, 97 Indiana, 579; *State* v. *Sackett*, 39 Minnesota, 69; *Lavery* v. *Commonwealth*, 101 Penn. St. 560; *League* v. *State*, 36 Maryland, 257, cited by the Court of Appeals.

Without in the least suggesting a doubt as to the efficacy, value, and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offence, and this being so, we

Counsel for Parties.

cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*.

The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists. We have heretofore decided that this court has no appellate jurisdiction over the judgments of the Supreme Court of the District of Columbia in criminal cases or on *habeas corpus;* but whether or not the judgments of the Supreme Court of the District, reviewable in the Court of Appeals, may be reviewed ultimately in this court in such cases, when the validity of a statute of, or an authority exercised under, the United States is drawn in question, we have as yet not been obliged to determine. *In re Chapman, Petitioner*, 156 U. S. 211. And that inquiry is immaterial here, as we have no doubt that the courts below had jurisdiction.

Leave denied.

BROWN *v.* UNITED STATES.

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

No. 863. Submitted March 5, 1895. — Decided June 3, 1895.

An instruction on the trial of a person indicted for murder, whereby the verdict of guilty of murder or manslaughter turns alone upon an inquiry as to the way in which the killing was done, is held to be reversible error.

THE case is stated in the opinion.

Mr. W. M. Cravens for plaintiff in error.

Mr. Assistant Attorney General Whitney and *Mr. William H. Pope* for defendants in error.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was an indictment, in which the defendant, a white man and not an Indian, was charged in one count with the crime of having killed and murdered, on the 8th day of December, 1891, at the Cherokee Nation, in the Indian country, and within the Western District of Arkansas, one Josiah Poorboy; in another count, with having killed and murdered on the same day and in the same nation, county, and District, one Thomas Whitehead.

The accused was convicted of the crimes charged and sentenced to be hanged. Upon writ of error to this court the judgment was reversed, and the cause was remanded, with directions to grant a new trial. The grounds of that reversal are set forth in the opinion of Mr. Justice Jackson in *Brown* v. *United States*, 150 U. S. 93.

At a second trial Brown was again found guilty on each count. A motion for a new trial having been made and overruled, the accused was sentenced, on the second count, to suffer the punishment of death by hanging, but the sentence on the first count was postponed "to await the result of the judgment against him for killing Whitehead."

This writ of error brings up for review the judgment last rendered.

It appeared in evidence on the last trial, as on the first one, that Poorboy and Whitehead were in search of James Craig and Waco Hampton for the purpose of arresting them. Previous to that time, Craig had been arrested by a deputy marshal, Charles Lamb, upon a charge of adultery, and had escaped from the custody of that officer. Lamb testified that he had verbally authorized Poorboy to arrest Craig. It seems, also, that Hampton was under indictment, and there was a warrant for his arrest in the hands of deputy marshal Bonner.

The shooting occurred in a public road, along which Hampton, Roach, and Brown were riding, (the latter riding behind Roach, on the same horse,) about nine or ten o'clock at night, when an effort was made by Poorboy and Whitehead to arrest Hampton and Brown. There was evidence tending to show

that Brown (who at the time of the killing was 19 years of age) was supposed by Poorboy and Whitehead, in the darkness of the evening, to be Craig. There is considerable conflict in the evidence as to what occurred at the time the shooting took place, but it is reasonably certain that Brown shot and killed either Whitehead or Poorboy, after he and Roach were compelled to dismount from their horse.

After the court had completed its charge to the jury, the accused made two requests for instructions, which were given with certain modifications, but the giving of them was accompanied with the admonition that the principles of law then announced were to be taken in connection with what had been previously said by the court.

The first of the instructions asked by the accused was as follows: "The evidence in this case shows that the deceased, Poorboy and Whitehead, were not officers, but were acting as private citizens, private individuals, without any warrant for Brown, and having no charge against Brown. Therefore, if unintentionally, or by mistake, believing him to be somebody else, they undertook to arrest the defendant, and the defendant resisted such arrest, and in such resistance killed the deceased, or killed the parties attempting such arrest, such killing would not be murder, but would be manslaughter." The court gave this instruction with this modification: "Unless such killing was done *in such a way* as to show brutality, barbarity, and a wicked and malignant purpose. If it was done in that way, then it would still be murder."

There was some evidence before the jury which, if credited, would have justified a verdict against the defendant for manslaughter only. Upon that evidence, doubtless, was based the above instruction asked by the defendant. If in resisting arrest he showed such brutality and barbarity as indicated, in connection with other circumstances, that he did not shoot simply to avoid being wrongfully arrested, but in execution of a wicked or malignant purpose to take life unnecessarily, or pursuant to some previous understanding with Hampton that he would assist in the killing of Whitehead and Poorboy, or either of them, the court should have so modified the defendant's in-

struction as to express that idea. But the jury might well have inferred, from the instruction, as modified, that they were at liberty to return a verdict of murder because alone of the *way* or *mode* in which the killing was done, even if they believed that, apart from the way in which the life of the deceased was taken, the facts made a case of manslaughter, not of murder. We do not think that a verdict of guilty of manslaughter or murder should have turned alone upon an inquiry as to the way in which the killing was done. The inquiry rather should have been whether at the moment the defendant shot there were present such circumstances, taking all of them into consideration, including the mode of killing, as made the taking of the life of the deceased manslaughter and not murder.

Because of the error above indicated, and without considering other questions presented by the assignments of error, the judgment is reversed and the cause remanded, with directions to set aside the judgment as well as the verdict upon each count of the indictment, and grant a new trial.

Reversed.

Mr. Justice Brewer and Mr. Justice Brown dissented.

CENTRAL LAND COMPANY *v.* LAIDLEY.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 239. Argued March 29, April 1, 1895. — Decided June 3, 1895.

This court has no jurisdiction of a writ of error to a state court, on the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract was made is admitted, and the only question is of its construction by that court.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case.

THIS was an action of ejectment, brought in April, 1882, in the circuit court of Cabell County, in the State of West Virginia, by John B. Laidley against the Central Land Company of West Virginia, to recover a tract of land in that State. The material facts were as follows:

Both parties claimed title under Sarah H. G. Pennybacker. On February 25, 1870, she, being the owner of the tract, and the wife of John M. Pennybacker, executed, with her husband, a deed purporting to convey the land to C. P. Huntington. That deed was duly recorded, together with certificates of the recorder that, on the same day, the husband came before him and acknowledged it to be his voluntary act and deed for the uses and purposes therein mentioned; and that the wife came before him, "and being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Sarah H. G. Pennybacker, acknowledged that she had willingly signed, sealed and delivered the same, and wished not to retract it." On October 16, 1871, Huntington conveyed his title to the Central Land Company. On January 26, 1882, Mrs. Pennybacker, having become a widow, executed and acknowledged, in due form of law, a deed of the same land to Laidley. These deeds were duly recorded.

At the first trial of this action, in December, 1884, Laidley requested the court to instruct the jury that the deed of Mr. and Mrs. Pennybacker conveyed his interest in the land; but that, if she was his wife at the time of its execution and acknowledgment, it was not valid, so far as it purported to be her deed, and did not convey any interest she might have in the land, and could not operate by way of estoppel against her or her grantees. The court declined to give this instruction; and a verdict was returned for the Central Land Company, and judgment rendered thereon. Laidley took the case by writ of error to the Supreme Court of Appeals of West Virginia, which, in November, 1887, held that the instruction requested by Laidley should have been given; and that the wife's acknowledgment was defective, because it did not show that she had met all the requirements of the Code of West

Statement of the Case.

Virginia of 1868, c. 73, § 4, (copied in the margin,[1]) which the court held to be that she should acknowledge the deed to be her act, should declare that she had willingly executed it, and should declare that she did not wish to retract it. The court accordingly reversed the judgment, and ordered the verdict to be set aside, and a new trial had in the circuit court of Cabell County. 30 West Virginia, 505.

In March, 1888, the Central Land Company filed in the county court a bill in equity against Laidley, alleging that Huntington, through his agent, Laidley's father, purchased from Mr. and Mrs. Pennybacker the whole title in the land, and paid the price of $11,000, which was then its full value, and took possession of it under the deed of February 25, 1870, and held it until his conveyance to the Central Land Company, which had since been in possession thereof; that Laidley procured the deed of January 26, 1882, from Mrs. Pennybacker fraudulently, and with notice of all these facts, and for the price of only $500, although the land had greatly increased in value; that the Supreme Court of Appeals, in the action of ejectment, had decided that the certificate of acknowledgment was defective in law, and consequently the deed did not convey her title to Huntington, and therefore reversed the judgment of the court below, and remanded the case for a new trial. The bill charged that, under and by virtue of that decision of the Supreme Court of Appeals, the legal title was in Laidley, but that he held it in trust for the Central Land Company, and prayed for a declaration and execution of the trust, and for an injunction against the action at law, and for further relief. That bill was dismissed upon a hearing, and the decree of dismissal was, on appeal, affirmed by the Supreme Court of Appeals in February, 1889. 32 West Virginia, 134.

[1] When a husband and his wife have signed a writing purporting to convey real estate, she may appear before a recorder authorized to admit such writing to record in his office; and if, on being examined privily and apart from her husband by such recorder, and having such writing fully explained to her, she acknowledge the same to be her act, and declare that she had willingly executed the same, and does not wish to retract it, such privy examination, acknowledgment and declaration shall then be recorded by such recorder in his office.

Statement of the Case.

In September, 1890, this action of ejectment was tried again in the circuit court of Cabell County. The Central Land Company requested the court to instruct the jury that, if they found from the evidence that Huntington purchased, paid for and took possession of the land, and afterwards, and before this action was brought, conveyed it to the Central Land Company, which took and since held possession thereof, then, by section 8 of article 11 of the constitution of the State of West Virginia, adopted by the people thereof in 1863; and by section 4 of chapter 73 of the Code of West Virginia of 1868, which section 4 was taken from the Code of Virginia of 1860, and was in force in the territory included in the State of West Virginia at the time of the adoption of its constitution; and by the settled construction and interpretation which, before the formation of the State of West Virginia, had been given to this section by the Supreme Court of Appeals of Virginia in the cases of *Hairston* v. *Randolph*, 12 Leigh, 445, *Siter* v. *McClanachan*, 2 Grattan, 280, and *Grove* v. *Zumbro*, 14 Grattan, 401; the deed of February 25, 1870, from Mr. and Mrs. Pennybacker to Huntington, acknowledged as aforesaid, was sufficient to pass to him all the right, title and interest of both the husband and the wife in the land, and the jury should find a verdict for the defendant. The court declined so to instruct the jury; and, at Laidley's request, instructed them that if, at the time of the execution of the deed of February 25, 1870, Mrs. Pennybacker was a married woman, that deed was absolutely void as to her, and passed no title of hers, legal or equitable, to Huntington; and by her deed of January 26, 1882, Laidley became vested with all her title and interest in the land.

The Central Land Company excepted to the refusal to instruct, and to the instruction given; and, after verdict and judgment for Laidley, presented to the Supreme Court of Appeals a petition for a writ of error, which was refused, "because the court is of opinion that the judgment complained of is plainly right; and the petitioner desiring to present to the Supreme Court of the United States a petition for a writ of error from this judgment, leave is hereby given to the petitioner to withdraw the petition and transcript of record aforesaid for that purpose."

Argument for Plaintiff in Error.

The Central Land Company thereupon sued out this writ of error, and assigned the following errors:

1st. "That the purchase of the said land of the said Pennybackers, and the said deed conveying the same, became an executed contract, which no action of the judiciary of the State of West Virginia had any right, authority or power to impair or invalidate by changing the settled construction of said section 4 of chapter 73 of the Code of West Virginia of 1868."

2d. "That under and by virtue of section 10, article 1, of the Constitution of the United States, no State is permitted to pass any law impairing the obligation of contracts; that the statutory construction of the laws of West Virginia, as it existed when the contract was made, governed the rights of parties, and rights vested under such existing constructions of the then laws cannot be divested, under said clause of the Constitution of the United States, by a subsequent decision of the state courts holding contracts invalid that were valid when made; such decisions of the state courts are contrary to the Constitution of the United States."

3d. "Because there appears on the record of said cause a Federal question in this; that the courts of West Virginia, in construing the said statute relating to deeds and acknowledgments thereof so as to invalidate the said deed to C. P. Huntington, under which your petitioner claims, changed, without legislative action, the settled and established construction which existed at the time of the execution and delivery of said deed, which is contrary to the Constitution of the United States; and that there is a Federal question raised by said record in this; that the said decision of the circuit court of Cabell County, which undertakes to deprive your petitioner of his property, is without due process of law, retroactive in its effect, and unconstitutional."

Laidley moved to dismiss the writ of error, for want of jurisdiction; and the motion to dismiss was argued with the merits of the case.

Mr. F. B. Enslow and *Mr. J. H. Ferguson*, (with whom was *Mr. H. C. Sims* on the brief,) for plaintiff in error. In

opposing the motion of the defendant in error to dismiss for want of jurisdiction they cited, among other cases: *Douglass* v. *County of Pike*, 101 U. S. 677; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Chicago* v. *Sheldon*, 9 Wall. 50; *Olcott* v. *Supervisors*, 16 Wall. 678; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574; *Anderson* v. *Santa Anna*, 116 U. S. 356; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Johnson* v. *Keith*, 117 U. S. 199.

Mr. W. E. Chilton and *Mr. J. F. Brown*, (with whom was *Mr. John E. Kenna* on the brief,) for defendant in error. In support of the motion to dismiss they cited among other cases; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; *Knox* v. *Exchange Bank*, 12 Wall. 379; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Railroad Company* v. *Rock*, 4 Wall. 177; *Havemeyer* v. *Iowa County*, 3 Wall. 294; *St. Paul, Minneapolis & Manitoba Railway* v. *Todd County*, 142 U. S. 282; *Blount* v. *Walker*, 134 U. S. 607; *Beatty* v. *Benton*, 135 U. S. 244; *San Francisco* v. *Itsell*, 133 U. S. 65; *Hopkins* v. *McLure*, 133 U. S. 380; *Hale* v. *Akers*, 132 U. S. 554; *Marrow* v. *Brinkley*, 129 U. S. 178; *DeSaussure* v. *Gaillard*, 127 U. S. 216; *Crossley* v. *New Orleans*, 108 U. S. 105; *Santa Cruz County* v. *Santa Cruz Railroad*, 111 U. S. 361; *McManus* v. *O'Sullivan*, 91 U. S. 578; *Murdock* v. *Memphis*, 20 Wall. 590; *Commercial Bank* v. *Buckingham*, 5 How. 317; *Grand Gulf Railroad* v. *Marshall*, 12 How. 165; *Green* v. *Neal*, 6 Pet. 291; *McBride* v. *Hoey*, 11 Pet. 167; *Elmendorf* v. *Taylor*, 10 Wheat. 152; *Furman* v. *Nichol*, 8 Wall. 44; *Railroad Company* v. *McClure*, 10 Wall. 511; *Burgess* v. *Seligman*, 107 U. S. 20; *Crowell* v. *Randolph*, 10 Pet. 368; *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635; *Texas Pacific Railway* v. *Southern Pacific Co.*, 137 U. S. 48; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Brooks* v. *Missouri*, 124 U. S. 394; *Detroit City Railway* v. *Guthard*, 114 U. S. 133; *Susquehanna Boom Co.* v. *West Branch Co.*, 110 U. S. 57; *Simmerman* v. *Nebraska*, 116 U. S. 54; *Chouteau* v. *Gibson*, 111 U. S. 200; *Brown* v. *Colorado*, 106 U. S. 95.

Opinion of the Court.

Mr. John B. Laidley in person also filed a brief in support of the motion to dismiss.

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

The questions upon the merits of this case, discussed at length by counsel, were whether the Supreme Court of Appeals of West Virginia rightly construed the provision of the Code of that State of 1868, which was, and was admitted to be, in all material respects, a reënactment of the corresponding provision of the Code of Virginia of 1860, prescribing the form of acknowledgment by a married woman of a deed of real estate; and whether the court below gave a construction of that provision less favorable to the validity of such a deed, than had been given to it by its own earlier decisions, and by the highest court of Virginia before the creation of the State of West Virginia. Those questions are not free from difficulty; and this court, before undertaking to pass upon them, must be satisfied that it has jurisdiction to do so.

The grounds relied on for invoking the appellate jurisdiction of this court are, in substance, that by the decision of the Supreme Court of Appeals of West Virginia, without any legislative action, the obligation of the contract contained in the deed from Mr. and Mrs. Pennybacker to Huntington, the grantor of the plaintiff in error, has been impaired, and the plaintiff in error has been deprived of its property without due process of law.

Assuming, without deciding, that these grounds were sufficiently and seasonably taken in the courts of West Virginia, we are of opinion that they present no Federal question.

In order to come within the provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the State, and not by a decision of its judicial department only.

The appellate jurisdiction of this court, upon writ of error

to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this court were to assume jurisdiction of this case, the question submitted for its decision would be, not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the State has erred in its construction of the statute. As was said by this court, speaking by Mr. Justice Grier, in such a case, as long ago as 1847, "It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the States, and not for the correction of alleged errors committed by their judiciary." *Commercial Bank* v. *Buckingham*, 5 How. 317, 343; *Lawler* v. *Walker*, 14 How. 149, 154.

It was said by Mr. Justice Miller, in delivering a later judgment of this court: "We are not authorized by the Judiciary Act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." *Knox* v. *Exchange Bank*, 12 Wall. 379, 383.

The same doctrine was stated by Mr. Justice Harlan, speaking for this court, as follows: "The state court may erroneously determine questions arising under a contract which con-

stitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion, be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the Constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment, in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question." *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 392.

Many other decisions of this court to the same effect are cited in that case. See also *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30; *St. Paul &c. Railway* v. *Todd County*, 142 U. S. 282; *Brown* v. *Smart*, 145 U. S. 452; *Wood* v. *Brady*, 150 U. S. 18.

The decisions cited by the plaintiff in error to support the jurisdiction of this court in the case at bar were either cases in which the writ of error was upon a judgment of a state court, which gave effect to a statute alleged to impair the obligation of a contract made before any such statute existed, as in *Louisiana* v. *Pilsbury*, 105 U. S. 278; in *Chicago Ins. Co.* v. *Needles*, 113 U. S. 574, and in *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; or else the writ of error was to a Circuit Court of the United States, bringing to this court the whole case, including the question how far the courts of the United States should follow the decisions of the highest court of the State, as in *Gelpcke* v. *Dubuque*, 1 Wall. 175, 205; *Olcott* v. *Supervisors*, 16 Wall. 678, 690; *Douglass* v. *Pike County*, 101 U. S. 677, 686; *Anderson* v. *Santa Anna*, 116 U. S. 356, 361; and other cases cited in *Louisiana* v. *Pilsbury*, 105 U. S. 278, 295.

The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two

of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the constitution of Iowa. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206. But a writ of error to review one of those decisions of the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the Constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Railroad Co.* v. *McClure*, 10 Wall. 511, 515.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States. *Walker* v. *Sauvinet*, 92 U. S. 90; *Head* v. *Amoskeag Co.*, 113 U. S. 9, 26; *Morley* v. *Lake Shore Railroad*, 146 U. S. 162, 171; *Bergmann* v. *Backer*, 157 U. S. 655.

This court therefore has no authority to decide the main questions, argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court, and of the Supreme Court of Appeals of Virginia before West Virginia became a separate State; and the writ of error must be

Dismissed for want of jurisdiction.

Mr. Justice Field dissented.

HILTON *v.* GUYOT.

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

HILTON *v.* GUYOT.

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

Nos. 130, 34. Argued April 10, 1894. — Decided June 3, 1895.

A citizen and resident of this country, who has his principal place of business here, but has an agent in a foreign country, and is accustomed to purchase and store large quantities of goods there, and, in a suit brought against him by a citizen and in a court of that country, appears and defends with the sole object of preventing his property within the jurisdiction, but not in the custody of that court, from being taken in satisfaction of any judgment that may be recovered against him there, cannot, in an action brought against him in this country upon such a judgment, impeach it for want of jurisdiction of his person.

The admission, at the trial in a court of a foreign country, according to its law and practice, of testimony not under oath and without opportunity of cross-examination, and of documents with which the defendant had no connection and which by our law would not be admissible against him, is not of itself a sufficient ground for impeaching the judgment of that court in an action brought upon it in this country.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it is not entitled to full credit and effect.

A judgment for a sum of money, rendered by a court of a foreign country, having jurisdiction of the cause and of the parties, in a suit brought by

Statement of the Case.

one of its citizens against one of ours, is *prima facie* evidence only, and not conclusive of the merits of the claim, in an action brought here upon the judgment, if by the law of the foreign country, as in France, judgments of our own courts are not recognized as conclusive.

THE first of these two cases was an action at law, brought December 18, 1885, in the Circuit Court of the United States for the Southern District of New York, by Gustave Bertin Guyot, as official liquidator of the firm of Charles Fortin & Co., and by the surviving members of that firm, all aliens and citizens of the Republic of France, against Henry Hilton and William Libbey, citizens of the United States and of the State of New York, and trading as copartners, in the cities of New York and Paris and elsewhere, under the firm name of A. T. Stewart & Co. The action was upon a judgment recovered in a French court at Paris in the Republic of France by the firm of Charles Fortin & Co., all whose members were French citizens, against Hilton and Libbey, trading as copartners as aforesaid, and citizens of the United States and of the State of New York.

The complaint alleged that in 1886, and since, during the time of all the transactions included in the judgment sued on, Hilton and Libbey, as successors to Alexander T. Stewart and Libbey, under the firm of A. T. Stewart & Co., carried on a general business as merchants in the cities of New York and Paris and elsewhere, and maintained a regular store and place of business at Paris; that during the same time Charles Fortin & Co. carried on the manufacture and sale of gloves at Paris, and the two firms had there large dealings in that business, and controversies arose in the adjustment of accounts between them.

The complaint further alleged that between March 1, 1879, and December 1, 1882, five suits were brought by Fortin & Co. against Stewart & Co. for sums alleged to be due, and three suits by Stewart & Co. against Fortin & Co., in the Tribunal of Commerce of the Department of the Seine, a judicial tribunal or court organized and existing under the laws of France, sitting at Paris, and having jurisdiction of suits and controversies between merchants or traders growing

out of commercial dealings between them; that Stewart & Co. appeared by their authorized attorneys in all those suits; and that, after full hearing before an arbitrator appointed by that court, and before the court itself, and after all the suits had been consolidated by the court, final judgment was rendered on January 20, 1883, that Fortin & Co. recover of Stewart & Co. various sums, arising out of the dealings between them, and amounting to 660,847 francs, with interest, and dismissed part of Fortin & Co.'s claim.

The complaint further alleged that appeals were taken by both parties from that judgment to the Court of Appeals of Paris, Third Section, an appellate court of record, organized and existing under the laws of the Republic of France, and having jurisdiction of appeals from the final judgments of the Tribunal of Commerce of the Department of the Seine, where the amount in dispute exceeded the sum of 1500 francs; and that the said court of appeal, by a final judgment, rendered March 19, 1884, and remaining of record in the office of its clerk at Paris, after hearing the several parties by their counsel, and upon full consideration of the merits, dismissed the appeal of the defendants, confirmed the judgment of the lower court in favor of the plaintiffs, and ordered, upon the plaintiffs' appeal, that they recover the additional sum of 152,528 francs, with 182,849 francs for interest on all the claims allowed, and 12,559 francs for costs and expenses.

The complaint further alleged that Guyot had been duly appointed, by the Tribunal of Commerce of the Department of the Seine, official liquidator of the firm of Fortin & Co., with full powers, according to law and commercial usage, for the verification and realization of its property, both real and personal, and to collect and cause to be executed the judgments aforesaid.

The complaint further alleged that the judgment of the Court of Appeals of Paris, and the judgment of the Tribunal of Commerce, as modified by the judgment of the appellate court, still remain in full force and effect; "that the said courts respectively had jurisdiction of the subject-matter of the controversies so submitted to them, and of the parties, the

said defendants having intervened, by their attorneys and counsel, and applied for affirmative relief in both courts; that the plaintiffs have hitherto been unable to collect the said judgments or any part thereof, by reason of the absence of the said defendants, they having given up their business in Paris prior to the recovery of the said judgment on appeal, and having left no property within the jurisdiction of the Republic of France, out of which the said judgments might be made;" and that there are still justly due and owing from the defendants to the plaintiffs upon those said judgments certain sums, specified in the complaint, and amounting in all to 1,008,783 francs in the currency of the Republic of France, equivalent to $195,122.47.

The defendants, in their answer, set forth in detail the original contracts and transactions in France between the parties, and the subsequent dealings between them, modifying those contracts; and alleged that the plaintiffs had no just claim against the defendants, but that, on the contrary, the defendants, upon a just settlement of the accounts, were entitled to recover large sums from the plaintiffs.

The answer admitted the proceedings and judgments in the French courts; and that the defendants gave up their business in France before the judgment on appeal, and had no property within the jurisdiction of France, out of which that judgment could be collected.

The answer further alleged that the Tribunal of Commerce of the Department of the Seine was a tribunal whose judges were merchants, ship captains, stockbrokers and persons engaged in commercial pursuits, and of which Charles Fortin had been a member until shortly before the commencement of the litigation.

The answer further alleged that in the original suits brought against the defendants by Fortin & Co. the citations were left at their storehouse in Paris; that they were then residents and citizens of the State of New York, and neither of them at that time or within four years before had been within, or resident or domiciled within, the jurisdiction of that tribunal, or owed any allegiance to France; but that

they were the owners of property situated in that country, which would by the law of France have been liable to seizure if they did not appear in that tribunal; and that they unwillingly, and solely for the purpose of protecting that property, authorized and caused an agent to appear for them in those proceedings; and that the suits brought by them against Fortin & Co. were brought for the same purpose, and in order to make a proper defence, and to establish counter claims arising out of the transactions between the parties, and to compel the production and inspection of Fortin & Co.'s books; and that they sought no other affirmative relief in that tribunal.

The answer further alleged that pending that litigation the defendants discovered gross frauds in the accounts of Fortin & Co.; that the arbitrator and the tribunal declined to compel Fortin & Co. to produce their books and papers for inspection; and that if they had been produced, the judgment would not have been obtained against the defendants.

The answer further alleged that, without any fault or negligence on the part of the defendants, there was not a full and fair trial of the controversies before the arbitrator, in that no witness was sworn or affirmed; in that Charles Fortin was permitted to make, and did make, statements not under oath, containing many falsehoods; in that the privilege of cross-examination of Fortin and other persons who made statements before the arbitrator was denied to the defendants; and in that extracts from printed newspapers, the knowledge of which was not brought home to the defendants, and letters and other communications in writing between Fortin & Co. and third persons, to which the defendants were neither privy nor party, were received by the arbitrator; that without such improper evidence the judgment would not have been obtained; and that the arbitrator was deceived and misled by the false and fraudulent accounts introduced by Fortin & Co., and by the hearsay testimony given without the solemnity of an oath and without cross-examination, and by the fraudulent suppression of the books and papers.

The answer further alleged that Fortin & Co. made up their statements and accounts falsely and fraudulently, and with

intent to deceive the defendants and the arbitrator and the said courts of France, and those courts were deceived and misled thereby; that, owing to the fraudulent suppression of the books and papers of Fortin & Co., upon the trial, and the false statements of Fortin regarding matters involved in the controversy, the arbitrator and the courts of France "were deceived and misled in regard to the merits of the controversies pending before them and wrongfully decided against said Stewart & Co. as hereinbefore stated; that said judgment hereinbefore mentioned is fraudulent, and based upon false and fraudulent accounts and statements, and is erroneous, in fact and in law, and is void; that the trial hereinbefore mentioned was not conducted according to the usages and practice of the common law, and the allegations and proofs given by said Fortin & Co., upon which said judgment is founded, would not be competent or admissible in any court or tribunal of the United States in any suit between the same parties involving the same subject-matter; and it is contrary to natural justice and public policy that the said judgment should be enforced against a citizen of the United States; and that, if there had been a full and fair trial upon the merits of the controversies so pending before said tribunals, no judgment would have been obtained against said Stewart & Co.

"Defendants, further answering, allege that it is contrary to natural justice, that the judgment hereinbefore mentioned should be enforced without an examination of the merits thereof; that by the laws of the Republic of France, to wit, article 181 [121] of the Royal Ordinance of June 15, 1629, it is provided, namely: 'Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall give rise to no lien or execution in our kingdom. Thus the contracts shall stand for simple promises, and notwithstanding such judgments our subjects against whom they have been rendered may contest their rights anew before our own judges.'

"And it is further provided by the laws of France, by article 546 of the Code de Procedure Civile, as follows: 'Judgments rendered by foreign tribunals shall be capable of execu-

tion in France, only in the manner and in the cases set forth by articles 2123 and 2128 of the Civil Code.'

"And it is further provided by the laws of France, by article 2128 [2123] of the Code de Procedure Civile [Civil Code], 'A lien cannot, in like manner, arise from judgments rendered in any foreign country, save only as they have been declared in force by a French tribunal, without prejudice, however, to provisions to the contrary, contained in public laws and treaties;' [and by article 2128 of that code, 'Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties.']

"That the construction given to said statutes by the judicial tribunals of France is such that no comity is displayed toward the judgments of tribunals of foreign countries against the citizens of France, when sued upon in said courts of France, and the merits of the controversies upon which the said judgments are based are examined anew, unless a treaty to the contrary effect exists between the said Republic of France and the country in which such judgment is obtained; that no treaty exists between the said Republic of France and the United States, by the terms or effect of which the judgments of either country are prevented from being examined anew upon the merits, when sued upon in the courts of the country other than that in which it is obtained; that the tribunals of the Republic of France give no force and effect, within the jurisdiction of the said country, to the duly rendered judgments of the courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of said courts is made thereon in this country."

The answer further set up, by way of counter claim, and in detail, various matters arising out of the dealings between the parties; and alleged that none of the plaintiffs had since 1881 been residents of the State of New York, or within the jurisdiction of that State, but the defendants were and always had been residents of that State.

The answer concluded by demanding that the plaintiffs'

complaint be dismissed, and that the defendants have judgment against them upon the counter claims, amounting to $102,942.91.

The plaintiffs filed a replication to so much of the answer as made counter claims, denying its allegations, and setting up in bar thereof the judgment sued on.

The defendants, on June 22, 1888, filed a bill in equity against the plaintiffs, setting forth the same matters as in their answer to the action at law, and praying for a discovery, and for an injunction against the prosecution of the action. To that bill a plea was filed, setting up the French judgments; and upon a hearing the bill was dismissed. 42 Fed. Rep. 249. From the decree dismissing the bill an appeal was taken, which was the second case now before this court.

The action at law afterwards came on for trial by a jury; and the plaintiffs put in the records of the proceedings and judgments in the French courts; and evidence that the jurisdiction of those courts was as alleged in the complaint, and that the practice followed and the method of examining the witnesses were according to the French law; and also proved the title of Guyot as liquidator.

It was admitted by both parties that, for several years prior to 1876, the firm of Alexander T. Stewart & Co., composed of Stewart and Libbey, conducted their business as merchants in the city of New York, with branches in other cities of America and Europe; that both partners were citizens and residents of the city and State of New York during the entire period mentioned in the complaint; and that in April, 1876, Stewart died, and Hilton and Libbey formed a partnership to continue the business under the same firm name, and became the owners of all the property and rights of the old firm.

The defendants made numerous offers of evidence in support of all the specific allegations of fact in their answer, including the allegations as to the law and comity of France. The plaintiffs, in their brief filed in this court, admitted that most of these offers "were offers to prove matters in support of the defences and counter claims set up by the defendants in the cases tried before the French courts, and which or most

of which would have been relevant and competent if the plaintiffs in error are not concluded by the result of those litigations, and have now the right to try those issues, either on the ground that the French judgments are only *prima facie* evidence of the correctness of those judgments, or on the ground that the case is within the exception of a judgment obtained by fraud."

The defendants, in order to show that they should not be concluded by having appeared and litigated in the suits brought against them by the plaintiff in the French courts, offered to prove that they were residents and citizens of the State of New York, and neither of them had been, within four years prior to the commencement of those suits, domiciled or resident within the jurisdiction of those courts; that they had a purchasing agent and a storehouse in Paris, but only as a means or facility to aid in the transaction of their principal business, which was in New York, and they were never otherwise engaged in business in France; that neither of them owed allegiance to France, but they were the owners of property there, which would, according to the laws of France, have been liable to seizure if they had not appeared to answer in those suits; that they unwillingly, and solely for the purpose of protecting their property within the jurisdiction of the French tribunal, authorized an agent to appear, and he did appear in the proceedings before it; and that their motion to compel an inspection of the plaintiffs' books, as well as the suits brought by the defendants in France, were necessary by way of defence or counter claim to the suits there brought by the plaintiffs against them.

Among the matters which the defendants alleged, and offered to prove, in order to show that the French judgments were procured by fraud, were that Fortin & Co., with intent to deceive and defraud the defendants, and the arbitrator and the courts of France, entered in their books, and presented to the defendants, and to the French courts, accounts, bearing upon the transactions in controversy, which were false and fraudulent, and contained excessive and fraudulent charges against the defendants, in various particulars specified; that the

defendants made due application to the Tribunal of Commerce to compel Fortin & Co. to allow their account books and letter books to be inspected by the defendants, and the application was opposed by Fortin & Co., and denied by the tribunal; that the discovery and inspection of those books were necessary to determine the truth of the controversies between the parties; that, before the Tribunal of Commerce, Charles Fortin was permitted to and did give in evidence statements not under oath, relating to the merits of the controversies there pending; and falsely represented that a certain written contract, made in 1873, between Stewart & Co. and Fortin & Co., concerning their dealings, was not intended by the parties to be operative according to its terms; and, in support of that false representation, made statements as to admissions by Stewart in a private conversation with him; and that the defendants could not deny those statements, because Stewart was dead, and they were not protected from the effect of Fortin's statements by the privilege of cross-examining him under oath; and that the French judgments were based upon false and fraudulent accounts presented and statements made by Fortin & Co. before the Tribunal of Commerce during the trial before it.

The records of the judgments of the French courts, put in evidence by the plaintiffs, showed that all the matters now relied on to show fraud were contested in and considered by those courts.

The plaintiffs objected to all the evidence offered by the defendants, on the grounds that the matters offered to be proved were irrelevant, immaterial, and incompetent; that, in respect to them, the defendants were concluded by the judgment sued on and given in evidence; and that none of those matters, if proved, would be a defence to this action upon that judgment.

The court declined to admit any of the evidence so offered by the defendants, and directed a verdict for the plaintiffs in the sum of $277,775.44, being the amount of the French judgment and interest. The defendants, having duly excepted to the rulings and direction of the court, sued out a writ of error.

Argument for Plaintiffs in Error.

The writ of error in the action at law and the appeal in the suit in equity were argued together in this court January 19, 22, and 23, 1894; and, by direction of the court, were reargued in April, 1894, before a full bench.

Mr. James C. Carter and *Mr. Elihu Root* for plaintiffs in error and appellants. *Mr. Horace Russell* was on their briefs.

There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation. Very numerous decisions have been had, especially in England, relating to this question in the various forms in which it has arisen; but if we should undertake to learn from the opinions of the courts in these cases what principles had been decided, we should find ourselves in utter confusion. On some occasions judges have said that the judgments of foreign tribunals should be treated as being as conclusive as those of our own; on others, that they are at most but *prima facie* evidence, and are subject to examination generally to ascertain whether justice has been done in them or not; and on others, that whether they are open to examination or not depends upon the circumstances under which they were pronounced.

In the learned notes to the *Duchess of Kingston's case*, in Smith's Leading Cases, a very minute reference is made to the various decisions in England and in this country, and some attempt made to group and classify them; but the reader will scarcely gain any assistance from them, and will, after perusal, feel certain of one thing only, viz.: that the subject is involved in great confusion.

The natural and obvious method of doing justice between two contending parties is to examine their allegations, to ascertain the facts respecting the matter in dispute, and to declare the law arising upon these facts. Aside from reasons of policy, this is the only course which should be pursued. It would be quite irrelevant for one of the parties to say,

"This same process has once been pursued before, and the result then reached ought to preclude further inquiry." To this answer it would be quite sufficient to reply that if justice had been done before, it could be again, and if it had not been done, it ought to be done now. But it would be an intolerable burden and expense, both to the public and to the parties, if the courts of the same country could be continually vexed with trials of the same controversy. "*Interest reipublicæ ut sit finis litium.*" It is necessary that some limitation should be imposed; and the conclusion of state policy in this country and in England has been that the parties should be allowed one full and fair opportunity to try their grievances, and one alone. This is sufficient to prevent attempts at the private redress of injuries. Hence, the general rule applicable to domestic judgments, that the judgment of a court of competent jurisdiction is conclusive between the same parties upon the same question in another court, whether as a plea, a bar, or as evidence.

In reaching this conclusion, some concession is perhaps made from strict and absolute justice in favor of convenience. But justice nevertheless is, as it always must be, the overruling consideration; and the doctrine would never have been adopted unless the conclusion had been thought to be a safe one, that the judgment in the first and only trial allowed would be, in the vast majority of cases, a sound and righteous one.

This doctrine has been established among us in view of the fact that rules and safeguards have been adopted which, if followed, will make the judgment one which may be enforced without further inquiry. It rests upon two principal considerations: (1) That there is a reasonably safe assurance that the former judgment, reached only after the employment of precautions carefully devised for the elimination of error, is just and right; and (2) that the maxim "*interest reipublicæ ut sit finis litium*," which deems it a satisfaction of the duty of government to furnish remedial justice, if one fair opportunity has been given, has been duly considered. Both of these considerations are wanting in the case of foreign judgments.

Argument for Plaintiffs in Error.

Except in the case of England and some of her colonies, where the national standards of justice, and also the methods of procedure, very much resemble our own, we can have no full assurance that a just conclusion has been reached. In many, perhaps most, other instances, there are substantial differences in the general conceptions of justice, manifested sometimes by peculiar local laws, and sometimes by peculiar doctrines of general jurisprudence, and sometimes by both. And, generally, the methods deemed essential by us to the working out of a just conclusion are not enforced. Jury trials, exclusion of improper evidence, cross-examination of witnesses, etc., are matters to which comparatively little attention is given. And if we may believe what has often been alleged upon good authority, in many countries there is a scandalous amount of partiality, favor and even bribery, in the administration of justice.

The maxim, "*interest reipublicæ ut sit finis litium*," applies to our own nation only. It is no part of our policy to restrict litigation in the world generally. In the case where a foreign judgment is set up as conclusive, we have not as yet afforded the one fair opportunity to litigate the question upon its original merits, which it is the duty of governments to furnish.

The suggestion that the comity of nations requires conclusive force to be given to foreign judgments, inasmuch as otherwise they will not give like force to our judgments, is wholly insufficient. This comity does, indeed, have a place in this branch of the law, but by no means the force thus suggested. We can never allow the assumption that Morocco, or Turkey, or Russia, or even Germany, Italy, or France has methods of judicial administration equal to our own, so as to justify ourselves in making a tacit agreement that we will enforce their judgments, if they will ours.

Our courts cannot show a comity toward England which they would deny to Russia. If a reciprocity in the treatment of judicial proceedings should be thought desirable, it can be safely brought about by treaty alone, where it may be yielded or withheld at pleasure. We shall consider this more at length later.

If, therefore, foreign judgments are in any case to be held conclusive with us, it must be for other reasons than those upon which we hold domestic judgments conclusive. It cannot be said that foreign judgments are ever so conclusive that no inquiry into them can be allowed; but there are many cases in which they may be justly held substantially conclusive. The common characteristic of all of them is that the obligation of the State to ascertain, declare, and enforce justice according to its own conceptions of justice does not in such cases exist, or is greatly diminished in force; and that it is wiser, safer, and better to adopt and enforce the judgment of the foreign State.

A careful examination of all the cases warrants us in assuming that the question whether a foreign judgment is conclusive, so as to preclude inquiry into the original merits of the controversy, depends upon the circumstances under which it was rendered; and that it is not thus conclusive where the State is under its ordinary obligation to the party demanding such inquiry to give him at least one full and fair opportunity of having his cause adjudicated upon its original merits. It is well settled that wherever a domestic judgment is interposed as a bar to an original investigation, it must appear that such judgment was the result of a proceeding so instituted and prosecuted as to show that the party sought to be precluded from original inquiry did have, in the suit in which the judgment was rendered, this full and fair opportunity. The American courts never can have any such complete assurance that the party against whom a foreign judgment has been rendered did have a full and fair opportunity for an adjudication of his cause, according to our conceptions of justice; and consequently, if, in any case, a foreign judgment is held conclusive, it must be because there is not, in the particular case, any such obligation on the part of the State to that party to afford him even one such full and fair opportunity to have his cause adjudicated according to its conceptions of justice.

Indeed, the general doctrine, as stated in most cases in the courts of the United States, goes much further than any of

the necessities of the present controversy require; and perhaps further than would be allowed in a precise statement of its extent. It declares that foreign judgments are *prima facie* evidence only. Only two cases are cited to the contrary. *Lazier* v. *Westcott*, 26 N. Y. 146; and *New York, Lake Erie & Western Railroad* v. *Henry*, 21 Blatchford, 400. In the first case the only question before the appellate court was whether the record was receivable in evidence notwithstanding the technical objections. The court held it was; but the learned Judge (Davies) who gave the opinion, then proceeded to argue a question not raised, namely, whether foreign judgments were conclusive, and held that they were. This opinion is unimportant. The second was a case of precisely the same character. The judgment was in no respect impeached.

A review of the English cases will show that the doctrine in England never has been, and is not now, inconsistent with the rule herein maintained; but that, on the contrary, the question whether a foreign judgment should be held conclusive depends upon the circumstances under which it was rendered.

First, as to the cases decided before A.D. 1800. *Isquiredo* v. *Forbes*, 1 Doug. 6 (n.). This is cited as a decision by Lord Hardwicke, that foreign judgments, when an action is brought upon them, are merely *prima facie* evidence on behalf of the plaintiffs.

Gage v. *Bulkeley*, 3 Atk. 215. On a plea of a foreign sentence in a Commissionary Court in France relating to the same matters for which a bill was brought in England, Lord Hardwicke said: "It must be overruled, for it is the most proper case to stand for an answer, with liberty to except, that I ever met with."

Sinclair v. *Fraser* (1768), 1 Doug. 5 (n.); more fully in Morison's Dec. 4542 (House of Lords). Mrs. Fraser, of Scotland, succeeded to an estate in Jamaica, and, being under age, her tutors appointed Sinclair to manage it. The estate was sold in 1763, and Sinclair procured a judgment in the Supreme Court of Jamaica for a balance due him upon an account cur-

rent, and then brought suit in Scotland on the Jamaica judgment. The defendant prayed that plaintiff should produce the vouchers of the debts claimed, in order to introduce a fair count. The Lord Ordinary ordered the vouchers to be produced. The plaintiff appealed to the Lords of Sessions, who sustained the Lord Ordinary; upon an appeal to the House of Lords they held that the judgment of the Supreme Court of Jamaica ought to be received as evidence *prima facie* of the debt, and that it lay upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained.

The decision went only upon the question of evidence and the burden of proof. Morison so treats it. In his head note he epitomizes the decision as follows: "Found that a foreign decree bearing to have been *in foro contentio*, had not the effect of *res judicata* in Scotland, but entitled the party claiming under it to plead that the *onus probandi* rested on his opponent."

This decision is an authority for the claim that the merits of a foreign judgment may be attacked. The Scotch courts did not give it the effect of even *prima facie* evidence. In this, held they were in error, but in this alone.

Herbert v. *Cook*, Willes, 36 (n.), Lord Mansfield, in speaking of the judgment of the Hundred Court (a domestic tribunal), said: "Besides, it is not a judgment of a court of record, but like a foreign judgment, and not conclusive evidence of the debt."

Walker v. *Witter* (1778), 1 Doug. 1, was an action of debt brought in Middlesex County, England, upon a judgment of the Supreme Court of Jamaica. The question was whether *nil debet* or *nul tiel record* was the proper plea. Lord Mansfield held that the former was the proper plea, and said: "Foreign judgments are a ground of action everywhere, but they are examinable. He recollected a case of a decree on the chancery side in one of the courts of great sessions of Wales, from which there was an appeal to the House of Lords, and the decree affirmed there, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of

the House of Lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined. He also mentioned a case on the mortmain acts."

In this decision Justices Willes, Ashurst, and Buller, all concurred.

Galbraith v. *Neville* (A.D. 1789), 1 Doug. 6 (n.); *S. C.* 5 East, 475–9 (n.): This was an action of debt on a judgment recovered in the Supreme Court of Jamaica. There was a verdict for the plaintiff. An order to show cause was made why there should not be a new trial. The reporters are in conflict as to the decision made upon the return of this order. Douglas has it, that there was a new trial granted. East says — in a note on 5 East, 475 — "It is there [Douglas 5 and 6] stated that the rule for a new trial . . . was absolute. But, according to my note of the case, it stood over from Easter 29 to Michaelmas 31 Geo. 3 for the court to advise upon it, when Lord Kenyon, C. J., said that the court had considered the matter, and were all of opinion that no new trial ought to be granted. He added that, without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was *prima facie* evidence of the debt; and they were of opinion that no evidence had been adduced to impeach this; and, therefore, discharged the rule."

It is apparent from these reports that if East was correct, as he probably was, in point of fact the judgment had been attacked on its merits, and the court finally determined to discuss the weight of evidence; and, upon this proposition it came to the conclusion that the weight of the impeaching evidence was not sufficient to overthrow the presumption in favor of the judgment. In this case Justice Buller said, and his opinion only is quoted, because if the report is correct in East, the court took a position side by side with him instead of with Lord Kenyon. He says: "The doctrine which was laid down in *Sinclair* v. *Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other party. I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in the

case alluded to from Wales, and the ground of his Lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are wrong, and it was upon that account that he said he would examine into the propriety of the decree.

"As to actions of this sort, see how far the court could go, if what was said in *Walker* v. *Witter* were departed from; it was there held that a foreign judgment was only to be taken to be right, *prima facie*, that is, we will allow the same force to a foreign judgment that we do to those of our courts not of record; but if the matter were carried further we should give them more credit; we should give them equal force with the courts of record here; now a foreign judgment has never been considered as a record."

The next case in order is *Messin* v. *Massareene*, 4 T. R. 493 (1791). The plaintiff having obtained a judgment against the defendant in the Châtelet of Paris, brought an action of *assumpsit* in King's Bench upon that judgment. Judgment was allowed to go by default. Walton, counsel of plaintiff, obtained a rule or order to show cause why it should not be referred to a master to see what was due for principal and interest without executing a writ of inquiry. It was contended that there was no instance in which such course had been taken. Kenyon, C. J., said: "This is an attempt to carry the rule further than has yet been done, and as there is no instance of the kind I am not disposed to make a precedent." Buller, J., said: "Though debt will lie here on a foreign judgment, the defendant may go into consideration of it."

The judgment involved in the *Duchess of Kingston's case* was a domestic judgment, and not that of a foreign court.

This brings us to the close of the century with the following result: We have Hardwicke, Mansfield, Ashurst, Buller, and Willes holding that a foreign judgment was examinable upon the merits. There were *dicta* by Lord Kenyon to the contrary, but overruled by his court, if East is correct.

In no case do any of the judges combat the position, that

if it appears that there has not been a fair trial upon the merits the judgment has no force as a bar.

Since 1800 we have the following cases, which appear to have been relied upon below: *Henderson* v. *Henderson*, 3 Hare, 100; *Godard* v. *Gray*, L. R. 6 Q. B. 139; *Schibsby* v. *Westenholtz*, L. R. 6 Q. B. 155; *Rousillon* v. *Rousillon*, 14 Ch. D. 351; *General Steam Navigation Co.* v. *Guillou*, 11 M. & W. 877; *Becquet* v. *McCarthy*, 2 B. & Ad. 951; *Nouvion* v. *Freeman*, 37 Ch. D. 244; *Trafford* v. *Blanc*, 36 Ch. D. 600; *Voinet* v. *Barrett*, 55 Law Journal (N. S.) Q. B. 39; *Scott* v. *Pilkington*, 2 B. & S. 11; *Bank of Australasia* v. *Nias*, 16 Q. B. 717; *Martin* v. *Nicolls*, 3 Sim. 458.

These cases, however, do not support the decision below. On the contrary, a further search would have disclosed cases which rejected it. *De Cosse Brissac* v. *Rathbone*, 6 H. & N. 301, is the only case which appears to fully sustain the conclusiveness of a foreign judgment.

The cases in which it has been determined in England that the foreign judgment under consideration in them was conclusive happen to have been of a character in which there was no very good reason for allowing the judgment to be impeached; but the courts in pronouncing their decisions, have sometimes announced a doctrine much broader than the case before them; and, instead of saying that the foreign judgments, *in the particular cases they were considering*, were not open to impeachment, declared generally that such judgments were conclusive.

In declaring this large conclusion there has sometimes been an attempt to formulate a principle, or principles, which would sustain the doctrine in the eye of reason; and two principles have been laid down as sufficient to justify the broad determination.

The first was originated by a judge of high authority, Mr. Baron Parke, in the case of *Russell* v. *Smyth*, 9 M. & W. 810, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given which the courts in England are bound to enforce. This was the principle

mainly relied upon in the court below by the counsel for the plaintiff in that court.

The other ground upon which the doctrine has been supported in the English cases is rather one of policy, namely, that the courts of that country should not engage in the work of retrying cases which have once been tried in a foreign country, for the reason that their judgments would not probably be any more agreeable to right and justice than the foreign judgment; which is the view which the learned judge in the court below preferred.

But an excellent opportunity was afforded to some English judges in 1882 to test the soundness of these principles, and the Court of King's Bench immediately and utterly broke away from them. *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295.

This action was brought on a Russian judgment rendered in an action where the plaintiff charged that the defendant had property in his possession which he refused to restore, and asked that its restoration on payment of its value by the defendant be compelled; and where the court decided in favor of the plaintiff and adjudged the defendant to pay the value of the goods. The defendant sought to impeach this judgment by a separate defence which alleged that it was obtained by the gross fraud of the plaintiff in representing to the court that the goods were in the defendant's possession, whereas they were at all times in the plaintiff's possession, as he well knew. To this defence a demurrer was interposed, and the argument was on this demurrer. It was not pretended that the Russian court had not full jurisdiction, or that a Russian judgment was not as conclusive as any other foreign judgment, or that the defendant in Russia was in any manner so deceived or imposed upon that he had not had a perfectly full and fair opportunity to defend himself, or that any artifice was employed by which the court was in any manner disabled or impeded in the discharge of its function of determining the truth. It was the simple case of the bringing of an action by a plaintiff who knew he had no good cause of action and supporting it by the falsehood of himself and witnesses, one or both.

Argument for Plaintiffs in Error.

The entire breaking down in this case of the rule, not founded upon the adjudications, but upon the *dicta*, of English cases, as well as of the erroneous principle upon which that rule had been said to rest, namely, that a foreign judgment created an obligation, is a proof of the falsity of the doctrine. In the presence of the fact, which the demurrer seemed to present, that the Russian judgment could not be enforced without committing a palpable wrong, the court determined not to enforce it. The mistake made was in not perceiving that the doctrine had been too largely stated, and that the true way of meeting the case was by limiting the doctrine to its just proportions, and making a discrimination between the cases where a foreign judgment should properly be held conclusive, and those where it should not.

This case was followed by *Vadala* v. *Lawes*, 25 Q. B. D. 310, in which the court, referring to *Abouloff* v. *Oppenheimer*, said: "I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion you can reopen the whole case, even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but, in that case, the court faced the difficulty that you could not give effect to the defence without retrying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to con-

sider how the two rules, to which I have alluded, could be worked together, they said: 'Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to retry the merits, you are entitled to do so according to the law of this country.' I cannot read that case in any other way. Lord Coleridge uses language which I do not think is capable of being misunderstood. In order to understand the judgment it is well to look at the argument for the defence — an argument conducted by Mr. Benjamin and Mr. Cohen, and an argument which I understand to have been accepted by the court: 'Even if the Russian courts had inquired into the existence of the fraud and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English court.'"

Thus it is plain that, in the light of the above decisions, no one can say that the present doctrine of the English courts is that a foreign judgment is necessarily conclusive, even where there was full jurisdiction, and a full opportunity for trial of the very point upon which the judgment is assailed.

The leading decisions of the state and federal courts will be found reported in the following cases, and are not in conflict with our contentions: *Bissell* v. *Briggs*, 9 Mass. 462; *Wood* v. *Gamble*, 11 Cush. 8; *Hall* v. *Williams*, 6 Pick. 232; *Buttrick* v. *Allen*, 8 Mass. 273; *McKim* v. *Odom*, 3 Fairf. 12 Maine 94; *Williams* v. *Preston*, 3 J. J. Marsh. 600; *Tayler* v. *Barron*, 10 Foster (30 N. H.) 78; *Aldrich* v. *Kinney*, 4 Connecticut, 380; *Olden* v. *Hallet*, 2 Southard, 466; *Taylor* v. *Phelps*, 1 Har. & Gill, 492; *Robinson* v. *Prescott*, 4 N. H. 450; *Hitchcock* v. *Aicken*, 1 Caines, 460; *Taylor* v. *Bryden*, 8 Johns. 173; *Pawling* v. *Bird*, 13 Johns. 192; *Pease* v. *Howard*, 14 Johns. 479; *McElmoyle* v. *Cohen*, 13 Pet. 312, 324; *Croudson* v. *Leonard*, 4 Cranch, 434; *Burnham* v. *Webster*, 2 Ware, 236; *DeBrimont* v. *Penniman*, 10 Blatchford, 436; *Hanley* v. *Donoghue*, 116 U. S. 1; *New York, Lake Erie & Western Railway Co.* v. *McHenry*, 21 Blatchford, 400; *Wiggins Ferry Co.* v. *Chicago & Alton Railroad*, 11 Fed. Rep. 381.

Argument for Plaintiffs in Error.

Thus far nothing has been said in relation to the effect of the absolute denial by the French law to judgments of the courts of other nations of anything in the nature of conclusiveness. And this denial extends to all cases whatsoever as against French citizens. If the alleged conclusiveness of foreign judgments is placed upon grounds of comity, how can the doctrine apply to the judgments of the courts of a nation which absolutely refuses reciprocity?

This is not the case where our courts are called upon to enforce a statute, as in *The Scotland*, 105 U. S. 24, 33; but where they are to declare what the law of comity is and requires. If a legislature passes a law the judicial tribunals are bound to execute it, even in favor of the citizens of a nation which has no similar law. A legislature may dispense, if it chooses, with the benefit of reciprocity.

The literal meaning of the word "comity" is "courtesy" — a disposition to accommodate — but the word is seldom employed, in juridical discussions, in that sense. No court is at liberty to deny or to refuse a claim made before it, according as mere courtesy or a disposition to accommodate shall require. What comity requires is as much required in courts of justice as anything else; and the inquiry, therefore, what comity is, is only another mode of inquiring what the law is in respect to the force which the laws, judicial proceedings or other acts done in one State ought to have in another State.

Says Chief Justice Taney in *Bank of Augusta* v. *Earle*, 13 Pet. 519, 589, "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned. The cases of contracts made in a foreign country are familiar examples; and courts of justice have always expounded and executed them, according to the law of the place in which they were made; provided that law was not repugnant to the laws or policy of their own country. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered; and is inadmissible when contrary to its policy, or prejudicial

to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations. It is truly said in Story's Conflict of Laws (p. 37), that 'in the silence of any positive rule affirming or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation which is administered and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided.' "

Our main contention, as already argued, is that it was the duty of the United States, and of each of the States, to furnish to their citizens one fair and full opportunity of establishing their claims by a trial upon the original merits; that a foreign judgment could not be made the occasion for denying this right, unless it could be said that it was certain that such judgment was as effective as our own in securing justice to the litigants; and that with our notions of the essential merits of our own judicial procedure it was impossible to assent to the view that the procedure of foreign nations, indiscriminately, was as well calculated to secure justice as our own.

If we are right in this contention, it follows that the question of comity has nothing to do with this case; because, the giving effect here to the law of France which makes her own judgments conclusive there, would be prejudicial to our own policy and to the rights and interests of our own citizens.

Assuming that our contention is correct, that foreign judgments are, in general, not conclusive, but may be so under some circumstances, there is nothing in the circumstances of the present case making this particular judgment conclusive upon the defendants therein. In no just sense could the appearance of Stewart & Co. in the French suit be deemed to be a voluntary one, so as to charge them with the responsibility of the litigation. If they had conceived that they

could carry on the dry goods business in France also as well as in America, that they could cater to the wants of the French as well as French merchants, and thereby make money, and had, in pursuance of such a view, gone abroad and established a mercantile storehouse there, and offered to sell goods to the people of Paris, and thus to come in competition with other merchants of Paris; in other words, to do in France just the same thing that Frenchmen are doing, then, indeed, a very different case would be presented. They would then be doing something not required by any of the necessities of a New York business. The French themselves have drawn this distinction with great clearness by refusing general access to their courts as suitors to all foreigners who are not actually domiciled in France. Code Civil, Art. 13, 14, 15; Wheaton Int. Law, 192.

The defendants in error have been forced to partially abandon this ground of international comity, because France gives no effect to the judgments of our courts. Can they do so without endangering the stability of their entire structure?

Reciprocal comity is the only ground upon which any civilized nation in the world, aside from England and the United States, gives or ever has given conclusive effect to foreign judgments.

M. Foelix, a French author of high authority, in his Traité du Droit International Privé, gives an exhaustive review of the laws and usages of all civilized nations in respect of the effect given to foreign judgments. It appears, that aside from England and the United States, there are but two views followed. France, Spain, Portugal, Russia, Sweden and Norway, and some minor countries which derive their laws from France, such as Belgium, the canton of Geneva, Greece and Hayti, give no effect whatever to a foreign judgment as *res judicata*.

On the other hand, all the other countries of Europe, including Germany, Austria, Prussia, Denmark and a multitude of smaller States, have adopted the principle of reciprocity, and give the effect of *res judicata* to the judgments of other States which give a similar effect to their judgments.

The principle has been adopted and enforced alike by the decisions of the courts under the common law of Germany, and by the statutes of the other nations mentioned, but no nation whatever gives such effect to any foreign judgment except upon the express ground of reciprocal treatment.

The grounds upon which the German courts proceed are well illustrated by the reasons which this author recites as given by the court of Cologne, in Rhenish Prussia, in deciding that a native who has been defeated before a foreign tribunal can try anew his rights before "his *natural judges*, called upon to give execution to the foreign judgment." The principal reasons stated are, in substance: "That a new examination into the merits of the cause can alone assure to the subject that protection to which he has a right, and that foreign judgments ought not to receive their execution in Rhenish Prussia except as Prussian judgments receive equally their execution in the country where the judgment the execution of which is in question was rendered."

Many of the countries mentioned have express statutes embodying this reciprocal principle, and in all the others the author says "the jurisprudence and the opinion of authors have sanctioned the same principle."

The French theory is well stated in decisions of the courts of Nimes and Bordeaux. They say: "It is considered that it is a principle of the public law of France . . . that the right of the tribunals of the Kingdom to order or refuse the execution of foreign judgments draws with it that of verifying the correctness of the judgment in matters of fact as in matters of law: . . . that the party brought before the tribunals to have a judgment rendered in a foreign country put into execution against him has the right to defend himself by all the means of the law, both as to form and as to the merits, and in the same manner as if the judgment did not exist."

The entire weight of European authority, aside from Great Britain, therefore, is that no State should ever enforce against one of its own citizens the judgment of another State except upon the ground of reciprocal advantage.

Argument for Plaintiffs in Error.

It is to be observed that every decision in the United States upon which the defendants in error rely as illustrating what they claim to be a tendency towards a new rule, relates to an English or a Canadian judgment; that is, a judgment of a country which does, in fact, profess to give the effect of *res judicata* to our judgments.

In *Lazier* v. *Wescott*, 26 N. Y. 146, the judgment sued upon was recovered in Canada. In *Dunston* v. *Higgins*, 138 N. Y. 70, the judgment sued on was rendered by the High Court of Justice of England, Queen's Bench Division. In *Baker* v. *Palmer*, 83 Illinois, 568, the judgment sued on was Canadian. In *Fisher* v. *Fielding*, in the Superior Court of Connecticut, decided January 4, 1894, the judgment sued on was English.

The fact that England and Canada do give effect to our judgments, added to the fact that they proceed according to the course of the common law and dispense the same kind of justice in the same way as our own tribunals, may be supposed to have influenced the minds of the courts before whom these judgments were brought. Two at least of those courts (in the latest case in New York, and in the Illinois case) put their judgments upon the express ground of comity.

The Michigan case was a clear case of a voluntary appearance, the defendant having apparently gone to Canada for the express purpose of uniting with plaintiff to invoke the jurisdiction of the Canadian court, which could not otherwise have attached either to him or to his property.

The Connecticut case was decided by a single judge of a subordinate state court within the Second Circuit, and may be regarded as following rather than adding to, the decision of the Circuit Court of that circuit now under review.

The general expression of judicial opinion in this country in recent years has included this question of reciprocity as an important element in determining the treatment to be given to foreign judgments.

Judge Woodbury, in *Burnham* v. *Webster*, 1 Wood. & Min. 172 (see also 2 Ware, 236), says: "When offered and considered elsewhere than in their own jurisdiction they (foreign judgments) are *ex comitate* treated with respect according to the

nature of the judgment and the character of the tribunal which rendered it and the reciprocal mode, if any, in which that government treats our judgments."

Judge Woodruff, in *De Brimont* v. *Penniman*, 10 Blatchford, 436, says: "The principle upon which foreign judgments receive any recognition in our courts is one of comity."

Judge Coxe says, in *New York, Lake Erie &c. Railroad* v. *McHenry*, 21 Blatchford, 400: "The rule as to foreign judgments rests upon considerations of comity."

Mr. Justice Cooley, in *McEwen* v. *Limmer*, American Law Register, speaking of the force and effect due Canadian judgments, says: "We should certainly never have assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality. We should demand nothing more and concede nothing less."

In the foregoing reference to the American authorities relied upon by the defendants in error we have omitted as having no real bearing upon the question the case of *Silver Lake Bank* v. *Harding*, 5 Ohio, 544, where the Supreme Court of Ohio held that the judgment of a Justice of the Peace in Pennsylvania was within the meaning of the constitutional provision, requiring full faith and credit to be given to the judgments of other States, and was entitled to receive effect as *res judicata;* and the case of *Glass* v. *Blackwell*, 48 Arkansas, 50, in which a judgment of a Justice of the Peace in Tennessee received a similar effect; and the case of *Jones* v. *Jamison*, 15 La. Ann. 35, in which a plaintiff, who had himself brought suit against a defendant in the island of Jamaica, where both parties were domiciled, and obtained a judgment, was held not entitled to sue again here on the original demand which he had by his own act caused to be merged in the judgment.

It may fairly be said that in America, as well as in Europe, the general weight of opinion and of practice tends to the result that if foreign judgments are to receive any effect at all as *res judicata*, that effect should be limited to judgments rendered by the courts of a country which gives similar effect to the judgments of that country in which the proceeding is brought.

Argument for Defendants in Error.

Mr. William G. Choate, (with whom was *Mr. William D. Shipman* on the brief,) for defendants in error and appellees.

I. The French courts having jurisdiction of the subject matter and of the parties, their judgments are conclusive to the same extent as domestic judgments, unless impeached for want of jurisdiction or for fraud in procuring the same.

The modern rule both in England and this country, overruling the earlier decisions which made a foreign judgment *prima facie* evidence only of a debt, is that a foreign judgment *in personam* is conclusive as to the existence of the debt established thereby, provided the court had jurisdiction of the subject matter and of the parties; and such judgment can be impeached only for fraud.

It having been contended by the plaintiffs in error upon the first argument of this case that the law is not settled in favor of the conclusiveness of foreign judgments we submit a statement of the English cases from the earliest times to the present day.

Wier's case, 1 Rolle's Abr. 530, is the earliest case. The plaintiff, a native of Friesland, attempted to enforce in England, by execution, a judgment obtained in Friesland against the defendant, an Englishman. The court said: "It is by the law of nations that the justice of one nation will be an aid to the justice of another nation, and the one execute the judgment of the other; and the law of England takes notice of this law and the Judge of Admiralty is the proper magistrate for this purpose, for he [sits] solely for the execution of the civil law in this realm." The Court of King's Bench, on *habeas corpus*, refused to release the defendant, who was taken in execution.

In *Cottington's case*, 2 Swanston, 326, *n* where the validity of a sentence of divorce by the Archbishop of Turin was involved, *Wier's case* was approved, the court saying: "In *Wytred's* [*Wier's*] *case*, 5 Jac., a judgment given in Holland for debt was executed here by the Admiralty of England upon the person who fled from execution there, and this was allowed upon a *habeas corpus* in B. R., so long as the

judgment there remained in force; wherefore, if the petitioner can either by the laws of Savoy or of Rome repeal that sentence at Turin, let him do so; but till that be done it is not possible for the Arches or the delegates to give any other sentence than what they have given."

In *Gold* v. *Canham*, 2 Swanston, 325, the facts shown were that the plaintiff had been a member of a partnership at Leghorn with the defendant and one Lee, and upon its dissolution had received a certain sum of money and an agreement from his copartners to indemnify him against claims against the partnership, and afterwards went into a new partnership with others, and was forced by sentence of the court at Florence to pay custom to the Great Duke for goods imported during the time of the former copartnership. The defendant alleged that there were no customs due to the Duke after seven years, and that there had been a reference of all differences to arbitrators, before whom the matter of the customs was not insisted upon.

But the court said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here."

In *Dupleix* v. *De Roven*, 2 Vernon, 543 (1705), the plaintiff filed a bill for discovery of assets and satisfaction of a judgment debt obtained in France against the defendant, an administrator. The court said: "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit* or an *insumul computasset*, so that the statute of limitations is pleadable in this case."

In *Burrows* v. *Jemino* (cited as *Jamereau*, *Jamineau*, and *Jemineau*) (1726), 2 Stra. 733; *S. C.* 2 Eq. Cas. Ab. 476, a suit had been brought at Leghorn against the plaintiff as the acceptor of a bill of exchange drawn there, and the judges of the court being of the opinion that the acceptance was not valid by the law of the country, so adjudged. Both parties afterwards happening to come to England, the plaintiff in the

suit at Leghorn brought his action here, but the defendant in that suit brought his bill in chancery for an injunction, and Lord Chancellor King held that "the court at Leghorn having a general and proper jurisdiction of the cause, their judgment was binding and conclusive with the court here," and granted a perpetual injunction.

In *Boucher* v. *Lawson* (1734), Cas. temp., Hardwicke, 85, the plaintiff brought an action on the case against the defendant as owner of a ship for his failure to deliver Portuguese gold, which defendant undertook to carry from Portugal to London, and there deliver to plaintiff. On the trial a special verdict was found, which determined among other things that it was unlawful according to the laws of Portugal to export gold. The counsel for defendant contended that if the courts of England held the particular determination of courts abroad to be conclusive in England, they should have more regard for the general laws of the foreign country declaring anything an unlawful trade, and not give any countenance to actions brought upon illicit commerce, citing the case of *Burrows* v. *Jamineau.* Lord Hardwicke on this point said: "The reason gone upon by King, Lord Chancellor, in the case of *Burrows* v. *Jamineau*, was certainly right, and where any court, whether foreign or domestic, that has the proper jurisdiction of the cases makes a determination, it is conclusive to all other courts." He then criticised the decision of the chancellor, on the ground that the party could have set up the defence in the suit at law, and that on that ground the bill should have been dismissed. He then refers to the case of Cottington's appeal in the time of Charles II. as supporting the same conclusion.

In *Otway* v. *Ramsay*, 2 Stra. 1090 (1737), in the King's Bench, it was held that debt does not lie in Ireland on an English judgment. The case is more fully reported in a note to 4 B. & C. 414.

In *Gage* v. *Bulkeley*, 3 Atk. 215 (1744). This was a plea of a foreign sentence in a Commissary Court in France relating to the same matters, for which the bill was brought here. Lord Hardwicke said: "It must be overruled, for it is the most proper case to stand for an answer with liberty to ex-

cept that I ever met with; and the more so as it is the sentence in a commissary court only, which is of a political nature, in order to determine disputes which might arise in relation to French actions."

This case is referred to by Lord Chancellor Camden in *Bayley* v. *Edwards*, 3 Swanston, 703 (1792), as "going a great way to show the true effect of foreign sentences in this country." Yet it seems only to rule that a defence of a foreign judgment should be taken by answer and not by plea, and it is evident that Lord Hardwicke doubted whether the court was a competent court.

In *Roach* v. *Garvan*, 1 Ves. Sen. 157 (1748), before Lord Hardwicke, an infant, a ward of the court, having in France intermarried with the son of her guardian at that time, the husband petitioned for a decree for cohabitation with his wife, who was kept from him by her mother, who had lately been appointed her guardian. Lord Hardwicke: "Where a marriage is in fact had, or in a contract *in præsenti* or in a suit for restitution of conjugal rights, a sentence in the Ecclesiastical Court, (unless there be collusion which will overturn the whole,) will be conclusive and bind all; but not if given in a collateral suit, as for a criminal action, for it will only bind the rights of the marriage in the three cases above. This was in a criminal court in the Châtelet in Paris, and it is strange if they have no other jurisdiction in France for marriage than a criminal court."

Lord Hardwicke seems to have doubted in this case also whether the court could be considered as a competent court whose judgment would be conclusive and held binding in England.

Up to this time in the reported decisions, while the courts refused to give to the record of a foreign judgment the full effect of a record of the superior courts of Westminster, there seems to have been no diversity in the opinions of the judges that a foreign judgment of a competent court having jurisdiction over the party and the subject matter was to be held binding and conclusive.

The case of *Sinclair* v. *Fraser* (1771), reported in 1 Doug.

5, note, appears to be the earliest case containing a dictum to the effect that a foreign judgment is only *prima facie* evidence of a debt. The actual question there involved was not to what extent a foreign judgment could be reëxamined on the merits, but whether it could be made the basis of an action without proof of the original consideration. It is entirely consistent with the decision, and with anything said by the judges, that the court might have held that where the parties to a foreign suit had both been within the jurisdiction, and the court had jurisdiction of the subject matter, and the cause was tried on its merits, it would have been held binding upon the parties although the defendant offered to try it over again.

This idea is suggested by Lord Campbell, in his opinion in the case of *Bank of Australasia* v. *Nias*, 16 Q. B. 717 (1851); and the suggestion is supported by the very words of the declaration of the House of Lords, above cited, that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly or unduly obtained.

The case of *Sinclair* v. *Fraser* was followed in 1775 by the case of *Crawford* v. *Witten*, Lofft, 154; in which it was determined that although the original cause is not considered as merged in a foreign judgment the foreign judgment could be sued on alone in *assumpsit*, as implying a promise.

The Duchess of Kingston's case, 11 Hargrave's St. Trials, 198, hardly touches upon this controversy.

Walker v. *Witter* (1778), 1 Doug. 1, was debt on a judgment of the Supreme Court of Jamaica. The pleas were *nil debet* and *nul tiel record*. The real question in the case was whether *debt* would lie on a foreign judgment. On the plea of *nil debet* the plaintiff took issue and a verdict was found for him. On the plea of *nul tiel record*, the plaintiff replied that there was such a record and made profert of what purported to be a record of the court in Jamaica. The decision, in which all the judges of the King's Bench concurred, was that debt would lie upon a foreign judgment because it was for a sum certain. The *dicta* of Lord Mansfield in this case seem to have been substantially the basis for the notion that

afterwards prevailed, that a foreign judgment was only *prima facie* evidence of a debt, even to the extent of authorizing in all cases a retrial of the merits.

The case of *Herbert* v. *Cook* (1782), Willes, 36, note, also turns upon a question of pleading. It contains a dictum by Lord Mansfield that the judgment of a court not of record in "England, 'like a foreign judgment,' is not conclusive evidence of the debt." But neither in the case of *Sinclair* v. *Fraser*, or *Walker* v. *Witter*, or *Herbert* v. *Cook* was the question involved of what effect is to be given to a judgment of a foreign court or of an inferior court of England, having jurisdiction of the cause and of the parties.

In *Galbraith* v. *Neville* (1789), 1 Doug. 6, note, Lord Kenyon reviews and dissents from the conclusions of Lord Mansfield as reported in the case of *Walker* v. *Witter*. He says: "I cannot help entertaining serious doubts concerning the doctrine laid down in *Walker* v. *Witter* that foreign judgments are not binding upon the parties here."

It is true that Mr. Justice Buller dissents from these views and insists that the result of the authorities is, that a foreign judgment has no more credit than is given to every species of written agreement: that is, that it should be considered as good till it is impeached.

In a note on this case, 5 East, 475, it is said that the case stood over from the Easter Term, 29th, to Mich. Term, 31st George III., for the court to advise upon it, when Lord Kenyon said that the court had considered the matter and were of opinion that no new trial ought to be granted. He added that without entering into the question how far a foreign judgment was impeachable it was at all events clear that it was *prima facie* evidence of the debt, and they were of opinion that no evidence had been adduced to impeach this, and therefore discharged the rule.

In *Messin* v. *Massareene* (1791), 4 T. R. 493, the plaintiff having obtained a judgment against the defendant in the Châtelet of Paris, brought an action of *assumpsit* in England on that judgment, in which the defendant suffered judgment to go by default. A motion to refer it to the Master to com-

pute the amount due and for final judgment without executing a writ of enquiry was denied.

In *Bayley* v. *Edwards* (1793), 3 Swanston, 703, before the Privy Council, the point being whether a suit pending in Jamaica could be pleaded in abatement of a suit in England, Lord Camden said: "As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under the separate jurisdiction, I think the parties ought to be amenable to every court possible, . . . and we must then endeavor to correct the mischiefs of these double suits as much as we can, by allowing in each country the benefit of all the other proceedings in the other part of the King's dominions."

In *Phillips* v. *Hunter* (1795), 2 H. Bl. 402, the question before the court being to whom money collected under a judgment recovered in Pennsylvania belonged, and not at all involving the question of the effect of the judgment as binding upon the parties or otherwise, Chief Justice Eyre said: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory, to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise. We examine it as we do all other considerations or promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law."

In *Buchanan* v. *Rucker* (1807), 1 Campbell, 63, which was *assumpsit* on a judgment of a court in the island of Tobago, where the objection was that the judgment was obtained by default, the defendant never having been resident in the island, and the only service of the declaration made by the nailing a copy of the same on the court-house door in accord-

ance with the alleged law of the island, Lord Ellenborough, in answer to the suggestion that the presumption was in favor of a foreign judgment as well as of a judgment obtained in one of the courts of England, said: "That may be so if the judgment appears on the face of it consistent with reason and justice; but it is contrary to the first principles of reason and justice that either in civil or criminal proceedings a man should be condemned before he is heard."

In the same case on a motion for a new trial, 9 East, 192, an affidavit having been produced showing a law of the colony that in case of a defendant absent from the island, the declaration could be so served, Lord Ellenborough said: "There is no foundation for this motion, even upon the terms of the law disclosed in the affidavit."

In *Hall* v. *Odber* (1809), 11 East, 118, the plaintiff sued upon a balance due upon a foreign judgment and also upon the original cause of action in *assumpsit*. The judgment was the judgment of the province of Lower Canada. The court in directing the judgment ordered a stay of proceedings by execution for six months, in order to enable the defendant to prove a counterclaim, if he had any. The six months had elapsed before the commencement of this action, and no proceedings had been taken by the defendant for the proof of his counterclaim in the foreign court. The court held that both counts were good, the one upon the judgment and the other upon the balance of accounts.

That the general expressions used in this case as to the judgment being only evidence of the debt were not intended by the court as determining how far a foreign judgment upon the merits would conclude a party appears plainly from the case of *Tarleton* v. *Tarleton* (1815), 4 M. & S. 20, before the same court. The case was covenant on a bond by the defendant and one D. B., conditioned to indemnify the plaintiff against the debt of the copartnership which had existed between the three. The breach alleged was that certain creditors of the firm had recovered judgment against the defendants in the island of Grenada for their claim, which plaintiff had been obliged to satisfy on execution in Grenada. On the trial the defendant

proposed to show that the proceedings in the court of Grenada were erroneous, inasmuch as the account was incorrectly stated. His Lordship, however, ruled that the defendant could not go into that question, inasmuch as the foreign court being a court of competent jurisdiction, what was done in it must, for the purpose of this action, be taken to be rightly done and the plaintiff had a verdict.

A motion for a new trial, made on the ground that the proceedings in the foreign court were not conclusive evidence, that it was *prima facie* only, and the defendant might impeach the justice of it, was denied.

In *Cavan* v. *Stewart* (1816), 1 Starkie, 525, the judgment of a Jamaica court, whereby the balance due from the defendant to the plaintiffs had been attached and sequestered at the suit of a creditor, was offered in evidence as a bar. The papers recited that the plaintiffs were absentees. It was held that as there was a default in the case, and no proof of notice, the judgment was not a bar. Lord Ellenborough: "It is perfectly clear on every principle of justice that you must either prove that the party was summoned or at least that he was once on the island."

And in the case of *Power* v. *Whitmore* (1815), 4 M. & S. 141, Lord Ellenborough says: "By the comity which is paid by us to the judgment of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgments so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate."

In *Kennedy* v. *Earl of Cassilis* (1818), 2 Swanston, 313, Lord Eldon says: "The court is bound to presume that foreign tribunals will proceed regularly and administer the justice of the case."

Arnot v. *Redfern* (1825), 2 C. & P. 88, was a suit on a Scotch judgment which gave interest from 1811 to date on a contract governed by English law, by which interest was not allowed. Best, C. J. Judgment given excluding this interest. On appeal, affirmed.

Harris v. *Saunders* (1825), 4 B. & C. 411: Held that an

Irish judgment since the Union is not a record in England, and remedy is by *assumpsit*. So held on authority of *Otway* v. *Ramsay*, *supra*.

Douglas v. *Forrest* (1828), 4 Bing. 686. Best, C. J., discusses the necessity for service of summons upon the party objecting to a foreign judgment in order to bind him, and gives effect to a Scotch judgment, though without actual notice, in a proceeding similar to our foreign attachment, where the debtor was a native-born Scotchman, and left property in Scotland. He approves the views expressed by Lord Ellenborough in *Buchanan* v. *Rucker* and *Cavan* v. *Stewart*.

Guinness v. *Carroll* (1830), 1 B. & Ad. 459, touches on the effect of a foreign judgment (Irish), but decides nothing on the subject.

Martin v. *Nicolls* (1830), 3 Sim. 458, before Vice-Chancellor Shadwell, appears to be the first case in which the question of the binding effect of a foreign judgment not impeachable for want of proper jurisdiction over the party, or for fraud in obtaining the same, was passed upon. The bill was filed, representing in effect that an action had been brought by the defendant in Antigua, and that a judgment had been recovered, and that afterwards an action was commenced in the Common Pleas in England upon that judgment against the plaintiff in this suit in equity, and the object of the bill was to obtain a discovery and a commission to examine witnesses in Antigua. The Vice-Chancellor said: "If I were to allow this bill to stand, I should be in effect saying that the judgment obtained in Antigua may be overruled by the Common Pleas. I must, therefore, allow this demurrer."

Novelli v. *Rossi* (1831), 2 B. & Ad. 757, has been supposed to be an authority that a foreign judgment could be impeached for a clear mistake in applying the law of England, where the case was or should have been governed by the English law. Since the case of *Godard* v. *Gray*, hereafter referred to, it cannot be considered authority for that position.

Becquet v. *McCarthy* (1831), 2 B. & Ad. 951, was an action in the King's Bench, on a judgment obtained by the

plaintiff against the defendant's testator in the island of Mauritius. The trial was before Lord Tenterden, C. J. The record showed that the action was between the plaintiff and one McCarthy, defendant's testator, at present residing at the Cape of Good Hope, cited at the domicil of the substitute of the King's Attorney General in the tribunals and courts of this colony, defendant, and the Paymaster General of Her Majesty's forces also defendant.

It also appeared by the minute of the court that the defendants in the suit had been cited to answer touching a fire which was alleged to have broken out in the paymaster's office and consumed a house and other property of the plaintiff, and damages were claimed in accordance with the law of the colony. Defendant's testator having made default, a second citation issued and the defendant did not appear. The tribunal then went on and determined the case in favor of the plaintiff. It was objected that the judgment was invalid by the law of the colony itself, there being no allegation of negligence. Also that it appeared by the judgment that McCarthy was absent from the colony at the time of the proceedings against him, and it was claimed that it was contrary to justice that a man should be condemned unheard.

Lord Tenterden, C. J., said, that the island belonged to England, but the French law prevailed there. To the point that negligence was essential by that law, he said: "The law of France being the law of the colony, the French court was much more competent to decide questions arising upon that law than we can be. We ought to see very plainly that that court has decided against the French law before we say that their judgment is erroneous upon such ground. . . . Another objection, and not an unimportant one, was that the testator, when the proceedings were instituted against him, was absent from the island, and it was urged that it was contrary to the principles of natural justice that any one should be condemned unheard and in his absence. Proof, however, was given that by law of the colony, in the case of a person formerly resident in the island absenting himself and not leaving any attorney upon whom process in the suit might be

served, the procurator general or his deputy was bound to take care of the interests of such absent party. . . . It must be presumed that he would do whatever was necessary on the discharge of that public duty; and we cannot take upon ourselves to say that the law is so contrary to natural justice as to render the judgment void."

In *Alivon* v. *Furnival* (1834), 1 C. M. & R. 277, 293; *S. C.* 4 Tyrwh. 751, the Court of Exchequer enforced the sentence of a French tribunal of commerce in favor of syndics of a bankrupt against a party who had owed the bankrupt a certain sum in an action of debt. Parke, B.: "We must assume the judgment of the court to be according to the French law, at least until the contrary was distinctly proved, according to the principle laid down in *Becquet* v. *McCarthy*, 2 B. & Ad.;" and as to the rule of damages allowed, he said: "And it is impossible for us to say that this principle of adjusting the damages is wrong as being contrary to natural justice, and there is no evidence that it is not conformable to the law of France."

In *Houlditch* v. *Donegal* (1834), 8 Bligh, N. S. 301; *S. C.* 2 Cl. & Fin. 470, *sub nom. Houlditch* v. *Donegall* before the House of Lords, upon an appeal from the Chancellor in Ireland upon a bill filed in the Irish court to enforce against the defendant decrees of the English chancery court, the defendant answered that the decrees were irregular and erroneous, and ought not to be taken as binding on him. The bill was dismissed, not on the merits, but on the ground that the bill would not lie in the court of chancery in Ireland for the purpose of carrying out and enforcing the decrees of the chancery court in England. While this case may be taken to represent the individual opinion at that time of Lord Brougham, it does not represent the opinion of the House of Lords, and the manner in which he disposed of the question seems to indicate that he had some misgivings that after all he might be wrong, or at least that the subject required a more careful examination than he gave it at that time.

Don v. *Lippmann* (1837), 5 Cl. & Fin. 1, was an appeal from the Scotch court. Lord Brougham's opinion is evi-

dence that he still entertained the same opinion expressed by him in *Houlditch* v. *Donegal*, that a foreign judgment is only *prima facie* evidence of a debt. But the case before the court was clearly one in which, upon admitted principles with regard to the necessity of the service of process upon a party or other proper notice of the suit, the judgment was a nullity outside of the country where it was rendered.

In *Price* v. *Dewhurst* (1837), 8 Sim. 279, Sir L. Shadwell, Vice-Chancellor, held that the decision of what was called the Executor's Court of Dealing in the island of St. Croix, consisting of the executors themselves, as to the disposition of personal property, would not be recognized as valid, as against an adverse party who was entitled to property by the law of England where the last will of the testator had been admitted to probate. This was affirmed (1838), 8 Sim. 617.

In *Ferguson* v. *Mahon* (1839), 11 Ad. & El. 179, in an action on an Irish judgment, the plea was, that the defendant was not arrested or served with process, nor had notice of process, nor appeared. The replication was that the defendant had had notice of certain process, to wit: a writ of summons issuing out of the court, etc. Demurrer to replication. The demurrer was overruled. On the plea judgment was given the defendant.

In *Smith* v. *Nicolls* (1839), 5 Bing. N. C. 208; *S. C.* 7 Scott, 147, it was held that a foreign judgment was void where defendant was not summoned, was neither present in the country, nor had an agent there. The judges review the cases and state it as a matter of some doubt whether a foreign judgment is conclusive or reëxaminable on the merits.

Russell v. *Smyth* (1842), 9 M. and W. 810, was an action to recover on a judgment for costs rendered in a Scotch court. Abinger, C. B.: "Foreign judgments are enforced in these courts, because the parties against whom they are pronounced are bound in duty to satisfy them."

Williams v. *Jones* (1843), 13 M. & W. 628. The action was on a judgment of a county court. Parke, B.: "The principle on which this action is founded is that where a court of competent jurisdiction has adjudicated a certain sum to be due

from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies whether they be courts of record or not."

These two cases, and especially the views taken by Baron Parke in them, are referred to in the later English cases as establishing the principle on which foreign judgments are held to be conclusive on the merits.

General Steam Navigation Co. v. *Guillou* (1843), 11 M. & W. 877. Plaintiff sued in case for injuries to plaintiff's ship by a ship of the defendant, under charge of the defendant's servants. It was pleaded that the company to which the defendant's ship belonged, and of which defendant was a member, brought suit in a court of France against the plaintiffs for negligence of their officers and crew, whereby she was sunk; that the plaintiffs appeared and defended themselves against the claim of the company, and insisted that the collision proceeded from the negligence of the defendant's servants, and that the court adjudged that the plaintiff's ship did, by the negligence of the plaintiff's officers and crew, run on board of and sink the ship of the company, and condemned the plaintiff in damages. The plea was held bad in form, so that it was unnecessary to determine whether it was bad in substance. Parke, B.: "But it is not to be understood that we feel much doubt on that question. They (the pleas) do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance or domicil, or temporary presence, by a decision of a French court; and they did not elect the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers who put forward the negligence of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey."

In *Henderson* v. *Henderson* (1843), 3 Hare, 100, the next of kin of an intestate filed their bill in equity in the Supreme

Court of Newfoundland against the plaintiff, and obtained a decree for a certain sum due them and afterwards brought their actions in England against him on the decree. The plaintiff thereupon brought this bill in England against the next of kin for an accounting concerning not only the same matters that had been passed upon in the colonial court, but other matters which might have been litigated in that suit, and alleged irregularities and errors in the proceedings in that court, and asked that the next of kin be restrained by injunction from proceeding with their action. The defendants demurred to the bill for want of equity. Vice-Chancellor Wigram held that the suit in Newfoundland was between the same parties as those in the present suit; that most of the matters concerning which an accounting was prayed for had been passed upon in that suit, and as to the remainder they were such as might have been litigated in it, and were therefore *res judicata* also.

Henderson v. *Henderson* (1843), 6 Q. B. 288, was an appeal by the plaintiff in the preceding suit from a judgment in the suit brought by the next of kin to enforce the Newfoundland decree. One of the points raised on the appeal was whether a foreign decree in equity could be enforced, the objection being that a decree for payment of money by a court of equity is not a declaration that the plaintiff has any legal right to the money, but only that upon certain views peculiar to the court the payment ought to be made.

The Court, per Lord Denman, C. J., after examining the authorities, was of the opinion that there was no doubt but that such a decree might be enforced where the chancery suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that an individual must pay, but that there might be instances where such a decree would be enforceable nowhere but in courts of equity, because they involve collateral and provisional matters to which a court of law could give no effect.

Another point made on the appeal was that the defendants in the suit in chancery in Newfoundland had not had justice done them. Lord Denman, C. J.: "This is never to be presumed; but the contrary principle holds unless we see in the

clearest light that the foreign law or at least some part of the proceedings of the foreign court are repugnant to natural justice; and this has been often made the subject of inquiry in our courts. But it steers clear of an inquiry into the merits of the case upon the facts found; for whatever constituted a defence in that court ought to have been pleaded there," etc.

In *Vallee* v. *Dumergue* (1849), 4 Exch. 290, plaintiff obtained a judgment in France against the defendant. The defendant claimed he had never resided or been in France nor subject to its laws, nor served with any process or notice whatever, nor did he have any notice or knowledge of any proceeding, nor did he appear. He claimed that the circumstances under which the judgment was obtained were contrary to natural justice. But it appeared that the defendant was a shareholder in a certain company in France; that by the law of France it was necessary for the defendant to elect a domicil in France if he resided abroad, at which the directors of the company might notify him of all proceedings relative to the company or himself as a shareholder; that by the law of France all legal proceedings affecting any party having his real domicil out of the kingdom, left for him at such elected domicil, were as valid as if left at his real domicil; that the defendant made election of domicil at Paris, and gave notice thereof to the plaintiff; and the plaintiff caused the summons to be left at the elected domicil in Paris. The court, by Alderson, B., held that whether the defendant had had actual notice of the proceedings was unimportant, as he had waived that by becoming a shareholder and thereby agreeing to accept a particular form of notification less than actual notice.

Notwithstanding the seeming approval by Chief Justice Wilde in *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661, of Lord Brougham's views as expressed in *Houlditch* v. *Donegal*, *supra*, the case is referred to in subsequent cases as sustaining the rule of the conclusiveness of foreign judgments upon the merits, and indeed, it was held that the declaration which set forth the colonial judgment as establishing his liability was good.

In the *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717,

which was *assumpsit* on the same judgment of the court of New South Wales, it was held that the judgment was binding on a member of the company sued in England. The question of the conclusiveness of the foreign judgment was fully argued.

In *Reimers* v. *Druce* (1856), 23 Beavan, 145, a bill by a foreign creditor to enforce a judgment obtained in the kingdom of Hanover was dismissed on the ground of laches, but the Master of the Rolls, Sir John Romilly, discussed at some length the extent to which a foreign judgment is impeachable when sought to be enforced in England, and after a review of the principal cases, and especially of the cases of the *Bank of Australasia* v. *Nias* and *Ricardo* v. *Garcias*, said it could be impeached for error apparent on the face of it, sufficient to show that such judgment ought not to have been pronounced, but that this error cannot be shown by extrinsic evidence.

It was held in *Sheehy* v. *Professional Life Ass. Co.* (1857), 3 C. B. (N. S.) 597, affirming 2 C. B. (N. S.) 211, that a foreign judgment could be enforced notwithstanding an irregularity in the service of process, where the defendant voluntarily appeared during the argument. Erle, J., said: "I have always understood that the only ground upon which our courts can refuse to give effect to a foreign judgment is that the whole foundation of the proceeding in the foreign court fails."

In *De Cosse Brissac* v. *Rathbone* (1861), 6 H. & N. 301, the suit was on a French judgment. The plea that it was erroneous on the merits. This plea was held bad. Wilde, B.: "*Ricardo* v. *Garcias* is an authority that the judgment of a foreign court of competent jurisdiction cannot be impeached upon the merits." Martin, B.: "We are all of opinion that this question is so concluded by the authorities that it is impossible for us to decide contrary to them, and the case must go to the Court of Errors. I may observe that the question does not come before me for the first time. For many years I have had occasion to consider it." In this case also it was ruled that a plea to the effect that a defendant appeared in the French action and defended the same for the purpose of protecting his property in France, which was subject to sequestration in case of a judgment, was bad.

Scott v. *Pilkington* (1862), 2 B. & S. 11. Suit on a New York judgment. Held, that the fact that an appeal is pending is not a bar, but may be a ground for delay; and that a plea that the court mistook the law of the forum was bad.

Simpson v. *Fogo* (1862), 1 Johns. & Hem. 18, on demurrer, and 1 Hem. & Mill. 195, on motion for a decree. In chancery. A ship being subject to a valid mortgage in England, went to Louisiana and was there attached by a creditor of the mortgagor. The mortgagee intervened and proved his rights, which were superior by the law of England, but they were disregarded, and the ship was sold and the proceeds paid to the attaching creditor. The purchaser having brought the ship to England, it was decided that the mortgagee might seize and sell her, and that the Louisiana decree was not binding, because founded on a perverse disregard of the English law, though a case properly subject to that law by the comity of nations.

In *Crawley* v. *Isaacs*, 16 Law Times, (N. S.) 529 (1867), it is said that the repugnancy to natural justice, spoken of in the cases, refers not to the decision on the merits of the case, but to matters of procedure.

The syllabus of *Godard* v. *Gray*, L. R. 6 Q. B. 139 (1870), gives a clear idea of the points decided.

"It is no bar to an action, on a judgment *in personam* of a foreign court having jurisdiction over the parties and cause, that the foreign tribunal has put a construction erroneous according to English law on an English contract.

"Declaration on a judgment of a French court having jurisdiction in the matter. Plea setting out the judgment, from which it appeared that the suit was for the breach by the shipowner of a charter party made in England, in which was a clause: 'Penalty for the non-performance of this agreement, estimated amount of freight'; and that the court had treated this clause (contrary to the English law) as fixing the amount of damages recoverable, and had given judgment accordingly for the amount of freight. The proceedings showed that both parties had appeared and been heard before the judgment was pronounced, but no objection was taken by the defendant to

the mode of assessing the damages. Held, by Blackburn and Mellor, JJ., that the defendant could not set up, as an excuse for not paying money awarded by a judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to the English law, which was really a question of fact; and that it made no difference that the mistake appeared on the face of the proceedings. By Hannen, J., that the French court could only be informed of foreign law by evidence, and the defendant, having neglected to bring the English law to the knowledge of the French court, could not impeach the judgment given against him on the ground of error as to that law." See also *Castrique* v. *Imrie*, L. R. 4 H. L. 414 (1870).

In *Rousillon* v. *Rousillon*, 14 Ch. D. 351 (1880), Fry, J., undertakes to state with precision the circumstances under which the courts of England will hold the judgment of the foreign tribunal conclusive, viz.: 1. Where the defendant is a subject of a foreign country in which the judgment has been obtained. 2. Where he was resident in the foreign country when the action began. 3. Where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued. 4. *Where he has voluntarily appeared.* 5. Where he has contracted to submit himself to the forum in which the judgment was obtained, and possibly, 6. Where the defendant has real estate within the foreign jurisdiction, in respect to which the cause of action arose whilst he was within that jurisdiction.

The Court of Queen's Bench, in *Schibsby* v. *Westenholtz*, L. R. 6 Q. B. 155 (1870), which follows and reinforces the decision in *Godard* v. *Gray*, also said: "Now, on this, we think some things are quite clear on principle. If the defendants had been at the time of the judgments subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been at the time when the suit was commenced resident in the country, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its

laws would have bound them. . . . Again, we think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding on him." Per Blackburn, J.

In *Messina* v. *Petrococchino* (1872), L. R. 4 P. C. 144, Sir Robert Phillimore says: "If the Greek Consular Tribunal was a competent court, having jurisdiction over the ship and cargo, then the sentence of that court was not open to examination by the court at Malta, but would be properly enforced by it, or in the clear language of Lord Ellenborough in the case of *Power* v. *Whitmore*, 4 M. & S. 150, 'By the comity which is paid by us to the judgments of other courts abroad of competent jurisdiction, we give a full and binding effect to such judgments, so far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate.'"

In *Trafford* v. *Blanc*, 36 Ch. D. 600, it is said: "The principle on which *Bank of Australasia* v. *Nias* was decided appears to be that the courts of this country do not sit to hear appeals from foreign tribunals, and that if the judgment of a foreign court is erroneous, the regular mode provided by every system of jurisprudence of procuring it to be examined and reversed ought to be followed. Neither do the courts of this country sit to rehear causes which have been tried abroad. Every system of jurisprudence provides a mode by which a judgment may be reviewed, and the cause reheard on the discovery of fresh evidence, and to the regular mode so provided recourse ought to be had, as in fact has been unsuccessfully done by the defendant in the present case."

The cases of *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295 (1882), and *Vadala* v. *Lawes*, 25 Q. B. D. 310 (1890), do not impair the authority of the above decisions. They apply to foreign judgments the principle of English law, that it is a defence that the plaintiff procured the former judgment by a fraud practised on the court in the trial, a defence which, by the decisive authority of this court, is not open to a domestic judgment here.

Argument for Defendants in Error.

Counsel also cited and commented on the following cases decided in British colonial courts on the same subject: *Bukshee* v. *Samunt* (1871), Appellate Civil, Sutherland's Weekly Reporter, 500; *Mammi* v. *Kalandan* (1874), Appellate, 8 Madras H. C. R. 14; *Pillai* v. *Saib* (1880), Appellate Civil, Indian Law Reports, 2 Madras Series, 337; *Shevákrám* v. *Kálidás* (1882), Appellate Civil, Indian Law Reports, 6 Bombay Series, 292; *Mudaliar* v. *Pallai* (1879), Appellate Civil, Indian Law Reports, 2 Madras Series, 400; *Parry* v. *Pillai* (1880), Appellate Civil, Indian Law Reports, 2 Madras Series, 407; *Maubourquet* v. *Wyse* (1867), 1 Irish C. L. 471; *Fowler* v. *Vail* (1877), 27 U. Canada C. P. 417; *S. C.* 4 Canada App. 267; *Woodruff* v. *McLennan*, 14 Ontario App. 242; *Victorian &c. Photo. Litho. Co.* v. *Davis* (1890), 11 New South Wales, 257; *Star Kidney Pad Co.* v. *McCarthy* (1886), 26 New Brunswick, 107; *British Linen Co.* v. *McEwan* (1892), 8 Manitoba (Law), 99; *Corse* v. *Moon* (1890), 22 Nova Scotia (10 Russ. & Gel.), 191; *Denoon* v. *Northway* (1883), 5 Sup. Ct. Circular, Ceylon, 133; *Blaine* v. *Col. Mar. Ass. Co.* (1882), 1 Juta (Cape of Good Hope), 402; *Jones* v. *Reed* (1890), 16 Victoria, 372.

Counsel also cited, with comments, the following American cases: *Buttrick* v. *Allen*, 8 Mass. 273; *Rankin* v. *Goddard*, 54 Maine, 28; *S. C.* 55 Maine, 389; *Thurber* v. *Blackbourne*, 1 N. H. 242; *Konitzky* v. *Meyer*, 49 N. Y. 571; *Lazier* v. *Westcott*, 26 N. Y. 146; *Taylor* v. *Bryden*, 8 Johns. 173; *Hanley* v. *Donoghue*, 116 U. S. 1; *Christmas* v. *Russell*, 5 Wall. 290, 304; *McMullen* v. *Richie*, 41 Fed. Rep. 502; *De Brimont* v. *Penniman*, 10 Blatchford, 437; *Silver Lake Bank* v. *Harding*, 5 Ohio, 545; *Glass* v. *Blackwell*, 48 Arkansas, 50; *Fisher* v. *Fielding*, Connecticut, (1894); *Hopkins* v. *Lee*, 6 Wheat. 109; *Pennington* v. *Gibson*, 16 How. 65.

II. The fraud which will vitiate a judgment is fraud extrinsic to the matter tried in the cause, and fraud upon the party or upon the court whereby judgment was improperly procured to be entered; not a fraud committed in the matter tried or examinable in the action. *United States* v. *Throckmorton*, 98 U. S. 64; *Vance* v. *Burbank*, 101 U. S. 514; *Moffat* v. *United States*, 112 U. S. 24; *United States* v. *Minor*,

114 U. S. 233; *Marshall* v. *Holmes*, 141 U. S. 589; *Greene* v. *Greene*, 2 Gray, 361; *Ross* v. *Wood*, 70 N. Y. 8; *Ward* v. *Southfield*, 102 N. Y. 287; *Sanders* v. *Soutter*, 126 N. Y. 193; *Price* v. *Dewhurst*, 8 Sim. 279; *Ochsenbein* v. *Papelier*, L. R. 8 Ch. 695.

III. The point made by the plantiffs in error that France does not enforce judgments of foreign states against its own subjects is wholly immaterial.

While the efficacy of foreign judgments rests partly on principles of comity, or friendly dealing between nations at peace, or was formerly held to do so, the modern doctrine of their conclusiveness rests on the same general ground of public policy which makes domestic judgments equally conclusive, viz.: that the public interest is that there be an end of litigation — that one fair chance to prove his cause to be just, in a competent court, is all that the good of society or the general principles of justice demand or permit a litigant to enjoy.

Nor should the well-grounded and consistent principles of our law be marred by introducing under the cover of "comity" the principle of "retaliation." That principle has been repudiated as a ground of decision by this court where the law of this country is positive and established. *The Scotland*, 105 U. S. 24. See also *Baker* v. *Palmer*, 83 Illinois, 568; *Cross* v. *United States Trust Co.*, 131 N. Y. 330; *Dammert* v. *Osborn*, 140 N. Y. 30.

Mr. George A. Black, by leave, filed a brief on behalf of Bailey and others, to which *Mr. Choate* and *Mr. Shipman* filed suggestions in reply.

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

These two cases, the one at law and the other in equity, of *Hilton* v. *Guyot*, and the case of *Ritchie* v. *McMullen* which has been under advisement at the same time, present important questions relating to the force and effect of foreign judgments, not hitherto adjudicated by this court, which have been argued

with great learning and ability, and which require for their satisfactory determination a full consideration of the authorities. To avoid confusion in indicating the parties, it will be convenient first to take the case at law of *Hilton* v. *Guyot.*

International law, in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation — is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations. *Fremont* v. *United States*, 17 How. 542, 557; *The Scotia*, 14 Wall. 170, 188; *Respublica* v. *De Longchamps*, 1 Dall. 111, 116; *Moultrie* v. *Hunt*, 23 N. Y. 394, 396.

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." Although the phrase has been often criticised, no satisfactory substitute has been suggested.

"Comity," in the legal sense, is neither a matter of absolute

obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, treating of the question in what department of the government of any State, in the absence of any clear declaration of the sovereign will, resides the authority to determine how far the laws of a foreign State shall have effect, and observing that this differs in different States, according to the organization of the departments of the government of each, says: "In England and America, the courts of justice have hitherto exercised the same authority in the most ample manner: and the legislatures have in no instance (it is believed) in either country interfered to provide any positive regulations. The common law of both countries has been expanded to meet the exigencies of the times as they have arisen; and so far as the practice of nations, or the *jus gentium privatum*, has been supposed to furnish any general principle, it has been followed out." Story's Conflict of Laws, §§ 23, 24.

Afterwards, speaking of the difficulty of applying the positive rules laid down by the Continental jurists, he says that "there is indeed great truth" in these remarks of Mr. Justice Porter, speaking for the Supreme Court of Louisiana: "They have attempted to go too far, to define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten that they wrote on a question which touched the comity of nations, and that that comity is, and ever must be, uncertain; that it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule; that no nation will suffer the laws of another to interfere with her own to the injury of her citizens; that whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the char-

acter of her institutions; that in the conflict of laws it must often be a matter of doubt which should prevail; and that, whenever a doubt does exist, the court, which decides, will prefer the laws of its own country to that of the stranger." Story's Conflict of Laws, § 28; *Saul* v. *His Creditors*, (1827) 5 Martin (N. S.) 569, 596.

Again: Mr. Justice Story says: "It has been thought by some jurists that the term *comity* is not sufficiently expressive of the obligation of nations to give effect to foreign laws when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty. Now, assuming that such a moral duty does exist, it is clearly one of imperfect obligation, like that of beneficence, humanity and charity. Every nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded." And, after further discussion of the matter, he concludes: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another." Story's Conflict of Laws, §§ 33–38.

Chief Justice Taney, likewise, speaking for this court while Mr. Justice Story was a member of it, and largely adopting his words, said: "It is needless to enumerate here the instances in which, by the general practice of civilized countries, the laws of the one will, by the comity of nations, be recognized and executed in another, where the rights of individuals are concerned." "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations." "It is not the comity of the courts, but the comity

of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided." *Bank of Augusta* v. *Earle*, (1839) 13 Pet. 519, 589; Story's Conflict of Laws, § 38.

Mr. Wheaton says: "All the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State." "The express consent of a State, to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists. There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States — *ex comitate, ob reciprocam utilitatem.*" Wheaton's International Law, (8th ed.) §§ 78, 79. "No sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable. The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries." § 147.

Chancellor Kent says: "The effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty." 2 Kent Com. (6th ed.) 120.

In order to appreciate the weight of the various authorities cited at the bar, it is important to distinguish different kinds of judgments. Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered

by a court having jurisdiction of the cause, and upon regular proceedings and due notice. In alluding to different kinds of judgments, therefore, such jurisdiction, proceedings and notice will be assumed. It will also be assumed that they are untainted by fraud, the effect of which will be considered later.

A judgment *in rem*, adjudicating the title to a ship or other movable property within the custody of the court, is treated as valid everywhere. As said by Chief Justice Marshall: "The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no coördinate tribunal is capable of making the inquiry." *Williams* v. *Armroyd*, 7 Cranch, 423, 432. The most common illustrations of this are decrees of courts of admiralty and prize, which proceed upon principles of international law. *Croudson* v. *Leonard*, 4 Cranch, 434; *Williams* v. *Armroyd*, above cited; *Ludlow* v. *Dale*, 1 Johns. Cas. 16. But the same rule applies to judgments *in rem* under municipal law. *Hudson* v. *Guestier*, 4 Cranch, 293; *Ennis* v. *Smith*, 14 How. 400, 430; *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291; *Scott* v. *McNeal*, 154 U. S. 34, 46; *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *Monroe* v. *Douglas*, 4 Sandf. Ch. 126.

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. *Cottington's case*, 2 Swanston, 326; *Roach* v. *Garvan*, 1 Ves. Sen. 157; *Harvey* v. *Farnie*, 8 App. Cas. 43; *Cheely* v. *Clayton*, 110 U. S. 701. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1688, in *Cottington's case*, above cited, said: "It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law,

and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences."

Other judgments, not strictly *in rem*, under which a person has been compelled to pay money, are so far conclusive that the justice of the payment cannot be impeached in another country, so as to compel him to pay it again. For instance, a judgment in foreign attachment is conclusive, as between the parties, of the right to the property or money attached. Story on Conflict of Laws, (2d ed.) § 592 *a*. And if, on the dissolution of a partnership, one partner promises to indemnify the other against the debts of the partnership, a judgment for such a debt, under which the latter has been compelled to pay it, is conclusive evidence of the debt in a suit by him to recover the amount upon the promise of indemnity. It was of such a judgment, and in such a suit, that Lord Nottingham said: "Let the plaintiff receive back so much of the money brought into court as may be adequate to the sum paid on the sentence for custom, the justice whereof is not examinable here." *Gold* v. *Canham*, (1689) 2 Swanston, 325; *S. C.* 1 Cas. in Ch. 311. See also *Tarleton* v. *Tarleton*, 4 M. & S. 20; *Konitzky* v. *Meyer*, 49 N. Y. 571.

Other foreign judgments which have been held conclusive of the matter adjudged were judgments discharging obligations contracted in the foreign country between citizens or residents thereof. Story's Conflict of Laws, §§ 330–341; *May* v. *Breed*, 7 Cush. 15. Such was the case, cited at the bar, of *Burroughs* or *Burrows* v. *Jamineau* or *Jemino*, Mosely, 1; *S. C.* 2 Stra. 733; 2 Eq. Cas. Ab. 525, pl. 7; 12 Vin. Ab. 87, pl. 9; Sel. Cas. in Ch. 69; 1 Dickens, 48.

In that case, bills of exchange, drawn in London, were negotiated, indorsed and accepted at Leghorn in Italy, by the law of which an acceptance became void if the drawer failed without leaving effects in the acceptor's hands. The acceptor, accordingly, having received advices that the drawer had failed

before the acceptances, brought a suit at Leghorn against the last indorsees, to be discharged of his acceptances, paid the money into court and obtained a sentence there, by which the acceptances were vacated as against those indorsees and all the indorsers and negotiators of the bills, and the money deposited was returned to him. Being afterwards sued at law in England by subsequent holders of the bills, he applied to the Court of Chancery and obtained a perpetual injunction. Lord Chancellor King, as reported by Strange, "was clearly of opinion that this cause was to be determined according to the local laws of the place where the bill was negotiated, and the plaintiff's acceptance of the bill having been vacated and declared void by a court of competent jurisdiction, he thought that sentence was conclusive and bound the Court of Chancery here;" as reported in Viner, that "the court at Leghorn had jurisdiction of the thing, and of the persons;" and, as reported by Mosely, that, though "the last indorsees had the sole property of the bills, and were therefore made the only parties to the suit at Leghorn, yet the sentence made the acceptance void against the now defendants and all others." It is doubtful, at the least, whether such a sentence was entitled to the effect given to it by Lord Chancellor King. See *Novelli* v. *Rossi*, 2 B. & Ad. 757; *Castrique* v. *Imrie*, L. R. 4 H. L. 414, 435; 2 Smith's Lead. Cas. (2d ed.) 450.

The remark of Lord Hardwicke, *arguendo*, as Chief Justice, in *Boucher* v. *Lawson*, (1734) that "the reason gone upon by Lord Chancellor King, in the case of *Burroughs* v. *Jamineau*, was certainly right, that where any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts," evidently had reference, as the context shows, to judgments of a court having jurisdiction of the thing; and did not touch the effect of an executory judgment for a debt. Cas. temp. Hardw. 85, 89; *S. C.* Cunningham, 144, 148.

In former times, foreign decrees in admiralty *in personam* were executed, even by imprisonment of the defendant, by the Court of Admiralty in England, upon letters rogatory from the foreign sovereign, without a new suit. Its right to

do so was recognized by the Court of King's Bench in 1607 in a case of *habeas corpus*, cited by the plaintiffs, and reported as follows: "If a man of Frizeland sues an Englishman in Frizeland before the Governor there, and there recovers against him a certain sum; upon which the Englishman, not having sufficient to satisfy it, comes into England, upon which the Governor sends his letters missive into England, *omnes magistratus infra regnum Angliæ rogans*, to make execution of the said judgment. The Judge of the Admiralty may execute this judgment by imprisonment of the party, and he shall not be delivered by the common law; for this is by the law of nations, that the justice of one nation should be aiding to the justice of another nation, and for one to execute the judgment of the other; and the law of England takes notice of this law, and the Judge of the Admiralty is the proper magistrate for this purpose; for he only hath the execution of the civil law within the realm. Pasch. 5 Jac. B. R., *Weir's case*, resolved upon an *habeas corpus*, and remanded." 1 Rol. Ab. 530, pl. 12; 6 Vin. Ab. 512, pl. 12. But the only question there raised or decided was of the power of the English Court of Admiralty, and not of the conclusiveness of the foreign sentence; and in later times the mode of enforcing a foreign decree in admiralty is by a new libel. See *The City of Mecca*, 5 P. D. 28, and 6 P. D. 106.

The extraterritorial effect of judgments *in personam*, at law or in equity, may differ, according to the parties to the cause. A judgment of that kind between two citizens or residents of the country, and thereby subject to the jurisdiction, in which it is rendered, may be held conclusive as between them everywhere. So, if a foreigner invokes the jurisdiction by bringing an action against a citizen, both may be held bound by a judgment in favor of either. And if a citizen sues a foreigner, and judgment is rendered in favor of the latter, both may be held equally bound. *Ricardo* v. *Garcias*, 12 Cl. & Fin. 368; *The Griefswald*, Swabey, 430, 435; *Barber* v. *Lamb*, 8 C. B. (N. S.) 95; *Lea* v. *Deakin*, 11 Bissell, 23.

The effect to which a judgment, purely executory, rendered

in favor of a citizen or resident of the country, in a suit there brought by him against a foreigner, may be entitled in an action thereon against the latter in his own country — as is the case now before us — presents a more difficult question, upon which there has been some diversity of opinion.

Early in the last century, it was settled in England that a foreign judgment on a debt was considered not, like a judgment of a domestic court of record, as a record or a specialty, a lawful consideration for which was conclusively presumed; but as a simple contract only.

This clearly appears in *Dupleix* v. *De Roven*, (1706) where one of two merchants in France recovered a judgment there against the other for a sum of money, which, not being paid, he brought a suit in chancery in England for a discovery of assets and satisfaction of the debt; and the defendant pleaded the statute of limitations of six years, and prevailed, Lord Keeper Cowper saying: "Although the plaintiff obtained a judgment or sentence in France, yet here the debt must be considered as a debt by simple contract. The plaintiff can maintain no action here, but an *indebitatus assumpsit* or an *insimul computassent;* so that the statute of limitations is pleadable in this case." 2 Vernon, 540.

Several opinions of Lord Hardwicke define and illustrate the effect of foreign judgments, when sued on or pleaded in England.

In *Otway* v. *Ramsay*, (1736) in the King's Bench, Lord Hardwicke treated it as worthy of consideration, "what credit is to be given by one court to the courts of another nation, proceeding both by the same rules of law," and said, "It is very desirable, in such case, that the judgment given in one kingdom should be considered as *res judicata* in another." But it was held that debt would not lie in Ireland upon an English judgment, because "Ireland must be considered as a provincial kingdom, part of the dominions of the Crown of England, but no part of the realm," and an action of debt on a judgment was local. 4 B. & C. 414–416, note; *S. C.* 14 Vin. Ab. 569, pl. 5; 2 Stra. 1090.

A decision of Lord Hardwicke as Chancellor was mentioned

in *Walker* v. *Witter*, (1778) 1 Doug. 1, 6, by Lord Mansfield, who said: "He recollected a case of a decree on the chancery side in one of the courts of great sessions in Wales, from which there was an appeal to the House of Lords, and the decree affirmed there; afterwards, a bill was filed in the Court of Chancery, on the foundation of the decree so affirmed, and Lord Hardwicke thought himself entitled to examine into the justice of the decision of the House of Lords, because the original decree was in the court of Wales, whose decisions were clearly liable to be examined." And in *Galbraith* v. *Neville*, (1789) 1 Doug. 6, note, Mr. Justice Buller said: "I have often heard Lord Mansfield repeat what was said by Lord Hardwicke in the case alluded to from Wales; and the ground of his lordship's opinion was this: when you call for my assistance to carry into effect the decision of some other tribunal, you shall not have it, if it appears that you are in the wrong; and it was on that account, that he said, he would examine into the propriety of the decree." The case before Lord Hardwicke, mentioned by Lord Mansfield, would appear (notwithstanding the doubt of its authenticity expressed by Lord Kenyon in *Galbraith* v. *Neville*) to have been a suit to recover a legacy, briefly reported, with references to Lord Hardwicke's note book, and to the original record, as *Morgan* v. *Morgan*, (1737–8) West. Ch. 181, 597; *S. C.* 1 Atk. 53, 408.

In *Gage* v. *Bulkeley*, (1744) briefly reported in 3 Atk. 215, cited by the plaintiffs, a plea of a foreign sentence in a commissary court in France was overruled by Lord Hardwicke, saying, "It is the most proper case to stand for an answer, with liberty to except, that I ever met with." His reasons are fully stated in two other reports of the case. According to one of them, at the opening of the argument he said: "Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominions it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority,

and have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act." "But though a foreign sentence cannot be used by way of plea in the courts here, yet it may be taken advantage of in the way of evidence." "You cannot in this kingdom maintain debt upon judgment obtained for money in a foreign jurisdiction; but you may an assumpsit in nature of debt upon a simple contract, and give the judgment in evidence, and have a verdict. So that the distinction seems to be, where such foreign sentence is used as a plea to bind the courts here as a judgment, and when it is made use of in evidence as binding the justice of the case only." And afterwards, in giving his decision, he said: "The first question is, Whether the subject-matter of the plea is good? The second is, Whether it is well pleaded? The first question depends upon this, Whether the sentence or judgment of a foreign court can be used by way of plea in a court of justice in England? And no authority, either at law or in equity, has been produced to shew that it may be pleaded: and therefore I shall be very cautious how I establish such a precedent." "It is true, such sentence is an evidence, which may affect the right of this demand, when the cause comes to be heard; but if it is no plea in a court of law to bind their jurisdiction, I do not see why it should be so here." Ridgeway temp. Hardw. 263, 264, 270, 273. A similar report of his judgment is in 2 Ves. Sen. (Belt's Supplt.) 409, 410.

In *Roach* v. *Garvan*, (1748) where an infant ward of the Court of Chancery had been married in France by her guardian to his son before a French court, and the son "petitioned for a decree for cohabitation with his wife, and to have some money out of the bank," Lord Hardwicke said, as to the validity of the marriage: "It has been argued to be valid from being established by the sentence of a court in France, having proper jurisdiction. And it is true, that if so, it is conclusive, whether in a foreign court or not, from the law of nations in such cases; otherwise the rights of mankind would be very precarious and uncertain. But the question is, whether this is a proper sentence, in a proper cause, and between proper

parties? Of which it is impossible to judge, without looking farther into the proceedings; this being rather the execution of the sentence, than the sentence itself." And after observing upon the competency of the French tribunal, and pointing out that restitution of conjugal rights was within the jurisdiction of the ecclesiastical court, and not of the Court of Chancery, he added, "Much less will I order any money out of the bank to be given him." 1 Ves. Sen. 157, 159. He thus clearly recognized the difference between admitting the effect of a foreign judgment as adjudicating the status of persons, and executing a foreign judgment by enforcing a claim for money.

These decisions of Lord Hardwicke demonstrate that in his opinion, whenever the question was of giving effect to a foreign judgment for money, in a suit in England between the parties, it did not have the weight of a domestic judgment, and could not be considered as a bar, or as conclusive, but only as evidence of the same weight as a simple contract, and the propriety and justice of the judgment might be examined.

In *Sinclair* v. *Fraser*, (1771) the appellant, having as attorney in Jamaica made large advances for his constituent in Scotland, and having been superseded in office, brought an action before the Supreme Court of Jamaica, and, after appearance, obtained judgment against him; and afterwards brought an action against him in Scotland upon that judgment. The Court of Session determined that the plaintiff was bound to prove before it the ground, nature and extent of the demand on which the judgment in Jamaica was obtained; and therefore gave judgment against him. But the House of Lords, (in which, as remarked by one reporter, Lord Mansfield was then the presiding spirit, acting in concert with, or for the Lord Chancellor, in disposing of the Scotch appeals,) "ordered and declared that the judgment of the Supreme Court of Jamaica ought to be received as evidence *prima facie* of the debt; and that it lies upon the defendant to impeach the justice thereof, or to show the same to have been irregularly obtained;" and therefore reversed the judgment of the Court of Session. 2 Paton, ix, 253; *S. C.* Morison Dict. Dec. 4542; 1 Doug. 5, note.

Opinion of the Court.

Accordingly, in *Crawford* v. *Witten*, (1773) a declaration in assumpsit, in an action in England upon a judgment recovered in the Mayor's Court of Calcutta in Bengal, without showing the cause of action there, was held good on demurrer. Lord Mansfield considered the case perfectly clear. Mr. Justice Aston, according to one report, said, "The declaration is sufficient; we are not to suppose it an unlawful debt;" and, according to another report, "They admitted the assumpsit by their demurrer. When an action comes properly before any court, it must be determined by the laws which govern the country in which the action accrued." And Mr. Justice Ashurst said: "I have often known assumpsit brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise." Lofft, 154; *S. C. nom. Crawford* v. *Whittal*, 1 Doug. 4, note.

In *Walker* v. *Witter*, (1778) an action of debt was brought in England upon a judgment recovered in Jamaica. The defendant pleaded *nil debet*, and *nul tiel record*. Judgment was given for the plaintiff, Lord Mansfield saying: "The plea of *nul tiel record* was improper. Though the plaintiffs had called the judgment a record, yet by the additional words in the declaration, it was clear they did not mean that sort of record to which implicit faith is given by the courts of Westminster Hall. They had not misled the court nor the defendant, for they spoke of it as a record of a court in Jamaica. The question was brought to a narrow point; for it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain; and on the part of the plaintiffs, that the judgment was only *prima facie* evidence of the debt. That being so, the judgment was not a specialty, but the debt only a simple contract debt; for assumpsit will not lie on a specialty. The difficulty in the case had arisen from not fixing accurately what a court of record is in the eye of the law. That description is confined properly to certain courts in England, and their judgments cannot be controverted. Foreign courts, and courts in England not of record, have not that privilege, nor the courts in Wales, etc. But the doctrine in the case of *Sinclair* v. *Fraser* was unquestionable. Foreign judgments are

a ground of action everywhere, but they are examinable." Justices Willes, Ashurst and Buller concurred, the two latter saying that wherever *indebitatus assumpsit* will lie, debt will also lie. 1 Doug. 1, 5, 6.

In *Herbert* v. *Cook*, (1782) again, in an action of debt upon a judgment of an inferior English court, not a court of record, Lord Mansfield said that it was "like a foreign judgment, and not conclusive evidence of the debt." Willes, 36, note.

In *Galbraith* v. *Neville*, (1789) upon a motion for a new trial after verdict for the plaintiff, in an action of debt on a judgment of the Supreme Court of Jamaica, Lord Kenyon expressed "very serious doubts concerning the doctrine laid down in *Walker* v. *Witter*, that foreign judgments are not binding on the parties here." But Mr. Justice Buller said: "The doctrine which was laid down in *Sinclair* v. *Fraser* has always been considered as the true line ever since; namely, that the foreign judgment shall be *prima facie* evidence of the debt, and conclusive till it be impeached by the other party." "As to actions of this sort, see how far the court could go, if what was said in *Walker* v. *Witter* were departed from. It was there held, that the foreign judgment was only to be taken to be right *prima facie*; that is, we will allow the same force to a foreign judgment, that we do to those of our own courts not of record. But if the matter were carried farther, we should give them more credit; we should give them equal force with those of courts of record here. Now a foreign judgment has never been considered as a record. It cannot be declared on as such, and a plea of *nul tiel record*, in such a case, is a mere nullity. How then can it have the same obligatory force? In short, the result is this; that it is *prima facie* evidence of the justice of the demand in an action of assumpsit, having no more credit than is given to every species of written agreement, *viz.* that it shall be considered as good till it is impeached." 1 Doug. 6, note. And the court afterwards unanimously refused the new trial, because, "without entering into the question how far a foreign judgment was impeachable, it was at all events clear that it was *prima facie* evidence of the debt; and they were of opinion

that no evidence had been adduced to impeach this." 5 East, 475, note.

In *Messin* v. *Massareene*, (1791) the plaintiff, having obtained a judgment against the defendants in a French court, brought an action of assumpsit upon it in England, and, the defendants having suffered a default, moved for a reference to a master, and for a final judgment on his report, without executing a writ of inquiry. The motion was denied, Lord Kenyon saying, "This is an attempt to carry the rule farther than has yet been done, and as there is no instance of the kind I am not disposed to make a precedent for it;" and Mr. Justice Buller saying, "Though debt will lie here on a foreign judgment, the defendant may go into the consideration of it." 4 T. R. 493.

In *Bayley* v. *Edwards*, (1792) the Judicial Committee of the Privy Council, upon appeal from Jamaica, held that a suit in equity pending in England was not a good plea in bar to a subsequent bill in Jamaica for the same matter; and Lord Camden said: "In *Gage* v. *Bulkeley*," (evidently referring to the full report in Ridgeway, above quoted, which had been cited by counsel,) "Lord Hardwicke's reasons go a great way to show the true effect of foreign sentences in this country. And all the cases show that foreign sentences are not conclusive bars here, but only evidence of the demand." 3 Swanston, 703, 708, 710.

In *Phillips* v. *Hunter*, (1795) the House of Lords, in accordance with the opinion of the majority of the judges consulted, and against that of Chief Justice Eyre, decided that a creditor of an English bankrupt, who had obtained payment of his debt by foreign attachment in Pennsylvania, was liable to an action for the money by the assignees in bankruptcy in England. But it was agreed, on all hands, that the judgment in Pennsylvania and payment under it were conclusive as between the garnishee and the plaintiff in that suit. And the distinction between the effect of a foreign judgment which vests title, and of one which only declares that a certain sum of money is due, was clearly stated by Chief Justice Eyre, as follows:

Order of the Court.

"This judgment against the garnishee in the court of Pennsylvania was recovered properly or improperly. If, notwithstanding the bankruptcy, the debt remained liable to an attachment according to the laws of that country, the judgment was proper; if, according to the laws of that country, the property in the debt was divested out of the bankrupt debtor, and vested in his assignees, the judgment was improper. But this was a question to be decided, in the cause instituted in Pennsylvania, by the courts of that country and not by us. We cannot examine their judgment, and if we could, we have not the means of doing it in this case. It is not stated upon this record, nor can we take notice, what the law of Pennsylvania is upon this subject. If we had the means, we could not examine a judgment of a court in a foreign State, brought before us in this manner.

"It is in one way only, that the sentence or judgment of a court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory, perhaps, in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory, not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise. We examine it as we do all other considerations or promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law." 2 H. Bl. 402, 409, 410.

In *Wright* v. *Simpson*, (1802) Lord Chancellor Eldon said: "Natural law requires the courts of this country to give credit to those of another for the inclination and power to do justice; but not, if that presumption is proved to be ill founded in that transaction, which is the subject of it; and if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." 6 Ves. 714, 730.

Under Lord Ellenborough, the distinction between a suit on a foreign judgment in favor of the plaintiff against the defendant, and a suit to recover money which the plaintiff had been compelled to pay under a judgment abroad, was clearly maintained.

In *Buchanan* v. *Rucker*, (1807) in assumpsit upon a judgment rendered in the island of Tobago, the defendant pleaded *non assumpsit*, and prevailed, because it appeared that he was not a resident of the island, and was neither personally served with process nor came in to defend, and the only notice was, according to the practice of the court, by nailing up a copy of the declaration at the court-house door. It was argued that "the presumption was in favor of a foreign judgment, as well as of a judgment obtained in one of the courts of this country." To which Lord Ellenborough answered: "That may be so, if the judgment appears, on the face of it, consistent with reason and justice; but it is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard." "There might be such glaring injustice on the face of a foreign judgment, or it might have a vice rendering it so ludicrous, that, it could not raise an assumpsit, and, if submitted to the jurisdiction of the courts of this country, could not be enforced." 1 Camp. 63, 66, 67. A motion for a new trial was denied. 9 East, 192. And see *Sadler* v. *Robins*, (1808) 1 Camp. 253, 256.

In *Hall* v. *Odber*, (1809) in assumpsit upon a judgment obtained in Canada, with other counts on the original debt, Lord Ellenborough and Justices Grose, Le Blanc and Bayley agreed that a foreign judgment was not to be considered as having the same force as a domestic judgment, but only that of a simple contract between the parties, and did not merge the original cause of action, but was only evidence of the debt, and therefore assumpsit would lie, either upon the judgment, or upon the original cause of action. 11 East, 118.

In *Tarleton* v. *Tarleton*, (1815) on the other hand, the action was brought upon a covenant of indemnity in an agreement for dissolution of a partnership, to recover a sum which the

plaintiff had been compelled to pay under a decision in a suit between the parties in the island of Grenada. Such was the case, of which Lord Ellenborough, affirming his own ruling at the trial, said: "I thought that I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have appeared and made his defence. The plaintiff, by this neglect, has been obliged to pay the money in order to avoid a sequestration." The distinction was clearly brought out by Mr. Justice Bayley, who said: "As between the parties to the suit, the justice of it might be again litigated; but as against a stranger it cannot." 4 M. & S. 20, 22, 23.

In *Harris* v. *Saunders*, (1825) Chief Justice Abbott (afterwards Lord Tenterden) and his associates, upon the authority of *Otway* v. *Ramsay*, above cited, held that, even since the Act of Union of 39 & 40 Geo. III, c. 67, assumpsit would lie in England upon a judgment recovered in Ireland, because such a judgment could not be considered a specialty debt in England. 4 B. & C. 411; *S. C.* 6 D. & R. 471.

The English cases, above referred to, have been stated with the more particularity and detail, because they directly bear upon the question what was the English law, being then our own law, before the Declaration of Independence. They demonstrate that by that law, as generally understood, and as declared by Hardwicke, Mansfield, Buller, Camden, Eyre and Ellenborough, and doubted by Kenyon only, a judgment recovered in a foreign country for a sum of money, when sued upon in England, was only *prima facie* evidence of the demand, and subject to be examined and impeached. The law of England, since it has become to us a foreign country, will be considered afterwards.

The law upon this subject, as understood in the United States, at the time of their separation from the mother country, was clearly set forth by Chief Justice Parsons, speaking for the Supreme Judicial Court of Massachusetts, in 1813, and by Mr. Justice Story, in his Commentaries on the Constitution of the United States, published in 1833. Both those

eminent jurists declared that by the law of England the general rule was that foreign judgments were only *prima facie* evidence of the matter which they purported to decide; and that by the common law, before the American Revolution, all the courts of the several Colonies and States were deemed foreign to each other, and consequently judgments rendered by any one of them were considered as foreign judgments, and their merits reëxaminable in another Colony, not only as to the jurisdiction of the court which pronounced them, but also as to the merits of the controversy, to the extent to which they were understood to be reëxaminable in England. And they noted that, in order to remove that inconvenience, statutes had been passed in Massachusetts, and in some of the other Colonies, by which judgments rendered by a court of competent jurisdiction in a neighboring Colony could not be impeached. *Bissell* v. *Briggs*, 9 Mass. 462, 464, 465; Mass. Stat. 1773–4, c. 16, 5 Prov. Laws, 323, 369; Story on the Constitution, (1st ed.) §§ 1301, 1302; (4th ed.) §§ 1306, 1307.

It was because of that condition of the law, as between the American Colonies and States, that the United States, at the very beginning of their existence as a nation, ordained that full faith and credit should be given to the judgments of one of the States of the Union in the courts of another of those States.

By the Articles of Confederation of 1777, art. 4, § 3, "Full faith and credit shall be given, in each of these States, to the records, acts and judicial proceedings of the courts and magistrates of every other State." 1 Stat. 4. By the Constitution of the United States, art. 4, § 1, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." And the first Congress of the United States under the Constitution, after prescribing the manner in which the records and judicial proceedings of the courts of any State should be authenticated and proved, enacted that "the said records and judicial proceedings, authenticated as aforesaid, shall have

such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." Act of May 26, 1790, c. 11, 1 Stat. 122; Rev. Stat. § 905.

The effect of these provisions of the Constitution and laws of the United States was at first a subject of diverse opinions, not only in the courts of the several States, but also in the Circuit Courts of the United States; Mr. Justice Cushing, Mr. Justice Wilson and Mr. Justice Washington holding that judgments of the courts of a State had the same effect throughout the Union as within that State; but Chief Justice Marshall (if accurately reported) being of opinion that they were not entitled to conclusive effect, and that their consideration might be impeached. *Armstrong* v. *Carson*, (1794) 2 Dall. 302; *Green* v. *Sarmiento*, (1811) 3 Wash. C. C. 17, 21; *S. C.* Pet. C. C. 74, 78; *Peck* v. *Williamson*, (reported as in November, 1813, apparently a mistake for 1812,) 1 Carolina Law Repository, 53.

The decisions of this court have clearly recognized that judgments of a foreign state are *prima facie* evidence only, and that, but for these constitutional and legislative provisions, judgments of a State of the Union, when sued upon in another State, would have no greater effect.

In *Croudson* v. *Leonard*, (1808) in which this court held that the sentence of a foreign court of admiralty *in rem*, condemning a vessel for breach of blockade, was conclusive evidence of that fact in an action on a policy of insurance, Mr. Justice Washington, after speaking of the conclusiveness of domestic judgments generally, said: "The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *prima facie* evidence. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides." 4 Cranch, 434, 442.

In *Mills* v. *Duryee*, (1813) in which it was established that, by virtue of the Constitution and laws of the United States, the judgment of a court of one of the States was conclusive

evidence, in every court within the United States, of the matter adjudged; and therefore *nul tiel record*, and not *nil debet*, was a proper plea to an action brought in a court of the United States in the District of Columbia upon a judgment recovered in a court of the State of New York; this court, speaking by Mr. Justice Story, said: "The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when Congress gave the effect of a record to the judgment, it gave all the collateral consequences." "Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *prima facie* evidence only, this clause in the Constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect." 7 Cranch, 481, 484, 485.

In *Hampton* v. *McConnel*, (1818) the point decided in *Mills* v. *Duryee* was again adjudged, without further discussion, in an opinion delivered by Chief Justice Marshall. 3 Wheat. 234.

The *obiter dictum* of Mr. Justice Livingston in *Hopkins* v. *Lee*, (1821) 6 Wheat. 109. 114, repeated by Mr. Justice Daniel in *Pennington* v. *Gibson*, (1853) 16 How. 65, 78, as to the general effect of foreign judgments, has no important bearing upon the case before us.

In *McElmoyle* v. *Cohen*, (1839) Mr. Justice Wayne, discussing the effect of the act of Congress of 1790, said, that "the adjudications of the English courts have now established the rule to be, that foreign judgments are *prima facie* evidence of the right and matter they purport to decide." 13 Pet. 312, 325.

In *D'Arcy* v. *Ketchum*, (1850) in which this court held that the provisions of the Constitution and laws of the United States gave no effect in one State to judgments rendered in another State by a court having no jurisdiction of the cause or of the parties, Mr. Justice Catron said: "In construing the act of 1790, the law as it stood when the act was passed

must enter into that construction; so that the existing defect in the old law may be seen, and its remedy by the act of Congress comprehended. Now it was most reasonable, on general principles of comity and justice, that, among States and their citizens united as ours are, judgments rendered in one should bind citizens of other States, where defendants had been served with process, or voluntarily made defence. As these judgments, however, were only *prima facie* evidence, and subject to be inquired into by plea, when sued on in another State, Congress saw proper to remedy the evil, and to provide that such inquiry and double defence should not be allowed. To this extent, it is declared in the case of *Mills* v. *Duryee*, Congress has gone in altering the old rule." 11 How. 165, 175, 176.

In *Christmas* v. *Russell*, (1866) in which this court decided that, because of the Constitution and laws of the United States, a judgment of a court of one State of the Union, when sued upon in a court of another, could not be shown to have been procured by fraud, Mr. Justice Clifford, in delivering the opinion, after stating that, under the rules of the common law, a domestic judgment, rendered in a court of competent jurisdiction, could not be collaterally impeached or called in question, said: "Common law rules placed foreign judgments upon a different footing, and those rules remain, as a general remark, unchanged to the present time. Under these rules, a foreign judgment was *prima facie* evidence of the debt, and it was open to examination, not only to show that the court in which it was rendered had no jurisdiction of the subject-matter, but also to show that the judgment was fraudulently obtained." 5 Wall. 290, 304.

In *Bischoff* v. *Wethered*, (1869) in an action on an English judgment rendered without notice to the defendant, other than by service on him in this country, this court, speaking by Mr. Justice Bradley, held that the proceeding in England "was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a *prima facie* character." 9 Wall. 812, 814.

Opinion of the Court.

In *Hanley* v. *Donoghue*, (1885) 116 U. S. 1, 4, and in *Wisconsin* v. *Pelican Ins. Co.*, (1888) 127 U. S. 265, 292, it was said that judgments recovered in one State of the Union, when proved in the courts of another, differed from judgments recovered in a foreign country in no other respect than in not being reëxaminable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.

But neither in those cases, nor in any other, has this court hitherto been called upon to determine how far foreign judgments may be reëxamined upon their merits, or be impeached for fraud in obtaining them.

In the courts of the several States, it was long recognized and assumed, as undoubted and indisputable, that by our law, as by the law of England, foreign judgments for debts were not conclusive, but only *prima facie* evidence of the matter adjudged. Some of the cases are collected in the margin.[1]

In the leading case of *Bissell* v. *Briggs*, above cited, Chief Justice Parsons said: "A foreign judgment may be produced here by a party to it, either to justify himself by the execution of that judgment in the country in which it was rendered, or to obtain the execution of it from our courts." "If the foreign court rendering the judgment had jurisdiction of the cause, yet the courts here will not execute the judgment, without first

[1] *Bartlet* v. *Knight*, (1805) 1 Mass. 401, 405; *Buttrick* v. *Allen*, (1811) 8 Mass. 273; *Bissell* v. *Briggs*, (1813) 9 Mass. 462, 464; *Hall* v. *Williams*, (1828) 6 Pick. 232, 238; *Gleason* v. *Dodd*, (1842) 4 Met. 333, 336; *Wood* v. *Gamble*, (1853) 11 Cush. 8; *McKim* v. *Odom*, (1835) 3 Fairf. 94, 96; *Middlesex Bank* v. *Butman*, (1848) 29 Maine, 19, 21; *Bryant* v. *Ela*, (1815) Smith (N. H.) 396, 404; *Thurber* v. *Blackbourne*, (1818) 1 N. H. 242; *Robinson* v. *Prescott*, (1828) 4 N. H. 450; *Taylor* v. *Barron*, (1855) 10 Foster, 78, 95; *King* v. *Van Gilder*, (1791) 1 D. Chip. 59; *Rathbone* v. *Terry*, (1837) 1 Rhode Island, 73, 76; *Aldrich* v. *Kinney*, (1822) 4 Connecticut, 380, 382; *Hitchcock* v. *Aicken*, (1803) 1 Caines, 460; *Smith* v. *Lewis*, (1808) 3 Johns. 157, 159; *Taylor* v. *Bryden*, (1811) 8 Johns. 173; *Andrews* v. *Montgomery*, (1821) 19 Johns. 162, 165; *Starbuck* v. *Murray*, (1830) 5 Wend. 148, 155; *Benton* v. *Burgot*, (1823) 10 S. & R. 240, 241, 242; *Barney* v. *Patterson*, (1824) 6 Har. & Johns. 182, 202, 203; *Taylor* v. *Phelps*, (1827) 1 Har. & Gill, 492, 503; *Rogers* v. *Coleman*, (1808) Hardin, 413, 414; *Williams* v. *Preston*, (1830) 3 J. J. Marsh. 600, 601.

allowing an inquiry into its merits. The judgment of a foreign court, therefore, is by our laws considered only as presumptive evidence of a debt, or as *prima facie* evidence of a sufficient consideration of a promise, where such court had jurisdiction of the cause; and if an action of debt be sued on any such judgment, *nil debet* is the general issue; or, if it be made the consideration of a promise, the general issue is *non assumpsit*. On these issues, the defendant may impeach the justice of the judgment, by evidence relative to that point. On these issues, the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for this purpose, he has no occasion to impeach the justice of the judgment." 9 Mass. 463, 464.

In a less known case, decided in 1815, but not published until 1879, the reasons for this view were forcibly stated by Chief Justice Jeremiah Smith, speaking for the Supreme Court of New Hampshire, as follows:

"The respect which is due to judgments, sentences and decrees of courts in a foreign State, by the law of nations, seems to be the same which is due to those of our own courts. Hence the decree of an admiralty court abroad is equally conclusive with decrees of our admiralty courts. Indeed, both courts proceed by the same rule, are governed by the same law — the maritime law of nations: Coll. Jurid. 100; which is the universal law of nations, except where treaties alter it.

"The same comity is not extended to judgments or decrees which may be founded on the municipal laws of the State in which they are pronounced, Independent States do not choose to adopt such decisions without examination. These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself. Wherever, then, the court may have proceeded on municipal

law, the rule is, that the judgments are not conclusive evidence of debt, but *prima facie* evidence only. The proceedings have not the conclusive quality which is annexed to the records or proceedings of our own courts, where we approve both of the rule and of the judges who interpret and apply it. A foreign judgment may be impeached; defendant may show that it is unjust, or that it was irregularly or unduly obtained. Doug. 5, note." *Bryant* v. *Ela*, Smith (N. H.) 396, 404.

From this review of the authorities, it clearly appears that, at the time of the separation of this country from England, the general rule was fully established that foreign judgments *in personam* were *prima facie* evidence only, and not conclusive of the merits of the controversy between the parties. But the extent and limits of the application of that rule do not appear to have been much discussed, or defined with any approach to exactness, in England or America, until the matter was taken up by Chancellor Kent and by Mr. Justice Story.

In *Taylor* v. *Bryden*, (1811) an action of assumpsit, brought in the Supreme Court of the State of New York, on a judgment obtained in the State of Maryland against the defendant as indorser of a bill of exchange, and which was treated as a foreign judgment, so far as concerned its effect in New York, (the decision of this court to the contrary in *Mills* v. *Duryee*, 7 Cranch, 481, not having yet been made,) Chief Justice Kent said: "The judgment in Maryland is presumptive evidence of a just demand; and it was incumbent upon the defendant, if he would obstruct the execution of the judgment here, to show, by positive proof, that it was irregularly or unduly obtained." "To try over again, as of course, every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other States, and would be carrying the doctrine of reëxamination to an oppressive extent. It would be the same as granting a new trial in every case, and upon every question of fact. Suppose a recovery in another State, or in any foreign court, in an action for a

tort, as for an assault and battery, false imprisonment, slander, etc., and the defendant was duly summoned and appeared, and made his defence, and the trial was conducted orderly and properly, according to the rules of a civilized jurisprudence, is every such case to be tried again here on the merits? I much doubt whether the rule can ever go to this length. The general language of the books is that the defendant must impeach the judgment by showing affirmatively that it was unjust by being irregularly or unfairly procured." But the case was decided upon the ground that the defendant had done no more than raise a doubt of the correctness of the judgment sued on. 8 Johns. 173, 177, 178.

Chancellor Kent, afterwards, treating of the same subject in the first edition of his Commentaries, (1827) put the right to impeach a foreign judgment somewhat more broadly, saying: "No sovereign is obliged to execute, within his dominion, a sentence rendered out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment [for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty]. In the former case, [of a suit to enforce a foreign judgment,] the rule is, that the foreign judgment is to be received, in the first instance, as *prima facie* evidence of the debt; and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained. This was the principle declared and settled by the House of Lords, in 1771, in the case of *Sinclair* v. *Fraser*, upon an appeal from the Court of Session in Scotland." In the second edition, (1832) he inserted the passages above printed in brackets; and in a note to the fourth edition, (1840) after citing recent conflicting opinions in Great Britain, and referring to Mr. Justice Story's reasoning in his Commentaries on the Conflict of Laws, § 607, in favor of the conclusiveness of foreign judgments, he added, "and that is certainly the more convenient and the safest rule, and the most consistent with sound principle, except in cases in which the court which pronounced the judgment has not due jurisdiction of the case, or of the

defendant, or the proceeding was in fraud, or founded in palpable mistake or irregularity, or bad by the law of the *rei judicatæ;* and in all such cases the justice of the judgment ought to be impeached." 2 Kent Com. (1st ed.) 102; (later eds.) 120.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, first published in 1834, after reviewing many English authorities, said, "The present inclination of the English courts seems to be to sustain the conclusiveness of foreign judgments" — to which, in the second edition in 1841, he added, "although certainly there yet remains no inconsiderable diversity of opinion among the learned judges of the different tribunals." § 606.

He then proceeded to state his own view of the subject, on principle, saying: "It is, indeed, very difficult to perceive what could be done, if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew on a suit upon the foreign judgment. Some of the witnesses may be since dead; some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation; is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt or of a breach of contract, are all the circumstances to be reëxamined anew? If they are, by what laws and rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment, and to proceed *ex æquo et bono?* Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to

show the intrinsic difficulties of the subject. Indeed, the rule that the judgment is to be *prima facie* evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side; for under such circumstances it would be equivalent to granting a new trial. It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by showing that the court had no jurisdiction, or that he never had any notice of the suit; or that it was procured by fraud; or that upon its face it is founded in mistake; or that it is irregular and bad by the local law, *fori rei judicatæ*. To such an extent the doctrine is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits." § 607.

He then observed: "The general doctrine maintained in the American courts in relation to foreign judgments certainly is that they are *prima facie* evidence, but that they are impeachable. But how far and to what extent this doctrine is to be carried does not seem to be definitely settled. It has been declared that the jurisdiction of the court, and its power over the parties and the things in controversy, may be inquired into; and that the judgment may be impeached for fraud. Beyond this no definite lines have as yet been drawn." § 608.

After stating the effect of the Constitution of the United States, and referring to the opinions of some foreign jurists, and to the law of France, which allows the merits of foreign judgments to be examined, Mr. Justice Story concluded his treatment of the subject as follows: "It is difficult to ascertain what the prevailing rule is in regard to foreign judgments in some of the other nations of continental Europe; whether they are deemed conclusive evidence, or only *prima facie* evidence. Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch

judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." § 618.

In *Bradstreet* v. *Neptune Ins. Co.*, (1839) in the Circuit Court of the United States for the District of Massachusetts, Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." 3 Sumner, 600, 608, 609.

In *Burnham* v. *Webster*, (1845) in an action of assumpsit upon a promissory note, brought in the Circuit Court of the United States for the District of Maine, the defendant pleaded a former judgment in the Province of New Brunswick in his favor in an action there brought by the plaintiff; the plaintiff replied that the note was withdrawn from that suit, by consent of parties and leave of the court, before verdict and judgment; and the defendant demurred to the replication. Judge Ware, in overruling the demurrer, said: "Whatever difference of opinion there may be as to the binding force of foreign judgments, all agree that they are not entitled to the same authority as the judgments of domestic courts of general jurisdiction. They are but evidence of what they purport to decide, and liable to be controlled by counter evidence, and do not, like domestic judgments, import absolute verity and remain incontrovertible and conclusive until reversed." And he added that, if the question stood entirely clear from authority, he should be of opinion that the plaintiff could not be allowed to deny the validity of the proceedings of a court whose authority he had invoked. 2 Ware, 236, 239, 241.

At a subsequent trial of that case before a jury, (1846) 1 Woodb. & Min. 172, the defendant proved the judgment in New Brunswick. The plaintiff then offered to prove the facts stated in his replication, and that any entry on the record of the judgment in New Brunswick concerning this note was therefore by mistake or inadvertence. This evidence was

excluded, and a verdict taken for the plaintiff, subject to the opinion of the court. Mr. Justice Woodbury, in granting a new trial, delivered a thoughtful and discriminating opinion upon the effect of foreign judgments, from which the following passages are taken:

"They do, like domestic ones, operate conclusively, *ex proprio vigore*, within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, *ex comitate*, treated with respect, according to the nature of the judgment, and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the *lex loci contractus*. With these views, I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not *in rem*, as it is in admiralty, having the subject-matter before the court, and acting on that rather than the parties, I would consider it only *prima facie* evidence as between the parties to it." p. 175.

"By returning to that rule, we are enabled to give parties, at times, most needed and most substantial relief, such as in judgments abroad against them without notice, or without a hearing on the merits, or by accident or mistake of facts, as here, or on rules of evidence and rules of law they never assented to, being foreigners and their contracts made elsewhere, but happening to be travelling through a foreign jurisdiction, and being compelled *in invitum* to litigate there." p. 177.

"Nor would I permit the *prima facie* force of the foreign judgment to go far, if the court was one of a barbarous or semi-barbarous government, and acting on no established principles of civilized jurisprudence, and not resorted to willingly by both parties, or both not inhabitants and citizens of the country. Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries — except, as before remarked, on the principle of the parties belonging there, or assenting to a trial there." p. 179.

"On the other hand, by considering a judgment abroad as only *prima facie* valid, I would not allow the plaintiff abroad, who had sought it there, to avoid it, unless for accident or mistake, as here. Because, in other respects, having been sought there by him voluntarily, it does not lie in his mouth to complain of it. Nor would I in any case permit the whole merits of the judgment recovered abroad to be put in evidence as a matter of course; but being *prima facie* correct, the party impugning it, and desiring a hearing of its merits, must show first, specifically, some objection to the judgment's reaching the merits, and tending to prove they had not been acted on; or [as?] by showing there was no jurisdiction in the court, or no notice, or some accident or mistake, or fraud, which prevented a full defence, and has entered into the judgment; or that the court either did not decide at all on the merits, or was a tribunal not acting in conformity to any set of legal principles, and was not willingly recognized by the party as suitable for adjudicating on the merits. After matters like these are proved, I can see no danger, but rather great safety in the administration of justice, in permitting, to every party before us, at least one fair opportunity to have the merits of his case fully considered, and one fair adjudication upon them, before he is estopped forever." p. 180.

In *De Brimont* v. *Penniman*, (1873) in the Circuit Court of the United States for the Southern District of New York, Judge Woodruff said: "The principle on which foreign judgments receive any recognition from our courts is one of comity. It does not require, but rather forbids it, where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens." And he declined to maintain an action against a citizen of the United States (whose daughter had been married in France to a French citizen) upon a decree of a French court requiring the defendant, then resident in France and duly served with process there, to pay an annuity to his son-in-law. 10 Blatchford, 436, 441.

Mr. Justice Story and Chancellor Kent, as appears by the passages above quoted from their commentaries, concurred in

the opinion that, in a suit upon a foreign judgment, the whole merits of the case could not, as matter of course, be reëxamined anew; but that the defendant was at liberty to impeach the judgment, not only by showing that the court had no jurisdiction of the case, or of the defendant, but also by showing that it was procured by fraud, or was founded on clear mistake or irregularity, or was bad by the law of the place where it was rendered. Story's Conflict of Laws, § 607; 2 Kent Com. (6th ed.) 120.

The word "mistake" was evidently used by Story and Kent, in this connection, not in its wider meaning of error in judgment, whether upon the law or upon the facts; but in the stricter sense of misapprehension or oversight, and as equivalent to what, in *Burnham* v. *Webster*, before cited, Mr. Justice Woodbury spoke of as "some objection to the judgment's reaching the merits, and tending to prove that they had not been acted on;" "some accident or mistake," or "that the court did not decide at all on the merits." 1 Woodb. & Min. 180.

The suggestion that a foreign judgment might be impeached for error in law of the country in which it was rendered is hardly consistent with the statement of Chief Justice Marshall, when, speaking of the disposition of this court to adopt the construction given to the laws of a State by its own courts, he said: "This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction, than to depart from the words of the statute." *Elmendorf* v. *Taylor*, (1825) 10 Wheat. 152, 159, 160.

In recent times, foreign judgments rendered within the do-

minions of the English Crown, and under the law of England, after a trial on the merits, and no want of jurisdiction, and no fraud or mistake, being shown or offered to be shown, have been treated as conclusive by the highest courts of New York, Maine and Illinois. *Lazier* v. *Wescott*, (1862) 26 N. Y. 146, 150; *Dunstan* v. *Higgins*, (1893) 138 N. Y. 70, 74; *Rankin* v. *Goddard*, (1866) 54 Maine, 28, and (1868) 55 Maine, 389; *Baker* v. *Palmer*, (1876) 83 Illinois, 568. In two early cases in Ohio, it was said that foreign judgments were conclusive, unless shown to have been obtained by fraud. *Silver Lake Bank* v. *Harding*, (1832) 5 Ohio, 545, 547; *Anderson* v. *Anderson*, (1837) 8 Ohio, 108, 110. But in a later case in that State it was said that they were only *prima facie* evidence of indebtedness. *Pelton* v. *Platner*, (1844) 13 Ohio, 209, 217. In *Jones* v. *Jamison*, (1860) 15 La. Ann. 35, the decision was only that, by virtue of the statutes of Louisiana, a foreign judgment merged the original cause of action as against the plaintiff.

The result of the modern decisions in England, after much diversity, not to say vacillation of opinion, does not greatly differ (so far as concerns the aspects in which the English courts have been called upon to consider the subject) from the conclusions of Chancellor Kent and of Justices Story and Woodbury.

At one time, it was held that, in an action brought in England upon a judgment obtained by the plaintiff in a foreign country, the judgment must be assumed to be according to the law of that country, unless the contrary was clearly proved — manifestly implying that proof on that point was competent. *Becquet* v. *McCarthy*, (1831) 2 B. & Ad. 951, 957; *Alivon* v. *Furnival*, (1834) 1 Cr., M. & R. 277, 293; *S. C.* 4 Tyrwh. 751, 768.

Lord Brougham, in the House of Lords, as well as Chief Justice Tindal and Chief Justice Wilde (afterwards Lord Chancellor Truro) and their associates, in the Common Bench, considered it to be well settled that an Irish or Colonial judgment, or a foreign judgment, was not, like a judgment of a domestic court of record, conclusive evidence, but only, like a

simple contract, *prima facie* evidence of a debt. *Houlditch* v. *Donegal*, (1834) 8 Bligh N. R. 301, 342, 346; *S. C.* 2 Cl. & Fin. 470, 476–479; *Don* v. *Lipmann*, (1837) 5 Cl. & Fin. 1, 20–22; *Smith* v. *Nicolls*, (1839) 7 Scott, 147, 166–170; *S. C.* 5 Bing. N. C. 208, 220–226; 7 Dowl. 282; *Bank of Australasia* v. *Harding*, (1850) 9 C. B. 661, 686, 687.

On the other hand, Vice Chancellor Shadwell, upon an imperfect review of the early cases, expressed the opinion that a foreign judgment was conclusive. *Martin* v. *Nicolls*, (1830) 3 Sim. 458.

Like opinions were expressed by Lord Denman, speaking for the Court of Queen's Bench, and by Vice Chancellor Wigram, in cases of Irish or Colonial judgments, which were subject to direct appellate review in England. *Ferguson* v. *Mahon*, (1839) 11 Ad. & El. 179, 183; *S. C.* 3 Per. & Dav. 143, 146; *Henderson* v. *Henderson*, (1844) 6 Q. B. 288, 298, 299; *Henderson* v. *Henderson*, (1843) 3 Hare, 100, 118.

In *Bank of Australasia* v. *Nias*, (1851) in an action upon an Australian judgment, pleas that the original promises were not made, and that those promises, if made, were obtained by fraud, were held bad on demurrer. Lord Campbell, in delivering judgment, referred to Story on the Conflict of Laws, and adopted substantially his course of reasoning in § 607, above quoted, with regard to foreign judgments. But he distinctly put the decision upon the ground that the defendant might have appealed to the Judicial Committee of the Privy Council, and thus have procured a review of the colonial judgment. And he took the precaution to say: "How far it would be permitted to a defendant to impeach the competency, or the integrity, of a foreign court from which there was no appeal, it is unnecessary here to inquire." 16 Q. B. 717, 734–737.

The English courts, however, have since treated that decision as establishing that a judgment of any competent foreign court could not, in an action upon it, be questioned, either because that court had mistaken its own law, or because it had come to an erroneous conclusion upon the facts. *De Cosse Brissac* v. *Rathbone*, (1861) 6 H. & N. 301; *Scott* v. *Pilking-*

ton, (1862) 2 B. & S. 11, 41, 42; *Vanquelin* v. *Bouard*, (1863) 15 C. B. (N. S.) 341, 368; *Castrique* v. *Imrie*, (1870) L. R. 4 H. L. 414, 429, 430; *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139, 150; *Ochsenbein* v. *Papelier*, (1873) L. R. 8 Ch. 695, 701. In *Meyer* v. *Ralli*, (1876) a judgment *in rem*, rendered by a French court of competent jurisdiction, was held to be reëxaminable upon the merits, solely because it was admitted by the parties, in the special case upon which the cause was submitted to the English court, to be manifestly erroneous in regard to the law of France. 1 C. P. D. 358.

In view of the recent decisions in England, it is somewhat remarkable that, by the Indian Code of Civil Procedure of 1877, "no foreign judgment" (which is defined as a judgment of "a civil tribunal beyond the limits of British India, and not having authority in British India, nor established by the Governor General in Council") "shall operate as a bar to a suit in British India," "if it appears on the face of the proceeding to be founded on an incorrect view of international law," or "if it is, in the opinion of the court before which it is produced, contrary to natural justice." Piggott on Foreign Judgments, (2d ed.) 380, 381.

It was formerly understood in England that a foreign judgment was not conclusive, if it appeared upon its face to be founded on a mistake or disregard of English law. *Arnott* v. *Redfern*, (1825–6) 2 Car. & P. 88, and 3 Bing. 353; *S. C.* 11 J. B. Moore, 209; *Novelli* v. *Rossi*, (1831) 2 B. & Ad. 757; 3 Burge on Colonial and Foreign Laws, 1065; 2 Smith's Lead. Cas. (2d ed.) 448; *Reimers* v. *Druce*, (1856) 23 Beavan, 145.

In *Simpson* v. *Fogo*, (1860) 1 Johns. & Hem. 18, and (1862) 1 Hem. & Mil. 195, Vice-Chancellor Wood (afterwards Lord Hatherley) refused to give effect to a judgment *in personam* of a court in Louisiana, which had declined to recognize the title of a mortgagee of an English ship under the English law. In delivering judgment upon demurrer, he said: "The State of Louisiana may deal as it pleases with foreign law; but if it asks courts of this country to respect its law, it must be on a footing of paying a like respect to ours. Any comity between the courts of two nations holding such

opposite doctrines as to the authority of the *lex loci* is impossible. While the courts of Louisiana refuse to recognize a title acquired here which is valid according to our law, and hand over to their own citizens property so acquired, they cannot at the same time expect us to defer to a rule of their law which we are no more bound to respect than a law that any title of foreigners should be disregarded in favor of citizens of Louisiana. The answer to such a demand must be, that a country which pays so little regard to our laws, as to set aside a paramount title acquired here, must not expect at our hands any greater regard for the competing title so acquired by the citizens of that country." 1 Johns. & Hem. 28, 29. And upon motion for a decree, he elaborated the same view, beginning by saying, "Whether this judgment does so err or not against the recognized principles of what has been commonly called the comity of nations, by refusing to regard the law of the country where the title to the ship was acquired, is one of the points which I have to consider;" and concluding that it was "so contrary to law, and to what is required by the comity of nations," that he must disregard it. 1 Hem. & Mil. 222–247. See also *Liverpool Co.* v. *Hunter*, (1867) L. R. 4 Eq. 62, 68, and (1868) L. R. 3 Ch. 479, 484.

In *Scott* v. *Pilkington*, (1862) Chief Justice Cockburn treated it as an open question whether a judgment recovered in New York for a debt could be impeached on the ground that the record showed that the foreign court ought to have decided the case according to English law, and had either disregarded the comity of nations by refusing to apply the English law, or erred in its view of English law. 2 B. & S. 11, 42. In *Castrique* v. *Imrie*, (1870) the French judgment which was adjudged not to be impeachable for error in law, French or English, was, as the House of Lords construed it, a judgment *in rem*, under which the ship to which the plaintiff in England claimed title had been sold. L. R. 4 H. L. 414. In *Godard* v. *Gray*, (1870) shortly afterwards, in which the Court of Queen's Bench held that a judgment *in personam* of a French court could not be impeached because it had put

a construction erroneous, according to English law, upon an English contract, the decision was put by Justices Blackburn and Mellor upon the ground that it did not appear that the foreign court had "knowingly and perversely disregarded the rights given by the English law;" and by Justice Hannen, solely upon the ground that the defendant did not appear to have brought the English law to the knowledge of the foreign court. L. R. 6 Q. B. 139, 149, 154. In *Messina* v. *Petrococchino*, (1872) Sir Robert Phillimore, delivering judgment in the Privy Council, said: "A foreign judgment of a competent court may indeed be impeached, if it carries on the face of it a manifest error." L. R. 4 P. C. 144, 157.

The result of the English decisions, therefore, would seem to be that a foreign judgment *in personam* may be impeached for a manifest and wilful disregard of the law of England.

Lord Abinger, Baron Parke and Baron Alderson were wont to say that the judgment of a foreign court of competent jurisdiction for a sum certain created a duty or legal obligation to pay that sum; or, in Baron Parke's words, that the principle on which the judgments of foreign and colonial courts are supported and enforced was, "that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." *Russell* v. *Smyth*, (1842) 9 M. & W. 810, 818, 819; *Williams* v. *Jones*, (1845) 13 M. & W. 628, 633, 634.

But this was said in explaining why, by the technical rules of pleading, an action of assumpsit, or of debt, would lie upon a foreign judgment; and had no reference to the question how far such a judgment was conclusive of the matter adjudged. At common law, an action of debt would lie on a debt appearing by a record, or by any other specialty, such as a contract under seal; and would also lie for a definite sum of money due by simple contract. Assumpsit would not lie upon a record or other specialty; but would lie upon any other contract, whether expressed by the party, or implied by law. In an action upon a record, or upon a contract under seal, a lawful consideration was conclusively presumed to exist, and could not be denied;

but in an action, whether in debt or in assumpsit, upon a simple contract, express or implied, the consideration was open to inquiry. A foreign judgment was not considered, like a judgment of a domestic court of record, as a record or specialty. The form of action, therefore, upon a foreign judgment was not in debt, grounded upon a record or a specialty; but was either in debt, as for a definite sum of money due by simple contract, or in assumpsit upon such a contract. A foreign judgment, being a security of no higher nature than the original cause of action, did not merge that cause of action. The plaintiff might sue, either on the judgment, or on the original cause of action; and in either form of suit the foreign judgment was only evidence of a liability equivalent to a simple contract, and was therefore liable to be controlled by such competent evidence as the nature of the case admitted. See cases already cited, especially *Walker* v. *Witter*, 1 Doug. 1; *Phillips* v. *Hunter*, 2 H. Bl. 402, 410; *Bissell* v. *Briggs*, 9 Mass. 463, 464; *Mills* v. *Duryee*, 7 Cranch, 481, 485; *D'Arcy* v. *Ketchum*, 11 How. 165, 176; *Hall* v. *Odber*, 11 East, 118; *Smith* v. *Nicolls*, 7 Scott, 147; *S. C.* 5 Bing. N. C. 208. See also *Grant* v. *Easton*, 13 Q. B. D. 302, 303; *Lyman* v. *Brown*, 2 Curtis, 559.

Mr. Justice Blackburn, indeed, in determining how far a foreign judgment could be impeached, either for error in law, or for want of jurisdiction, expressed the opinion that the effect of such a judgment did not depend upon what he termed "that which is loosely called 'comity,'" but upon the saying of Baron Parke, above quoted; and consequently "that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action." *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139, 148, 149; *Schibsby* v. *Westenholz*, (1870) L. R. 6 Q. B. 155, 159. And his example has been followed by some other English judges. Fry, J., in *Rousillon* v. *Rousillon*, (1880) 14 Ch. D. 351, 370; North, J., in *Nouvion* v. *Freeman*, (1887) 35 Ch. D. 704, 714, 715; Cotton and Lindley, L. JJ., in *Nouvion* v. *Freeman*, (1887) 37 Ch. D. 244, 250, 256.

But the theory that a foreign judgment imposes or creates a duty or obligation is a remnant of the ancient fiction, assumed by Blackstone, saying that "upon showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt, and is bound to pay it." 3 Bl. Com. 160. That fiction, which embraced judgments upon default, or for torts, cannot convert a transaction wanting the assent of parties into one which necessarily implies it. *Louisiana* v. *New Orleans*, 109 U. S. 285, 288. While the theory in question may help to explain rules of pleading which originated while the fiction was believed in, it is hardly a sufficient guide at the present day in dealing with questions of international law, public or private, and of the comity of our own country, and of foreign nations. It might be safer to adopt the maxim, applied to foreign judgments by Chief Justice Weston, speaking for the Supreme Judicial Court of Maine, *judicium redditur in invitum*, or, as given by Lord Coke, *in præsumptione legis judicium redditur in invitum. Jordan* v. *Robinson*, (1838) 15 Maine, 167, 168; Co. Lit. 248 *b*.

In *Russell* v. *Smyth*, above cited, Baron Parke took the precaution of adding, "Nor need we say how far the judgment of a court of competent jurisdiction, in the absence of fraud, is conclusive upon the parties." 9 M. & W. 819. He could hardly have contemplated erecting a rule of local procedure into a canon of private internationl law, and a substitute for "the comity of nations," on which, in an earlier case, he had himself relied as the ground for enforcing in England a right created by a law of a foreign country. *Alivon* v. *Furnival*, 1 Cr., M. & R. 277, 296; *S. C.* 4 Tyrwh. 751, 771.

In *Abouloff* v. *Oppenheimer*, (1882) Lord Coleridge and Lord Justice Brett carefully avoided adopting the theory of a legal obligation to pay a foreign judgment as the test in determining how far such a judgment might be impeached. 10 Q. B. D. 295, 300, 305. In *Hawksford* v. *Giffard*, (1886) in the Privy Council, on appeal from the Royal Court of Jersey, Lord Herschell said: "This action is brought upon an English judgment, which, until a judgment was obtained in Jersey, was in

that country no more than evidence of a debt." 12 App. Cas. 122, 126. In *Nouvion* v. *Freeman*, in the House of Lords, (1889) Lord Herschell, while he referred to the reliance placed by counsel on the saying of Baron Parke, did not treat a foreign judgment as creating or imposing a new obligation, but only as declaring and establishing that a debt or obligation existed. His words were: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists, which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that, giving credit to the courts of another country, we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." And Lord Bramwell said: "How can it be said that there is a legal obligation on the part of a man to pay a debt, who has a right to say, 'I owe none, and no judgment has established against me that I do?' I cannot see." The foreign judgment in that case was allowed no force, for want of finally establishing the existence of a debt. 15 App. Cas. 1, 9, 10, 14.

In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect,

the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact. The defendants, therefore, cannot be permitted, upon that general ground, to contest the validity or the effect of the judgment sued on.

But they have sought to impeach that judgment upon several other grounds, which require separate consideration.

It is objected that the appearance and litigation of the defendants in the French tribunals were not voluntary, but by legal compulsion, and therefore that the French courts never acquired such jurisdiction over the defendants, that they should be held bound by the judgment.

Upon the question what should be considered such a voluntary appearance, as to amount to a submission to the jurisdiction of a foreign court, there has been some difference of opinion in England.

In *General Steam Navigation Co.* v. *Guillou*, (1843) in an action at law to recover damages to the plaintiff's ship by a collision with the defendant's ship through the negligence of the master and crew of the latter, the defendant pleaded a judgment by which a French court, in a suit brought by him, and after the plaintiffs had been cited, had appeared, and had asserted fault on this defendant's part, had adjudged that it was the ship of these plaintiffs, and not that of this defendant, which was in fault. It was not shown or suggested that the ship of these plaintiffs was in the custody or possession of the French court. Yet Baron Parke, delivering a considered judgment of the Court of Exchequer, (Lord Abinger and Barons Alderson and Rolfe concurring,) expressed a decided opinion that the pleas were bad in substance, for these reasons: "They do not state that the plaintiffs were French subjects, or resident, or even present in France when the suit began, so as to be bound by reason of allegiance, or domicil, or temporary presence, by a decision of a French court; and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers, who put forward the negligence

of the defendant as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey." 11 M. & W. 877, 894; *S. C.* 13 Law Journal (N. S.) Exch. 168, 176.

But it is now settled in England that, while an appearance by the defendant in a court of a foreign country, for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. *De Cosse Brissac* v. *Rathbone*, (1860) 6 H. & N. 301; *S. C.* 20 Law Journal (N. S.) Exch. 238; *Schibsby* v. *Westenholz*, (1870) L. R. 6 Q. B. 155, 162; *Voinet* v. *Barrett*, (1885) 1 Cab. & El. 554; *S. C.* 54 Law Journal (N. S.) Q. B. 521, and 55 Law Journal (N. S.) Q. B. 39.

The present case is not one of a person travelling through or casually found in a foreign country. The defendants, although they were not citizens or residents of France, but were citizens and residents of the State of New York, and their principal place of business was in the city of New York, yet had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there, although they did not make sales in France. Under such circumstances, evidence that their sole object in appearing and carrying on the litigation in the French courts was to prevent property, in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of those courts, from being taken in satisfaction of any judgment that might be recovered against them, would not, according to our law, show that those courts did not acquire jurisdiction of the persons of the defendants.

It is next objected that in those courts one of the plaintiffs was permitted to testify not under oath, and was not subjected to cross-examination by the opposite party, and that the defendants were, therefore, deprived of safeguards which are by our law considered essential to secure honesty and to detect fraud in a witness; and also that documents and papers were admitted in evidence, with which the defendants had no con-

nection, and which would not be admissible under our own system of jurisprudence. But it having been shown by the plaintiffs, and hardly denied by the defendants, that the practice followed and the method of examining witnesses were according to the laws of France, we are not prepared to hold that the fact that the procedure in these respects differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment.

It is also contended that a part of the plaintiffs' claim is affected by one of the contracts between the parties having been made in violation of the revenue laws of the United States, requiring goods to be invoiced at their actual market value. Rev. Stat. § 2854. It may be assumed that, as the courts of a country will not enforce contracts made abroad in evasion or fraud of its own laws, so they will not enforce a foreign judgment upon such a contract. *Armstrong* v. *Toler*, 11 Wheat. 258; *DeBrimont* v. *Penniman*, 10 Blatchford, 436; *Lang* v. *Holbrook*, Crabbe, 179; Story's Conflict of Laws, §§ 244, 246; Wharton's Conflict of Laws, § 656. But as this point does not affect the whole claim in this case, it is sufficient, for present purposes, to say that there does not appear to have been any distinct offer to prove that the invoice value of any of the goods sold by the plaintiffs to the defendants was agreed between them to be, or was, in fact, lower than the actual market value of the goods.

It must, however, always be kept in mind that it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party.

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal

record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.

There is no doubt that both in this country, as appears by the authorities already cited, and in England, a foreign judgment may be impeached for fraud.

Shortly before the Declaration of Independence, the House of Lords, upon the trial of the Duchess of Kingston for bigamy, put to the judges the question whether — assuming a sentence of the ecclesiastical court against a marriage, in a suit for jactitation of marriage, to be conclusive evidence so as to prevent the counsel for the Crown from proving the marriage upon an indictment for polygamy — "the counsel for the Crown may be admitted to avoid the effect of such sentence, by proving the same to have been obtained by fraud or collusion." Chief Justice De Grey, delivering the opinion of the judges, which was adopted by the House of Lords, answering this question in the affirmative, said: "But if it was a direct and decisive sentence upon the point, and, as it stands, to be admitted as conclusive evidence upon the court, and not to be impeached from within; yet, like all other acts of the highest judicial authority, it is impeachable from without; although it is not permitted to show that the court was mistaken, it may be shown that they were misled. Fraud is an intrinsic collateral act; which vitiates the most solemn proceedings of courts of justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal." 20 Howell's State Trials, 537, 543, note; *S. C.* in 2 Smith's Lead. Cas.

All the subsequent English authorities concur in holding that any foreign judgment, whether *in rem* or *in personam*, may be impeached upon the ground that it was fraudulently obtained. *White* v. *Hall*, (1806) 12 Ves. 321, 324; *Bowles* v. *Orr*, (1835) 1 Yo. & Col. Exch. 464, 473; *Price* v. *Dewhurst*, (1837) 8 Sim. 279, 302–305; *Don* v. *Lippmann*, (1837) 5 Cl. &

Fin. 1, 20; *Bank of Australasia* v. *Nias*, (1851) 16 Q. B. 717, 735; *Reimers* v. *Druce*, (1856) 23 Beavan, 145, 150; *Castrique* v. *Imrie*, (1870) L. R. 4 H. L. 414, 445, 446; *Godard* v. *Gray*, (1870) L. R. 6 Q. B. 139, 149; *Messina* v. *Petrococchino*, (1872) L. R. 4 P. C. 144, 157; *Ochsenbein* v. *Papelier*, (1873) L. R. 8 Ch. 695.

Under what circumstances this may be done does not appear to have ever been the subject of judicial investigation in this country.

It has often, indeed, been declared by this court that the fraud which entitles a party to impeach the judgment of one of our own tribunals must be fraud extrinsic to the matter tried in the cause, and not merely consist in false and fraudulent documents or testimony submitted to that tribunal, and the truth of which was contested before it and passed upon by it. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 66; *Vance* v. *Burbank*, 101 U. S. 514, 519; *Steel* v. *Smelting Co.*, 106 U. S. 447, 453; *Moffat* v. *United States*, 112 U. S. 24, 32; *United States* v. *Minor*, 114 U. S. 233, 242. And in one English case, where a ship had been sold under a foreign judgment, the like restriction upon impeaching that judgment for fraud was suggested; but the decision was finally put upon the ground that the judicial sale passed the title to the ship. *Cammell* v. *Sewell*, (1858–60) 3 H. & N. 617, 646; 5 H. & N. 728, 729, 742.

But it is now established in England, by well considered and strongly reasoned decisions of the Court of Appeal, that foreign judgments may be impeached, if procured by false and fraudulent representations and testimony of the plaintiff, even if the same question of fraud was presented to and decided by the foreign court.

In *Abouloff* v. *Oppenheimer*, (1882) the plaintiff had recovered a judgment at Tiflis in Russia, ordering the defendants to return certain goods or to pay their value. The defendants appealed to a higher Russian court, which confirmed the judgment, and ordered the defendants to pay, besides the sum awarded below, an additional sum for costs and expenses. In an action in the English High Court of

Justice upon those judgments, the defendants pleaded that they were obtained by the gross fraud of the plaintiff, in fraudulently representing to the Russian courts that the goods in question were not in her possession when the suit was commenced, and when the judgment was given, and during the whole time the suit was pending; and by fraudulently concealing from those courts the fact that those goods, as the fact was, and as she well knew, were in her actual possession. A demurrer to this plea was overruled, and judgment entered for the defendants. And that judgment was affirmed in the Court of Appeal by Lord Chief Justice Coleridge, Lord Justice Baggallay and Lord Justice Brett, all of whom delivered concurring opinions, the grounds of which sufficiently appear in the opinion delivered by Lord Justice Brett (since Lord Esher, Master of the Rolls), who said: "With regard to an action brought upon a foreign judgment, the whole doctrine as to fraud is English, and is to be applied in an action purely English. I am prepared to hold, according to the judgment of the House of Lords adopting the proposition laid down by De Grey, C. J., that if the judgment upon which the action is brought was procured from the foreign court by the successful fraud of the party who is seeking to enforce it, the action in the English court will not lie. This proposition is absolute and without any limitation, and, as the Lord Chief Justice has pointed out, is founded on the doctrine that no party in an English court shall be able to take advantage of his own wrongful act, or, as it may be stated in other language, that no obligation can be enforced in an English court of justice which has been procured by the fraud of the person relying upon it as an obligation." "I will assume that in the suit in the Russian courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and

that the fraud was committed, the defendants will be entitled to succeed in the present action. It has been contended that the same issue ought not to be tried in an English court which was tried in the Russian courts; but I agree that the question whether the Russian courts were deceived never could be an issue in the action tried before them." "In the present case, we have had to consider the question fully; and, according to the best opinion which I can form, fraud committed by a party to a suit, for the purpose of deceiving a foreign court, is a defence to an action in this country, founded upon the judgment of that foreign court. It seems to me that if we were to accede to the argument for the plaintiff, the result would be that a plausible deceiver would succeed, whereas a deceiver who is not plausible would fail. I cannot think that plausible fraud ought to be upheld in any court of justice in England. I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the courts of this country; and further, that nothing ought to persuade an English court to enforce a judgment against one party, which has been obtained by the fraud of the other party to the suit in the foreign court." 10 Q. B. D. 295, 305–308.

The same view was affirmed and acted on in the same court by Lords Justices Lindley and Bowen in *Vadala* v. *Lawes*, (1890) 25 Q. B. D. 310, 317–320, and by Lord Esher and Lord Justice Lopes in *Crozat* v. *Brogden*, (1894) 2 Q. B. 30, 34, 35.

In the case at bar, the defendants offered to prove, in much detail, that the plaintiffs presented to the French court of first instance and to the arbitrator appointed by that court, and upon whose report its judgment was largely based, false and fraudulent statements and accounts against the defendants, by which the arbitrator and the French courts were deceived and misled, and their judgments were based upon such false and fraudulent statements and accounts. This offer, if satisfactorily proved, would, according to the decisions of the English Court of Appeal in *Abouloff* v. *Oppenheimer*, *Vadala* v. *Lawes*, and *Crozat* v. *Brogden*, above cited,

be a sufficient ground for impeaching the foreign judgment, and examining into the merits of the original claim.

But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is, the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.

In France, the Royal Ordinance of June 15, 1629, art. 121, provided as follows: "Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may contest their rights anew before our judges." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sect. 3, no. 77.

By the French Code of Civil Procedure, art. 546, "Judgments rendered by foreign tribunals, and acts acknowledged before foreign officers, shall not be capable of execution in France, except in the manner and in the cases provided by articles 2123 and 2128 of the Civil Code," which are as follows: By article 2123, "A lien cannot arise from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal; without prejudice to provisions to the contrary which may exist in public laws and treaties." By article 2128, "Contracts entered into in a foreign country cannot give a lien upon property in France, if there are no provisions contrary to this principle in public laws or in treaties." Touillier, *ub. sup.* no. 84.

The defendants, in their answer, cited the above provisions of the statutes of France, and alleged, and at the trial offered to prove, that, by the construction given to

these statutes by the judicial tribunals of France, when the judgments of tribunals of foreign countries against the citizens of France are sued upon in the courts of France, the merits of the controversies upon which those judgments are based are examined anew, unless a treaty to the contrary effect exists between the Republic of France and the country in which such judgment is obtained, (which is not the case between the Republic of France and the United States,) and that the tribunals of the Republic of France give no force and effect, within the jurisdiction of that country, to the judgments duly rendered by courts of competent jurisdiction of the United States against citizens of France after proper personal service of the process of those courts has been made thereon in this country. We are of opinion that this evidence should have been admitted.

In *Odwin* v. *Forbes*, (1817) President Henry, in the Court of Demerara, which was governed by the Dutch law, and was, as he remarked, "a tribunal foreign to and independent of that of England," sustained a plea of an English certificate in bankruptcy, upon these grounds: "It is a principle of their law, and laid down particularly in the ordinances of Amsterdam," "that the same law shall be exercised towards foreigners in Amsterdam as is exercised with respect to citizens of that State in other countries; and upon this principle of reciprocity, which is not confined to the city of Amsterdam, but pervades the Dutch laws, they have always given effect to the laws of that country which has exercised the same comity and indulgence in admitting theirs." "That the Dutch bankrupt laws proceed on the same principles as those of the English; that the English tribunals give effect to the Dutch bankrupt laws; and that, on the principle of reciprocity and mutual comity, the Dutch tribunals, according to their own ordinances, are bound to give effect to the English bankrupt laws when duly proved, unless there is any express law or ordinance prohibiting their admission." And his judgment was affirmed in the Privy Council on Appeal. Case of *Odwin* v. *Forbes*, pp. 89, 159–161, 173–176; *S. C.* (1818) Buck Bankr. Cas. 57, 64.

President Henry, at page 76 of his Treatise on Foreign Law, published as a preface to his report of that case, said: "This comity, in giving effect to the judgments of other tribunals, is generally exercised by States under the same sovereign, on the ground that he is the fountain of justice in each, though of independent jurisdiction; and it has also been exercised in different States of Europe with respect to foreign judgments, particularly in the Dutch States, who are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign States, which show the same comity to theirs; but the tribunals of France and England have never exercised this comity to the degree that those of Holland have, but always required a fresh action to be brought, in which the foreign judgment may be given in evidence. As this is a matter of positive law and internal policy in each State, no opinion need be given; besides, it is a mere question of comity, and perhaps it might be neither politic nor prudent, in two such great States, to give indiscriminate effect to the judgment of each other's tribunals, however the practice might be proper or convenient in federal States, or those under the same sovereign."

It was that statement, which appears to have called forth the observations of Mr. Justice Story, already cited: "Holland seems at all times, upon the general principle of reciprocity, to have given great weight to foreign judgments, and in many cases, if not in all cases, to have given to them a weight equal to that given to domestic judgments, wherever the like rule of reciprocity with regard to Dutch judgments has been adopted by the foreign country whose judgment is brought under review. This is certainly a very reasonable rule, and may perhaps hereafter work itself firmly into the structure of international jurisprudence." Story's Conflict of Laws, § 618.

This rule, though never either affirmed or denied by express adjudication in England or America, has been indicated, more or less distinctly, in several of the authorities already cited.

Lord Hardwicke threw out a suggestion that the credit to be given by one court to the judgment of a foreign court

might well be affected by "their proceeding both by the same rules of law." *Otway* v. *Ramsay*, 4 B. & C. 414–416, note.

Lord Eldon, after saying that "natural law" (evidently intending the law of nations) "requires the courts of this country to give credit to those of another for the inclination and power to do justice," added that "if it appears in evidence, that persons suing under similar circumstances neither had met, nor could meet, with justice, that fact cannot be immaterial as an answer to the presumption." *Wright* v. *Simpson*, 6 Ves. 714, 730.

Lord Brougham, presiding as Lord Chancellor in the House of Lords, said: "The law in the course of procedure abroad sometimes differs so mainly from ours in the principles upon which it is bottomed, that it would seem a strong thing to hold that our courts were bound conclusively to give execution to the sentence of foreign courts, when, for aught we know, there is not any one of those things which are reckoned the elements or the corner stones of the due administration of justice, present to the procedure in these foreign courts." *Houlditch* v. *Donegal*, 8 Bligh N. R. 301, 338.

Chief Justice Smith, of New Hampshire, in giving reasons why foreign judgments or decrees, founded on the municipal laws of the State in which they are pronounced, are not conclusive evidence of debt, but *prima facie* evidence only, said: "These laws and regulations may be unjust, partial to citizens, and against foreigners; they may operate injustice to our citizens, whom we are bound to protect; they may be, and the decisions of courts founded on them, just cause of complaint against the supreme power of the State where rendered. To adopt them is not merely saying that the courts have decided correctly on the law, but it is approbating the law itself." *Bryant* v. *Ela*, Smith (N. H.) 396, 404.

Mr. Justice Story said: "If a civilized nation seeks to have the sentences of its own courts held of any validity elsewhere, they ought to have a just regard to the rights and usages of other civilized nations, and the principles of public and national law in the administration of justice." *Bradstreet* v. *Neptune Ins. Co.*, 3 Sumner, 600, 608.

Mr. Justice Woodbury said that judgments *in personam*, rendered under a foreign government, "are, *ex comitate*, treated with respect, according to the nature of the judgment, and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments;" and added, "Nor can much comity be asked for the judgments of another nation, which, like France, pays no respect to those of other countries." *Burnham* v. *Webster*, 1 Woodb. & Min. 172, 175, 179.

Mr. Justice Cooley said, "True comity is equality; we should demand nothing more, and concede nothing less." *McEwan* v. *Zimmer*, 38 Michigan, 765, 769.

Mr. Wheaton said: "There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted only from considerations of utility and the mutual convenience of States — *ex comitate, ob reciprocam utilitatem.*" "The general comity, utility and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution." Wheaton's International Law, (8th ed.) §§ 79, 147.

Since Story, Kent and Wheaton wrote their commentaries, many books and essays have been published upon the subject of the effect to be allowed by the courts of one country to the judgments of another, with references to the statutes and decisions in various countries. Among the principal ones are Foelix, Droit International Privé, (4th ed. by Demangeat, 1866) lib. 2, tits. 7, 8; Moreau, Effets Internationaux des Jugements (1884); Piggott, on Foreign Judgments (2d ed. 1884); Constant, de l'Exécution des Jugements Étrangers (2d ed. 1890), giving the text of the articles of most of the modern codes upon the subject, and of French treaties with Italian, German and Swiss States; and numerous papers in Clunet's Journal de Droit International Privé, established in 1874, and continued to the present time. For the reasons stated at the outset of this opinion, we have not thought it important to state the conflicting theories of continental commenta-

tors and essayists as to what each may think the law ought to be; but have referred to their works only for evidence of authoritative declarations, legislative or judicial, of what the law is.

By the law of France, settled by a series of uniform decisions of the Court of Cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgment *au fond* — to the bottom, including the whole merits of the cause of action on which the judgment rests. Pardessus, Droit Commercial, § 1488; Bard, Précis de Droit International, (1883) nos. 234–239; Story's Conflict of Laws, §§ 615–617; Piggott, 452; Westlake on Private International Law, (3d ed. 1890) 350.

A leading case was decided by the Court of Cassation on April 19, 1819, and was as follows: A contract of partnership was made between Holker, a French merchant, and Parker, a citizen of the United States. Afterwards, and before the partnership accounts were settled, Parker came to France, and Holker sued him in the Tribunal of Commerce of Paris. Parker excepted, on the ground that he was a foreigner, not domiciled in France; and obtained a judgment, affirmed on appeal, remitting the matter to the American courts — *obtint son renvoi devant les tribunaux Américains.* Holker then sued Parker in the Circuit Court of the United States for the District of Massachusetts, and in 1814 obtained a judgment there, ordering Parker to pay him $529,949. (One branch of the controversy had been brought before this court in 1813. *Holker* v. *Parker*, 7 Cranch, 436.) Holker, not being able to obtain execution of that judgment in America, because Parker had no property there and continued to reside in Paris, obtained from a French judge an order declaring the judgment executory. Upon Parker's application to nullify the proceeding, the Royal Court of Paris, reversing the judgment of a lower court, set aside that order, assigning these reasons: "Considering that judgments rendered by foreign courts have neither effect nor authority in France; that this rule is doubtless more particularly appli-

cable in favor of Frenchmen, to whom the King and his officers owe a special protection; but that the principle is absolute, and may be invoked by all persons without distinction, being founded on the independence of States; that the Ordinance of 1629, in the beginning of its article 121, lays down the principle in its generality, when it says that judgments rendered in foreign kingdoms and sovereignties, for any cause whatever, shall have no execution in the Kingdom of France; and that the Civil Code, art. 2123, gives to this principle the same latitude, when it declares that a lien cannot result from judgments rendered in a foreign country, except so far as they have been declared executory by a French tribunal — which is not a matter of mere form, like the granting in past times of a *pareatis* from one department to another for judgments rendered within the kingdom; but which assumes, on the part of the French tribunals, a cognizance of the cause, and a full examination of the justice of the judgment presented for execution, as reason demands, and this has always been practised in France, according to the testimony of our ancient authorities; that there may result from this an inconvenience, where the debtor, as is asserted to have happened in the present case, removes his property and his person to France, while keeping his domicil in his native country; that it is for the creditor to be watchful, but that no consideration can impair a principle on which rests the sovereignty of governments, and which, whatever be the case, must preserve its whole force." The court therefore adjudged that, before the tribunal of first instance, Holker should state the grounds of his action, to be contested by Parker, and to be determined by the court upon cognizance of the whole cause. That judgment was confirmed, upon deliberate consideration, by the Court of Cassation, for the reasons that the Ordinance of 1629 enacted, in absolute terms and without exception, that foreign judgments should not have execution in France; that it was only by the Civil Code and the Code of Civil Procedure that the French tribunals had been authorized to declare them executory; that therefore the Ordinance of 1629 had no application; that the articles of the Codes,

referred to, did not authorize the courts to declare judgments, rendered in a foreign country, executory in France without examination; that such an authorization would be as contrary to the institution of the courts, as would be the award or the refusal of execution arbitrarily and at will; would impeach the right of sovereignty of the French government, and was not in the intention of the legislature; and that the Codes made no distinction between different judgments rendered in a foreign country, and permitted the judges to declare them all executory; and therefore those judgments, whether against a Frenchman or against a foreigner, were subject to examination on the merits. *Holker* v. *Parker*, Merlin, Questions de Droit, Jugement, § 14, no. 2.

The Court of Cassation has ever since constantly affirmed the same view. Moreau, no. 106, note, citing many decisions; Clunet, 1882, p. 166. In Clunet, 1894, p. 913, note, it is said to be "settled by judicial decisions — *il est de jurisprudence* — that the French courts are bound, in the absence of special diplomatic treaties, to proceed to the revision on the whole merits — *au fond* — of foreign judgments, execution of which is demanded of them," citing, among other cases, a decision of the Court of Cassation on February 2, 1892, by which it was expressly held to result from the articles of the Codes, above cited, "that judgments rendered, in favor of a foreigner against a Frenchman, by a foreign court, are subject, when execution of them is demanded in France, to the revision of the French tribunals, which have the right and the duty to examine them, both as to the form, and as to the merits." Sirey, 1892, 1, 201.

In Belgium, the Code of Civil Procedure of 1876 provides that if a treaty on the basis of reciprocity be in existence between Belgium and the country in which the foreign judgment has been given, the examination of the judgment in the Belgian courts shall bear only upon the questions whether it "contains nothing contrary to public order, to the principles of the Belgian public order;" whether, by the law of the country in which it was rendered, it has the force of *res judicata;* whether the copy is duly authenticated; whether the

defendant's rights have been duly respected; and whether the foreign court is not the only competent court, by reason of the nationality of the plaintiff. Where, as is the case between Belgium and France, there is no such treaty, the Belgian Court of Cassation holds that the foreign judgment may be reëxamined upon the merits. Constant, 111, 116; Moreau, no. 189; Clunet, 1887, p. 217; 1888, p. 837; Piggott, 439. And in a very recent case, the Civil Tribunal of Brussels held that, "considering that the right of revision is an emanation of the right of sovereignty; that it proceeds from the *imperium*, and that, as such, it is within the domain of public law; that from that principle it manifestly follows that, if the legislature does not recognize executory force in foreign judgments where there exists no treaty upon the basis of reciprocity, it cannot belong to the parties to substitute their will for that of the legislature, by arrogating to themselves the power of delegating to the foreign judge a portion of sovereignty." Clunet, 1894, pp. 164, 165.

In Holland, the effect given to foreign judgments has always depended upon reciprocity, but whether by reason of Dutch ordinances only, or of general principles of jurisprudence, does not clearly appear. *Odwin* v. *Forbes*, and Henry on Foreign Law, above cited; Story's Conflict of Laws, § 618; Foelix, no. 397, note; Clunet, 1879, p. 369; 1 Ferguson's International Law, 85; Constant, 171; Moreau, no. 213.

In Denmark, the courts appear to require reciprocity to be shown before they will execute a foreign judgment. Foelix, nos. 328, 345; Clunet, 1891, p. 987; Westlake, *ub. sup.* In Norway, the courts reëxamine the merits of all foreign judgments, even of those of Sweden. Foelix, no. 401; Piggott, 504, 505; Clunet, 1892, p. 296. In Sweden, the principle of reciprocity has prevailed from very ancient times; the courts give no effect to foreign judgments, unless upon that principle; and it is doubtful whether they will even then, unless reciprocity is secured by treaty with the country in which the judgment was rendered. Foelix, no. 400; Olivecrona, in Clunet, 1880, p. 83; Constant, 191; Moreau, no. 222; Piggott, 503; Westlake, *ub. sup.*

In the Empire of Germany, as formerly in the States which now form part of that Empire, the judgments of those States are mutually executed; and the principle of reciprocity prevails as to the judgments of other countries. Foelix, nos. 328, 331, 333–341; Moreau, nos. 178, 179; Vierhaus, in Piggott, 460–474; Westlake, *ub. sup.* By the German Code of 1877, "compulsory execution of the judgment of a foreign court cannot take place, unless its admissibility has been declared by a judgment of exequatur;" "the judgment of exequatur is to be rendered without examining whether the decision is conformable to law;" but it is not to be granted "if reciprocity is not guaranteed." Constant, 79–81; Piggott, 466. The Reichsgericht, or Imperial Court, in a case reported in full in Piggott, has held that an English judgment cannot be executed in Germany, because, the court said, the German courts, by the Code, when they execute foreign judgments at all, are "bound to the unqualified recognition of the legal validity of the judgments of foreign courts," and "it is, therefore, an essential requirement of reciprocity, that the law of the foreign State should recognize in an equal degree the legal validity of the judgments of German courts, which are to be enforced by its courts; and that an examination of their legality, both as regards the material justice of the decision as to matters of fact or law, and with respect to matters of procedure, should neither be required as a condition of their execution, by the court *ex officio*, nor be allowed by the admission of pleas which might lead to it." Piggott, 470, 471. See also Clunet, 1882, p. 35; 1883, p. 246; 1884, p. 600.

In Switzerland, by the Federal Constitution, civil judgments in one canton are executory throughout the Republic. As to foreign judgments, there is no federal law, each canton having its own law upon the subject. But in the German cantons, and in some of the other cantons, foreign judgments are executed according to the rule of reciprocity only. Constant, 193–204; Piggott, 505–516; Clunet, 1887, p. 762; Westlake, *ub. sup.* The law upon this subject has been clearly stated by Brocher, President of the Court of Cassation of Geneva, and professor of law in the university there. In his Nouveau

Traité de Droit International Privé, (1876) § 174, treating of the question whether "it might not be convenient that States should execute, without reviewing their merits, judgments rendered on the territory of each of them respectively," he says: "It would, certainly, be advantageous for the parties interested to avoid the delays, the conflicts, the differences of opinion, and the expenses resulting from the necessity of obtaining a new judgment in each locality where they should seek execution. There might thence arise, for each sovereignty, a juridical or moral obligation to lend a strong hand to foreign judgments. But would not such an advantage be counterbalanced, and often surpassed, by the dangers that might arise from that mode of proceeding? There is here, we believe, a question of reciprocal appreciation and confidence. One must, at the outset, inquire whether the administration of the foreign judiciary, whose judgments it is sought to execute without verifying their merits, presents sufficient guaranties. If the propriety of such an execution be admitted, there is ground for making it the object of diplomatic treaties. That form alone can guarantee the realization of a proper reciprocity; it furnishes, moreover, to each State the means of acting upon the judicial organization and procedure of other States." In an article in the Journal, after a review of the Swiss decisions, he recognizes and asserts that "it comes within the competency of each canton to do what seems to it proper in such matters." Clunet, 1879, pp. 88, 94. And in a later treatise, he says: "We cannot admit that the recognition of a State as sovereign ought necessarily to have as a consequence the obligation of respecting and executing the judicial decisions rendered by its tribunals; in strict right, the authority of such acts does not extend beyond the frontier. Each sovereignty possesses in particular, and more or less in private, the territory subject to its power. No other can exercise there an act of its authority. This territorial independence finds itself, in principle, directly included in the very act by which one nation recognizes a foreign State as sovereign; but there cannot result therefrom a promise to adopt, and to cause to be executed upon the national territory, judgments rendered by

the officials of the foreign State, whoever they may be. That would be an abdication of its own sovereignty; and would bind it in such sort as to make it an accomplice in acts often injurious, and in some cases even criminal. Such obligations suppose a reciprocal confidence; they are not undertaken, moreover, except upon certain conditions, and by means of a system of regulations intended to prevent or to lessen the dangers which might result from them." 3 Cours de Droit International Privé, (1885) 126, 127.

In Russia, by the Code of 1864, "the judgments of foreign tribunals shall be rendered executory according to the rules established by reciprocal treaties and conventions," and, where no rules have been established by such treaties, are to be "put in execution in the Empire, only after authorization granted by the courts of the Empire;" and, "in deciding upon demands of this kind, the courts do not examine into the foundation of the dispute adjudged by the foreign tribunals, but decide only whether the judgment does not contain dispositions which are contrary to the public order, or which are not permitted by the laws of the Empire." Constant, 183–185. Yet a chamber of the Senate of St. Petersburg, sitting as a Court of Cassation, and the highest judicial tribunal of the Empire in civil matters, has declined to execute a French judgment, upon the grounds that, by the settled law of Russia, "it is a principle in the Russian Empire that only the decisions of the authorities to whom jurisdiction has been delegated by the sovereign power have legal value by themselves and of full right;" and that "in all questions of international law, reciprocity must be observed and maintained as a fundamental principle." *Adam v. Schipoff*, Clunet, 1884, pp. 45, 46, 134. And Professor Englemann, of the Russian University of Dorpat, in an able essay, explaining that and other Russian decisions, takes the following view of them: "The execution of a treaty is not the only proof of reciprocity." "It is necessary to commit the ascertainment of the existence of reciprocity to the judicial tribunals, for the same reasons for which there is conferred upon them the right to settle all questions incident to the cause to be adjudged. The existence of reciprocity be-

tween two States ought to be proved in the same manner as all the positive facts of the case." "It is true that the principle of reciprocity is a principle, not of right, but of policy; yet the basis of the principle of all regular and real policy is also the fundamental principle of right, and the point of departure of all legal order — the *suum cuique*. This last principle comprehends right, reciprocity, utility; and reciprocity is the application of right to policy." "Let this principle be applied wherever there is the least guaranty, or even a probability of reciprocity, and the cognizance of this question be committed to the judicial tribunals, and one will arrive at important results, which, on their side, will touch the desired end, international accord. But, for this, it is indispensable that the application of this principle should be entrusted to judicial tribunals, accustomed to decide affairs according to right, and not to administrative authorities, which look above all to utility, and are accustomed to be moved by political reasons, intentions, and even passions." Clunet, 1884, pp. 120–122. But it would seem that no foreign judgment will be executed in Russia, unless reciprocity is secured by treaty. Clunet, 1884, pp. 46, 113, 139, 140, 602.

In Poland, the provisions of the Russian Code are in force; and the Court of Appeal of Warsaw has decided that, where there is no treaty, the judgments of a foreign country cannot be executed, because, "in admitting a contrary conclusion, there would be impugned one of the cardinal principles of international relations, namely, the principle of reciprocity, according to which each State recognizes juridical rights and relations, originating or established in another country, only in the measure in which the latter, in its turn, does not disregard the rights and relations existing in the former." Clunet, 1884, pp. 494, 495.

In Roumania, it is provided by code that "judicial decisions rendered in foreign countries cannot be executed in Roumania, except in the same manner in which Roumanian judgments are executed in the country in question, and provided they are declared executory by competent Roumanian judges;" and this article seems to be held to require legislative reciprocity.

Moreau, no. 219; Clunet, 1879, p. 351; 1885, p. 537; 1891, p. 452; Piggott, 495.

In Bulgaria, by a resolution of the Supreme Court, in 1881, "the Bulgarian judges should, as a general rule, abstain from entering upon the merits of the foreign judgment; they ought only to inquire whether the judgment submitted to them does not contain dispositions contrary to the public order, and to the Bulgarian laws." Constant, 129, 130; Clunet, 1886, p. 570. This resolution closely follows the terms of the Russian Code, which, as has been seen, has not precluded applying the principle of reciprocity.

In Austria, the rule of reciprocity does not rest upon any treaty or legislative enactment, but has been long established, by imperial decrees and judicial decisions, upon general principles of jurisprudence. Foelix, no. 331; Constant, 100–108; Moreau, no. 185; Weiss, Traité de Droit International, (1886) 980; Clunet, 1891, p. 1003; 1894, p. 908; Piggott, 434. In Hungary, the same principles were always followed as in Austria; and reciprocity has been made a condition by a law of 1880. Constant, 109; Moreau, no. 186 & note; Piggott, 436; Weiss, *ub. sup.*

In Italy before it was united into one kingdom, each State had its own rules. In Tuscany, and in Modena, in the absence of treaty, the whole merits were reviewed. In Parma, as by the French Ordinance of 1629, the foreign judgment was subject to fundamental revision, if against a subject of Parma. In Naples, the code and the decisions followed those of France. In Sardinia, the written laws required above all the condition of reciprocity, and, if that condition was not fulfilled, the foreign judgment was reëxaminable in all respects. Fiore, Effetti Internazionali delle Sentenze, (1875) 40–44; Moreau, no. 204. In the Papal States, by a decree of the Pope in 1820, "the exequatur shall not be granted, except so far as the judgments rendered in the States of his Holiness shall enjoy the same favor in the foreign countries; this reciprocity is presumed, if there is no particular reason to doubt it." Touillier, Droit Civil, lib. 3, tit. 3, c. 6, sec. 3, no. 93. And see Foelix, no. 343; Westlake, *ub. sup.* In the Kingdom of Italy,

by the Code of Procedure of 1865, "executory force is given to the judgments of foreign judicial authorities by the court of appeal in whose jurisdiction they are to be executed, by obtaining a judgment on an exequatur in which the court examines (*a*) if the judgment has been pronounced by a competent judicial authority; (*b*) if it has been pronounced, the parties being regularly cited; (*c*) if the parties have been legally represented or legally defaulted; (*d*) if the judgment contains dispositions contrary to public order or to the internal public law of the realm." Constant, 157. In 1874, the Court of Cassation of Turin, "considering that in international relations is admitted the principle of reciprocity, as that which has its foundation in the natural reason of equality of treatment, and, in default thereof, opens the way to the exercise of the right of retaliation;" and that the French courts examine the merits of Italian judgments, before allowing their execution in France; decided that the Italian courts of appeal, when asked to execute a French judgment, ought not only to inquire into the competency of the foreign court, but also to review the merits and the justice of the controversy. *Levi* v. *Pitre*, in Rossi, Esecuzione delle Sentenze Straniere, (1st ed. 1875) 70, 284; and in Clunet, 1879, p. 295. Some commentators, however, while admitting that decision to be most authoritative, have insisted that it is unsound, and opposed to other Italian decisions, to which we have not access. Rossi, *ub. sup.* (2d ed. 1890) 92; Fiore, 142, 143; Clunet, 1878, p. 237; Clunet, 1879, pp. 296, 305; Piggott, 483; Constant, 161.

In the principality of Monaco, foreign judgments are not executory, except by virtue of a special ordinance of the Prince, upon a report of the Advocate General. Constant, 169; Piggott, 488.

In Spain, formerly, foreign judgments do not appear to have been executed at all. Foelix, no. 398; Moreau, no. 197; Silvela, in Clunet, 1881, p. 20. But by the Code of 1855, revised in 1881 without change in this respect, "judgments pronounced in foreign countries shall have in Spain the force that the respective treaties give them; if there are no special treaties with the nation in which they have been rendered, they shall

have the same force that is given by the laws of that nation to Spanish executory judgments; if the judgment to be executed proceeds from a nation by whose jurisprudence effect is not given to the judgments pronounced by Spanish tribunals, it shall have no force in Spain;" and "application for the execution of judgments pronounced in foreign countries shall be made to the Supreme Tribunal of Justice; which, after examining an authorized translation of the foreign judgment, and after hearing the party against whom it is directed and the public minister, shall decide whether it ought or ought not to be executed." Constant, 141, 142; Piggott, 499, 500. A case in which the Supreme Court of Spain in 1880 ordered execution of a French judgment, after reviewing its merits, is reported in Clunet, 1881, p. 365. In another case, in 1888, the same court, after hearing the parties and the public minister, ordered execution of a Mexican judgment. The public minister, in his demand for its execution, said: "Our law of civil procedure, inspired, to a certain point, by the modern theories of international law, which, recognizing among civilized nations a true community of right, and considering mankind as a whole in which nations occupy a position identical with that of individuals towards society, gives authority, in Spain, to executory judgments rendered by foreign tribunals, even in the absence of special treaty, provided that those countries do not proscribe the execution there of our judgments, and under certain conditions which, if they limit the principle, are inspired by the wish of protecting our sovereignty and by the supreme exigencies of justice. When nothing appears, either for or against, as to the authority of the judgments of our courts in the foreign country, one should not put an obstacle to the fulfilment, in our country, of judgments emanating from other nations, especially when the question is of a country which, by its historic origin, its language, its literature, and by almost the identity of its customs, its usages, and its social institutions, has so great a connection with our own — which obliges us to maintain with it the most intimate relations of friendship and courtesy." And he pointed out that Mexico, by its code, had adopted reciprocity as a fundamental prin-

ciple. Among the reasons assigned by the court for ordering the Mexican judgment to be executed was that "there exists in Mexico no precedent of jurisprudence which refuses execution to judgments rendered by the Spanish tribunals." Clunet, 1891, pp. 288–292.

In Portugal, foreign judgments, whether against a Portuguese or against a foreigner, are held to be reviewable upon the merits before granting execution thereof. Foelix, no. 399; Clunet, 1875, pp. 54, 448; Moreau, no. 217; Constant, 176–180; Westlake, *ub. sup.*

In Greece, by the provisions of the Code of 1834, foreign judgments, both parties to which are foreigners, are enforced without examination of their merits; but if one of the parties is a Greek, they are not enforced if found contradictory to the facts proved, or if they are contrary to the prohibitive laws of Greece. Foelix, no. 396; Constant, 151, 152; Moreau, no. 202; Saripolos, in Clunet, 1880, p. 173; Piggott, 475.

In Egypt, under the influence of European jurisprudence, the code of civil procedure has made reciprocity a condition upon which foreign judgments are executed. Constant, 136; Clunet, 1887, pp. 98, 228; 1889, p. 322.

In Cuba and in Porto Rico, the codes of civil procedure are based upon the Spanish code of 1855. Piggott, 435, 503. In Hayti, the code reënacts the provisions of the French code. Constant, 153; Moreau, no. 203; Piggott, 460.

In Mexico, the system of reciprocity has been adopted, by the Code of 1884, as the governing principle. Constant, 168; Clunet, 1891, p. 290.

The rule of reciprocity likewise appears to have generally prevailed in South America. In Peru, foreign judgments do not appear to be executed without examining the merits, unless when reciprocity is secured by treaty. Clunet, 1879, pp. 266, 267; Piggott, 548. In Chili, there appears to have been no legislation upon the subject; but, according to a decision of the Supreme Court of Santiago in 1886, "the Chilian tribunals should not award an exequatur, except upon decisions in correct form, and also reserving the general principle of reciprocity." Clunet, 1889, p. 135; Constant, 131,

132. In Brazil, foreign judgments are not executed, unless because of the country in which they were rendered admitting the principle of reciprocity, or because of a *placet* of the government of Brazil, which may be awarded according to the circumstances of the case. Constant, 124 & note; Moreau, no. 192; Piggott, 543–546; Westlake, *ub. sup.* In the Argentine Republic, the principle of reciprocity was maintained by the courts, and was affirmed by the Code of 1878, as a condition *sine qua non* of the execution of foreign judgments, but has perhaps been modified by later legislation. Moreau, no. 218; Palomeque, in Clunet, 1887, pp. 539–558.

It appears, therefore, that there is hardly a civilized nation on either continent, which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of money. In France, and in a few smaller States — Norway, Portugal, Greece, Monaco, and Hayti — the merits of the controversy are reviewed, as of course, allowing to the foreign judgment, at the most, no more effect than of being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe — in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Roumania, in Austria and Hungary, (perhaps in Italy,) and in Spain — as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed the same effect only as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.

The prediction of Mr. Justice Story (in § 618 of his Commentaries on the Conflict of Laws, already cited,) has thus been fulfilled, and the rule of reciprocity has worked itself firmly into the structure of international jurisprudence.

The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs' claim.

In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another; but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.

By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as *prima facie* evidence, and not conclusive. There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. It is not to be supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.

If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants' offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. If the judgment had been rendered in this country, or in any other outside of the jurisdiction of France, the French courts would not have executed or enforced it, except after examining into its merits. The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the Colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it. In the courts of nearly every other nation, it would be subject to reëxamination, either merely because it was a foreign judgment, or because judgments of that nation would be reëxaminable in the courts of France.

Dissenting Opinion: Fuller, C. J., Harlan, Brewer, Jackson, JJ.

For these reasons, in the action at law, the

Judgment is reversed, and the cause remanded to the Circuit Court with directions to set aside the verdict and to order a new trial.

For the same reasons, in the suit in equity between these parties, the foreign judgment is not a bar, and, therefore, the

Decree dismissing the bill is reversed, the plea adjudged bad, and the cause remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Jackson, dissenting.

Plaintiffs brought their action on a judgment recovered by them against the defendants in the courts of France, which courts had jurisdiction over person and subject-matter, and in respect of which judgment no fraud was alleged, except in particulars contested in and considered by the French courts. The question is whether under these circumstances, and in the absence of a treaty or act of Congress, the judgment is reëxaminable upon the merits. This question I regard as one to be determined by the ordinary and settled rule in respect of allowing a party, who has had an opportunity to prove his case in a competent court, to retry it on the merits, and it seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.

This application of the doctrine is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law. The fundamental principle concerning judgments is that disputes are finally determined by them, and I am unable to perceive why a judgment *in personam* which is not open to question on the ground of want of jurisdiction, either intrinsically or over the parties, or of fraud, or on any other recognized ground of impeachment, should not be held *inter partes*, though recovered abroad, conclusive on the merits.

Judgments are executory while unpaid, but in this country execution is not given upon a foreign judgment as such, it being enforced through a new judgment obtained in an action brought for that purpose.

The principle that requires litigation to be treated as terminated by final judgment properly rendered, is as applicable to a judgment proceeded on in such an action, as to any other, and forbids the allowance to the judgment debtor of a retrial of the original cause of action, as of right, in disregard of the obligation to pay arising on the judgment and of the rights acquired by the judgment creditor thereby.

That any other conclusion is inadmissible is forcibly illustrated by the case in hand. Plaintiffs in error were trading copartners in Paris as well as in New York, and had a place of business in Paris at the time of these transactions and of the commencement of the suit against them in France. The subjects of the suit were commercial transactions, having their origin, and partly performed, in France under a contract there made, and alleged to be modified by the dealings of the parties there; and one of the claims against them was for goods sold to them there. They appeared generally in the case, without protest, and by counterclaims relating to the same general course of business, a part of them only connected with the claims against them, became actors in the suit and submitted to the courts their own claims for affirmative relief, as well as the claims against them. The courts were competent and they took the chances of a decision in their favor. As traders in France they were under the protection of its laws and were bound by its laws, its commercial usages and its rules of procedure. The fact that they were Americans and the opposite parties were citizens of France is immaterial, and there is no suggestion on the record that those courts proceeded on any other ground than that all litigants, whatever their nationality, were entitled to equal justice therein. If plaintiffs in error had succeeded in their cross suit and recovered judgment against defendants in error, and had sued them here on that judgment, defendants in error would not have been permitted to say that the judgment in France was

not conclusive against them. As it was, defendants in error recovered, and I think plaintiffs in error are not entitled to try their fortune anew before the courts of this country on the same matters voluntarily submitted by them to the decision of the foreign tribunal. We are dealing with the judgment of a court of a civilized country, whose laws and system of justice recognize the general rules in respect to property and rights between man and man prevailing among all civilized peoples. Obviously the last persons who should be heard to complain are those who identified themselves with the business of that country, knowing that all their transactions there would be subject to the local laws and modes of doing business. The French courts appear to have acted "judicially, honestly, and with the intention to arrive at the right conclusion;" and a result thus reached ought not to be disturbed.

The following view of the rule in England was expressed by Lord Herschell in *Nouvion* v. *Freeman*, L. R. 15 App. Cas. 1, 9, quoted in the principal opinion: "The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that court be disputed, and can only be questioned in an appeal to a higher tribunal. In such a case it may well be said that giving credit to the courts of another country we are prepared to take the fact that such adjudication has been made as establishing the existence of the debt or obligation." But in that connection the observations made by Mr. Justice Blackburn in *Godard* v. *Gray*, L. R. 6 Q. B. 139, 148, and often referred to with approval, may usefully again be quoted:

"It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgments of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other coun-

tries, unless where there are reciprocal treaties to that effect. But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B., in *Williams* v. *Jones*, 13 M. & W. at p. 633: 'Where a court of competent jurisdiction had adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.' And taking this as the principle, it seems to follow that anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action. It must be open, therefore, to the defendant to show that the court which pronounced the judgment had not jurisdiction to pronounce it, either because they exceeded the jurisdiction given to them by the foreign law, or because he, the defendant, was not subject to that jurisdiction; and so far the foreign judgment must be examinable. Probably the defendant may shew that the judgment was obtained by the fraud of the plaintiff, for that would shew that the defendant was excused from the performance of an obligation thus obtained; and it may be that where the foreign court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him; but we prefer to imitate the caution of the present Lord Chancellor in *Castrique* v. *Imrie*, L. R. 4 H. L. at p. 445, and to leave those questions to be decided when they arise, only observing in the present case, as in that 'the whole of the facts appear to have been inquired into by the French courts, judicially, honestly, and with the intention to arrive at the right conclusion, and having heard the facts as stated before them, they came to a conclusion which justified them in France in deciding as they did decide.' . . . Indeed, it is difficult to understand how the common course of pleading is consistent with any notion that the judgment was only evidence. If that were so, every count on a

foreign judgment must be demurrable on that ground. The mode of pleading shews that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. This may seem a technical mode of dealing with the question; but in truth it goes to the root of the matter. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter evidence negativing the existence of that original cause of action. If, on the other hand, there is a *prima facie* obligation to obey the judgment of a tribunal having jurisdiction over the party and the cause, and to pay the sum decreed, the question would be, whether it was open to the unsuccessful party to try the cause over again in a court, not sitting as a court of appeal from that which gave the judgment. It is quite clear that this could not be done where the action is brought on the judgment of an English tribunal; and, on principle, it seems the same rule should apply, where it is brought on that of a foreign tribunal."

In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.

And, without going into the refinements of the publicists on the subject, it appears to me that that law finds authoritative expression in the judgments of courts of competent jurisdiction over parties and subject-matter.

It is held by the majority of the court that defendants cannot be permitted to contest the validity and effect of this judgment on the general ground that it was erroneous in law

or in fact; and the special grounds relied on are *seriatim* rejected. In respect of the last of these, that of fraud, it is said that it is unnecessary in this case to decide whether certain decisions cited in regard to impeaching foreign judgments for fraud could be followed consistently with our own decisions as to impeaching domestic judgments for that reason, "because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France, and that ground is the want of reciprocity on the part of France as to the effect to be given to the judgments of this and other foreign countries." And the conclusion is announced to be "that judgments rendered in France or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff's claim." In other words, that although no special ground exists for impeaching the original justice of a judgment, such as want of jurisdiction or fraud, the right to retry the merits of the original cause at large, defendant being put upon proving those merits, should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely.

I cannot yield my assent to the proposition that because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered, (subject, of course, to the recognized exceptions,) therefore we should pursue the same line of conduct as respects the judgments of French tribunals. The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary.

As the court expressly abstains from deciding whether the judgment is impeachable on the ground of fraud, I refrain from any observations on that branch of the case.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and MR. JUSTICE JACKSON concur in this dissent.

RITCHIE v. McMULLEN.

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

No. 15. Argued November 10, 14, 1893. — Decided June 3, 1895.

In an action upon a foreign judgment, an answer admitting that "certain attorneys entered, or undertook to enter, the appearance of the defendant" in the action in the foreign court; and alleging that the judgment was entered without his knowledge, in his absence, and without any hearing; but not alleging that the attorneys were not authorized to enter his appearance in that action, or that he appeared and answered under compulsion, or for any other purpose than to contest his personal liability, is insufficient to show that the foreign court had no jurisdiction of his person.

Averments, in an answer to an action upon a foreign judgment, that it was "an irregular and void judgment," and "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings," are mere averments of legal conclusions, and are insufficient to impeach the judgment, without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority.

To warrant the impeaching of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged.

A judgment rendered by a court having jurisdiction of the cause and of the parties, upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by the law of which, as in England and in Canada, a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, is conclusive, as between the parties, in an action brought upon it in this country, as to all matters pleaded and which might have been tried in the foreign court.

THIS was an action at law, brought September 21, 1888, in the Circuit Court of the United States for the Northern District of Ohio, by James B. McMullen, a citizen of the State of Illinois, and George W. McMullen, a citizen of the Province of Ontario in the Dominion of Canada, against Samuel J. Ritchie, a citizen of the State of Ohio, upon a judgment for the

sum of $238,000, recovered by the plaintiffs against the defendant on February 26, 1888, in the Queen's Bench Division of the High Court of Justice for the Province of Ontario.

The petition alleged that by a contract in writing, dated January 13, 1886, the plaintiffs, being the owners of 210 first mortgage bonds of the Central Ontario Railway, a corporation of the Province of Ontario, for $1000 each, and of certain coupons thereof, amounting to the sum of $71,250, agreed to sell, and the defendant agreed to purchase, those bonds and coupons for the price of $210,000 of the fully paid-up stock of the Canadian Copper Company, a corporation of the State of Ohio; that on the same day, in part performance of the contract, the defendant accepted five bills of exchange for $5000 each, drawn by one of the plaintiffs, payable to the other plaintiff's order, at the Bank of Montreal at Picton in the Province of Ontario, on July 1, 1886, with an indorsement thereon that the five bonds of the Central Ontario Railway attached to the bills were to be delivered to the defendant upon his paying the acceptances; and it was agreed that the payment by the defendant of those bills should be considered as payment of a like sum upon the contract, and the delivery by the plaintiff of the bonds attached to the bills should be considered as a delivery of so many bonds under the contract.

The petition further alleged that before October 8, 1887, all things necessary to entitle the plaintiff to the performance of the contract had happened, and the plaintiffs were ready to perform it on their part, and the defendant neglected and refused to perform it on his part; and that on that day the plaintiff commenced an action in the Queen's Bench Division of the High Court of Justice for Ontario, "a duly and lawfully constituted court of record, having jurisdiction over all civil and criminal matters in and for that part of the Dominion of Canada called the Province of Ontario," and caused a writ of summons to be personally served upon the defendant on November 8, 1887; and that on November 28, 1887, the defendant "duly entered his appearance in said action in said court;" that that action was brought upon the contract aforesaid, and that the plaintiffs, in their statement of claim,

Statement of the Case.

"duly delivered to said defendant or his duly constituted solicitors and attorneys, in accordance with the laws of said Province of Ontario," prayed for specific performance of the contract, or for damages for the breach thereof.

The petition further alleged that in that action, on November 28, 1887, the defendant, in accordance with those laws, delivered to the plaintiffs his answer, denying the allegations of the plaintiffs' claim; and averring that, before the making of the contract aforesaid, the plaintiffs jointly and the defendant were each the owners of a large number of the bonds of the Central Ontario Railway, and agreed, in order the better to effect a sale of all the bonds, that the plaintiffs' bonds should be assigned to the defendant, in order to enable him to deal with them as the apparent owner, accounting to the plaintiffs for their share of the proceeds; that the contract aforesaid was executed in order to carry out that understanding, and that, if it purported to be an absolute sale to him of the plaintiffs' bonds for a certain sum to be paid by him, did not faithfully express the agreement between the parties, and should be reformed; that it was no part of the agreement that he should pay the plaintiffs any money in respect of the assignment until he had sold the bonds and received the proceeds; that the defendant's acceptances were given solely for the plaintiffs' accommodation; and that the defendant had not sold any of the bonds, although he had used his best endeavors to do so.

The petition further alleged that on December 18, 1887, issue was joined upon that answer; that on February 29, 1888, that action came on for trial in said court, and judgment was rendered that the plaintiffs recover of the defendant the sum of $238,000, and costs; that the judgment was unreversed and unsatisfied, in whole or in part; and that, by reason of the premises, the defendant became indebted to the plaintiffs in that sum, with interest, and, although payment had been demanded, had not paid the same or any part thereof.

To this action on the judgment, the defendant filed an answer, containing the following statements:

The defendant "admits that on January 13, 1886, he entered

into a contract in writing with the plaintiffs"—a copy of which was made part of the answer, showing that it was a contract of sale and purchase, as alleged in the petition, and that the bonds and coupons were to be delivered, and the price paid, at the Bank of Montreal at Picton. "And he denies that he entered into any other contract in writing with them upon any subject or touching any matter in contention in this action.

"He admits that an action was commenced against him in the Province of Ontario, Canada, for the general purpose stated in the petition, and that service of a summons was in form made upon him in Summit County, Ohio, and that certain attorneys entered, or undertook to enter, the appearance of this defendant in said action.

"He admits that a formal, but an irregular and void judgment was entered up against him in said court on or about the 29th day of February, 1888, which judgment was entered without his knowledge and in his absence, and without any hearing whatever.

"And this defendant denies each and every other fact, statement and allegation in said petition.

"And for a further defence this defendant alleges that the said contract entered into between the parties was entered into for the purposes stated in his answer in said original action in the Province of Ontario, and for no other purpose; that the contract was altogether an accommodation contract, made between the parties with the full understanding and agreement that it was never to be performed between them; that it was made for the accommodation and convenience of the plaintiffs, to enable them to make use of the bonds described in the petition, and to aid them in the raising of money thereon.

"And this defendant further alleges that the said plaintiffs did not, at the time stated in the petition, nor at any other time, ever undertake to or in fact perform said contract upon their part, or any part thereof. They never at any time demanded performance upon the part of this defendant of said contract, unless the bringing of said action was a demand of such performance. They never at any time tendered the bonds

or coupons in the contract and in the petition mentioned to this defendant, and they never delivered any of the said bonds to this defendant, nor did they ever make delivery nor attempt to make delivery of said bonds in accordance with the terms of said written contract, the said plaintiffs well knowing at all times what the real purpose of said contract was, and that the same was not to be performed upon the part either of the plaintiffs or of this defendant.

"This defendant says that he was not present at the time that said pretended judgment was rendered; but he states the fact to be that there were no facts existing, or presented to the court, which justified such judgment; that no bonds nor coupons were brought into court for delivery to this defendant, nor are any bonds or coupons upon deposit in the office of the clerk of said court, or in any other depositary, to be delivered to the defendant upon the performance of said contract upon his part, nor is it in the power of the said plaintiffs, or either of them, to make such delivery."

The defendant further alleges that, if he were compelled to pay the judgment, he would be compelled to pay it without any consideration whatever; that by the wrongful act of the plaintiffs he was compelled to pay three bills of exchange of $5000 each, which the plaintiffs had delivered to *bona fide* purchasers; that he never received but ten of the bonds; that the conditions of the contract were dependent conditions; and that the plaintiffs had not performed their part of the contract.

The defendant also "denies that any hearing occurred before said court;" and "denies that there was any showing made by the plaintiffs of their readiness or their ability to perform their contract; but says that said judgment was irregular and without evidence, without performance upon the part of the plaintiffs, entered up against him in his absence, without his knowledge, and without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action."

The plaintiffs demurred to the answer, "because the same does not state facts sufficient to constitute a defence." The

Circuit Court sustained the demurrer, and rendered judgment for the plaintiffs for the sum sued for, with interest and costs. 41 Fed. Rep. 502. The defendant sued out this writ of error.

Mr. Jeremiah M. Wilson and *Mr. Samuel Shellabarger* for plaintiff in error.

Mr. Samuel E. Williamson for defendant in error.

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

The judgment of the Canadian court is, beyond all doubt, sufficient to support this action, unless it is successfully impeached. Testing the answer in this case by the rules laid down in *Hilton* v. *Guyot*, just decided, no adequate ground for impeaching that judgment is shown.

Upon this record, the Queen's Bench Division of the High Court of Justice of the Province of Ontario must be taken to have been a competent court, so far as the subject-matter or cause of action was concerned, to entertain jurisdiction of the action brought before it by the plaintiffs against the defendant. The petition in the present case alleges that the plaintiffs brought in that court, described as "a duly and lawfully constituted court of record, having jurisdiction over all civil matters" in and for the Province of Ontario, an action upon a certain contract in writing between the parties. The defendant, in his answer to this petition, expressly admits that "an action was commenced against him in the Province of Ontario, Canada, for the general purpose stated in the petition." The competency of the Canadian court must therefore be deemed to be admitted, and, indeed, was hardly denied at the bar.

Giving to the answer the construction, most favorable to the defendant, of setting up two distinct and independent defences, separated by the words, "And for a further defence," there is nothing in it to show that the Canadian court had not jurisdiction of the person of the defendant. The first part of the answer expressly admits that "certain attorneys entered,

or undertook to enter, the appearance of this defendant in said action." As it does not allege that the attorneys were not authorized to enter the defendant's appearance in that action, they must be taken to have been authorized by him to do so. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 830; *Hill* v. *Mendenhall*, 21 Wall. 453; *Molony* v. *Gibbons*, 2 Camp. 502. The second part of the answer describes the defence, now undertaken to be made upon the merits of the case, as the one "stated in his answer in said original action in the Province of Ontario," thus clearly showing that he had not only appeared, but answered in that action. It is nowhere alleged that he appeared or answered in that court under compulsion, or for any purpose except to contest his personal liability. He must therefore be taken to have voluntarily submitted himself to the jurisdiction of the court.

The defendant, indeed, in the first part of his answer, alleges that the "judgment was entered without his knowledge and in his absence, and without any hearing whatever;" and, likewise, in the second part of his answer, "says that he was not present at the time that said pretended judgment was rendered," and "denies that any hearing occurred before said court," and "says that said judgment was irregular and without evidence," and "entered up against him in his absence, without his knowledge." But, as he had once submitted himself to the jurisdiction of the court, all these allegations and denials are quite consistent with the position, taken by the plaintiffs at the argument here, that the defendant, at the time appointed for the hearing, failed to appear and made default, and therefore no hearing or evidence was necessary to entitle the court to proceed to judgment.

The general averments, in the first part of the answer, that the judgment was "an irregular and void judgment," and, in the second part, that "said judgment was irregular," and, "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings in said action," are but averments of legal conclusions, and wholly insufficient to impeach the judgment, without specifying the grounds upon which it is supposed to be

irregular and void, or without jurisdiction or authority to enter it. *Cowan* v. *Braidwood*, 1 Man. & Gr. 882; *S. C.* 2 Scott N. R. 138.

To warrant the impeaching of a foreign judgment because procured by fraud, fraud must be distinctly alleged and charged. *White* v. *Hall*, 12 Ves. 321; *Wallingford* v. *Mutual Society*, 5 App. Cas. 685, 697, 701; *Ambler* v. *Choteau*, 107 U. S. 589, 591. This answer does not even contain a general charge that the judgment was procured by fraud, or any equivalent allegation. And the only matters specified, from which fraud is sought to be inferred, are those already considered, which have no tendency to prove it; and the knowledge which the plaintiffs had of the real purpose of the contract, which is referred to, not as a ground for charging fraud in procuring the judgment, but only as incidental to and in explanation of the allegation that the plaintiffs never tendered, or delivered, or attempted to deliver, any bonds to the defendant, in accordance with the written contract. To treat the loose and imperfect allegations of this answer as duly setting up a defence of fraud would be inconsistent with all precedent, and would ignore the duty of giving the other party notice of the defences which he must be prepared to meet.

By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect. *Scott* v. *Pilkington*, 2 B. & S. 11; *Abouloff* v. *Oppenheimer*, 10 Q. B. D. 295, 307; *Vadala* v. *Lawes*, 25 Q. B. D. 310, 316; *Nouvion* v. *Freeman*, 15 App. Cas. 1, 10; *Fowler* v. *Vail*, 27 Upper Canada C. P. 417, and 4 Ontario App. 267.

The defences set up in the answer to this action upon the Canadian judgment reduce themselves to an attempt, without any sufficient allegation of want of jurisdiction of the cause or of the defendant, or of any fraud in procuring that judgment, or of any other special ground for not allowing the judgment full effect, but upon general allegations setting up the same matters of defence which were pleaded and might have been tried in the foreign court, to reopen and try anew the whole merits of the original claim in an action upon the

judgment. This, for the reasons stated in *Hilton* v. *Guyot*, *ante*, 113, cannot be allowed.

Upon principle, therefore, as well as upon authority, comity requires that the judgment sued on should beheld conclusive of the matter adjudged.

Judgment affirmed.

MR. CHIEF JUSTICE FULLER concurring.

MR. JUSTICE HARLAN, MR. JUSTICE BREWER, and myself concur in the judgment in this case, but not on all the grounds stated in the opinion of the court. Our views on the general subject are indicated in the dissenting opinion in *Hilton* v. *Guyot*, *ante*, 229.

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

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1894, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 196. ÆTNA LIFE INSURANCE COMPANY *v.* COUNTY OF LYON, in the State of Iowa. Error to the Circuit Court of the United States for the Northern District of Iowa. February 4, 1895. Judgment affirmed, with costs, by a divided court. *Mr. D. B. Henderson*, *Mr. L. G. Hurd*, *Mr. F. B. Daniels*, and *Mr. A. B. Cummins* for the plaintiff in error. *Mr. A. Van Wagenen* and *Mr. N. T. Guernsey* for the defendant in error.

No. 256. ALLEN *v.* MERRILL. Appeal from the Circuit Court of the United States for the Northern District of New York. October 11, 1894. Dismissed, with costs, on motion of counsel for appellants. *Mr. C. H. Duell* for the appellants. No appearance for appellees.

No. 249. ALLIS, EXECUTORS, &C., *v.* STATE BANK OF CRETE. Error to the Circuit Court of the United States for the District of Nebraska. October 8, 1894. Dismissed per stipulation. *Mr. T. M. Marquett* for the plaintiffs in error. *Mr. John L. Webster* for the defendants in error.

No. 254. AMERICAN PRESERVERS' COMPANY *v.* NORRIS. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. October 11, 1894. Dismissed, with costs, on authority of counsel for appellant. *Mr. C. H. Krum* for the appellant. *Mr. F. N. Judson* for the appellees.

No. 117. ANDERSON *v.* MINNEAPOLIS UNION ELEVATOR COMPANY. Error to the Circuit Court of the United States for

the District of Minnesota. August 14, 1894. Dismissed pursuant to the twenty-eighth rule. *Mr. James N. Castle* for the plaintiff in error. *Mr. Ralph Whelan* for the defendant in error.

No. 268. ARMSTRONG *v.* UNITED STATES. Appeal from the Court of Claims. April 22, 1895. Judgment affirmed on the authority of *United States* v. *Fletcher*, 148 U. S. 84. *Mr. Thomas C. Fletcher* for the appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Dodge* for the appellee.

No. 267. BABB *v.* JAMISON, ADMINISTRATOR. Error to the Supreme Court of the State of Missouri. December 17, 1894. Dismissed for the want of jurisdiction, on the authority of *Duncan* v. *Missouri*, 152 U. S. 377. *Mr. Michael Kinealy* for the plaintiffs in error. *Mr. T. J. Rowe* for the defendants in error.

No. 290. BARELA *v.* PEREA. Appeal from the Supreme Court of the Territory of New Mexico. April 10, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. F. W. Clancy* for the appellant. *Mr. S. B. Newcomb* for the appellee.

No. 248. BARNEY *v.* WHITE. Error to the Circuit Court of the United States for the Southern District of New York. April 22, 1895. Judgment affirmed for the sum of $1039.02, with interest thereon from March 24, 1883, until paid, and costs in said Circuit Court; each party to pay one-half of the costs in this court. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for the plaintiff in error. *Mr. Samuel F. Phillips* and *Mr. Frederick D. McKenney* for the defendants in error.

No. 988. BARRETT *v.* UNITED STATES. Error to the Circuit Court of the United States for the District of South Carolina. April 15, 1895. Docketed and dismissed, on motion of *Mr.*

Solicitor General Conrad for the defendant in error. No one opposing.

No. 186. BARTLETT *v.* UNITED STATES. Appeal from the Court of Claims. January 24, 1895. Dismissed per stipulation. *Mr. Robert A. Howard* for the appellant. *Mr. Attorney General* for the appellee.

No. 184. BENTLEY *v.* UNITED STATES. Appeal from the Court of Claims. January 24, 1895. Dismissed pursuant to the tenth rule. *Mr. A. G. Safford* for the appellant. *Mr. Attorney General* for the appellee.

No. 698. BENTON, *alias* NEWBY, *v.* UNITED STATES. Error to the District Court of the United States for the Southern District of Illinois. December 10, 1894. Dismissed pursuant to the tenth rule. *Mr. James McCartney* for the plaintiff in error. *Mr. Attorney General* for the defendant in error.

No. 859. BILLING *v.* GILMER. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fifth circuit. December 10, 1894. Petition denied. *Mr. W. A. Gunter* for Gilmer in support of petition. No appearance for Billing, *et al.*, Executors, &c.

No. 127. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON *v.* METROPOLITAN TRUST COMPANY. Appeal from the Circuit Court of the United States for the District of Kansas. December 14, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. H. Rossington*, *Mr. Charles Blood Smith* and *Mr. E. J. Dallas* for the appellants. *Mr. M. A. Low* for the appellees.

No. 231. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON *v.* METROPOLITAN TRUST COMPANY. Appeal from

the Circuit Court of the United States for the District of Kansas. March 25, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. H. Rossington*, *Mr. Charles Blood Smith*, and *Mr. E. J. Dallas* for the appellants. No appearance for the appellees.

No. 724. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF KINGMAN, KANSAS, *v.* CORNELL UNIVERSITY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the eighth circuit. October 22, 1894. Petition denied. *Mr. George Gray* for Board of County Commissioners of the county of Kingman, Kansas, in support of petition. *Mr. W. H. Rosssington* and *Mr. Charles Blood Smith* for Cornell University in opposition thereto.

No. 735. BUCK *v.* LOUISIANA. Error to the Supreme Court of the State of Louisiana. October 22, 1894. Dismissed for want of jurisdiction. *Mr. Duane E. Fox* for the plaintiffs in error. *Mr. W. Hallett Phillips*, *Mr. H. J. Leovy*, and *Mr. M. J. Cunningham* for the defendant in error.

No. 706. BURNET *v.* JACOBUS. Appeal from the Circuit Court of the United States for the Southern District of New York. November 22, 1894. Dismissed, with costs, on motion of Mr. George Hoadly for the appellant. *Mr. George Hoadly* for the appellant. *Mr. Attorney General* for the appellee.

No. 12. BYRNE *v.* UNITED STATES. Appeal from the Court of Claims. December 17, 1894. Judgment affirmed, pursuant to the sixteenth rule. *Mr. W. J. Moberly*, *Mr. P. B. Thompson*, and *Mr. Allan Rutherford* for the appellant. *Mr. Attorney General* for the appellee.

No. 382. CAMPBELL *v.* CARROLL. Error to the Supreme Court of the State of Missouri. April 15, 1895. Dismissed,

with costs, on the authority of counsel for the plaintiffs in error. *Mr. John W. Noble* for the plaintiffs in error. *Mr. J. B. Dennis* for the defendant in error.

No. 980. CHARLSON *v.* UNITED STATES. Error to the District Court of the United States for the Northern District of Alabama. April 8, 1895. Docketed and dismissed on motion of *Mr. Solicitor General Conrad* for the defendant in error. No one opposing.

No. 329. CHESTER *v.* HILLSMAN. Error to the Supreme Court of the State of Tennessee. April 26, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. J. B. Heiskell* for the plaintiffs in error. No appearance for the defendants in error.

No. 892. CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY *v.* MCKEEN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the seventh circuit. January 28, 1895. Petition denied. *Mr. Lawrence Maxwell, Jr.*, for the Cincinnati, Hamilton and Dayton Railroad Company in support of the petition. *Mr. W. H. H. Miller*, *Mr. F. Winter*, and *Mr. John B. Elam* for McKeen in opposition thereto.

No. 33. CITY OF NEW ORLEANS *v.* LOUISVILLE AND NASHVILLE RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. January 14, 1895. Decree affirmed, with costs, for want of prosecution. *Mr. E. A. O'Sullivan* for the appellant. *Mr. George Denegre* and *Mr. Walter D. Denegre* for the appellees.

No. 32. CLEAVELAND FENCE COMPANY *v.* INDIANAPOLIS FENCE COMPANY. Appeal from the Circuit Court of the United States for the District of Indiana. October 11, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. Augustus L.*

Mason for the appellant. *Mr. Chester Bradford* for the appellees.

No. 241. CONTINENTAL INSURANCE COMPANY *v.* UNION INSURANCE COMPANY. Error to the Circuit Court of the United States for the Southern District of New York. January 17, 1895. Dismissed per stipulation. *Mr. Thomas H. Hubbard* for the plaintiff in error. *Mr. Joseph H. Choate* for the defendant in error.

No. 183. COUNTY COURT OF ST. CHARLES COUNTY *v.* UNITED STATES *ex rel.* SHELLEY. Error to the Circuit Court of the United States for the Eastern District of Missouri. January 25, 1895. Dismissed, with costs, pursuant to the sixteenth rule, on motion of Mr. W. B. Homer for the defendant in error. *Mr. J. H. Overall* for the plaintiffs in error. *Mr. W. B. Homer* for the defendant in error.

No. 209. COUNTY COURT OF WAYNE COUNTY *v.* SOCIETY FOR SAVINGS. Error to the Circuit Court of the United States for the District of West Virginia. February 4, 1895. Judgment affirmed, with costs, and interest by a divided court. *Mr. James F. Brown* for the plaintiff in errror. *Mr. Henry C. Simms* and *Mr. F. B. Enslow* for the defendant in error.

No. 148. COUNTY OF ALACHUA *v.* MURPHY. Appeal from the Circuit Court of the United States for the Northern District of Florida. June 16, 1894. Dismissed pursuant to the twenty-eighth rule. *Mr. S. Y. Finley* for the appellant. *Mr. W. W. Hampton* for the appellee.

No. 292. COUNTY OF GRATIOT *v.* AYLESWORTH. Error to the Circuit Court of the United States for the Eastern District of Michigan. April 22, 1895. Judgment affirmed, with costs and interest, by a divided court. *Mr. Charles J. Willett*

for the plaintiff in error. *Mr. Thomas S. Jerome* for the defendant in error.

No. 211. DANIELS *v.* CASE. Error to the Circuit Court of the United States for the Western District of Missouri. September 10, 1894. Dismissed pursuant to the twenty-eighth rule. *Mr. S. B. Ladd* for the plaintiff in error. *Mr. Daniel B. Holmes* for the defendants in error.

No. 10, Original. *Ex parte:* In the matter of Debs *et al.*, petitioners. Petition for writ of error. January 17, 1895. Petition denied. *Mr. C. S. Darrow*, *Mr. L. S. Gregory*, and *Mr. Lyman Trumbull* for the petitioners. *Mr. Assistant Attorney General Whitney* as *amicus curiæ*. [See 158 U. S. 573.]

No. 187. DEVLIN *v.* HEISE. Appeal from the Circuit Court of the United States for the District of Maryland. January 25, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Benjamin Price* for the appellant. *Mr. W. B. H. Dowse* and *Mr. John R. Bennett* for the appellees.

No. 237. DIEFENTHAL *v.* HAMBURG-AMERICKANISCHER PACKETFAHRT AKTIEN GESELLSHAFT. Appeal from the District Court of the United States for the Eastern District of Louisiana. March 26, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. J. R. Beckwith* for the appellants. No appearance for appellee.

No. 96. DILLARD *v.* MOORMAN. Error to the Corporation Court of Lynchburg, Virginia. November 21, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. W. Larkin* for the plaintiff in error. No appearance for the defendant in error.

Cases not Otherwise Reported.

No. 856. DRAKE *v.* REGGEL. Appeal from the Supreme Court of the Territory of Utah. January 28, 1895. Dismissed, with costs, on authority of counsel for the appellants. *Mr. J. G. Sutherland* and *Mr. J. W. Judd* for the appellants. No appearance for the appellees.

No. 201. DUBUQUE AND SIOUX RAILROAD COMPANY *v.* SNELL. Error to the Supreme Court of the State of Iowa. January 28, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. E. S. Bailey* and *Mr. Theodore Hawley* for the plaintiffs in error. No appearance for the defendant in error.

No. 247. EASTERN OREGON GOLD MINING COMPANY *v.* MILLER. Error to the Circuit Court of the United States for the District of Oregon. April 3, 1895. Dismissed, with costs, pursuant to the sixteenth rule, on motion of *Mr. J. H. Mitchell* for defendant in error. *Mr. John Mullan* and *Mr. Frank V. Drake* for the plaintiff in error. *Mr. John H. Mitchell* and *Mr. John M. Gearin* for the defendant in error.

No. 121. EAST LAKE LAND COMPANY *v.* BROWN. Error to the Circuit Court of the United States for the Northern District of Alabama. December 17, 1894. Judgment reversed, with costs, on the authority of *Chappell* v. *Waterworth*, 155 U. S. 102, and cause remanded to the said Circuit Court, with a direction to remand it to the city court of Birmingham, county of Jefferson, Alabama. *Mr. John T. Morgan* for the plaintiff in error. *Mr. D. P. Bestor* for the defendant in error.

No. 69. EMMONS *v.* HALTERN. Error to the District Court of the United States for the District of Alaska. December 3, 1894. Judgment affirmed, with costs, by a divided court. *Mr. D. A. McKnight* and *Mr. M. B. Gerry* for the plaintiffs in error. *Mr. H. B. Moulton* for the defendant in error.

Cases not Otherwise Reported.

No. 235. ERHARDT *v.* WUPPERMAN. Error to the Circuit Court of the United States for the Southern District of New York. January 7, 1895. Dismissed, with costs, on motion of Mr. Solicitor General Maxwell for the plaintiff in error. *Mr. Attorney General* for the plaintiff in error. *Mr. Edward Hartley* for the defendants in error.

No. 984. FERRYBOAT MONTCLAIR *v.* EASTON AND AMBOY RAILROAD COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit. April 22, 1895. Petition denied. *Mr. George Bethune Adams* and *Mr. Franklin A. Wilcox* for Ferryboat Montclair, etc., in support of petition. *Mr. W. W. Goodrich* for Easton and Amboy Railroad Company in opposition thereto.

No. 282. FRANKENTHAL *v.* COOK. Error to the United States Court for the Indian Territory. April 15, 1895. Judgment affirmed, with costs and interest, by a divided court. *Mr. W. T. Hutchings* for the plaintiffs in error. *Mr. Frank P. Blair* for the defendant in error.

No. 843. GERARD *v.* DIEBOLD SAFE AND LOCK COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fifth circuit. February 4, 1895. Petition denied. *Mr. Patrick O'Farrell* for Gerard in support of the petition. No opposition.

No. 157. GINDELE *v.* CORRIGAN. Error to the Supreme Court of the State of Illinois. January 14, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. C. E. Kremer* for the plaintiffs in error. *Mr. Hiram T. Gilbert* for the defendant in error.

Cases not Otherwise Reported.

No. 1009. GRAND TRUNK RAILWAY COMPANY *v.* TENNANT. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the first circuit. May 20, 1895. Petition denied. *Mr. Almon A. Strout*, *Mr. Clarence A. Hight*, *Mr. Henry N. Rice*, and *Mr. Melville Church* for Grand Trunk Railway Company in support of the petition. *Mr. Orville D. Baker* for Tennant in opposition thereto.

No. 147. GREENWOOD DISTRICT OF SEBASTIAN COUNTY *v.* MISSOURI AND ARKANSAS MINING AND LUMBER COMPANY. Error to the Circuit Court of the United States for the Western District of Arkansas. January 11, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. John H. Rogers* for the plaintiff in error. *Mr. E. D. Kenna* for the defendant in error.

No. 350. GULF, COLORADO AND SANTA FÉ RAILWAY COMPANY *v.* JOHNSON. Error to the County Court of Coleman County, Texas. May 6, 1895. Judgment reversed, with costs, on the authority of *The Gulf, Colorado and Santa Fé Railway Company* v. *Hefley*, No. 255 on the docket for the present term, and cause remanded for further proceedings not inconsistent with the opinion of the court in that case. *Mr. A. T. Britton*, *Mr. A. B. Browne*, *Mr. J. W. Terry*, and *Mr. George R. Peck* for the plaintiff in error. No appearance for the defendants in error.

No. 98. HALFF *v.* PHILLIPS. Appeal from the Circuit Court of the United States for the Northern District of Texas. November 22, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. Rufus H. Thayer* for the appellants. *Mr. William Allen Butler*, *Mr. Gist Blair*, and *Mr. Adrian H. Joline* for the appellees.

No. 145. HAT SWEAT MANUFACTURING COMPANY *v.* DAVIS SEWING MACHINE COMPANY. Appeal from the Circuit Court

of the United States for the Northern District of New York. January 11, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. John R. Bennett* for the appellant. No appearance for the appellee.

No. 243. HAVEMEYER AND ELDER SUGAR REFINING COMPANY *v.* MAGONE. Error to the Circuit Court of the United States for the Southern District of New York. April 8, 1895. Judgment affirmed, with costs, by a divided court. *Mr. Edwin B. Smith* for the plaintiff in error. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for the defendant in error.

No. 23. HAVEN *v.* BORLAND. Error to the Circuit Court of the United States for the Northern District of California. October 10, 1894. Dismissed, with costs, pursuant to the nineteenth rule. *Mr. W. W. Cope* for the plaintiff in error. *Mr. G. W. Towle, Jr.*, for the defendant in error.

No. 257. HAYES *v.* FISCHER. Appeal from the Circuit Court of the United States for the Southern District of New York. October 8, 1894. Dismissed per stipulation. *Mr. Livingston Gifford* for the appellant. *Mr. Edmund Wetmore* for the appellee.

No. 332. HAYS *v.* APGAR. Appeal from the Circuit Court of the United States for the District of New Jersey. May 3, 1895. Dismissed, each party to pay his own costs, per stipulation. *Mr. D. M. Porter* for the appellant. *Mr. Gilbert Collins* for the appellee.

No. 177. HITCHCOCK *v.* WANZER LAMP COMPANY. Appeal from the Circuit Court of the United States for the Northern District of New York. January 24, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Anthony Pollok* for the appellants. *Mr. E. H. Brown* for the appellees.

Cases not Otherwise Reported.

No. 989. HUNTER *v.* UNITED STATES. Error to the Circuit Court of the United States for the Northern District of Georgia. April 15, 1895. Docketed and dismissed on motion of *Mr. Solicitor General Conrad* for the defendant in error. No one opposing.

No. 300. HUSTON *v.* LOOKOUT MOUNTAIN RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. January 24, 1895. Dismissed, with costs, on authority of counsel for the appellants. *Mr. J. D. Brannon* and *Mr. J. S. Pilcher* for the appellants. No appearance for the appellees.

No. 288. HYDE *v.* HOGUE. Appeal from the Circuit Court of the United States for the District of West Virginia. April 9, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. T. B. Swann* for the appellants. *Mr. J. F. Brown* for the appellees.

No. 159. INLAND AND COASTWISE TRANSPORTATION COMPANY *v.* CORNELL. Appeal from the Supreme Court of the District of Columbia. January 15, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. Willoughby* for the appellants. *M. J. A. Hyland* for the appellees.

No. 929. JOHNSON *v.* VAN WYCK. Error to the Court of Appeals for the District of Columbia. March 4, 1895. Docketed and dismissed, with costs, on motion of *Mr. William F. Mattingly* for the defendant in error. No one opposing.

No. 78. JONES *v.* VIRGINIA. Error to the Supreme Court of Appeals of the State of Virginia. November 12, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. W. Larkin* for the plaintiff in error. *Mr. R. Taylor Scott* for the defendant in error.

Cases not Otherwise Reported.

No. 279. KENNER *v.* BITELY. Appeal from the Circuit Court of the United States for the Western District of Virginia. April 8, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. John A. Buchanan* for the appellant. No appearance for the appellee.

No. 334. KING *v.* JACKSON. Appeal from the Circuit Court of the United States for the Western District of Tennessee. March 14, 1895. Dismissed, the cause having abated owing to the death of the appellant, on motion of Mr. Don M. Dickinson for the appellant. *Mr. Don M. Dickinson* for the appellant. No appearance for the appellee.

No. 259. KIRK *v.* DU BOIS. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. October 8, 1894. Dismissed, with costs, on authority of counsel for appellants. *Mr. W. Bakewell* for the appellants. *Mr. G. A. Jenks* for the appellee.

No. 1001. KNEVALS *v.* FLORIDA CENTRAL AND PENINSULAR RAILROAD COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fifth circuit. May 20, 1895. Petition denied. *Mr. H. Bisbee*, *Mr. James E. Padgett*, and *Mr. Edwin Forrest* for Knevals, trustee, in support of petition. *Mr. Samuel F. Phillips*, *Mr. Frederic D. McKenney*, and *Mr. Julien T. Davies* for Florida Central and Peninsular Railroad Company *et al.* in opposition thereto.

No. 397. LAWSON *v.* KELLY. Error to the Supreme Court of the State of Texas. March 25, 1895. Dismissed, with costs, on authority of counsel for the plaintiff in error. *Mr. Walter Gresham* for the plaintiff in error. *Mr. S. R. Fisher* for the defendant in error.

Cases not Otherwise Reported.

No. 556. LEACH *v.* WATERVALE MINING COMPANY. Appeal from the Supreme Court of the Territory of Arizona. May 20, 1895. Dismissed, with costs, on motion of Mr. A. B. Browne for the appellants. *Mr. A. T. Britton* and *Mr. A. B. Browne* for the appellants. No appearance for the appellee.

No. 206. L. E. WATERMAN COMPANY *v.* WEBSTER. Appeal from the Circuit Court of the United States for the Southern District of New York. January 29, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. S. Logan* for the appellant. *Mr. Arthur v. Briesen* for the appellees.

No. 882. LINCK *v.* SALT LAKE CITY. Appeal from the Supreme Court of the Territory of Utah. January 10, 1895. Docketed and dismissed, with costs, on motion of Mr. J. L. Rawlins for the appellees. *Mr. J. L. Rawlins* for the appellees in support of motion. No opposition.

No. 163. MADDOCK *v.* COXON. Appeal from the Circuit Court of the United States for the District of New Jersey. January 16, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. F. C. Lowthorp* for the appellant. *Mr. W. B. Preble* for the appellees.

No. 79. MALLAN *v.* BRANSFORD. Error to the Supreme Court of Appeals of the State of Virginia. November 12, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. W. Larkin* for the plaintiffs in error. No appearance for the defendant in error.

No. 985. MALOY *v.* DUDEN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit. April 22, 1895. Petition denied. *Mr. W. D. Davidge*, *Mr. Wm. McArthur*, and *Mr. D. M. Neuberger* for Maloy in support of petition. *Mr. Ronald K. Brown* for Duden in opposition thereto.

Cases not Otherwise Reported.

No. 62. MANNING *v.* MCLARREN, as special administrator, etc. Appeal from the Circuit Court of the United States for the District of Massachusetts. January 9, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Jerome F. Manning* for the appellant. *Mr. Joseph B. Warner* for the appellee.

No. 692. MARCUS *v.* UNITED STATES. Error to the Circuit Court of the United States for the Southern District of New York. March 28, 1895. Dismissed per stipulation. *Mr. Abram J. Rose* for the plaintiff in error. *Mr. Attorney General* and *Mr. Solicitor General Conrad* for the defendant in error.

No. 992. MARION COUNTY *v.* COLER. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fifth circuit. May 6, 1895. Petition denied. *Mr. A. H. Garland* and *Mr. R. C. Garland* for Marion County, Texas, in support of the petition. *Mr. W. S. Herndon* for Coler & Co. in opposition thereto.

No. 351. MASON *v.* SPALDING. Appeal from the Supreme Court of the District of Columbia. October 24, 1894. Dismissed, with costs, on motion of Mr. W. L. Cole for the appellant. *Mr. W. L. Cole* for the appellant. *Mr. W. Willoughby* for the appellee.

No. 126. MAYFIELD *v.* MATTA. Error to the Circuit Court of the United States for the Northern District of Texas. October 9, 1894. Judgment reversed, at cost of plaintiffs in error, per stipulation, and cause remanded to be proceeded in according to law. *Mr. E. H. Graham* for the plaintiffs in error. *Mr. Eugene Williams* for the defendant in error.

No. 569. MAZARAKOS *v.* UNITED STATES. Error to the District Court of the United States for the Northern Dis-

trict of Illinois. October 23, 1894. Dismissed pursuant to the tenth rule. *Mr. Woodbury Blair* for the plaintiff in error. *Mr. Attorney General* for the defendant in error.

No. 331. McAleer *v.* Hill. Error to the Supreme Court of the State of Washington. April 29, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. M. D. Brainard*, *Mr. Charles J. Jenner*, and *Mr. Louis Henry Legg* for the plaintiffs in error. *Mr. J. J. Darlington* for the defendant in error.

No. 849. McDonald *v.* United States. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the seventh circuit. December 12, 1894. Petition denied. *Mr. William H. Barnum* for McDonald *et al.* No opposition.

No. 340. McSorley *v.* Hill. Error to the Supreme Court of the State of Washington. April 30, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Charles K. Jenner*, *Mr. M. D. Brainard*, and *Mr. Louis Henry Legg* for the plaintiffs in error. *Mr. J. J. Darlington* for the defendant in error.

No. 294. Meeks *v.* Schall. Appeal from the Circuit Court of the United States for the Northern District of Alabama. April 11, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. J. M. Head* for the appellant. No appearance for the appellees.

No. 996. Meyers *v.* League. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fifth circuit. May 20, 1895. Petition denied. *Mr. R. R. Briggs* for Meyers in support of the petition. No one opposing.

Cases not Otherwise Reported.

No. 88. MILLER *v.* WESTERN UNION TELEGRAPH COMPANY. Error to the Circuit Court of the United States for the Southern District of Ohio. November 14, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. Thomas McDougall* for the plaintiff in error. *Mr. Lawrence Maxwell, Jr.*, for the defendant in error.

No. 909. MORAN *v.* HAGERMAN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the ninth circuit. March 11, 1895. Petition denied. *Mr. Wheeler H. Peckham* for Moran *et al.* in support of the petition. *Mr. Horatio C. King*, *Mr. W. E. F. Deal*, and *Mr. Edmund Tauszky* for Hagerman, administrator, etc., *et al.* in opposition thereto.

No. 276. MORGAN *v.* SOUTH DAKOTA. Error to the Supreme Court of the State of South Dakota. March 25, 1895. Dismissed, with costs, on motion of counsel for the plaintiff in error. *Mr. Samuel Wagner* for the plaintiff in error. *Mr. Robert Dollard* for the defendant in error.

No. 156. NATIONAL CASH REGISTER COMPANY *v.* BOSTON CASH INDICATOR AND RECORDER COMPANY. Appeal from the Circuit Court of the United States for the District of Massachusetts. November 1, 1894. Dismissed, with costs, on motion of counsel for appellant. *Mr. C. M. Peck* and *Mr. Edward Rector* for the appellant. *Mr. F. P. Fish* for the appellee.

No. 522. NATIONAL DREDGING COMPANY *v.* ALABAMA. Error to the Supreme Court of the State of Alabama. March 8, 1895. Dismissed, with costs, on motion of counsel for the plaintiff in error. *Mr. Gaylord B. Clark* and *Mr. Anthony Higgins* for the plaintiff in error. No appearance for the defendant in error.

Cases not Otherwise Reported.

No. 1005. NATIONAL LIFE INSURANCE COMPANY *v.* BOARD OF EDUCATION OF THE CITY OF HURON. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the eighth circuit. May 20, 1895. Petition denied. *Mr. R. J. Wells* for Board of Education of the City of Huron, South Dakota, in support of the petition. *Mr. N. T. Guernsey* for National Life Insurance Company of Montpelier, Vermont, in opposition thereto.

No. 847. NEALLY *v.* STEAMSHIP MICHIGAN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fourth circuit. December 3, 1894. Petition denied. *Mr. J. Wilson Leakin* and *Mr. Harrington Putnam* for Steamship Michigan in support of the petition. *Mr. Eugene P. Carver* and *Mr. Robert H. Smith* for Neally *et al.* in opposition thereto.

No. 202. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY *v.* BROWN. Error to the Circuit Court of the United States for the Southern District of New York. January 17, 1895. Dismissed per stipulation. *Mr. Frederic B. Jennings* for the plaintiff in error. *Mr. F. H. Betts* for the defendant in error.

No. 207. NEW YORK, LAKE ERIE AND WESTERN RAILROAD COMPANY *v.* RUSH. Error to the Circuit Court of the United States for the Northern District of Ohio. February 4, 1895. Dismissed, with costs, per stipulation. *Mr. W. E. Cushing* and *Mr. S. E. Williamson* for the plaintiff in error. *Mr. Thomas W. Sanderson* and *Mr. Myron A. Norris* for the defendant in error.

No. 964. NEW YORK LIFE INSURANCE COMPANY *v.* SMITH, administratrix, etc. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the ninth circuit. April 22, 1895. Petition denied. *Mr. George W. Hubbell* for New York Life Insurance Company in support of petition. No one opposing.

Cases not Otherwise Reported.

No. 28. NORTHERN PACIFIC RAILROAD COMPANY *v.* BUSH. Error to the Circuit Court of the United States for the Northern District of Illinois. October 8, 1894. Dismissed, with costs, on motion of Mr. A. H. Garland for the plaintiff in error. *Mr. George Willard*, *Mr. James McNaught*, and *Mr. A. H. Garland* for the plaintiff in error. No appearance for defendant in error.

No. 344. NORTHERN PACIFIC RAILROAD COMPANY *v.* RAGSDALE. Error to the Circuit Court of the United States for the District of Minnesota. May 1, 1895. Dismissed, with costs, on motion of Mr. R. C. Garland for the plaintiff in error. *Mr. James McNaught*, *Mr. A. H. Garland*, and *Mr. W. J. Curtis* for the plaintiff in error. *Mr. Moses E. Clapp* for the defendant in error.

No. 287. OAKLAND ELECTRIC LIGHT AND MOTOR COMPANY *v.* KEITH. Error to the Circuit Court of the United States for the Northern District of California. April 9, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. M. A. Wheaton* for the plaintiff in error. *Mr. M. M. Estee*, *Mr. W. W. Dudley*, *Mr. L. T. Michener*, and *Mr. John H. Miller* for the defendant in error.

No. 123. PACIFIC COAST STEAMSHIP COMPANY *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the District of Washington. February 4, 1895. Dismissed, per stipulation, on motion of Mr. Assistant Attorney General Conrad for the appellee. *Mr. J. C. Haines*, *Mr. A. H. Holmes*, and *Mr. Stephen M. White* for the appellant. *Mr. Attorney General* for the appellee.

No. 325. RASH *v.* FARLEY. Error to the Court of Appeals of the State of Kentucky. May 6, 1895. Judgment affirmed, with costs, on the authority of *Emert* v. *Missouri*, 156 U. S. 296, decided at this term. *Mr. John H. Rogers* for the plaintiff in error. No appearance for the defendant in error.

Cases not Otherwise Reported.

No. 320. RICE *v.* RICE. Appeal from the Circuit Court of the United States for the District of Delaware. May 31, 1894. Dismissed pursuant to the twenty-eighth rule. *Mr. George H. Bates* and *Mr. Edward G. Bradford* for the appellant. *Mr. Anthony Higgins* for the appellees.

No. 823. RICHARDSON *v.* GREEN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the ninth circuit. October 22, 1894. Petition denied. *Mr. Lewis L. McArthur* for Green *et al.* in support of petition. *Mr. William A. Maury* and *Mr. J. N. Dolph* for Richardson *et al.* in opposition thereto.

No. 315. RITCHIE *v.* MERRILL. Appeal from the Circuit Court of the United States for the Southern District of New York. April 23, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Charles A. Peabody* and *Mr. Charles H. Drew* for the appellant. No appearance for the appellees.

No. 672. ROYAL CLAY MANUFACTURING COMPANY *v.* CHICAGO SEWER PIPE AND COAL COMPANY. Error to the Circuit Court of the United States for the Northern District of Illinois. May 20, 1895. Dismissed, with costs, on authority of counsel for plaintiff in error. *Mr. S. S. Gregory*, *Mr. Wm. M. Booth*, and *Mr. James S. Harlan* for the plaintiff in error. No appearance for the defendant in error.

No. 213. ROYER *v.* SHULTZ BELTING COMPANY. Error to the Circuit Court of the United States for the Eastern District of Missouri. January 29, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. J. O. Broadhead* for the plaintiff in error. *Mr. Chester H. Krum* for the defendant in error.

Cases not Otherwise Reported.

No. 881. SAYWARD *v.* NUNAN. Error to the Supreme Court of the State of Washington. January 7, 1895. Docketed and dismissed, with costs, on motion of Mr. Edward B. Whitney for the defendants in error. *Mr. Edward B. Whitney* for the defendants in error in support of the motion. No opposition.

No. 80. SCHEELE *v.* LORDAN. Appeal from the Circuit Court of the United States for the Eastern District of Texas. November 12, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. J. M. Burroughs* for the appellant. No appearance for the appellee.

No. 210. SCHREINER *v.* SMITH. Appeal from the Circuit Court of the United States for the Northern District of Illinois. January 16, 1895. Dismissed, with costs, on authority of counsel for the appellant. *Mr. I. C. Sloan* and *Mr. A. R. Bushnell* for the appellant. *Mr. James L. High* for the appellees.

No. 252. SELLERS *v.* MILLER. Appeal from the Circuit Court of the United States for the Northern District of Texas. November 6, 1894. Dismissed, with costs, on motion of counsel for appellant. *Mr. F. Charles Hume* and *Mr. E. H. Graham* for the appellant. No appearance for the appellees.

No. 246. SEXTON *v.* JONES. Appeal from the Circuit Court of the United States for the District of Oregon. March 28, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Frank V. Drake* for the appellants. No appearance for appellees.

No. 42. SMITH *v.* PITTSBURGH GAS COMPANY. Appeal from the Circuit Court of the United States for the Western District of Pennsylvania. October 12, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. D. F. Patterson* for the appellants. *Mr. W. Bakewell* for the appellee.

Cases not Otherwise Reported.

No. 116. SOUTHERN PACIFIC RAILROAD COMPANY *v.* GRAHAM. Appeal from the Circuit Court of the United States for the Southern District of California. March 7, 1895. Dismissed, with costs, on motion of Mr. J. Hubley Ashton for the appellant. *Mr. J. Hubley Ashton* for the appellant. *Mr. W. B. Wallace* and *Mr. J. H. Call* for the appellees.

No. 115. SOUTHERN PACIFIC RAILROAD COMPANY *v.* MCCUTCHEON. Appeal from the Circuit Court of the United States for the Southern District of California. March 7, 1895. Dismissed, with costs, on motion of Mr. J. Hubley Ashton for the appellant. *Mr. J. Hubley Ashton* for the appellant. *Mr. W. B. Wallace*, *Mr. George W. Merrill*, and *Mr. J. H. Call* for the appellee.

No. 35. SOUTHERN PACIFIC RAILROAD COMPANY *v.* UNITED STATES. Appeal from the Circuit Court of the United States for the Northern District of California. October 8, 1894. Dismissed on motion of Mr. J. Hubley Ashton for the appellant. *Mr. Henry Beard*, *Mr. Charles H. Tweed*, and *Mr. J. Hubley Ashton* for the appellant. *Mr. Attorney General* for the appellee.

No. 335. STANTON v. UNION TRUST COMPANY *et al.* Appeal from the Circuit Court of the United States for the District of Kansas. April 30, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. Lucien Birdseye* for the appellants. No appearance for the appellees.

No. 185. STEAMBOAT CITY OF WORCESTER *v.* SCOTT. Appeal from the Circuit Court of the United States for the District of Connecticut. September 6, 1894. Dismissed pursuant to the twenty-eighth rule. *Mr. Harrington Putnam* for the appellant. *Mr. Walter C. Noyes* for the appellee.

Cases not Otherwise Reported.

No. 722. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY *v.* LEEP. Error to the Supreme Court of the State of Arkansas. December 10, 1894. Dismissed, with costs, on motion of Mr. John F. Dillon for the plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for the plaintiff in error. No appearance for the defendant in error.

No. 93. TENNANT *v.* DUDLEY. Error to the Circuit Court of the United States for the Northern District of Texas. March 4, 1895. Dismissed, with costs, per stipulation. *Mr. E. H. Graham* for the plaintiffs in error. *Mr. Eugene Williams* for the defendants in error.

No. 108. TEXAS AND PACIFIC RAILWAY COMPANY *v.* GEIGER. Error to the Supreme Court of the State of Texas. December 11, 1894. Dismissed, with costs, on motion of Mr. John F. Dillon for the plaintiff in error. *Mr. John F. Dillon* for the plaintiff in error. *Mr. T. P. Young* for the defendant in error.

No. 110. TEXAS AND PACIFIC RAILWAY COMPANY *v.* MCELROY. Error to the Court of Appeals of the State of Texas. March 18, 1895. Dismissed, with costs, on motion of Mr. D. D. Duncan in behalf of counsel for the plaintiffs in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for the plaintiffs in error. No appearance for the defendant in error.

No. 111. TEXAS AND PACIFIC RAILWAY COMPANY *v.* WILSON. Error to the Court of Appeals of the State of Texas. March 18, 1895. Dismissed, with costs, on motion of Mr. D. D. Duncan in behalf of counsel for the plaintiffs in error. *Mr. John F. Dillon* and *Mr. Winslow S. Pierce* for the plaintiffs in error. No appearance for the defendant in error.

Cases not Otherwise Reported.

No. 814. THOM *v.* PITTARD. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the fourth circuit. November 12, 1895. Petition denied. *Mr. Robert M. Hughes* for Pittard *et al.* in support of petition. No appearance for Thom, receiver, etc.

No. 317. THOMPSON *v.* UNITED STATES. Error to the Circuit Court of the United States for the Southern District of New York. April 24, 1895. Dismissed pursuant to the tenth rule. *Mr. Adolph L. Sanger* for the plaintiff in error. No appearance for the defendant in error.

No. 13. THOMSON *v.* SMITH & GRIGGS MANUFACTURING COMPANY. Appeal from the Circuit Court of the United States for the District of Connecticut. October 10, 1894. Dismissed, with costs, pursuant to the nineteenth rule. *Mr. George W. Hey* for the appellants. *Mr. C. E. Mitchell* for the appellees.

No. 318. TOPLITZ *v.* MERRITT. Error to the Circuit Court of the United States for the Southern District of New York. April 22, 1895. Dismissed, with costs, on authority of counsel for the plaintiffs in error, on motion of Mr. Solicitor General Conrad for the defendant in error. *Mr. Stephen G. Clarke* for the plaintiffs in error. *Mr. Attorney General* for the defendant in error.

No. 286. TREDWAY *v.* RILEY. Error to the Supreme Court of the State of Nebraska. April 8, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. O. C. Tredway* and *Mr. William E. Gantt* for the plaintiff in error. *Mr. W. L. Joy* for the defendant in error.

No. 998. TUCKER *v.* UNITED STATES. Error to the District Court of the United States for the Eastern District of Texas.

April 29, 1895. Docketed and dismissed on motion of *Mr. Solicitor General* for the defendant in error. No one opposing.

No. 22. WASHBURN AND MOEN MANUFACTURING COMPANY *v.* FREEMAN WIRE COMPANY. Appeal from the Circuit Court of the United States for the Eastern District of Missouri. October 12, 1894. Dismissed, with costs, on motion of Mr. John R. Bennett for the appellant. *Mr. Henry Hitchcock*, *Mr. G. A. Finkelnburg*, and *Mr. John R. Bennett* for the appellant. No appearance for appellees.

No. 302. WHEELER *v.* MALLON. Error to the City Court of Brooklyn, in the State of New York. April 15, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. W. E. Osborne* for the plaintiffs in error. *Mr. Louis W. Frost* for the defendant in error.

No. 72. WHEELER *v.* TERREL. Error to the Supreme Court of the State of New York. November 9, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. James Stikeman* for the plaintiff in error. No appearance for the defendant in error.

No. 71. WHEELER *v.* WHITE. Error to the Supreme Court of the State of New York. November 8, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. James Stikeman* for the plaintiff in error. No appearance for the defendant in error.

No. 900. WHITNEY *v.* UNITED STATES. Appeal from the Court of Private Land Claims. February 4, 1895. Docketed and dismissed on motion of *Mr. Assistant Attorney General Conrad* for the appellee. No opposition.

No. 1046. WIGGS *v.* SOUTHERN PACIFIC RAILROAD COMPANY. Appeal from the Circuit Court of the United States

for the Northern District of California. June 3, 1895. Docketed and dismissed, with costs, on motion of *Mr. J. Hubley Ashton* for the appellee. No one opposing.

No. 242. WILLIAMS *v.* PASSUMPSIC SAVINGS BANK. Appeal from the Circuit Court of the United States for the Northern District of Florida. March 27, 1895. Dismissed, with costs, pursuant to the tenth rule. *Mr. H. Bisbee* for the appellants. No appearance for the appellee.

No. 864. WINEMAN *v.* STEAMER IRON CHIEF. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the sixth circuit. January 7, 1895. Petition denied. *Mr. Harvey D. Goulder* for steamer Iron Chief, etc., in support of petition. *Mr. H. C. Wisner* for Wineman in opposition thereto.

No. 309. WOOD *v.* BACH. Error to the Circuit Court of the United States for the Northern District of Illinois. April 29, 1895. Judgment affirmed, with costs and interest, by a divided court. *Mr. Charles H. Aldrich*, *Mr. N. C. Sears*, and *Mr. P. V. Hoffman* for the plaintiffs in error. *Mr. R. A. Childs* for the defendants in error.

No. 6. WORCESTER, NASHUA AND ROCHESTER RAILROAD COMPANY *v.* JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY; No. 18. WORCESTER, NASHUA AND ROCHESTER RAILROAD COMPANY *v.* DAY; No. 73. WORCESTER, NASHUA AND ROCHESTER RAILROAD COMPANY *v.* INDIA MUTUAL INSURANCE COMPANY; No. 74. WORCESTER, NASHUA AND ROCHESTER RAILROAD COMPANY *v.* SWEET; No. 468. WORCESTER, NASHUA AND ROCHESTER RAILROAD COMPANY *v.* PEOPLE'S SAVINGS BANK. Error to the Superior Court of the State of Massachusetts. October 8, 1894. Dismissed per stipulation. *Mr. Attorney General* for the plaintiff in error. *Mr. Samuel Wells* for the defendant in

error in No. 6. *Mr. W. A. Monroe* and *Mr. George O. Shattuck* for the defendants in error in Nos. 18, 73, and 74, and *Mr. W. S. B. Hopkins* for the defendant in error in No. 468.

No. 106. WORSWICK MANUFACTURING COMPANY *v.* KANSAS CITY. Appeal from the Circuit Court of the United States for the Western District of Missouri. December 7, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. M. D. Leggett*, *Mr. L. L. Leggett*, and *Mr. Albert E. Lynch* for the appellants. *Mr. F. F. Rozzelle* and *Mr. J. R. Edson* for the appellees.

No. 493. WRIGHT *v.* ROLLINS. Error to the Supreme Court of the State of California. October 15, 1894. Dismissed per stipulation, on motion of Mr. Calderon Carlisle for the plaintiff in error. *Mr. Calderon Carlisle* for the plaintiff in error. *Mr. Thomas D. Riordan* for the defendant in error.

No. 838. UEBERWEG *v.* COMPAGNIE GÉNÉRALE TRANSATLANTIQUE. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit. November 12, 1894. Petition denied. *Mr. Robert D. Benedict* and *Mr. Edward K. Jones* for Compagnie Générale Transatlantique in support of petition. *Mr. Henry G. Ward* for Ueberweg in opposition thereto.

No. 551. UNITED STATES *v.* CONVERSE. Appeal from the Court of Claims. January 21, 1895. Dismissed on motion of Mr. Solicitor General Maxwell for the appellant. *Mr. Attorney General* for the appellant. *Mr. W. W. Dudley*, *Mr. L. T. Michener*, and *Mr. R. R. McMahon* for the appellee.

No. 515. UNITED STATES *v.* DAVENPORT. Appeal from the Court of Claims. January 28, 1895. Judgment affirmed by

a divided court. *Mr. Attorney General*, *Mr. Assistant Attorney General Dodge*, and *Mr. Felix Brannigan* for the appellant. *Mr. Richard R. McMahon* for the appellee.

No. 827. UNITED STATES *v.* HUNING. Appeal from the Court of Private Land Claims. March 4, 1895. Dismissed on motion of Mr. Solicitor General for the appellant. *Mr. Attorney General* for the appellant. *Mr. Frank W. Clancy* for the appellee.

No. 1032. UNITED STATES *v.* MERCK. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the second circuit. June 3, 1895. Petition denied. *Mr. Attorney General* and *Mr. Solicitor General* for United States in support of the petition. No one opposing.

No. 407. UNITED STATES *ex rel.* MERRICK *v.* FOSTER. Error to the Supreme Court of the District of Columbia. January 24, 1895. Dismissed, with costs, on motion of Mr. J. M. Wilson for the plaintiffs in error. *Mr. J. M. Wilson* for the plaintiffs in error. *Mr. Attorney General* for the defendant in error.

No. 134. YOUNG *v.* FOERSTER. Appeal from the Circuit Court of the United States for the Southern District of New York. December 17, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. Edwin H. Brown* for the appellants. *Mr. Arthur v. Briesen* for the appellee.

No. 68. YOUNG *v.* FOX. Appeal from the Circuit Court of the United States for the Eastern District of Tennessee. November 7, 1894. Dismissed, with costs, pursuant to the tenth rule. *Mr. William Henry De Witt* for the appellants. *Mr. Jefferson Chandler* for the appellees.

II.

OCTOBER TERM, 1895.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1895.

INDIANA *v.* KENTUCKY.

ORIGINAL.

No. 2. Original. Submitted October 15, 1895. — Decided October 21, 1895.

The court appoints commissioners to run the disputed boundary line in accordance with its decision, announced May 19, 1890, 136 U. S. 479.

At October Term, 1889, this court decided a case of disputed boundary between the State of Indiana and the State of Kentucky. 136 U. S. 479. At the present term the parties presented the following petition:

"*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

"The plaintiff, The State of Indiana, and the defendant, The State of Kentucky, show to your honors that they have agreed upon and submit herewith the accompanying draft of an order in conformity to the opinion and order of

the Court herein and move for an order in accordance therewith.

"THE STATE OF INDIANA,
By *William A. Ketcham*,
its Attorney General.
"THE STATE OF KENTUCKY,
By *Richard H. Cunningham*,
its Solicitor.

"WASHINGTON, D. C., *October* 15, 1895.

"IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1895.

"THE STATE OF INDIANA *vs.* THE STATE OF KENTUCKY. } Original, No. 2.

"On this 15th day of October, 1895, comes The State of Indiana, by its attorney general, and also comes The State of Kentucky, by its solicitor, Richard H. Cunningham, and said parties advise and inform the Court that in accordance with the opinion and order hereinbefore entered in that behalf they have agreed upon the following-named gentlemen to be suggested to this Court as commissioners, as stated and set forth in said opinion and order, viz.: Gustave V. Menzies, of Mount Vernon, Ind.; Gaston M. Alves, of Henderson, Ky., and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the Court, being fully advised in the premises, does now order and decree that the above-named Gustave V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said States of Indiana and Kentucky as designated in the said opinion of this Court heretofore entered herein, and to report to this Court with all reasonable dispatch their doings in that behalf. It is further ordered by the Court that duly certified copies of this order shall be forthwith issued by the clerk of this Court, under his hand and seal, to each of the above-named commissioners, and before entering upon the discharge of their duties as such commissioners, they and

each of them shall be and appear before either the clerk of this Court or the clerk of the United States Circuit Court within and for either the district of Indiana, Kentucky, or Ohio and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be transmitted to and filed with the clerk of this court and in this cause."

Mr. William A. Ketcham, Attorney General of the State of Indiana, for plaintiff.

Mr. Richard H. Cunningham for defendant.

The Chief Justice.

This cause coming on on the application of the State of Indiana, by its attorney general, and of the State of Kentucky, by its solicitor, Richard H. Cunningham, for the appointment of commissioners herein, in accordance with the opinion, judgment, and decree hereinbefore filed and entered, and the court being advised and informed by said parties that they have agreed upon the following-named gentlemen to be suggested to this court for such appointment, viz.: Gustave V. Menzies, of Mount Vernon, Indiana; Gaston M. Alves, of Henderson, Kentucky; and Col. Amos Stickney, of the Engineer Corps of the United States Army; and the court, being fully advised in the premises, does now order and decree that the above named Gustave V. Menzies, Gaston M. Alves, and Amos Stickney be, and they are hereby, appointed commissioners to ascertain and run the boundary line between the said States of Indiana and Kentucky as designated in the said opinion of this court heretofore filed, and judgment and decree heretofore entered herein, and to report to this court with all reasonable dispatch their doings in that behalf. It is further ordered by the court that duly certified copies of this order shall be forthwith issued by the clerk of this court, under his hand and the seal of the court, to each of the above-named commissioners, and before entering upon the discharge of their duties as such commissioners they, and

each of them, shall be and appear before either the clerk of this court or the clerk of the United States Circuit Court within and for either the District of Indiana, Kentucky, or Ohio and take an oath faithfully to discharge the duties required of them as such commissioners, which oaths shall be forthwith transmitted to and filed with the clerk of this court and in this cause.

SIMMONS *v.* BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY.

BURLINGTON, CEDAR RAPIDS AND NORTHERN RAILWAY COMPANY *v.* SIMMONS.

Nos. 11 and 12. Argued November 1, 1894. — Decided October 21, 1895.

When a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and when the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, a similar order as to right of redemption by the junior mortgagee is not substantially, or even formally, necessary.

In such case a junior mortgagee, who stands by while the sale is made and confirmed, must be deemed, in equity, to have waived his right to redeem.

A decree in such a suit that the sale is to be made subject to the rights of the junior mortgagee and of intervening creditors, and reserving to the court the right to make further orders and directions, and providing that no sale shall be binding until reported to the court for its approval, and a subsequent order that the property shall be sold subject to the future adjudication as to such rights, and the property conveyed subject thereto, while it warrants a contention that the court intended to make a future disposition of the claims of such parties, does not authorize the junior mortgagee to wait for a period of seven years before attempting to enforce his alleged rights; and such delay deprives him of the right to ask the aid of a court of equity in enforcing them.

The Burlington, Cedar Rapids and Minnesota Railway Company was a corporation organized under the laws of the State of Iowa, and, in pursuance of its granted powers, had, prior to the litigation which brought the case here, con-

structed a main line and three branches known as "the Milwaukee Extension," "the Pacific Extension," and "the Muscatine Western." It had at different times executed mortgages, one upon the main line, covering the railway, rolling stock, and franchises held or thereafter to be acquired, securing bonds to the amount of $5,400,000; one subsequent in date upon the Milwaukee extension, securing bonds to the amount of $2,200,000; one later in date, upon the Muscatine Western extension, securing bonds to the amount of $800,000; and one, still later in date, upon the Pacific extension, securing bonds in the sum of $1,800,000; and, finally, one known as the income and equipment mortgage, which was a second mortgage upon the railway and branches, and purporting to be a first mortgage upon the income and upon certain rolling stock not covered by the first mortgages.

On the 15th day of May, 1875, Charles L. Frost, as surviving trustee in the "main line" mortgage, filed in the Circuit Court of the United States for the District of Iowa an original bill against the Burlington, Cedar Rapids and Minnesota Railway Company, as sole defendant, to foreclose the mortgage on the main line. By amendment the Farmers' Loan and Trust Company was made a party defendant upon an averment that said company were trustees in a mortgage executed subsequent to the plaintiff's mortgage, and praying that "their lien on the income and equipment of said road may be declared subsequent to that of the plaintiffs', and they may be decreed to redeem plaintiffs' mortgage or their equity be barred and foreclosed, and for such other relief as the plaintiffs' case may require." A demurrer to this bill had been filed by the railway company, and, after the Farmers' Loan and Trust Company was added as a party defendant, it joined in the demurrer.

The several trustees in the Milwaukee extension mortgage and the Muscatine extension mortgage likewise filed in the same court foreclosure bills, in which, by amendment, the Farmers' Loan and Trust Company was made a party defendant, and as to which the same relief was prayed as that contained in the bill filed by Frost, trustee.

Statement of the Case.

On June 23, 1875, the Farmers' Loan and Trust Company, as trustee in the mortgage on the Pacific division and as trustee in the income and equipment mortgage, filed an original bill against the railway company, praying a foreclosure of both of said mortgages. In that portion of the bill that dealt with the income and equipment mortgage it was alleged that said mortgage was a first lien on two engines, known as Nos. 30 and 31, and upon one hundred and thirty box cars, known as the even numbers from 882 to 1140. An answer was filed by the railway company, not traversing or denying the allegations of the bill as respected the mortgage on the Pacific division, but denying that as many equipment or income bonds had been sold as were averred to have been sold. On the 30th of October, 1875, the case came on for hearing, and a final decree was entered, ordering that the property covered by the Pacific division mortgage be sold without appraisement or redemption at public auction, etc., but ordering that "that portion of complainants' bill relating to the income and equipment mortgage, so called, is ordered to be consolidated with the causes pending in this court against said respondent, wherein said Frost, Taylor, and others are respectively complainants."

On the same day on which this decree was entered there was filed in the cause wherein Charles L. Frost and others, trustees, were plaintiffs, and the Burlington, Cedar Rapids and Minnesota Railway Company was defendant, an answer on behalf of the Farmers' Loan and Trust Company, in which it was admitted that the deed of trust to Frost was a first lien upon the main line and upon the ordinary rolling stock used thereon, not included in the mortgages executed by the company, known as the Pacific, Milwaukee, and Muscatine Western mortgages, and not including also engines Nos. 30 and 31 and box cars Nos. 882 to 1140.

On the same day the Farmers' Loan and Trust Company filed a cross-bill against the complainants in the several bills of complaint heretofore mentioned. The prayer of this cross-bill was as follows: "Wherefore your orator prays that said several suits be consolidated; that an equitable portion, as

above shown, be decreed as against all of said parties to be included in said deed of trust, (the income mortgage,) and that the same be properly designated as proper to be sold with said division under said mortgage; and that your orator have a decree declaring its lien upon said two engines 30 and 31 and said 130 box cars, under said mortgage, to be prior and paramount to any held by any of said trustees and parties."

The record discloses that on October 30, 1875, the causes were ordered to be consolidated; the defendant railway company withdrew its demurrers, pleas, and answers in the said several causes; and thereupon "said several causes and said consolidated cause came on for final hearing and trial before the court on the several bills of complaint, the amended bill, the several mortgages, and deeds of trust, and the proofs."

The decree found the amount remaining due and unpaid on the bonds secured by the main line mortgage, and adjudged the defendant to pay the same within ten days, in default of which payment its equity of redemption was to be forever barred, and W. M. Kaiser was appointed a special master to advertise and sell said main line and its franchises and appurtenant property "without redemption or appraisement," and it was ordered that James Grant be a special trustee to purchase the property for all holders of bonds secured by the main line mortgage who shall assent to such purchase, and pay their share of the expenses, and he was ordered to convey the property, under the direction of the court or one of its judges, to such corporation as such bondholders might organize, to hold the title thus acquired for the benefit of the whole or such part as should assent thereto.

Pending the foreclosure proceedings, a new corporation, called the Burlington, Cedar Rapids and Northern Railway Company, was formed for the purpose of purchasing the several mortgaged properties at the foreclosure sales. On the 22d day of June, 1876, the main line was sold by the master to a committee, who purchased for the benefit of all bondholders, and who directed that a conveyance be made by deed to the Burlington, Cedar Rapids and Northern Railway Company. On the same day the Muscatine western

extension was sold to the same purchasers, and at their request a deed was made to the said new company. Likewise, on the same day, the Pacific division was sold by the master, named in that decree, and the purchaser, John I. Blair, acting as trustee for the bondholders of the Pacific division, directed that the conveyance should be made to the said new company.

The masters making these sales executed deeds of the main line and of the several branches to the said the Burlington, Cedar Rapids and Northern Railway Company, conveying in terms an absolute title to the property described in each deed. The reports of the several sales, accompanied by the deeds executed by the masters, were submitted to the court for approval, as required by the decree, and on July 20, 1876, the Circuit Court judge approved said sales and deeds, and ordered the property to be delivered to said new company as of July 1, 1876.

The plan of reorganization provided for the execution of a mortgage of the entire property of the new company to the amount of $6,500,000, and such a mortgage, bearing date 1st of September, 1875, was, on November 9, 1876, executed and delivered to the Farmers' Loan and Trust Company as trustee.

It appears that the stock and bonds of the new organization were put upon the market, and have been bought and sold as mercantile securities since their issue in 1876.

In February, 1882, the Farmers' Loan and Trust Company addressed to the holders of the income and equipment bonds of the Burlington, Cedar Rapids and Minnesota Railway Company, and to Hubbard, Clark and Dawley, attorneys of some of said bonds, a communication, resigning as trustee under the income and equipment mortgage.

On April 13, 1883, there was presented to the District Judge of the United States for the Southern District of Iowa a petition of one Lawrence Turnure and others, claiming to be holders of income and equipment bonds of the Burlington, Cedar Rapids and Minnesota Railway Company. The petition alleged the resignation as trustee of the Farmers' Loan

and Trust Company, asked that Charles E. Simmons should be appointed trustee, and that he should be authorized, as such, to file an "amended and supplemental cross-bill in the nature of a bill of revivor and supplement," and that he be permitted to bring in new parties in accordance with such amended and supplemental cross-bill.

On this petition an order was endorsed by the judge, appointing Simmons trustee and giving him leave to file his cross-bill in the nature of a bill of revivor and supplement, "subject to the right of all parties interested to move the vacation of this order after process to or appearance of the defendants."

On the following day the cross-bill of Charles E. Simmons, as trustee succeeding the Farmers' Loan and Trust Company, was filed against Frederick Taylor, as successor to Charles L. Frost, trustee, the Burlington, Cedar Rapids and Minnesota Railway Company, the Burlington, Cedar Rapids and Northern Railway Company, and the Farmers' Loan and Trust Company.

This cross-bill set up a history of the proceedings, not differing in substantial particulars from the statement herein previously made, but claimed that in no proceeding had there been any adjudication, determination, decree, or order in any manner affecting or determining the rights of the Farmers' Loan and Trust Company, as trustee under the income and equipment mortgage, or of the bondholders claiming under said mortgage.

The cross-bill prayed for an account to be rendered by the Burlington, Cedar Rapids and Northern Railway Company of the earnings of the main line since the said company had had control and management of the same, and prayed for a decree permitting the complainant to redeem the said main line upon payment of the amount bid by the committee of bondholders at the foreclosure sale, less the profits and gains ascertained by the accounting prayed for, and that, upon such redemption, the complainant should be decreed to take the title to said railway, franchises and property free and clear from the trust deed of Frost and the decree of the court in

his behalf, and from all rights of the Burlington, Cedar Rapids and Northern Railway Company in the property, and that the trust deed or mortgage from the Burlington, Cedar Rapids and Northern Railway Company to the Farmers' Loan and Trust Company, trustee, and the lien thereof be utterly cancelled as to said main line, and as to the complainant and bondholders claiming under said trust deed.

Issue was made by answer filed by the Burlington, Cedar Rapids and Northern Railway Company, in which answer, among other things, that company denied that there had been no adjudication determining the rights of the trustee under the income and equipment mortgage, and denied that any right of redemption remained in the Farmers' Loan and Trust Company, or in its successors, after the sale under the decree of October 30, 1875. This answer likewise denied that the bonds held by those on whose behalf the cross-bill was filed by Simmons were ever legally issued.

On November 28, 1883, the Farmers' Loan and Trust Company filed its answer to the cross-bill. In this answer it was averred that the Farmers' Loan and Trust Company had, in fact or law, no valid claim to the said engines and box cars, except subject to the prior claims of the other mortgages, and that all such claims were cut off and foreclosed by the sale under the decree of October 30, 1875.

Replications were filed and evidence taken, and on October 28, 1885, an opinion and decree were filed, finding, first, that the income and equipment mortgage was a valid lien upon the main line of the railway, and that the right of redemption under it had not been foreclosed by the decree of October 30, 1875, nor by the sale thereunder; second, that the Burlington, Cedar Rapids and Northern Railway Company was entitled to redeem the main line by paying off the income and equipment mortgage; third, that, in the event such redemption should not be made, then the bondholders secured by the income and equipment mortgage should be entitled to redeem said main line of railway by paying into court the amount due thereon, as the same should be determined in the manner

provided in the decree; fourth, that in the event of neither of these redemptions taking place, the Burlington, Cedar Rapids and Minnesota Railway Company should be entitled to redeem said main line by paying off the amount due on the deed of trust, or deeds of trust, against which such redemptions should be made; fifth, that in the event that neither the Burlington, Cedar Rapids and Northern Railway Company, nor the Burlington, Cedar Rapids and Minnesota Railway Company, should so redeem, then the income and equipment mortgage should be foreclosed and a sale of the property had, and the proceeds be applied, first, to the payment of the bonds issued under the main line mortgage, and second, the amount, thereafter to be determined, that should be due upon the income and equipment mortgage. The cause was then referred to a master to determine sundry matters stated in the decree.

From this decree an appeal was taken to this court, which appeal was dismissed for the reason that the decree appealed from was not a final decree. *Burlington, Cedar Rapids & Northern Railway* v. *Simmons*, 123 U. S. 52. Subsequently, a report was filed by the master, which was excepted to by Simmons, trustee, and by the Burlington, Cedar Rapids and Northern Railway Company. This report and the exceptions thereto were passed upon by the court below in an opinion filed on May 15, 1889, reported in 38 Fed. Rep. 683; and on May 29, 1889, a final decree was entered in accordance with the opinion of the court.

From this decree the Burlington, Cedar Rapids and Northern Railway Company appealed, as well from so much thereof as found the cross-complainant entitled to redeem at all, as from those portions thereof which affirmed the validity of any of the bonds and which held the railway company bound to account; and the cross-complainant appealed from such portions thereof as found invalid some of the bonds asserted in the cross-bill.

Mr. Charles A. Clark for Simmons.

Mr. William A. Abbott filed a brief for Henry Clews.

Mr. J. M. Woolworth, (with whom was *Mr. E. E. Cook* on the brief,) for the Burlington, Cedar Rapids and Northern Railway Company.

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

The decisive questions in this case turn on the character and effect of the decree entered on October 30, 1875. Did that decree leave the rights under the second mortgage, known as the income and equipment mortgage, unadjudicated, and thereby subject the purchasers at the sale under the decree to a future inquiry into those rights, or was the decree final, as respects the property sold thereunder, and do the purchasers, the Burlington, Cedar Rapids and Northern Railway Company, hold the property free from the lien of the second mortgage?

The answer to these questions must be found in the allegations and proofs upon which the decree was based, as well as in the terms of the decree itself.

The record shows that all the parties to be affected by the decree were before the court — the Burlington, Cedar Rapids and Minnesota Railway Company as a mortgage debtor in default, and the trustees in the several mortgages. The property against which the proceedings were aimed was a railroad consisting of a main road and several branches. That the railway company was insolvent and utterly unable to satisfy decrees for the payment of money was evident.

In such circumstances what kind of a decree would be probable, and in the natural course of events? Would it not be expected that the proceedings would eventuate in a sale, in such a way as to dispose of the questions raised in the several cases, and to vest in the purchasers an unincumbered title to the entire railway system?

We learn from the pleadings and evidence that such a plan of sale was apparently pursued, and resulted in the organization of a new company whose mortgage bonds and stock were distributed among the original bondholders upon terms satis-

factory to all, including a number of those who likewise held bonds secured by the income mortgage. The sales were reported to the court, and, with the deeds in pursuance thereof, were duly approved. The new company went into possession and management of the railroad and branches, and has increased largely their value by important extensions. The bonds and stock of the new company, it is safe to presume, have gone largely into new hands. The possession and title of the Burlington, Cedar Rapids and Northern Railway Company remained undisturbed and unchallenged till April, 1883 — a period of more than seven years — when the petition of certain alleged bondholders under the income mortgage was filed, asking leave to file what is termed "an amended and supplemental cross-bill in the nature of a bill of revivor and supplement," the avowed purpose of which is to have the title of the Burlington, Cedar Rapids and Northern Railway Company declared subject to the lien of the income mortgage; to have the mortgage issued in pursuance of the plan of reorganization declared void, as respects the main line; and to hold that company to account for the earnings during the period of its possession.

To constrain a court of equity to grant relief so apparently inconsistent with the previous proceedings, and so destructive of the rights of persons who have since become interested, the case presented should be clear and free from doubt.

What, then, are the reasons urged in favor of the complainant in the amended and supplemental cross-bill?

It is claimed, in the first place, that the Farmers' Loan and Trust Company, a party in the cause as trustee named in the income and equipment mortgage, had an equitable right to redeem, and that as the decree of October, 1875, contained no declaration or recital that said trustee was barred of the equity of redemption, and as no time was given to it to redeem from the first mortgages, the rights of the trustee and of the income bondholders were wholly unaffected by the decree and by the sales in accordance therewith. In other words, the proposition is that, in a decree which orders a sale of the property to pay the first mortgage debt, an express order cutting off the

equity of redemption of a junior mortgagee, although a party to the suit, is necessary to divest the latter of his lien and of his right of redemption.

We are unwilling to accept this as a sound statement of the law, or, at all events, to concede it as invariably true. Where a junior mortgagee is a party defendant to a foreclosure bill in which, as in the present case, there is a prayer that he be decreed to redeem, and where the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, we do not deem a similar order as to right of redemption by the junior mortgagee to be substantially or even formally necessary. He has, of course, a right to redeem, but if he chooses not to assert such right, and stands by while the sale is made and confirmed, he must in equity be deemed to have waived his right.

We think the law was correctly stated by Mr. Justice Matthews in *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 68, where he said: "In case the proceeding results finally in a sale of the mortgaged premises, the sale is made free from the equity of redemption of the mortgagor, and all holders of junior incumbrances, if made parties to the suit, and is of the whole premises, when necessary to the payment of the amount due, or when the property is not properly divisible; it conveys a clear and absolute title as against all parties to the suit, or their privies, and the proceeds of the sale are distributed after payment of the amount due, for non-payment of which the sale was ordered, in satisfaction of the unpaid debt remaining, whether due or not."

So in *Lansing* v. *Goelet*, 9 Cowen, 346, 391, in which case there was an elaborate examination of the subject, the law was expressed in the following terms: "A judicial sale of the estate under the decree of the court, if the court has power to make the decree, whether it be in the form of a decree of sale preceded by a formal decree of foreclosure, or in the form of a decree of sale without a formal decree of foreclosure, effectually bars the right of the mortgagor to redeem; and the purchaser will hold it under the title he acquires to it by virtue

of the sale and conveyance he receives from the master, free and discharged from the equity of redemption. The purchase money then stands in the place of the estate, and will be applicable, as that was, first, to the satisfaction of the debt of the mortgagee, and the overplus and residue, if any, to the use of the mortgagor."

In 3 Pomeroy's Eq. Jur., § 1228, it is said that "the sale under a valid decree immediately cuts off, bars, and forecloses the rights of the mortgagor and of all subsequent grantees, owners, incumbrancers, and other persons interested, who were made parties defendant, and of all grantees, owners, and incumbrancers subsequent to the filing of a notice of *lis pendens*, although not made defendants."

It is contended in the next place that the rights of the junior mortgagee were saved by the express terms of the decree. The language relied upon was as follows: "And this decree is made subject to the rights of any intervening creditors now before this court, and the claim of the Farmers' Loan and Trust Company in the income and equipment mortgage to any of the cars and machinery named in that mortgage is to be submitted to this court in term time or vacation, as soon as counsel can agree on the facts in relation thereto." And again: "The court reserves the power to make further orders and directions; and no sale under this decree is to be binding until reported to the court for its approval."

Reliance is also placed upon the language of a subsequent order of the court, on October 26, 1876, in which, after affirming the sales and conveyances, it is said that said order "shall in nowise be taken to affect any claim, right, interest, or lien upon or to the property sold and conveyed by said master's deeds, now pending in this court, but that the said claim, rights, interests, and liens, are merely reserved, subject to future adjudication, and the said grantees in said deeds take the property hereby conveyed subject thereto."

The construction sought to be put upon this language, namely, that the court thereby intended to make a future disposition of the claims of the income and equipment mort-

gage one of the terms of the sale, is an admissible one, and, if it had been urged by timely action, it might properly have been adopted. But, as we have seen, those interested under the income and equipment mortgage not only failed to embrace the opportunity afforded to redeem as against the first mortgages, but suspended all action for a period of more than seven years. The condition of the record, as it existed before the filing of the amended and supplemental cross-bill, disclosed no intention to ask for a redemption, and even if the condition of the case prior to the sale and the terms of the decree left it a debatable matter whether the court intended to bar any right of redemption on the part of the junior mortgage, we think the contemporaneous and subsequent conduct of those interested in that mortgage deprives them of any right, after so long a period, to demand the assistance of a court of equity as against the purchasers and those who may have become interested with them.

We do not find it necessary to determine whether those of the bondholders under the income and equipment mortgage, and who also held first mortgage bonds, estopped themselves from asserting a right of redemption by accepting the new securities issued under the plan of reorganization. If, indeed, those so acting constituted all of the income bondholders, such a determination might be a ready method of disposing of the entire case. But as there seems to have been some who did not receive the new bonds in payment of first mortgage bonds, and would not, therefore, be brought within the range of the suggested estoppel, we prefer to pass by that question and consider whether all the holders of bonds under the income and equipment mortgage did not, by their inaction and acquiescence under the decree and sale, lose any right to redeem which they might otherwise have had as against the purchasers.

As we have seen, the Farmers' Loan and Trust Company, in its answer and cross-bill, as they stood before and at the time of the decree of October 30, 1875, did not assert any right or any intention to redeem, although in the bill an opportunity was afforded it so to do. It restricted its allega-

tions and claims for relief entirely to the engines and box cars. When the cases, as well the case of Frost, trustee, in respect to the foreclosure of the main line, and the other consolidated bills of foreclosure, came on to be heard, there was no assertion of any right or wish to redeem. There was record notice to the said trustee that a plan of sale and reorganization was intended which contemplated the issue of new stock and bonds. Not only was there a tacit acquiescence in the proceedings, but no sign of any intention to disturb the title of the purchasers was given until more than seven years had elapsed, during which period large expenditures were made, and, beyond a doubt, third persons had become interested on the faith of that title.

The principle upon which this ground of defence rests has been so often vindicated and applied by this court that we do not feel it necessary to further enforce it by argument, nor to cite cases so numerous. It is sufficient to refer to *Abraham* v. *Ordway*, 158 U. S. 416.

The rule is aptly expressed by 2 Pomeroy's Eq. Jur., § 816, as follows: "Acquiescence is an important factor in determining equitable rights and remedies in obedience to the maxims: He who seeks equity must do equity, and he who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel — may produce a *quasi* estoppel — upon the rights of remedy." And in § 965: "When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity. Even where there has been no act nor language

properly amounting to an acquiescence, a mere delay, a mere suffering time to elapse unreasonably, may of itself be a reason why courts of equity refuse to exercise their jurisdiction in cases of actual and constructive fraud, as well as in other instances. It has always been a principle of equity to discourage stale demands; laches are often a defence wholly independent of the statute of limitations."

As these views lead to the conclusion that the so-called amended and supplemental cross-bill, filed by Simmons, trustee, in April, 1883, cannot be maintained against the Burlington, Cedar Rapids and Northern Railway Company, nor against the trustee named in the new mortgage, it is unnecessary for us to enter into questions that arose affecting the title of alleged bondholders under the income and equipment mortgage, and with respect to which a cross-appeal was taken from the decree of the court below.

It may be that whatever questions existed between the Burlington, Cedar Rapids and Minnesota Railway Company and the trustee of the income and equipment mortgage were left open as between them, if, indeed, any property remained to which a decree of foreclosure could apply. As to this we express no opinion. But so far as the Burlington, Cedar Rapids and Northern Railway Company and the Farmers' Loan and Trust Company, trustee, under the new mortgage, are concerned, the so-called amended and supplemental cross-bill should be dismissed.

The decree of the court below, under the said amended and supplemental cross-bill, is therefore reversed, and the record remitted with directions to enter a decree in accordance with this opinion, the costs in the court below and in this court to be paid by the appellants in No. 11.

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

RICHMOND NERVINE COMPANY *v.* RICHMOND.

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

No. 59. Argued April 30, May 1, 1895. — Decided October 21, 1895.

The fact that a trade-mark bears the name and portrait of the person in whose name it is registered does not render it unassignable to another. On the facts this court reverses the decree of the court below.

THIS was a bill in equity filed by the Dr. S. A. Richmond Nervine Company, a Missouri corporation, against Samuel A. Richmond, the founder of the corporation, and a citizen of Illinois, to enjoin the use of a certain trade-mark, and to recover damages and profits for the unlawful use of the same.

The facts of the case were substantially as follows: The defendant Richmond, prior to December, 1877, being engaged at St. Joseph, Missouri, in the business of making and selling a preparation known as "Samaritan Nervine," a medicine for the relief of epileptic fits and similar diseases, adopted as a trade-mark the figure of a man in an epileptic fit falling backwards, with his arms extended, and his cane and hat dropping to the ground, with the word "trade" printed in small capitals on the right side of the figure, and the word "mark" printed in small capitals on the left side. This trade-mark was duly registered in the Patent Office, March 26, 1878, and was imprinted upon the wrappers which enclosed the bottles in which the medicine was sold, and was used from the day of its adoption in 1873 or 1874 continuously until a change in the size and character of the bottle and trade-mark was made in the spring of 1884. Dr. Richmond met with considerable success in the sale of his medicine, and was reasonably prosperous until just prior to 1882, when he became embarrassed and unable to pay his debts, the result of engaging in a hotel venture in St. Joseph, which proved disastrous.

In May, 1882, there was organized by Richmond and two of

his clerks, under the laws of Missouri, a corporation under the name of the "Dr. S. A. Richmond Medical Company," hereinafter called the "Medical Company," for the purpose of manufacturing and selling the Samaritan Nervine and Nervine Pills. The capital stock of the corporation was fixed at five thousand dollars, divided into 50 shares, of which James H. Richmond, a brother of the defendant, was named as the owner of 48, and John Albus and Michael Draut, the other two incorporators, of one share each. The property of Dr. Richmond, viz., the receipt for making the nervine and pills, the right to manufacture them, the trade-mark of the man falling in a fit, the outfit or plant for manufacturing the medicine, with the good will of the business, were assigned by Dr. Richmond to the Medical Company in consideration of five thousand dollars, the amount of the capital stock.

Long prior to this, however, and in December, 1871, defendant Richmond was married to Eva E. Shannon, who appears to have received from her father some money, together with the proceeds of some real estate, which she loaned to her husband to aid him in the prosecution of his business. To secure her for the money thus contributed, James A. Richmond, the Doctor's brother, on May 5, 1882, assigned to her 47 shares of the stock he held in the Medical Company. These shares she held until the company made an assignment for the benefit of its creditors and ceased to do business, as hereinafter stated.

Dr. Richmond became the general manager of the company, had charge of its business, superintended the preparation and putting up of the medicine, purchased bottles, wrappers, etc., attended to the advertising and sales, and was paid by the company for his services a salary of $200 per month, and in addition was allowed free of cost such medicines made by the company as were needed to supply the patients he was personally treating. He subsequently became president, and also acted as treasurer of the company, which advertised the Samaritan Nervine very extensively, using the trade-mark, bottles, and wrappers assigned to it by Dr. Richmond. The company continued prosperous from its organization in May,

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1882, until May 13, 1884, when it made an assignment for the benefit of its creditors under the laws of the State of Missouri.

Before this, however, and in November or December, 1883, Dr. Richmond, who was then president and manager of the company, recommended a change in the size of the bottles, and the adoption of a new trade-mark, to wit, an eight-ounce bottle with his own portrait blown in the side, with the words "Samaritan Nervine" and "New Style," and that the new trade-mark consist of a portrait of himself surrounded by four globes or hemispheres stamped or engraved on the outside wrapper of the bottle. This new style, as it was called, was adopted by the company, Dr. Richmond gave orders to the Kellogg Engraving Company of Chicago for engraving the new trade-mark, and early in 1884 ordered a large quantity of eight-ounce bottles from a firm in Pittsburg to be made in accordance with the new style adopted by the company, together with cartoons with the trade-mark printed thereon. Upon the adoption of this new style of bottle and trade-mark, a circular was prepared by him notifying customers of the company and the trade generally of the change made by the company in the size of the bottles, the wrapper, and the trade-mark. This circular described the new bottle and the trade-mark, announced that they would go into use on the first day of May, 1884, and that medicines put up in any other style would not be genuine. They were sent to the trade generally in the United States and Canada. The old style of bottle and the old trade-mark of a man falling in a fit were discarded, except as to stock on the market, which had been prepared prior to the change.

On May 13, 1884, a meeting of the directors was held, at which Dr. Richmond announced that, owing to certain claims being pressed, which the company could not pay, it was insolvent, and upon his recommendation a resolution was adopted directing him to execute an assignment of the property, effects, assets, and business of the company for the benefit of its creditors. An assignment was executed to one John F. Tyler the same day, including all the property of the

company, advertising materials, printed matter, circulars, electrotypes, medicine bottles, and materials on hand for the manufacture of medicine, and all and every article of property or right belonging to the company.

The assignment appeared to have been entirely unnecessary, and was probably a scheme of defendant's to get possession and control of the company's assets, but it seemed to have been regularly made, and the assets appraised upon an estimate placed upon them by defendant at the sum of $998. Immediately thereafter, to wit, May 16, 1884, the property and assets of the company were sold to one C. W. Wolverton, of Tuscola, Illinois, who was the attorney of James A. Richmond, for the sum of $1000, two dollars more than the appraised value. Wolverton promptly assigned whatever interest he took by the purchase to one Powell, to whom the assignee refused to deliver the assets, having discovered the fraud, and Powell sued out a writ of replevin and thereby got possession of such corporeal property as the officer holding the writ could take and deliver.

It appeared that Dr. Richmond went to Chicago in July, 1884, and began there to manufacture the Samaritan Nervine, to use the bottles and trade-marks that had been adopted and procured by the Medical Company before the assignment, including both the old and new trade-mark, and also to use the good will of the company. He carried on this business under the name of the "World's Medical Association" for about three months, under a pretended lease from Powell, the second vendee from the assignee of the Medical Company.

As soon as the sale of the property and effects of the company for $1000 became known to the creditors, they filed a petition in the Circuit Court of Buchanan County, Missouri, to set aside the sale to Wolverton upon the ground that it was fraudulent and void as against creditors; and the court, on hearing the evidence, on June 23, 1884, decided that the sale was fraudulent and void, and ordered that the property be resold for the benefit of creditors, which was done, and on August 28, 1884, James A. Richmond purchased it for $25,000, which sale was subsequently confirmed by the court.

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Richmond paid $2500 on the purchase, and gave security for the balance, $22,500, which, however, was never paid by him. On December 11, 1884, the "Dr. S. A. Richmond Nervine Company," plaintiff, hereinafter called the Nervine Company, was organized under the laws of the State of Missouri by James A. Richmond, Michael Draut, and John Christ, Richmond being elected president. A resolution was then adopted electing Dr. S. A. Richmond treasurer and general manager of the company, at a salary of $200 per month, with power, together with the president of the company, to execute all contracts for carrying on its business.

James A. Richmond transferred to the company his interest in the receipt for the manufacture of the medicine, the trade-mark, and all his personal property, and an assignment was also obtained from Powell of any right he claimed to have acquired by reason of the original sale by the assignee to Wolverton. The Nervine Company then became the sole and exclusive owners of all the property and effects of the original company, which had been assigned to Tyler for the benefit of its creditors, together with the right to manufacture and sell the medicines and to use the trade-marks, bottles, wrappers, etc.

In January, 1886, after the company had been doing business about two years, Dr. Richmond having become involved in certain legal proceedings, ceased his connection with the company, and was subsequently sent to an asylum, where he remained until November, 1887. During this time his wife, who received seventeen shares in the Nervine Company, took charge of the business and successfully conducted it until it was enjoined by the court below in this suit. After he left the asylum Dr. Richmond did not return to his family, but went to Tuscola, Illinois, began the manufacture of the nervine, as he had done in Chicago, using the trade-marks, bottles, wrappers, and good will of the company without its knowledge or consent, claiming that everything was his own in equity at least. He subsequently had the trade-mark, consisting of his portrait, surrounded by four globes or hemispheres, registered as his own.

Thereupon the doctor was notified by the company to cease manufacturing the medicine and using the trade-mark, and upon his refusal this bill was filed against him, praying for an injunction and an accounting.

To this bill Dr. Richmond filed an answer and a cross-bill, denying that the plaintiff company owned or had ever owned the trade-mark in question, or any of the interests claimed by it, or had ever used or had a right to use the eight-ounce bottles, or any trade-marks in connection therewith, except by his permission and subject to his right to terminate such use. He averred that the trade-marks and good will of the business were his own; that he only leased them to the plaintiff company; denied that his wife ever had any interest in the stock of the old or new company, and averred that whatever stock she held was his, and held only by her as trustee for him.

Upon a hearing upon pleadings and proofs a decree was entered dismissing the original bill, and decreeing upon the cross-bill that the Nervine Company be enjoined from making or selling the medicines or using the bottles, wrappers, or trade-mark of the portrait of Dr. Richmond surrounded by the four globes, known as the new trade-mark. From the decree plaintiff appealed to this court.

Mr. Benjamin Butterworth, (with whom was *Mr. Julian C. Dowell* on the brief,) for appellant.

Mr. William Henry Browne for appellee.

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

The record in this case presents only questions of fact, in which are involved the ownership of a trade-mark devised by Dr. Richmond in December, 1883, consisting of a portrait of himself, surrounded by four globes. Plaintiff's theory in this connection is that the trade-mark in question was designed by Dr. Richmond while acting as president and manager of the Medical Company; was adopted and, if not used, was advertised as about to be used, by that company prior to its

assignment on May 13, 1884; that it passed to Tyler, the assignee of such company, by virtue of the general assignment made upon that day, for the benefit of its creditors; that by him it was sold to James A. Richmond, with the other assets of the Medical Company, August 28, 1884, Richmond in turn assigning and transferring it to the Nervine Company, the plaintiff in this suit.

The theory of the defendant is, as stated in his testimony, that the Medical Company never acquired any property or assets; that he, the defendant, had arranged with his brother, with the two other stockholders of the company, and his wife Eva, before the company was organized; that the transfer of the property was for his own benefit, and the stock all issued in trust for him; that the sale to the Medical Company of the property mentioned was a mere form; that he decided in the fall of 1884 to change the trade-mark and wrapper from the old style to the new style; that he spoke to his brother about it, and stated to the company that he would lease his trade-mark, viz., the portrait of himself, surrounded by the four globes, to the company, provided they compromised with one Hubbard of New Haven, to whom the company had become indebted in the sum of $33,000 for advertising; that he had engravings made in Chicago on his own account, for his own benefit, and paid for them himself; that he subsequently went to Philadelphia, after the engraving was done, and ordered boxes, cartoons, caddies, etc., for himself, on his own account, and paid for them himself, though he may have used the company's money and signed the company's check for the amount; that the money was in fact his; that the company made an assignment, but failed to lease his trade-marks owing to the claim of Hubbard not being settled or arranged. If, as he swears, the Medical Company was but another name for himself and belonged to him, it is difficult to see why he should have ordered the engravings, bottles, and cartoons on his own account and paid for them with his own money as distinguished from the money of the company, or why he should have talked as he did about separating from the company and entering into business on his own account.

He further states that he did lease the trade-mark in question to the Nervine Company about December 11, 1884, when he became the general manager of the company, and had charge and control of its business up to January, 1886, soon after which he became incapacitated and insane; that in the latter part of 1887 he notified the Nervine Company to cease using his trade-marks, and finally, in 1889, brought suit to compel them to do so.

There is a large amount of testimony in the case which is manifestly irrelevant to the question in issue. While it is entirely possible that the Medical Company may have been organized for the purpose of enabling Dr. Richmond to avoid individual liability, and the stock which properly belonged to him put in the name of the nominal stockholders in pursuance of a scheme to defraud his creditors, the existence of this corporation cannot be ignored in this proceeding. Were the proof never so satisfactory that the 47 shares of stock of the Medical Company transferred by defendant's brother to his wife Eva were in fact intended to be held in trust for him, we could not assume that she was not the *bona fide* owner of the stock standing in her name, as the object of this suit is not to impeach such ownership; nor could it be done in any suit to which she was not a party.

The real question is whether on May 13, 1884, the date of the general assignment to the Medical Company, it was then the owner of the trade-mark in question, since if it were, it passed to the assignee of the corporation as a part of its assets. Upon this point there is considerable conflict of testimony. Prior to 1884 the only trade-mark in use by the Medical Company was that of a man falling in a fit, and this it is admitted passed to the assignee, and is now the property of the plaintiff. There is no doubt that Dr. Richmond, in November or December, 1883, while acting as president and manager of the company, devised the trade-mark in question, and made all the necessary arrangements for the intended change in the size of the bottle and in the trade-mark; that advertisements were put into circulars notifying the trade that the change would take place on the first of May, 1884; that the

bills for engraving this trade-mark were all paid for by the company and charged, not to Dr. Richmond personally, but to the expense account of the company; that the circulars announcing the proposed change were printed and circulated in January and February of that year, under the supervision of Dr. Richmond; that these circulars contained a fac-simile of the cartoon or caddy as it would appear, together with a notice warning the public that none would be genuine unless thus encased, and bearing the following inscription: "Have Dr. Richmond's picture blown in the bottle, his picture to be printed on two sides of the caddy or cartoon, and the bottle enlarged;" that orders were placed for the new style of bottle with a Pittsburg firm, and were paid for by the company on delivery. Some of these bottles were received about the first of May, while Dr. Richmond continued to be superintendent of the company, and a memorandum of their payment appears upon the cash book of the company. There was also an order placed for cartoons to be used after May 1 for wrapping or encasing the nervine preparation, which were also paid for by the company. These cartoons contained the words: "Put up or prepared by the Dr. S. A. Richmond Medical Company." After Dr. Richmond left St. Joseph and went to Chicago, the words "Prepared by the Dr. S. A. Richmond Nervine Company" were changed to "Prepared by the World's Medical Association," the name under which defendant did business in Chicago. While it is doubtful whether the Medical Company actually sold any medicines put up in the new bottles, and encased in the new wrappers and bearing the new trade-mark, before its assignment, there is no doubt that a large quantity of these bottles, cartoons, and wrappers were on hand at the time of such assignment, which had been paid for and belonged to the company. Nor is there any doubt that after the organization of the Nervine Company, these bottles, wrappers, and trade-marks were made use of by such company, the plaintiff in this case, so long as Dr. Richmond continued to be its general manager. Defendant claims that this was done under a lease from himself, which was in writing, but this lease is

neither produced nor accounted for, and in his cross-bill only an oral license is claimed. The business done by Dr. Richmond in Chicago from July to October, 1884, under the name of the World's Medical Association, appears to have been a mere episode, as he resumed business in St. Joseph upon the organization of the plaintiff company in December, 1884, and continued with them until January, 1886.

The testimony of Dr. Richmond, who was the main witness in his own behalf, is materially impaired, not only by his own confession that the organization of the Medical Company was procured by himself for the purpose of defrauding his creditors, and that the first appraisement and sale of its assets were also a fraud concocted by him for the same purpose, but by the further fact that, in a suit brought at Columbus, Ohio, against him for advertising, he swore that he owned none of the stock of the Medical Company, and that he had no interest in such stock. A witness, who at different times gives different versions of the same transaction, and blows hot or cold as his interest in the particular litigation may require, can scarcely complain if the court fail to give his testimony the weight to which it would otherwise be entitled.

In fine, we are of the opinion that the Nervine Company is justly entitled to the use of the trade-mark in question.

The fact that such trade-mark bears Dr. Richmond's own name and portrait does not render it unassignable to another. *Kidd* v. *Johnson*, 100 U. S. 617, 620; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540; *Hoxie* v. *Chaney*, 143 Mass. 592, 595; *Fish Bros. Wagon Co.* v. *La Belle Wagon Works*, 82 Wisconsin, 546.

The decree of the court below must be

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

GILFILLAN *v.* McKEE.

McPHERSON, EXECUTOR, *v.* McKEE.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 26, 46. Argued March 14, 15, 1895. — Decided October 21, 1895.

When a decree in chancery awards to a party in the suit a portion of a special fund, forming one of the matters in dispute therein, and denies to him the right to a part of a general fund, forming another and distinct matter in dispute, his acceptance of the awarded share in the special fund does not operate as a waiver of his right of appeal from so much of the decree as denies to him a share in the general fund.

Where a decree is several as to different defendants, and the interest represented by each is separate and distinct from that of the others, any party may appeal separately, to protect his own interests.

Some years before the commencement of the civil war, Cochrane, who had already acted as agent of the Choctaws in prosecuting their claims against the United States, contracted with them to continue to prosecute all their unsettled claims, and they contracted to pay him for such services thirty per cent of all sums collected through his efforts, when they should be paid by the United States. Under this contract he had collected a large amount when the war broke out, and the Choctaws sided with the South. On the termination of the war Latrobe was employed by the Choctaws in supporting such claims, and did valuable service. In 1866 Cochrane, being about to die, and desiring to secure pay for the services he had rendered, made a verbal arrangement for assigning the contract to Black, and by will authorized his executor to sell, assign or compromise his claims. He also recognized by his will that Lea was entitled to an interest in the contract equal to his own. This interest afterwards became vested in Gilfillan and his associates. Cochrane's executor, McPherson, agreed with Black for the continued prosecution of the claims on the terms named in the original contract, to which the Choctaws assented. Black and his partner, Lamon, and Lamon individually, continued acting under this contract until 1870, when the Choctaws made a new contract with McKee and his partner to prosecute their claims; and (the partner soon dying) this contract was executed by McKee. Under it the prosecutor was to receive thirty per cent of the amounts awarded, and it was provided that he should adjust the claims of all parties who had previously prosecuted claims for the Choctaws and should pay to the widow of Cochrane five per cent of the

Statement of the Case.

thirty per cent. In 1881 the question of the liability of the United States on these claims was referred to the Court of Claims and a judgment was rendered in favor of the Choctaws, which was substantially affirmed by this court, 119 U. S. 1. Congress then made an appropriation of $2,858,798.62 for the payment of that judgment. Before this appropriation was made, and in view of it, the Choctaw council recognized the contract with McKee, and another with Luce, as valid, and appropriated thirty per cent of the amount to be received from Congress under the appropriation to their satisfaction. The council also by the same act appropriated $14,140 as a sum shown to be due to Cochrane for services performed by him in his lifetime. After the passage of the appropriation bill by Congress McKee drew from the Treasury twenty-five per cent of the whole judgment, and Luce five per cent, the two making the thirty per cent. Suits in equity were then commenced against McKee by Lamon, as surviving partner of Black & Lamon; by Gilfillan and others interested with him; by McPherson as executor of Cochrane; and by Mrs. Latrobe as executrix of her husband; setting up their various claims upon the fund. McKee filed a bill of interpleader in the Lamon case, and subsequent proceedings were had in the several suits as set forth in detail in this and the following two cases. They resulted in decrees that one-half of the special fund should be paid to McPherson, as executor of Cochrane, and the other half to Gilfillan and his associates; and that the general fund should be distributed to Cochrane's widow, to Latrobe, and to Lamon, in specified proportions. Lamon was awarded $35,000 and interest for his services and disbursements, and the claims of Lamon and Black, as assignees of the Cochrane contract, and as surviving partners, were disallowed. McPherson, as executor, appealed from so much of the decree as denied him participation in the general fund; Gilfillan and others from the decree distributing the general fund, and from a decree dismissing their cross-bill; McKee from the decree giving a distributive share in the general fund to Latrobe; and Lamon and Black from the decree disallowing their claim.

Held,

(1) That McPherson had a right of appeal from the decree excluding him from participation in the distribution of the general fund, although he had accepted payment of his share of the special fund;

(2) That the sum awarded to Mrs. Cochrane by the Choctaws was intended as a donation to her, and not as compensation to Cochrane, and that the judgment of the court below to that effect should be sustained;

(3) Further holdings were made in regard to the contentions in *McKee* v. *Lamon*, *post*, 317, and *McKee* v. *Latrobe*, *post*, 327, which will be found set forth in the head notes to those cases respectively.

The litigation involved in this and the following cases was originally instituted by a bill filed July 7, 1888, by Ward H.

Lamon and Chauncy F. Black, survivors of themselves and Jeremiah S. Black, (Black, Lamon & Co.,) against Henry E. McKee, the object of which was to protect and enforce their equitable rights and interest in an appropriation of $2,858,798.62, made by an act of Congress approved June 22, 1888, 25 Stat. 239, c. 503, to carry into effect the decision of this court in the case of the Choctaw Nation against the United States, relating to what is known as the Choctaw net proceeds claim. 119 U. S. 1. Six days after the filing of this bill by Lamon and Black another bill was filed, July 13, by John H. B. Latrobe, against Henry E. McKee and others, for the same general purpose of sharing in the sum recovered by McKee.

On July 19, McKee filed a bill of interpleader, which is the subject of the opinion in this case, against a large number of defendants, claiming, under eight or nine different titles, to share in the fund held by him, of which he admitted that they or some of them were entitled to the sum of $161,197.63, which he paid into court. This amount was made up of a general fund of $147,057.63, being five per cent of a commission of thirty per cent, which had been dedicated by the Choctaw Indians to the payment of attorneys and agents in the prosecution of their claims, and which had been received by McKee; and also of a special fund of $14,140, due to the estate of John T. Cochrane, for which a special appropriation had been made by an act of the general council of the Choctaw Nation of February 25, 1888, and which McKee had agreed to pay. The bill prayed that the defendants interplead, and that the court determine to whom the money should be paid.

On October 1, 1889, a decree of interpleader was entered, the defendants were enjoined from instituting or prosecuting any suit or action for the recovery of the money paid into the registry of the court by the complainant, and complainant was dismissed as a party to the suit with his costs to be taxed. The decree, however, was made without prejudice to the rights of any of the defendants to institute any action at law or in equity, to recover from the complainant any de-

mands which they might have for amounts due from him over and above the money paid into court.

Answers and cross-bills were filed by the several defendants making claims to both funds, and upon a hearing upon pleadings and proofs one-half of the special fund of $14,140 was ordered to be paid to McPherson, executor of the will of John T. Cochrane, and the remaining half to the solicitors of James Gilfillan, John A. Rollings, and the estate of C. D. Maxwell. The general fund was ordered paid to Ellen Cochrane, widow of John T. Cochrane, John H. B. Latrobe, and Ward H. Lamon, in certain specified proportions. The claims asserted by certain other defendants, including a claim of McPherson, executor of Cochrane, to be paid out of the general fund for professional services rendered by Cochrane, was denied, and an appeal allowed in the decree. An appeal was also allowed to Gilfillan, Rollings, and Eastman, administratrix of the estate of C. D. Maxwell, from so much of the decree as awarded the general fund to Ellen Cochrane, John H. B. Latrobe, and Ward H. Lamon, and also from a decree previously rendered sustaining a demurrer to the cross-bill of Rollings, Gilfillan, and Maxwell, and dismissing the same. As to the last decree the appeal was dismissed.

Subsequently, as it appears from the certificate of the clerk, of March 1, 1895, the money deposited in court was paid out to the several persons to whom it had been awarded by the above decree.

The facts underlying all these cases were substantially as follows:

1. That the Choctaw Nation, having various unsettled claims against the United States, arising out of treaty stipulations, the principal of which was a claim for the net proceeds of certain lands, by resolutions of its legislative council, adopted November 9, 1853, and November 1, 1854, appointed certain citizens of that nation, the principal one of whom was one Pitchlynn, to prosecute such claims, and, in the name of the Choctaw people, "to enter into any and all contracts which in their judgment are or may become necessary and proper, to bring to a final and satisfactory adjustment and

settlement all claims and demands whatsoever, which the Choctaw Nation or any member thereof has against the government of the United States by treaty or otherwise."

2. Pursuant to this authority, on February 13, 1855, these delegates entered into a contract with John T. Cochrane, in which, after reciting the abandonment of a similar contract that had been made with Albert Pike, and the fact that Cochrane had already been for three years before acting as the agent of the Choctaw Nation in the prosecution of a claim for arrearages of annuities and school moneys, in which he had rendered valuable and most important services, Cochrane bound himself to continue to prosecute all unsettled claims and demands of the Choctaw Nation, and especially a claim arising under the treaty of Dancing Rabbit Creek of September 27, 1830, to the net proceeds of the lands ceded to the United States by that treaty, and to do his utmost to secure payment of said claims and demands, the Choctaws upon their part agreeing to pay him thirty per cent of every and all such sums of money, payable to them, as soon as the same was paid over by the United States.

3. Shortly thereafter Cochrane succeeded in inducing the authorities of the United States to enter into a treaty with the Choctaws, which was concluded June 22, 1855, 11 Stat. 611, by which it was agreed that the claim of the Choctaws for the net proceeds of the lands in question should be submitted for adjudication to the Senate, which body was thus charged with and assumed the functions of an umpire, and on the 9th of March, 1859, made an award in favor of the Choctaws, according to certain principles, and referred the matter to the Secretary of the Interior to state an account showing the amount due to them according to such principles. That official made his report to the Senate on May 8, 1860, certifying that there was due to the Choctaw Nation, under the award of the Senate, the sum of $2,981,247.30, and in 1861 there was paid to the Choctaws on account thereof the sum of $250,000.

4. No progress was made in the further prosecution of their claim from 1861 to 1866, by reason of the alliance of

the Choctaws with the Southern confederacy during the war. After the close of the war, however, Cochrane procured a treaty to be entered into between the United States and the Choctaw Nation, relieving them of their disabilities. 14 Stat. 769.

5. In 1866, Cochrane was stricken with a mortal illness, and with a view of securing to himself and family some remuneration for the services he had performed in behalf of the Choctaws, proposed to assign to Ward H. Lamon, or to some one in his behalf, all his interest in the contract of February 13, 1855; and verbal arrangements for the accomplishment of that result by the assignment of said contract to Jeremiah S. Black were made before the death of Cochrane. Before his death Cochrane made a will dividing his property equally between his wife Ellen and his sister Mary Magruder, and authorizing John D. McPherson, his executor, to sell, assign, or compromise his claims under his contract with the Choctaws as he should deem most for the interest of his estate. There was also an acknowledgment in this will that an equal interest in the Choctaw contract belonged to Luke Lea. After Cochrane's death, McPherson having qualified as his executor, a contract was entered into between him and Jeremiah S. Black, November 8, 1866, for the further prosecution of the Choctaw claims by Black, as the successor of Cochrane, and upon the terms of the contract made with Cochrane February 13, 1855, to which assignment the Choctaw delegates gave their assent.

6. The firm of Black, Lamon & Co., in whose behalf the assignment to Black was in fact made, at once entered upon and continued the work of prosecuting this claim until Judge Black withdrew from active practice, from which time the duty of prosecuting the claim devolved solely upon Lamon.

7. Nothing, however, was definitely accomplished before July 16, 1870, when, for reasons unnecessary to be here stated, the delegates of the Choctaw Nation entered into a new contract with James G. Blunt and Henry E. McKee to prosecute their claim, stipulating to pay them for their services and expenses thirty per cent of the sum already awarded and due to the Choctaw Nation, or of any sum that might be paid,

whenever the money or bonds arising from said claim should come into the possession of the party or parties authorized by the Choctaw people to receive the same. This contract contained a further stipulation of Blunt and McKee "to pay to Mrs. John T. Cochrane of Washington, D. C., five per centum from the thirty per centum before referred to whenever they shall receive the same; and the said Blunt and McKee further agree to adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim upon the principle of equity and justice, according to the value of the services so rendered." Blunt soon afterwards died, leaving McKee to carry out the contract alone.

8. In 1881, an act was passed by Congress, 21 Stat. 504, c. 139, referring the question of the liability of the United States in respect to the Choctaw claims to the Court of Claims, and in March, 1886, a judgment was rendered in the Court of Claims in favor of the Choctaw Nation. 21 C. Cl. 59. From the judgment so rendered both parties appealed to this court, which also decided in favor of the Choctaws, and held that the award made by the Senate in 1859 determined the amount due in respect of the claim, 119 U. S. 1, and on June 29, 1888, an appropriation was made for the payment of the judgment of $2,858,798.62. 25 Stat. 217, 239, c. 503, § 9.

9. On February 25, 1888, an act of the legislative council of the Choctaw Nation, after reciting the recovery of the judgment, and that McKee and his associates were making proper efforts to secure from Congress an appropriation for the payment, enacted that the contract with McKee and another with one Luce should be recognized as valid, that the services required had been fully performed, and that to satisfy the obligations of the Choctaw Nation to McKee and Luce, who was jointly interested with him, there should be appropriated thirty per cent of the amount appropriated by Congress for the payment of the judgment, twenty-five per cent of which should be paid to McKee, and it was made the duty of the treasurer of the nation to make such payment. The fourth section enacted that "the sum of $14,140 shown to be due to the late John T. Cochrane, deceased, by an act of the

Counsel for Parties.

general council of November 1, 1861, is hereby appropriated out of any money received from the United States in payment of said judgment, and the payment of said amount shall be made to said Henry E. McKee," etc. The fifth section enacted "that the payments herein directed to be made shall, when made, either under this act, or said other two acts hereinbefore referred to, be taken and accepted as full and complete payment and final discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claim against the United States."

10. On the filing of the bill of complaint July 7, 1888, by the surviving partners of Black, Lamon & Co. in the following case, a preliminary restraining order was issued enjoining the defendant McKee from demanding or receiving said money from the Treasury. But, in violation of this order, McKee, on July 9, collected and received from the Treasury the sum of $783,768.82, being the thirty per cent fund mentioned in the Cochrane and McKee contract as set aside for the compensation for services rendered in the prosecution of said claim. McKee, being subsequently ordered to pay into the registry of the court the sum of $136,500 in the same case, in addition to the sum of $161,197.63 paid into the court in this case, refused to obey the order, and to avoid doing so absconded from the jurisdiction of the court, and has ever since kept himself concealed to avoid process.

Mr. John J. Weed and *Mr. Jefferson Chandler* for McKee.

Mr. S. S. Henkle for Mrs. Cochrane; *Mr. Enoch Totten* and *Mr. Reginald Fendall* for Mrs. Latrobe; and *Mr. James Coleman* and *Mr. Nathaniel Wilson* for Lamon & Black submitted on their several briefs on the motion to dismiss.

Mr. Totten and *Mr. Fendall* for Mrs. Latrobe and *Mr. Henkle* for Mrs. Cochrane, submitted on their briefs, on the merits.

Mr. A. B. Duvall for Gilfillan submitted on his brief.

Mr. Willis B. Smith for Marbury, Administrator, submitted on his brief.

Mr. George F. Appleby and *Mr. Calderon Carlisle* for McPherson.

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

A motion to dismiss the appeal of McPherson, made by the appellees, demands a preliminary consideration. This motion is made upon the ground, *first*, that the appellant is precluded from questioning the validity of the decree because, having been awarded a large sum of money out of the fund for distribution, he applied for and received the same, as did all the other beneficiaries to whom awards were made; and that the decree disposed of the entire fund and has been fully executed; *second*, that the decree was joint against the appellants and also against the other co-defendants, whereas the appellants appeal separately and alone, their co-defendants not joining, and without any proceeding in the nature of a summons and severance.

1. It did undoubtedly appear from the certificate of the clerk above mentioned that McPherson was paid $7070 of the amount decreed to him out of the special fund. But it further appeared that he claimed to be paid from the general fund of $147,057.63, and that his claim in that particular was denied. While the acceptance of the whole or a part of a particular amount awarded to a defendant might perhaps operate to estop him from insisting upon an appeal, there were practically two decrees in this case, one applicable to the special fund, which, in the bill, the subsequent pleadings, and in the decree, had been kept as a distinct and separate matter, a portion of which fund was awarded to McPherson; and the other applicable to the general fund in which McPherson had been denied any participation whatever. Clearly his acceptance of a share in the special fund did not operate as a waiver of his appeal from the other part of the decree disposing of the general fund. There is nothing inconsistent in his action

in accepting the amount awarded to him from the special fund, and appealing from the refusal of the court to award him the general fund. As was said by this court in *Embry* v. *Palmer*, 107 U. S. 3, 8: "No waiver or release of errors, operating as a bar to the further prosecution of an appeal or writ of error, can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree which it is sought to bring into review. If the release is not expressed, it can arise only upon the principle of an estoppel. The present is not such a case. The amount awarded, paid, and accepted constitutes no part of what is in controversy. Its acceptance by the plaintiff in error cannot be construed into an admission that the decree he seeks to reverse is not erroneous."

2. The objection that an appeal was not taken by the other defendants; that they did not join in the appeal, and that there was nothing in the nature of a summons and severance, is equally untenable. The decree was several, both in form and substance, and the interest represented by each defendant was separate and distinct from that of the other. In such cases any party may appeal separately to protect his own interest. *Cox* v. *United States*, 6 Pet. 172; *Todd* v. *Daniel*, 16 Pet. 521; *Hanrick* v. *Patrick*, 119 U. S. 156; *City Bank* v. *Hunter*, 129 U. S. 557, 578.

3. As to the merits, we are only concerned in this case with the general fund of $147,057.63, which is five per cent upon the thirty per cent which the Choctaws agreed to pay to McKee for his services. This fund was awarded by the final decree to Ellen Cochrane, individually, and to Latrobe and Lamon, the fund being divided into $257\frac{57}{160}$ parts, of which Latrobe took 75, Lamon 35, and Ellen Cochrane the residue. The parts assigned to Latrobe and Lamon represent the decree obtained by them upon their separate bills against McKee in the two following cases. Both McPherson as executor of Cochrane, and Rollings and Gilfillan, assignees of Lea, appealed from the decree in the present case. The interests of these appellants are in reality identical. Cochrane, in his will, made in 1866, acknowledged an equal interest in the Choctaw

contract to belong to Colonel Luke Lea, and on September 24, 1869, Lea assigned all his interest to Rollings and Gilfillan. No controversy exists between these parties; but if McPherson be awarded the fund, both are interested to defeat the claims of Latrobe and Lamon, which diminish by the amount of their decrees the sums which would otherwise go to the Cochrane estate. Both are also interested adversely to Ellen Cochrane, who claims the entire fund individually, while the appellants claim it as assets of Cochrane's estate to pass under his will, one-half to Rollings and Gilfillan, assignees, and the other half to be divided equally between Ellen Cochrane, his wife, and Mary Magruder, his sister.

The controversy between them turns upon the construction of the contract of July 16, 1870, between McKee and the Choctaws, in which Blunt and McKee agreed "to pay to Mrs. John T. Cochrane of Washington city, D. C., five per centum from the thirty per centum before referred to whenever they shall receive the same." The view of the court below was that, if there were a trust in favor of parties who had rendered valuable services before the execution of the McKee contract of July 16, 1870, that trust attached to every dollar received by McKee, and that it was not in his power to disengage any particular dollar or any particular sum of money from the charge, and hence that the amount paid into court by McKee in this case was subject to the trust found by the court to exist in the other cases in favor of Latrobe and Lamon. As the court also awarded the residue to Ellen Cochrane, it follows that it must have treated this as a donation to Mrs. Cochrane and not as a payment for services rendered by Cochrane, as, under the latter theory, it would have been ordered paid to McPherson, as executor, to become a part of the assets of his estate.

Two questions then arise upon this appeal. First, was the payment in the McKee contract to be made to Mrs. Cochrane intended as a personal gift to her, or as a payment for Cochrane's services? Second, was such sum subject to a trust in favor of Latrobe and Lamon?

In disposing of the *first* question it is only necessary to

consider the contract between the Choctaws and McKee, in which the former agreed that for services rendered and money expended and to be expended in the prosecution of the claim, Blunt and McKee should receive thirty per cent of the amount awarded, or of any sum that may be paid by the United States, Blunt and McKee on their part agreeing to pay five per cent of this thirty per cent to Mrs. Cochrane, and also to adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim, upon the principle of equity and justice, according to the value of the services so rendered. By section 4 of the act of the Choctaw council of February 25, 1888, the sum of $14,140 was the amount fixed as due the late John T. Cochrane, deceased, by an act of the general council of November 1, 1861, and that sum was appropriated out of any money to be received from the United States in payment of said judgment. Exactly for what this was intended as a payment does not clearly appear, but the fact that it was found to be due by an act passed in 1861 indicates very clearly that it could not have been for services subsequently rendered, although section 5 provides that the payments therein directed to be made should be accepted as full discharge and satisfaction of all the contracts and obligations of the Choctaw Nation to any and all attorneys for services rendered to the nation in the prosecution of said claim. This appropriation was evidently intended to discharge that obligation to him personally.

The argument for Mrs. Cochrane is based upon this plain agreement on McKee's part to pay her the five per cent, although, as no consideration moved from her either to McKee or to the Choctaws, it is in reality a donation. Upon the contrary, the appellants insist that the payment was intended as compensation for the services of Cochrane, which had been undoubtedly of great value to the Choctaws, and that the nation had no right to divert what must naturally have been intended as a payment for those services away from his estate, to which it properly belonged, and turn it into a donation to his widow. The oral testimony as to the intention of the parties, if competent at all, is conflicting and wholly unsatisfactory.

Opinion of the Court.

As already observed, the Cochrane contract provided for payment to him of thirty per cent of the amount collected, but it was a contract wholly contingent upon his success, and was never performed either by Cochrane personally, or by Black and Lamon, his assignees. Nothing was ever earned by them under this contract, and neither Cochrane's executor nor his assignee ever stood in position to sue upon it, or to claim anything by virtue of it. At the same time, both the Choctaws and McKee were ready to concede that Cochrane had rendered valuable services, which had doubtless contributed much to the ultimate success of the venture, and were, therefore, willing that compensation should be made in some form. Under the circumstances, there was nothing unreasonable in providing that this compensation should take the shape of a personal gift to Mrs. Cochrane, and thus relieve the estate from litigation with a horde of other claimants, who might be expected to appear and claim to have rendered services to Cochrane, for which they were equitably entitled to share in the compensation. The oral testimony indicates that the insertion of Mrs. Cochrane's name instead of the executor of her husband's estate was an idea of Pitchlynn's, the chairman of the delegation, who thought that such a provision would prevent the necessity of the fund going through the probate court. In this connection McKee also states that the provision was put in at the instance of Pitchlynn, who stated that he considered the death of Cochrane ended his contract, and his right to any further compensation for his services in the prosecution of the claim, but he was determined to make some provision which would not be subject to the control of Cochrane's executor or subject to his creditors, but that it should be paid directly to her, to be held and enjoyed by her in her own right; and hence that Pitchlynn insisted upon the provision in the contract in favor of Mrs. Cochrane, and the contract on the face of it expressed exactly what was intended by the contracting parties at the time. Had Cochrane or his assigns earned anything under this contract, and the promise had been to pay money earned for services fully performed, a question might have arisen as to

the power of the Choctaws or of McKee to divert it from the estate in favor of the widow, but as the obligation, if any existed at all, was only a moral one, the parties had a right to discharge it in their own way.

This construction is consonant with the language of the act of the Choctaw council appropriating $14,140 in payment of the amount due to the estate of Cochrane, and providing that such payment should be a final discharge and satisfaction of their obligation to him personally. Upon the whole, we think the court construed this provision of the contract correctly.

As Mrs. Cochrane did not appeal from that part of the decree admitting Latrobe and Lamon to share with her, and as the appeal of the other parties turns primarily upon the validity of the allowance to Mrs. Cochrane, and not upon the fact that Lamon and Latrobe were admitted to share in such allowance, it is unnecessary to consider the second question. If the amount decreed to them were reduced, such reduction would redound to Mrs. Cochrane's benefit and not to the appellants.

While, as before observed, we think the court made a correct disposition of the case so far as this appeal is concerned, the reversal of the following case may make it necessary to readjust the amount due to Lamon and Black, and consequently

Our decree in this case must be for a reversal to await the disposition of the following case, and for further proceedings in conformity with this opinion.

McKEE *v.* LAMON.

LAMON *v.* McKEE.

APPEALS FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Nos. 33, 34. Argued and submitted March 13, 14, 1895. — Decided October 21, 1895.

Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which may be enforced by bill in equity, if not by action at law.

The acceptance of money, with notice of its ultimate destination, is sufficient to create a duty on the part of the bailee to devote it to the purpose intended by the bailor.

In enforcing such a trust a court of equity may make such incidental orders as may be necessary for the proper distribution of the fund.

On the facts set forth in the headnote to *Gilfillan* v. *McKee*, just decided, it is in this suit, further *Held*,

(1) That when the Choctaws transferred the work from Black & Lamon to McKee, there was no intention on the part of anybody to ignore what had already been done ;

(2) That Lamon, as representing the surviving partners of Black, Lamon & Company, was entitled to recover the reasonable value of their services from the date of the assignment by McPherson to the date of the McKee contract.

THESE cases were argued in connection with *Gilfillan* v. *McKee* and *McPherson* v. *McKee*, *ante*, 303. This was the original bill therein referred to filed against McKee by Lamon and Black, surviving partners, and was based upon the assignment of the original Cochrane contract for a compensation of thirty per cent to Jeremiah S. Black, and the substitution of Black, in the place of Cochrane, as the attorney, counsel, and agent of the Choctaw Nation for the prosecution of their claim. This contract was entered into between McPherson, as the executor of Cochrane, and Jeremiah S. Black, on the 8th of November, 1866, and was assented to by the delegates of the Choctaw Nation, whereby the right of Cochrane to receive the thirty per cent became vested in Black. This assignment seems really to have been made for the benefit of Lamon, who raised and paid $25,000 of the $75,000, which it

was contemplated should be paid to Cochrane in the verbal arrangements carried on between Lamon and Cochrane before his death. The bill, after setting forth the facts stated in the interpleader case, averred that, on the dissolution of the firm of Black, Lamon & Co., in 1872, Lamon succeeded to the interest of Black in the remainder of the thirty per cent, after certain prior claims thereon should be paid.

The only averment of the performance of the Cochrane and Black contracts by the firm of Black, Lamon & Co., or either member of such firm, was that "they undertook the prosecution of said claim, and urged the same with great persistence before the committees of Congress, and did all in their power to bring about such legislation as the situation demanded, and they so continued so long as the firm of Black, Lamon & Co. existed. That, after some years, said Jeremiah S. Black, by reason of his failing strength and advanced life, was compelled to abandon the active work of his profession, and the said copartnership was for that reason dissolved, and the duty of prosecuting said claim devolved solely upon said Lamon."

The bill was subsequently amended in this particular by averring "that said services were rendered and said advances were made with the full knowledge and consent, and at the special instance and request of the Choctaw Nation, with the agreement and understanding that the said plaintiffs were to receive as compensation for said services such sum as the same were reasonably worth, to be paid out of the money claimed as aforesaid, when paid by the United States, and that said agreement and understanding was independent of the said Cochrane contract and of the rights claimed by the plaintiffs under and by virtue of the said Cochrane contract." A subsequent paragraph set up a lien upon the judgment rendered in favor of the Choctaws, and upon the amount due from the United States and upon the thirty per cent fund set apart by the Choctaw Nation for payment for services.

The amended bill further averred that while the question of the payment of the claim was pending before Congress, McKee procured the passage of two acts of the council of the Choctaw Nation, which acts were passed, as requested by

McKee, with the express understanding and agreement between McKee and the Choctaw Nation that he would "pay to these complainants and others such sum or sums of money as they were justly entitled to receive for the services rendered and money expended by them in the prosecution of said claim, and with the further agreement that when said McKee should receive" the money set apart by said acts, as aforesaid, "that he, the said McKee, would hold the same in his possession in trust for the benefit of such persons, including these complainants, as might be entitled to some part thereof." The prayer was that McKee be enjoined from collecting the thirty per cent set apart for the payment of expenses; that a receiver be appointed to collect the same from the Treasury and pay it out to the plaintiffs and such other persons as had a just and equitable claim thereto.

Upon filing this bill, an order was entered enjoining the defendant from receiving this money from the Treasury. McKee, however, disregarded this order, no bond having been given as required by the rule of the court, and drew from the Treasury $783,768.82, which was twenty-five per cent of the whole judgment, five per cent of the thirty per cent having been paid to one Luce, who had taken Blunt's place in the contract. A rule was issued against McKee to show cause why he should not be punished for contempt in violating the restraining order of the court, but it appearing that no bond had been filed, the motion was overruled and McKee was discharged. On the discharge of the rule, plaintiffs filed a petition based on the bill, answer, and affidavits, and prayed for the appointment of a receiver. After full argument, the court ordered that McKee should pay into court the sum of $136,500.00, to be held subject to the order of the court. McKee refused to obey this order, and absconded from the jurisdiction of the court. An appeal, however, was taken from the order, and the same was vacated and rescinded on December 3, 1889.

Subsequently, upon a hearing upon pleadings and proofs, a decree was rendered in favor of Ward H. Lamon against McKee as compensation for his services rendered and of his

disbursements and expenditures, for $35,000.00, with interest thereon at the rate of six per cent, and so much of the bill as related to the claim of Lamon and Black, or either of them, as assignees of the so-called Cochrane contract, and as surviving partners of Black and Lamon, or Black, Lamon & Co., was dismissed.

From this decree the defendants Ward H. Lamon and Chauncy F. Black appealed to this court.

Mr. John J. Weed and *Mr. Jefferson Chandler* for McKee.

Mr. James Coleman and *Mr. Nathaniel Wilson* for Lamon submitted on their brief.

Mr. Enoch Totten and *Mr. Reginald Fendall* for Mrs. Latrobe, submitted on their brief.

Mr. Willis B. Smith for Marbury, Administrator, submitted on his brief.

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

In these cases, Nos. 33 and 34, we are concerned only with the decree in Lamon's favor for $35,000, and with that part of the decree dismissing the claim of Lamon and Black. The bill was originally filed for the purpose of securing the payment to Lamon and Black of thirty per cent of the sum of $2,858,798.62 which the appellant was about to receive from the United States, under the authority received by him from the Choctaw Nation, and also for an injunction restraining him from receiving such sum of money, and for the appointment of a receiver, who should be authorized to collect this sum from the Treasury, whenever the same should become due and payable; and also for an accounting between the appellant and Lamon and Black in respect to the amount due them for services rendered and money expended in the prosecution of the claim. It appearing, however, that the contract of February 13, 1855, was never carried out, nor the money ever collected as required by the contract between Cochrane and

the Choctaw Nation, before Cochrane could become entitled to his thirty per cent, complainants amended their bill, by averring that McKee procured an act of the Choctaw council of February 25, 1888, making provision for the payment of the amount due under his contract with them, by an express understanding and agreement that he would pay to the complainants and others such sum or sums of money as they were justly entitled to receive, for services rendered and money expended by them in the prosecution of their claim. In his answer, McKee denied the allegations of the bill so far as it related to services alleged to have been rendered in the prosecution of the said claim by the firm of Black, Lamon & Co., or either of them, previous or subsequent to July 16, 1870, but on the contrary averred that Black retired from and abandoned the case before such date; that by reason of such abandonment, the Choctaws, being without counsel, solicited himself and Blunt to take charge of the prosecution of such claim.

1. The first point made by the appellant McKee, that the Supreme Court of the District of Columbia was without jurisdiction to entertain the suit, because upon the averments of the bill the suit was in legal effect one against the Choctaw Nation, to which the nation was a necessary party, is without foundation. The suit is neither directly nor indirectly against the Choctaw Nation; nor if made a party defendant would the complainants be entitled to any relief against the nation. No claim is made against it, nor is any attempt made to impair the effect of its legislation. By its first contract with Cochrane, made by its agents February 13, 1855, in pursuance and by virtue of resolutions of its legislative council of November 9, 1853, and November 10, 1854, it agreed to pay Cochrane for his services thirty per cent of all collections made by him in their behalf. By its second contract, it doubtless assumed that the first contract had been abandoned by Cochrane and his successors Lamon and Black, and agreed to pay the same thirty per cent upon an amount which had already been fixed, with the further stipulation that Blunt and McKee should pay to Mrs. Cochrane five per cent upon such thirty per cent, and should adjust the claims of all parties who had theretofore

rendered service in the prosecution of such claim upon the principles of equity and justice, according to the value of the services so rendered.

The Choctaw Nation had really no interest in the thirty per cent. The stipulation was made by Blunt and McKee for the benefit of the parties interested in the percentage, and as soon as the money should be received by them, or either of them, they would hold it as trustees for the persons legally and equitably entitled to it. McKee, having obtained possession of the money, may be held accountable by a court of equity for its proper distribution. There can be no doubt of the general proposition that where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law. The acceptance of the money with notice of its ultimate destination is sufficient to create a duty on the part of the bailee to devote it to the purposes intended by the bailor. *Taylor* v. *Benham*, 5 How. 233, 274; *Kane* v. *Bloodgood*, 7 Johns. Ch. 90, 110; *Barings* v. *Dabney*, 19 Wall. 1; *National Bank* v. *Insurance Co.*, 104 U. S. 54; *Keller* v. *Ashford*, 133 U. S. 610; *Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187; *Ryan* v. *Dox*, 34 N. Y. 307; Story's Equity Jurisprudence, §§ 1041, 1255; Mechem on Agency, § 568. And in enforcing such trust, a court of equity may make such incidental orders as may be necessary for the proper protection and distribution of the fund.

It is true that in this case the names of the beneficiaries are not given in the instrument creating the trust, but they are designated by class as "all parties who have rendered service heretofore in the prosecution of said claim," and were to be rewarded "upon the principles of equity and justice, according to the value of the services so rendered." And if there be any conflict between individuals of such class, a court of equity is the proper tribunal for the adjustment of their respective claims. In such case, where the property is disposed of absolutely, the original assignor or party creating the trust need not be made a party to the bill. Story's Equity Pleadings, § 153. This proposition renders it unnecessary to consider

whether the Choctaw Nation is subject to be sued in the Supreme Court of the District of Columbia. The fact that the act of Congress making the appropriation required the money to be paid "upon the requisition or requisitions" issued by "the proper authorities of the Choctaw Nation" did not oust the court of equity from controlling its subsequent disposition. The object of the bill is not to change the direction of Congress in respect to such payment, but to determine the further disposition of the money after it has reached the hands of the designated payee.

The objection that there was no consideration for the promise made by the appellant to adjust the claims of all parties, etc., is untenable, since the original receipt of the money is a sufficient consideration for all promises expressed or implied with reference to its final disposition. *Walker* v. *Rostron*, 9 M. & W. 411; Mechem on Agency, § 568.

2. The history of this controversy may be epitomized as follows: The Choctaws, believing that they had certain just claims against the government, and particularly for the net proceeds of lands ceded to the United States by the treaty of Dancing Rabbit Creek of September 22, 1830, at first employed Albert Pike to prosecute such claims, and upon his abandoning the same annulled his contract, employed Cochrane and agreed to pay him thirty per cent of the amount collected by him. The contract with him was made February 13, 1855, and continued in force until it was superseded by the contract made with Black, November 8, 1866 — indeed, the contract of 1855 indicates that, for three years before that, Cochrane had been acting as the agent of the Choctaw Nation in the prosecution of certain other claims, in regard to which he had rendered most important and valuable services, etc. During these fourteen years he seems to have had charge of the Choctaw claims, and been engaged in their active prosecution. During this time the treaty of 1855, submitting the Choctaw claim for the net proceeds to the Senate, was concluded, and the award of the Senate of 1859 made, by which the Choctaws were allowed the proceeds from the sale of such lands as had been sold by the United States on the first of January preceding, deducting

certain expenses therefrom, and referring the claim to the Secretary of the Interior to state the amount due them according to certain principles of settlement laid down by the Senate. During this time, also, the act of Congress of 1861 was passed, which ratified and confirmed the Senate award, and provided for a partial payment thereof. At the same time Cochrane's express contract with the Choctaws was that his compensation of thirty per cent was only payable when the money was paid over by the United States to the Choctaw Nation or its legally authorized representatives — in other words, it was contingent upon success. Under this contract he seems to have been paid, for moneys collected before his death, the sum of $282,600, thirty per cent of the amount he had procured for the Choctaws.

On November 8, 1866, McPherson, the executor of Cochrane's estate, Cochrane in the meantime having died, acting under an authority contained in his will, assigned to Black all the interest of Cochrane in the thirty per cent compensation, and substituted him in the place of Cochrane, with the proviso that he should pay out of the money to be received by him to Cochrane's executor such sum as should be agreed upon between the parties, as well as all other demands justly due and payable out of such thirty per cent. In this connection Black seems to have been acting principally for his partner, Mr. Lamon. It appears that the firm of Black, Lamon & Co. were actively engaged in an effort to secure from Congress an appropriation to pay the Senate award during several sessions, Judge Black appearing before committees of Congress on behalf of the nation and their award, and the other parties preparing memoranda and briefs; that both Lamon and Black devoted much time in explaining the said award, and the claims upon which it was founded, to individual members of Congress. That, in 1870, Mr. Lamon, who had the principal charge of the case, advised the Choctaw delegates to discontinue further efforts to obtain from Congress the payment of the award by direct appropriation, and to apply for the passage of a bill referring the same to the Court of Claims for adjudication; that the delegates declined to accede to this proposition, and

insisted upon a further effort to secure the appropriation direct from Congress. That about this time they entered into the contract with McKee, and that thereafter Lamon, who does not seem to have been apprised of such contract, continued to urge upon Congress the justice of their claim and the duty of the United States to pay said award, until about 1878, when he prepared, at the request of Pitchlynn, the chief delegate, a bill authorizing the reference of such claim to the Court of Claims and a memorial to accompany the same.

About 1870, however, Black appears to have withdrawn from the case, except so far as was necessary for the protection of the interests of Thomas A. Scott, who had advanced some $75,000 to Cochrane's executor, whom Black felt in honor bound to protect. His reasons for so retiring are fully stated in a letter of March 27, 1883.

Whether, under Revised Statutes, § 3477, prohibiting the assignment of claims against the United States, as interpreted by this court in *Spofford* v. *Kirk*, 97 U. S. 484, and subsequent cases, the original contract between Cochrane and the Choctaw Nation, or the assignment thereof to Black by Cochrane's executor, McPherson, was of any force or validity or not, it is unnecessary to inquire. It is sufficient to say that the contract was entirely contingent upon the money being collected, and the compensation therein provided for was payable only from such money. As none was ever collected by Black or Lamon, they never obtained a legal right to compensation. But the question still arises whether, notwithstanding there was no legal claim, the Choctaws were not at liberty to recognize the fact that important services had been rendered, and that a moral obligation to pay for them existed on the part of those who should ultimately succeed in making the collection.

In this posture of affairs the contract of July 16, 1870, between the Choctaws and McKee was entered into. There is very little, if any, testimony to justify the charge in the amended bill that this contract was fraudulently obtained for the purpose of cheating the complainants and other persons interested in the claim, and to obtain possession of the funds which McKee knew were due and justly payable out of the

proceeds. The truth seems to be that the Choctaws were either discontented with the advice given by Lamon and Black to discontinue their efforts to secure a direct appropriation for the payment of the award and apply for leave to go to the Court of Claims, or became satisfied that Black and Lamon were so much engrossed in other matters that they could not bestow the proper attention upon this; in short, that Black had practically abandoned the case, and that further assistance must be obtained. That there was no intention on the part of either party to ignore what had already been done is evident from the concluding paragraph of their contract, out of which the express trust is claimed to arise, that Blunt and McKee would adjust the claims of all parties who had theretofore rendered services in the prosecution of the claim upon the principles of equity and justice, according to the value of the services so rendered. That this clause must have referred to Cochrane and his assignees is evident from the fact that the stipulation was made expressly in favor of those who had "heretofore" rendered services. As such services had been rendered only by Cochrane and his assignees, and as Cochrane's individual claim was already provided for by the donation of five per cent to his wife, it is difficult to understand for what the subsequent reservation was made if not for Black and Lamon, who had succeeded him, and who had certainly rendered some valuable services in the prosecution.

The court below was of the opinion "that the Choctaws, in defining the trust, did not mean that people whose contracts they had annulled were to come within the trust," and hence that Black and Lamon, whose services were all rendered under the Cochrane contract, were not intended to be included. We do not think this necessarily follows. It is true that, in 1874, the general council of the Choctaw Nation did pass an act annulling the contract with Cochrane, but this act is really of very little value, since the contract had already been practically abandoned as early as 1870, and was as dead as any act of the legislative council could make it. This act may have given it its *coup de grace*, but for all practical purposes it was null already. The object of the stipulation in question was to

acknowledge that valuable services had "*heretofore*" been rendered, and as Cochrane had already been provided for, it is but natural to suppose that his assignees were the ones intended to be recognized.

We are, therefore, of opinion that complainants, as surviving partners of the firm of Black, Lamon & Co., are entitled to recover the reasonable value of those services from the date of the assignment from McPherson to Black to the date of the McKee contract, which may be taken as denoting the time when the Black contract was abandoned. Whatever services Lamon rendered prior to that time he rendered as a member of, and for the benefit of, the firm of Black, Lamon & Co., and that, too, is the theory of this bill, which is founded upon a partnership claim. If, subsequently to that time, or to the time when Lamon first learned of McKee's contract, Lamon rendered services which were of value to McKee, they would not fall within the express trust of the McKee contract, but perhaps might be subject to an implied trust in his favor. As to that, however, and as to the question whether the bill is properly framed to cover an individual liability, we express no opinion.

The decree of the court below is, therefore,

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

McKEE *v.* LATROBE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 35. Argued and submitted March 13, 14, 1895. — Decided October 21, 1895.

On the facts set forth in the headnote to *Gilfillan* v. *McKee*, just decided, it is further held that Latrobe was entitled to receive from the general fund the value of his services, and that their value was $75,000.

This case also was argued in connection with *Gilfillan* v. *McKee*, *ante*, 303. The bill was originally filed by John H. B. Latrobe, July 13, 1888, six days after the bill of Lamon and

Black was filed, and for the same general purpose of sharing in the sum recovered by McKee, relying upon the trust contained in the contract of July 16, 1870, between the Choctaw Nation and McKee, in favor of persons who had rendered services theretofore in the prosecution of said claim.

His allegation of service is substantially that, after the close of the war of the rebellion, the Choctaw Nation employed him as their professional adviser in all matters, including the net proceeds claim, pertaining to their rights against the United States, for which the nation agreed to pay him a reasonable compensation. That he immediately entered upon the duties thus assumed, and prepared the treaty of 1866 between the nation and the United States, reinstating the Indians in their rights and privileges. For this service, however, he seems to have been paid. That he procured and submitted large masses of evidence to the various committees of Congress having the matters in charge, and made numerous arguments before said committees, and before the executive officers of the United States, and stated accounts in behalf of the nation against the United States, and was engaged five or six years in the active prosecution of their claim. That these services continued until about the time McKee interposed in the business as the leading agent of the nation. That after that date, his services were apparently not needed or desired by the other attorneys, and he did but little, but is informed and believes that McKee and those working with him prosecuting the case, which he had previously prepared, and, with the use of the results of his professional skill and industry, secured the payment of the claim. That, if the McKee contract were held to be valid, then McKee was bound in equity and justice to pay to complainant a fair and just compensation for the services theretofore rendered, for which McKee should be charged as trustee. That it was agreed in 1866, between himself and the Choctaws, that his services should be rendered in conjunction with Cochrane, and that he subsequently agreed with Cochrane that his compensation should be paid out of the percentage reserved to Cochrane by his contract, and that he is reasonably entitled to receive $75,000, which had been

agreed upon between himself and McPherson, Cochrane's executor, as his proper compensation.

In his answer, McKee denied the general employment of the complainant by the Choctaw Nation, and averred that, if he were ever employed at all, it was only to assist and advise with the authorities of said nation in regard to the negotiation of the treaty of April 28, 1866, and denied that under such treaty the claim for net proceeds was secured, or that it had been prosecuted to a successful conclusion through the provisions of such treaty.

Upon a hearing upon pleadings and proofs, the case resulted in a decree for $75,000 against McKee, with the further provision that if anything were paid to the complainant Latrobe out of the fund deposited in the court by McKee in the interpleader suit, such sum should be credited in favor of McKee on the decree. Upon the following day, a decree was entered in the interpleader suit, to which Latrobe was a party defendant, awarding him his distributive share of the entire amount, $75,000, out of the general fund of $147,057.63 in controversy in that case. McKee appealed from the decree in this case.

Mr. John J. Weed and *Mr. Jefferson Chandler* for appellant.

Mr. Enoch Totten, (with whom was *Mr. Reginald Fendall* on the brief,) for Mrs. Latrobe.

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

This is another one of the claims made under the trust expressed in the McKee contract, "to adjust the claims of all parties who have rendered service heretofore in the prosecution of said claim, upon the principle of equity and justice, according to the value of the services so rendered." McKee's argument in this connection is, that this was a personal agreement and obligation of himself and Blunt with the Choctaw Nation; was not for the benefit of Latrobe; vested in no one any interest in the money which might become payable under that contract; and was not an assignment or dedication of

any part of the money which they might receive from the Choctaw Nation, in consideration of the performance by them of their contract — in other words, that it was a contract of indemnity, by which McKee undertook to save the Choctaw Nation harmless from any claim that should be made for services that had been theretofore rendered by other agents and attorneys. We do not so read it. A trust so plainly declared would be of no avail, if the class of persons who are described therein could not take advantage of it. It was not needed to indemnify the Choctaws, since no possible action could lie against them after the contract had been abandoned by Black. It was evidently intended to satisfy any moral obligation for services which had been performed, but not completed, and to throw the burden of adjusting and paying them upon McKee.

His theory, too, is inconsistent with his repeated statements to leading members of the Choctaw council, whose affidavits, received in the place of depositions, show that he declared to the leading authorities of the nation that he considered himself obligated under his contract to pay all outstanding obligations to persons for the services rendered in the prosecution of the claim prior to his own contract. In addition to that, and in corroboration of his own statements, he exhibited a letter written by his own attorney, and by his direction, to Leflore, in which he stated that "so far as I know, or have ever heard, every lawyer who has ever rendered service, or pretends to have rendered service, in regard to the net proceeds claim expects to get his pay out of the thirty per cent, and to get it through McKee. For myself, I expect to be paid by Mr. McKee out of his thirty per cent. I have no claim against the Choctaw Nation if Mr. McKee's thirty per cent is paid, even if he should not pay me, but of this I have not the slightest doubt. McKee's contract requires him to stand between the Choctaws and their attorneys who have rendered service. He would be liable to suit in the courts, here and elsewhere, wherever he could be found, if he should neglect or fail to carry out his agreement with the Choctaws to settle and adjust the claims of other attorneys, who have rendered ser-

vice, upon principles of equity and justice. The Choctaws would not be liable to any such suit anywhere." Here follows a list of parties who had rendered service in the prosecution of the claim, among which is the name of John H. B. Latrobe, with the statement that "he looks to Mr. McPherson, executor of Mr. Cochrane, for his fee. Whatever sum Mr. Latrobe or Mr. Cochrane gets, comes out of McKee's thirty per cent." McKee's prompt repudiation of this promise, and his vigorous defence to all these claims, argues either a serious impairment of memory with reference to the transaction, or a deliberately dishonest purpose.

The services of Mr. Latrobe in this connection seem to have had their origin in a visit made by the Choctaw delegation on their way to Washington, at Latrobe's residence in Baltimore. It seems they expressed to him the fear that all their treaties with the government had been abrogated by the war that had just ended; that he expressed some doubt upon the point, said he would look into the matter, and a short time afterwards called upon the delegation and told them that he had made up his mind that their treaties had not been abrogated by the war; that the right had been given to the President to abrogate them by proclamation, and that he had not done so; that the occasion had passed, and that the treaties were still in force. The value of his services was subsequently agreed upon by McPherson, executor of Cochrane's estate, and fixed at $75,000. This was the value put upon them by the court below, and we see no occasion to disturb it.

The decree of the court below is, therefore,

Affirmed.

McCORMICK *v.* HAYES.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 37. Argued March 27, 28, 1895. — Decided October 21, 1895.

In an action in which the plaintiff claims title under the act of September 28, 1850, c. 84, 9 Stat. 519, granting to the several States the swamp and overflowed lands in each unfit for cultivation, and the defendant claims title under the act of May 15, 1856, c. 28, 11 Stat. 9, making a grant of lands to the State of Iowa to aid in the construction of railroads, parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers having authority in the premises, that the lands in controversy were, in fact, at the date of the act of 1850, swamp and overflowed ground.

THIS writ of error brought up a judgment of the Supreme Court of Iowa, which affirmed a judgment of the District Court of Linn County in that State, declaring the defendant in error, who was the plaintiff in the suit, to be the owner of the southwest quarter of the northwest quarter of section nineteen, township eighty-five, range eight, west of the fifth principal meridian.

It was assigned as error that the judgment of the state court deprived the defendant of rights secured to him under the laws of the United States.

The plaintiff Hayes claimed title under the Swamp Land act of Congress of September 28, 1850, 9 Stat. 519, c. 84; the defendant, under an act of Congress, approved May 15, 1856, (and the acts amendatory thereof,) granting lands to the State of Iowa in aid of the construction of certain railroads. 11 Stat. 9, c. 28.

The question of title cannot be fully understood without examining various enactments, Federal and state, under which the parties respectively claim the lands in dispute, as well as some of the decisions of this court. This court felt, it said, the more disposed to enter upon this examination because of the statement by counsel in argument that many cases in the

Supreme Court of the State depend, in whole or in part, on the determination of the questions involved in this suit.

By the Swamp Land act of 1850 Congress granted to Arkansas, to enable it to construct the necessary levees and drains for reclaiming the swamp and overflowed lands within that State, the whole of such lands made "unfit thereby for cultivation." § 1. The act made it the duty of the Secretary of the Interior to make out, as soon as practicable after its passage, an accurate list and plats of those lands, and transmit it to the governor of the State, and, at the request of the latter, to cause a patent to be issued to the State therefor. "On that patent," the act declared, "the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof." § 2. The required list and plats, it was provided, should include all legal subdivisions, the greater part of which were wet and unfit for cultivation, and exclude each subdivision the greater part of which was not of that character. § 3. The provisions of the act were extended to and their benefits conferred upon each State in which swamp and overflowed lands were situated. § 4.

The legislature of Iowa authorized the commissioner of the State Land Office to provide the proofs necessary to secure those lands to the State. Laws of Iowa, 1850, 1851, 169, c. 69.

By a subsequent statute of the State, approved January 13, 1853, all the swamp and overflowed lands granted to Iowa were granted to the counties respectively in which they were situated, for the purpose of constructing the necessary levees and drains for reclaiming the same. If it appeared that any of such lands had been sold by the United States after the passage of the act of 1850, the counties in which they lay were authorized to convey to the purchasers — the county court taking from the purchaser an assignment of all his rights in the premises, with authority to receive from the United States the purchase money. Where a county surveyor had made no examination and report of swamp lands within his county, in compliance with instructions from the governor, the county court was directed to appoint a competent person with authority to examine such lands, and make reports and plats to the

county court, which should transmit lists of the lands in each of the counties, "in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgment of the same by the general government," were to be recorded. Laws of Iowa, 1852, 29, c. 12, §§ 1, 2, 3.

A subsequent act, approved January 25, 1855, authorized the governor to draw all moneys due or that might become due to the State, arising from any disposition of its swamp lands by the government of the United States, to provide for the selection of the swamp lands of the State, and to secure the title to the same, and also for the selection, in the name of the State, of other lands in lieu of such as had been or might thereafter be entered with warrants; the selections made by organized counties to be reported by the governor to the authorities at Washington. Laws of Iowa, 1854, 1855, 261, c. 138.

Such was the legislation — so far as it need be noticed — at the time Congress, by an act approved May 15, 1856, granted to Iowa, to aid in the construction of certain lines of railroad in that State, every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads, with liberty to the State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the rights of preëmption had attached at the time the lines or routes of the respective roads were definitely fixed; the land so located to be in no case farther than fifteen miles from the lines of the roads. But the act expressly exempted from its operation, and reserved to the United States, any and all lands theretofore reserved by any act of Congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, except so far as it was found necessary to locate the routes of the railroads through such reserved lands, in which case the right of

way only was granted, subject to the approval of the President of the United States. 11 Stat. 9, c. 28.

The next enactment in point of time was the act of Congress, approved March 2, 1857, 11 Stat. 251, c. 117, providing that the selection of swamp and overflowed lands, granted to the several States by the Swamp Land act, and by the act of March 2, 1849, giving aid to the State of Louisiana in draining the swamp lands within its limits, and theretofore reported to the Commissioner of the General Land Office, so far as such lands remained vacant and unappropriated and were not interfered with by an actual settlement under any existing law of the United States, "be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law."

The trust conferred upon Iowa by the act of Congress of May 15, 1856, was accepted by the State by an act approved March 26, 1860. And by the latter act so much of the lands, interests, rights, powers, and privileges as were granted by Congress in aid of the construction of a railroad from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line running as near as practicable to the 42d parallel across the State to the Missouri River, were granted and conferred upon the Cedar Rapids and Missouri River Railroad Company, an Iowa corporation. Laws of Iowa, 1860, 40, c. 37.

By an act of Congress, approved March 12, 1860, it was provided that the selection to be made from lands then already surveyed in each of the States, under the authority of the Swamp Land Act of 1850, and of the act, approved March, 1849, to aid Louisiana in draining the swamp lands therein, "shall be made within two years from the adjournment of the legislature of each State at its next session after the date of this act; and, as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the

State that the surveys have been selected and confirmed." 12 Stat. 3, c. 5.

At the trial in the District Court the plaintiff introduced witnesses having more or less knowledge of the land in dispute. Their evidence, it is claimed, showed that at and ever since the passage of the act of 1850 this land was, within the meaning of that act, swamp and overflowed land.

The parties stipulated that the land in controversy was seventeen miles in a direct line from the Cedar Rapids and Missouri River Railroad, (now the Chicago and Northwestern Railroad,) as constructed, built, and operated; that the railway was built, constructed, and was being operated on the present line of the latter road, for a distance of about 100 miles west of Cedar Rapids, Iowa, on and prior to the 2d day of June, 1864; and that the assessed value of the land in controversy for each and every year since 1866 to the present time, as returned by the assessor, as shown by his assessment books, was $95.

The *north*west quarter of the northwest quarter of section 19, township 85, range 8, was selected as swamp and overflowed land.

The land here in dispute is the *south*west quarter of the northwest quarter of the *same section*, township, and range, and is covered by a quitclaim deed to Hayes, acknowledged September 4, 1888, from the supervisors of Linn County, State of Iowa, the consideration recited being one dollar.

The present suit was commenced within a few days after the making of that deed.

The defendant's witnesses stated facts tending to show that the land in controversy was not and never was swamp or overflowed land.

He introduced in evidence a list of lands, aggregating 1809 acres, certified as having been granted by Congress to Iowa for the Iowa Air Line Railroad, afterwards the Cedar Rapids and Missouri River Railroad. This list designated lands within the six-mile limit, *and included the land in controversy*, was signed by the Commissioner of the General Land

Statement of the Case.

Office, December 23, 1858, and approved by the Secretary of the Interior, December 27, 1858.

The defendant read in evidence a list of lands in Linn County, aggregating 668 acres, certified and approved in 1881 *to the State* by the Secretary of the Interior, under the act of May 15, 1856, *as having inured to the Cedar Rapids and Missouri River Railroad Company. This list included the land in suit*, was in the form required by the Iowa statutes, and was signed by the governor and register of the state land office.

He also read in evidence a deed dated March, 1870, from the Cedar Rapids and Missouri River Railroad Company to the Iowa Railroad Land Company, and also a deed to him from the Iowa Railroad Land Company, dated October 30, 1885 — both deeds covering the land in dispute.

It appears that the parties made the following stipulation, which was read in evidence by the defendant, to wit: "In order to avoid the introduction of evidence upon the subject hereinafter mentioned, it is stipulated and agreed by and between the parties: That the county of Linn, prior to 1875, made selections of swamp lands as shown by the records of the register of the state land office, which selections so made embrace certain tracts in section 19, township 85, range 8, in Linn County, and among them the *north*west quarter of N. W. quarter and the south*east* quarter of the N. W. quarter of said above-named section. The said selections so made, or a copy thereof, are on file in the Secretary of State's office in the State of Iowa, and that the tract in controversy [the *south*west quarter of the northwest quarter of the same section] *was not included in any such selections*, and that so far as shown by any record of the State or county the tract in controversy has never been patented to the State nor by the State to the county."

It was also proven by the defendant that the Cedar Rapids and Missouri River Railroad Company and the Iowa Railroad Land Company and himself had annually paid the state, county, and other taxes assessed and levied on said land from 1866 to 1888, both inclusive.

Opinion of the Court.

Each party objected to the evidence introduced by the other on the ground of incompetency.

This was the case on which the District Court gave judgment establishing and quieting the plaintiff's title.

Mr. Charles A. Clark for plaintiff in error.

Mr. D. E. Voris for defendant in error.

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

Undoubtedly, the certification to the State by the Department of the Interior, of the lands in controversy, under the railroad act of May 15, 1856, as having inured to the Cedar Rapids and Missouri River Railroad Company, was unauthorized by law, if the lands at the date of the Swamp Land act of 1850 were swamp and overflowed lands, whereby they were unfit for cultivation; for, lands of that character were expressly reserved from the operation of the railroad grant of 1856. If they were not granted to the State for the benefit of the railroad company, because previously granted to the State as swamp and overflowed lands, they could not be legally certified or transferred to the State to be applied in aid of the construction of the railroad.

This is made clear by the decision in *Railroad Company* v. *Fremont County*, 9 Wall. 89, 94.

That was a suit in equity to quiet the title to a tract of land in Iowa, both parties claiming under grants by Congress — the plaintiff, the county of Fremont, under what is known as the Swamp Land act of 1850; the railroad company, under the above act of Congress of May 15, 1856, granting lands to Iowa to aid in the construction of railroads. After referring to that part of the act reserving from its operation any and all lands theretofore reserved to the United States by any act of Congress, or in any manner by competent authority for the purpose of aiding in any object of internal improvement, or for any other purpose whatever, the court, among other things, said: "These reservations clearly embrace the

previous grant of the swamp and overflowed lands for the purpose of enabling the States to redeem them and fit them for cultivation by levees and drains. At the time of the passage of this act, (May 15, 1856,) a moiety of the lands in controversy had been selected and reported to the land department; and the authorities of the State, under instructions from that department, were engaged in the selection of the remainder. The lands already selected and returned had been withdrawn from sale, and were not in the market at the time of the passage of the act; and as soon as the remaining lists were returned, which was January 21, 1857, they were also withdrawn from the market. In the language of the railroad act, the whole of the lands in controversy were 'otherwise appropriated,' and were 'reserved' for the purpose of aiding the States in their objects of internal improvements." Many decisions of this court are to the same effect.

The controlling question, therefore, in this case, so far as the plaintiff is concerned — and he must recover upon the strength of his own title, even if that of the defendant be defective — is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the State, under the Swamp Land act, can be shown by parol testimony to have been, in fact, at the date of that act, swamp and overflowed lands? Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the Swamp Land act, and transmit the same to the governor of the State, and, at the request of the latter, to cause a patent to be issued to the State therefor, and having provided that "on that patent the fee simple to said lands shall vest in said State subject to the disposal of the legislature thereof," did the title vest in the State, by virtue alone, and immediately upon the passage of the act, without any selection by or under the direction of the Department of the Interior, so that the State's grantees could maintain an action to recover the possession of them?

At the term of the court at which *Railroad Company* v.

Fremont County was determined the case of *Railroad Company* v. *Smith*, 9 Wall. 95, was decided. The latter case was ejectment by a railroad company to recover certain lands in Missouri. It deduced title from an act of Congress, approved June 10, 1852, granting public lands to that State to aid in the construction of certain railroads. The State accepted the grant, and by statute vested in the railroad company the lands so granted, without any description of their boundaries. The defendant Smith, asserting title under the Swamp Land act, introduced parol evidence tending to show that, at the date of that act, the lands in dispute were, in fact, wet and unfit for cultivation, and, therefore, were to be deemed swamp and overflowed lands within the meaning of the act of Congress. It was admitted that the title had vested in the railroad company, unless the land was of the class that was reserved by the above act of 1852, which, in that respect, was similar to the act of 1856 granting lands to Iowa to aid in the construction of railroads. The court held this evidence to be competent.

Mr. Justice Clifford did not concur in the judgment of the court, being of the opinion that as special power was conferred upon the Secretary of the Interior to make out an accurate list and plats of the lands, it was quite clear that a jury was no more competent to ascertain and determine whether a particular subdivision should be included, or excluded, from the list and plats required to be made under that section, than they would be to make the list and plats during the trial of a case involving the question of title; and that courts and juries were not empowered to make the required list and plats, nor determine what particular lands shall be included in the list and plats before they were prepared by the officer designated by law to perform that duty; otherwise, he said, the States could select for themselves, and if their title was questioned by the United States or by individuals, they could claim of right that the matter shall be determined by jury.

The next case is that of *French* v. *Fyan*, 93 U. S. 169, 172, 173. That was also ejectment, and the question was, whether,

as against a patent for the lands there in controversy, issued by the United States to Missouri under the Swamp Land act of 1850, it was competent to show by parol testimony that the lands so patented were not, in fact, swamp and overflowed lands within the meaning of the act. In that case, the plaintiff, by purchase in 1872, became vested with such title as had passed in 1854 to the Missouri Pacific Railroad Company under the act granting lands to aid that corporation in the construction of its road. The defendant based his claim on a patent issued by the United States in 1857 under the Swamp Land act of 1850. It thus appeared on the face of the papers — treating the grant by the Swamp Land act as one *in præsenti*, and any patent issued under it, no matter when issued, as relating to the date of the grant — that the better title was with the defendant, because the grant under which the railroad company claimed was not made until after the passage of the Swamp Land act. In this view, the question arose whether, in an action at law, in which these evidences of title came in conflict, parol testimony could be admitted that the land was never, in fact, swamp and overflowed, and, in that way, collaterally impeach the patent issued to the State under the act of 1850.

In considering that question the court, in *French* v. *Fyan*, reaffirmed the general doctrine, to which there are some recognized exceptions not important to be here stated, that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, was conclusive upon all others. Speaking by Mr. Justice Miller, who delivered the opinion in the previous case of *Railroad Co.* v. *Smith*, the court, in *French* v. *Fyan*, said: "We see nothing in the case before us to take it out of the operation of that rule; and we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought

before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In the argument of *French* v. *Fyan* great reliance was placed by the counsel on *Railroad Co.* v. *Smith*, above cited, in which, as we have seen, parol evidence was held to be competent to prove that a particular piece of land was swamp and overflowed land within the meaning of the act of Congress. Upon this point the court, in *French* v. *Fyan*, said: "But a careful examination will show that it was done with hesitation, and with some dissent in the court. The admission was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made *no selection or lists whatever*, and *would issue no patents*, although many years had elapsed since the passage of the act. The court said: 'The matter to be shown is one of observation and examination; whether arising before the Secretary, whose duty it was primarily to decide it, or before the court whose duty it became, because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose.' There was no means, as this court has decided, to compel him to act; and if the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur, and the entire grant to the State might be defeated by this neglect or refusal of the Secretary to perform his duty. *Gaines* v. *Thompson*, 7 Wall. 347; *Secretary* v. *McGarrahan*, 9 Wall. 298; *Litchfield* v. *Register and Receiver*, 9 Wall. 575. There is in this no conflict with what we decide in the present case, but, on the contrary, the strongest implication, that if, in that case, the Secretary *had made any decision*, the evidence would have been excluded."

The same general question arose, under somewhat different circumstances, in *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69,

which was an action to recover possession of a tract of land in California; the plaintiff deraigning title through a conveyance by one to whom the United States had issued a patent in 1875; the defendant contending that the lands in controversy, although covered by the above patent, were, in fact, lands that passed to the State under the Swamp Land act of 1850. The question was, whether the defendant, who did not connect himself in any way with the title, and was a mere intruder, without color of title, could be admitted to show by parol evidence that the lands were in fact swamp and overflowed. The court said: "In that case [*French* v. *Fyan*, 93 U. S. 169] parol evidence to show that the land covered by a patent to Missouri under the act was not swamp and overflowed land, was held to be inadmissible. On the same principle parol testimony to show that the land covered by a patent of the United States to a settler under the preëmption laws was such swamp and overflowed land must be held to be inadmissible to defeat the patent. It is the duty of the land department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preëmption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title. As was said in the case cited of the patent to the State, it may be said in this case of the patent to the preemptioner, it would be a departure from sound principle and contrary to well-considered judgments of this court to permit, in such action, the validity of the patent to be subjected to the test of the verdict of a jury on oral testimony."

It is supposed by counsel that these principles were modified in *Wright* v. *Roseberry*, 121 U. S. 488, 511, 512, 518. But such is not the fact. In that case the plaintiff sued to recover possession of a tract of land in California. He asserted title under that act, claiming by conveyance from parties who had purchased from the State; the defendants, under patents of the United States issued under the preëmption laws to them or to parties from whom they derived their interest. The particular point to which the court directed its attention was whether an action could be maintained upon the title to swamp

and overflowed lands *in California* until they had been certified as such pursuant to the fourth section of the act of Congress of July 23, 1866, entitled "An act to quiet land titles in California." In determining that question it became necessary to examine the course of legislation and of judicial decision under the Swamp Land act of 1850. Referring to the act of July 23, 1866, 14 Stat. 218, c. 219, the court said that "Congress changed the provisions of law for the identification of swamp and overflowed lands *in that State. It no longer left their identification to the Secretary of the Interior*, but provided for such identification by the joint action of the state and Federal authorities." That act, the court said, tended to remove the uncertainty and confusion which prevailed in relation to land titles in that State, "principally by recognizing the action of the State in disposing of the lands granted to her, in cases where such disposition was made to parties in good faith, and did not interfere with previously acquired interests, and by providing a mode for identifying the swamp and overflowed lands in the future without the action of the Secretary of the Interior." It appeared in proof that the lands there in controversy had been segregated as swamp and overflowed lands by the authorities of the State of California; that their designation as such lands on a plat of the township made by the surveyor general of the United States was approved by that officer, and forwarded to the General Land Office, pursuant to the act of 1866; and that such plat was approved by the Commissioner, as shown by its official use of it. "The act of Congress," the court said, "intended that the segregation maps prepared by authority of the State, and filed in the state surveyor general's office, if found upon examination by the United States surveyor general to be made in accordance with the public surveys of the general government, should be taken as evidence that the lands designated thereon as swamp and overflowed were such in fact, except where this would interfere with previously acquired interests." So far from modifying the rule announced in *French* v. *Fyan*, the court recognized the authority of that case, and distinguished it from the one then under consideration.

Opinion of the Court.

In *Heath* v. *Wallace*, 138 U. S. 573, 585, the court held that the decision of the land department on the question whether lands were swamp and overflowed, within the meaning of the act of 1850, was the decision of a fact, which, in the absence of fraud or imposition, was conclusive upon the courts.

The latest case in this court upon the general question before us is *Chandler* v. *Calumet & Hecla Mining Co.*, 149 U. S. 79, 88, 89, 92. The action was ejectment, each party holding a conveyance from the State of Michigan; that to the plaintiff, Chandler, having been made many years subsequent to the one made to the defendant. The plaintiff claimed that the premises in controversy were a part of the swamp and overflowed lands granted to the State by the act of September 28, 1850, and were patented to him by the State on the 3d day of November, 1887, whereby he acquired a title to the same, superior to that attempted to be passed to the defendant by the prior patent based on an act of Congress of August 26, 1852, granting public lands to Michigan to aid in the construction of a ship canal around the Falls of St. Mary. There was proof showing that the State and the Interior Department made a selection of lands under the Swamp Land act, and that the lands there in controversy were not embraced in such selection, nor in the patent to the State for them. The defendant contended that this action of the State and of the Interior Department was a determination that the particular land in dispute was not covered by the act of 1850, and its having been selected and certified to the State under the act of 1852 was a determination that it was included in the canal grant; and that this determination could not be collaterally attacked in an action at law. Referring to *Railroad Company* v. *Smith*, Mr. Justice Jackson, speaking for the court, after observing that the converse of the situation existing in that case was presented in the case then before it, said: "But aside from this, the rule as to oral evidence, recognized in that case, was afterwards explained, and limited in its operation to cases in which there had been non-action or refusal to act on the part of the Secretary of the Interior in selecting lands granted, as appears in the subsequent cases of *French* v. *Fyan*, 93

U. S. 169, 173, and *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 69, where parol evidence was offered to show that patented lands were not of the character described."

After examining *French* v. *Fyan* and *Ehrhardt* v. *Hogaboom*, above cited, and stating that nothing said or involved in *Wright* v. *Roseberry* was in conflict with the rulings in those cases, the court proceeded: "Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which pass to the State by the swamp land grant, and that the selection by the State of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the department to the State that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands selected and patented to the State, and its inclusion in the selection of the State as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the State, operated to pass the title thereto as completely as could have been done by formal patent, *Frasher* v. *O'Connor*, 115 U. S. 102; and being followed by the State's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony in an action at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in dispute was in fact swamp land, for the purpose of contradicting and invalidating the department's certification thereof to the State and the latter's patent to the canal company."

To this review of the former decisions of this court but little need be added. The case before us is not like that of *Railroad Company* v. *Smith*, in which, as subsequently

explained in *French* v. *Fyan*, it was shown that there was an absolute neglect of duty on the part of the Interior Department, in that it neither made, nor would make any selection or lists whatever, and, therefore, there was no action by that department that could be relied on as a determination of the question whether the particular lands then in dispute were or were not embraced by the Swamp Land act. That case was exceptional in its circumstances, and seemed to justify the decision rendered, in order to prevent a total failure of justice, arising from the unexplained neglect of the land department to perform the duty imposed by the act of 1850. What was said in *French* v. *Fyan* shows that this court not only so regarded the previous case, but it was, in effect, said that the ruling in *Railroad Company* v. *Smith* was not to be extended to any case in which the land department had taken action or made a decision or determination under the Swamp Land act.

In the case now before us, the selection by Linn County, grantee of the State, prior to 1875, of swamp and overflowed lands in the very section of which the lands in dispute formed a part, without including the latter in such selection, together with the acquiescence in that selection by the Interior Department, and the selection by or under the direction of the Secretary of the Interior, and their certification to the State, first in 1858, and again in 1881, of the lands in dispute, as lands inuring, under the act of Congress of May 15, 1856, to the Cedar Rapids and Missouri River Railroad Company, and, therefore, not lands embraced by the act of 1850, constituted a determination, based on "observation and examination," that the lands here in dispute were not swamp and overflowed, and, therefore, had not been reserved or appropriated, prior to the date of the railroad land grant act, but passed, as the Secretary of the Interior certified, to the State, for the purposes named in the railroad act. Twice the land department certified these lands to the State as inuring to it under the railroad land grant act, and it does not appear that the State has ever questioned the correctness of that certification or applied to the Secretary of the Interior for a reëxamination

as to the character of the lands. Nor did the county of Linn, so far as the record shows, ever contend that these lands belonged to it, under the act of 1850, as the grantee of the State, until its board of supervisors for the consideration of $50, (their deed, however, reciting one dollar as the consideration,) sold them to the plaintiff, taking his promissory note for the price. This was in 1888, a few days before this suit was brought, and more than thirty years after the Secretary of the Interior first certified them to the State as railroad grant lands.

We are of opinion that this case comes within the ruling of previous cases, particularly *Chandler* v. *Calumet & Hecla Mining Co.*, and *French* v. *Fyan*.

Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers, having authority in the premises, that these lands were, in fact, at the date of the act of 1850, swamp and overflowed grounds, which should have been embraced by Linn County in its selection of land of that character, and withheld from the State as lands granted expressly in aid of railroad construction within its limits.

The plaintiff was not entitled to the relief asked, and, as the case was tried by the court, judgment should have been rendered for the defendant.

As the court below did not proceed upon the grounds we have stated to be proper, and as its judgment deprived the defendant of rights secured by the laws and exercised under the authority of the United States, that judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Reversed.

SIOUX CITY & ST. PAUL RAILROAD COMPANY *v.* UNITED STATES.

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

No. 20. Argued April 16, 17, 1895. — Decided October 21, 1895.

The Sioux City & St. Paul Railroad Company having failed to complete the entire road from Sioux City to the Minnesota line, as contemplated by the act of Congress of May 12, 1864, c. 84, 13 Stat. 72, making a grant of public land in aid of its construction, and as required by the statutes of Iowa, has not only received as many acres of public land as it could rightfully claim under that act, but has also received 2004.89 acres in excess of what it could rightfully claim.

Grants of odd-numbered sections of public lands to aid in the construction of railways imply no guaranty that each section shall consist of 640 acres, nor any obligation on the part of the United States to give other public lands to supply deficiencies in reaching that amount.

Under the said act of 1864, the grant was made to the State as trustee, and not to the railroad company, and the title under the patent, when issued, vested in the State as trustee.

When lands are granted by acts of Congress of the same date, or by the same act, to aid in the construction of two railroads that must necessarily intersect, or which are required to intersect, each grantee, when the maps of definite location are filed and accepted, takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines.

THIS suit was brought by the United States against the Sioux City and St. Paul Railroad Company, pursuant to the act of Congress of March 3, 1887, providing for the adjustment of land grants in aid of the construction of railroads, and for the forfeiture of unearned lands theretofore granted. 24 Stat. 556, c. 376.

Upon its appearing that from any cause lands had been erroneously certified or patented to or for the use and benefit of any company to aid in the construction of a railroad, it became the duty of the Secretary of the Interior to demand the relinquishment or reconveyance of such lands, whether within granted or indemnity limits. If the company failed

for ninety days to comply with that demand, it was made the duty of the Attorney General to institute proceedings for the cancellation of the patents, certifications, or other evidence of title issued for such lands, and for the restoration of the title to the United States. § 2.

The decree from which the present appeal was taken quieted the title of the United States, as against the Sioux City and St. Paul Railroad Company, and Elias F. Drake and Amherst H. Wilder, trustees in mortgages given by that company, to certain tracts of lands in Dickinson County, Iowa, alleged to contain 800 acres, and to other tracts in O'Brien County, in the same State, alleged to contain 21,179.85 acres; in all, 21,979.85 acres. *United States* v. *Sioux City & St. Paul Railroad*, 43 Fed. Rep. 617.

The railroad company claimed title under an act of Congress, approved May 12, 1864, c. 84, granting lands to Iowa in aid of the construction of railroads in that State, 13 Stat. 72, and also under statutes of Iowa passed in execution of the objects of that act.

The United States claimed that the company had received a larger quantity of lands than it was entitled to receive under the act of 1864, and, therefore, could have no claim to the particular lands here in controversy.

The relation of the parties to these lands and the facts upon which the question of title depended was shown by the following summary of the evidence:

By the above act of May 12, 1864, Congress granted lands to the State of Iowa to aid in the construction of two railroads in that State; one, from Sioux City to the south line of Minnesota, at such point as the State of Iowa might select between the Big Sioux River and the west fork of the Des Moines River; the other, for the use and benefit of the McGregor Western Railroad Company, an Iowa corporation, to aid in the construction of a railroad extending from South McGregor, Iowa, in a westerly direction, by the most practicable route on or near the forty-third parallel of north latitude, until it intersected, in the county of O'Brien, the proposed road from Sioux City to the Minnesota state line.

Statement of the Case.

The grant was of every alternate section, designated by odd numbers. But if it appeared, at the date of definite location, that the United States had sold any granted section or part thereof, or that any preëmption or homestead right had attached thereto, or that the same had been reserved by the United States for any purpose whatever, the Secretary of the Interior was to select, or cause to be selected, for the purposes stated in the act, from the public lands nearest to the tiers of sections specified, so much, in alternate sections or parts of sections, designated by odd numbers, as was equal to the lands lost to the State in either of the modes just stated. The lands thus selected were to be held by the State for the above uses and purposes, and were not, in any case, to be located more than twenty miles from the lines of the road to be constructed. All lands, previously reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any work of internal improvement or other purpose, were expressly reserved and excepted from the operation of the act, except so far as it was found necessary to locate the routes of the roads through such reserved lands. § 1.

The lands granted were "subject to the disposal of the legislature of Iowa for the purposes aforesaid, and no other;" and the railroad was to be and remain a public highway for the use of the government of the United States, free of toll or other charge upon the transportation of the property or troops of the United States, as well as for the transportation of the mail at such price as Congress should fix. §§ 3, 6.

The fourth section of the act was the subject of much discussion by counsel. It provided: "That the lands hereby granted shall be disposed of by said State, for the purposes aforesaid only, and *in manner* following, namely: *When* the governor of said State shall certify to the Secretary of the Interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial, and workmanlike manner as a first-class railroad, *then* the Secretary of the Interior shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the

ten consecutive miles as aforesaid. *When* the governor of said State shall certify that another section of ten consecutive miles shall have been completed as aforesaid, *then* the Secretary of the Interior shall issue patents to said State in like manner, for a like number; and *when* certificates of the completion of additional sections of ten consecutive miles of either of said roads are, from time to time, made as aforesaid, additional sections of lands shall be patented as aforesaid, *until* said roads or either of them *are completed*, *when* the whole of the lands hereby granted shall be patented to the State for the uses aforesaid and none other: . . . *Provided further*, That if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the State of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine: *And provided further*, That said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act; and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

The lands embraced by the act were to be withdrawn from market as soon as the governor of the State filed, or caused to be filed, with the Secretary of the Interior, maps designating the routes of the respective roads. § 5.

The last section of the act granted to the State of Minnesota four additional alternate sections of land per mile — to be selected under the conditions, restrictions, and limitations contained in a former act of Congress, approved March 3, 1857, c. 99, 11 Stat. 195 — for the purpose of aiding the construction of a railroad in that State, extending from St. Paul and St. Anthony, by way of Minneapolis, to a convenient point of junction west of the Mississippi, in the southern boundary of the State, and in the direction of the mouth of the Big Sioux River. § 7.

By an act approved April 3, 1866, Iowa accepted the lands, powers, and privileges conferred upon it by the act of May 12,

1864; and, so much of the lands, interests, rights, powers, and privileges as were or could be granted and conferred in pursuance of the act of Congress, for the purpose of aiding the construction of the railroad from Sioux City to the Minnesota line, were disposed of, granted, and conferred upon the Sioux City and St. Paul Railroad Company, an Iowa corporation, to be hereafter called, for the sake of brevity, the Sioux City company. That act authorized the company to select and designate the point upon the south line of Minnesota to which its road should be built. Laws of Iowa, 1866, 143, c. 134, §§ 1, 2, 7.

By a subsequent statute of Iowa, approved April 20, 1866, it was provided that the lands, powers, duties, and trusts conferred by the act of Congress of "July 12, 1864," were accepted by the State upon the terms, conditions, and restrictions therein contained, and that "whenever any lands shall be patented to the State of Iowa, in accordance with the provisions of said act of Congress, said land shall be held by the State in trust for the benefit of the railroad company entitled to the same by virtue of said act of Congress, and to be deeded to said railroad company as shall be ordered by the legislature of the State of Iowa." Laws of Iowa, 1866, 189, c. 144. The word "July" in that act, inserted by mistake, was stricken out by an act passed March 24, 1868, and "May" substituted, and the acceptance intended to be made by the act of April 20, 1866, was ratified and confirmed. Laws of Iowa, 1868, 49, c. 42.

On the 17th of July, 1867, the Sioux City company filed in the General Land Office a map showing the location of its route from Sioux City, Iowa, northwardly to the south line of Minnesota, a distance of 83.52 miles. This map was accepted by the Interior Department, and, August 26, 1867, the odd-numbered sections within the ten and twenty-mile limits of the located line were withdrawn from the market.

The company — commencing, not at Sioux City, as was apparently contemplated by Congress and indicated by the map of definite location, but at the Minnesota line — began the construction of its road in 1872, and completed it south-

wardly in the direction of Sioux City, but only as far as Le Mars, in Plymouth County, a distance of 56.13 miles. No road was ever constructed by that company between Le Mars and Sioux City, a distance of about 25 miles, although it did construct, in 1872, within the corporate limits of Sioux City, about two miles of track, and erected there machine shops, depots, and round-houses of the value of $125,000, of which $30,000 were the proceeds of a special tax levied and collected by that city under a statute of the State.

In conformity with the act of 1864 the governor of Iowa certified, July 26, 1872, to the completion, in a good, substantial, and workmanlike manner, as a first-class railroad, of two sections of ten consecutive miles each, or twenty miles; August 10, 1872, of one section or ten miles; February 4, 1873, two other sections or twenty miles; in all fifty miles or five sections of ten consecutive miles each.

The Secretary of the Interior, as has been seen, was authorized by the fourth section of the act of 1864 to issue patents for one hundred sections of land as each section of ten consecutive miles was certified by the governor of the State to have been properly completed. Nevertheless, he issued to the State in the name of the United States for the use and benefit of the Sioux City company patents for 191,464.04 acres, October 16, 1872; 205,374.76 acres, June 17, 1873; 10,911.41 acres, January 25, 1875; and 160 acres June 4, 1877 — in all, 407,910.21 acres. As one tract of 40 acres was patented twice, the real amount patented to the State was 407,870.21 acres.

If each odd-numbered section for ten sections in width on each side of the road, within the terminal limits of the fifty miles of road certified as completed, had contained the full complement of 640 acres, the utmost quantity which the Secretary of the Interior was authorized to patent to the State on account of that fifty miles of road would have been 320,000 acres.

Of the 407,870.21 acres of land patented to the State, 322,412.81 acres were conveyed by the State to this company, the State retaining within its control the title to the balance, namely, 85,457.40 acres.

Statement of the Case.

The legislature of Iowa by an act of March 13, 1874, directed the governor to certify to the Sioux City company, in accordance with the provisions of the act of April 20, 1866, any and all lands then held in trust for its benefit. That act, however, only required the conveyance of such of the trust lands, held by the State, as the company was entitled to by virtue of the act of Congress. For this reason, it is suggested, the governor did not convey the 85,457.40 acres that remained after conveying to the company the 322,412.81 acres of the 407,870.21 acres.

It was stipulated by the parties that the State had never conveyed to the Sioux City company the lands in Dickinson and O'Brien Counties which are here in dispute and claimed by the United States.

In 1878 the Chicago, Milwaukee and St. Paul Railway Company, to be hereafter referred to as the Milwaukee company, having succeeded to the rights of the McGregor Western Railroad Company, the other corporation named in the act of 1864, completed the construction of the McGregor railroad to a point of intersection with the line of the Sioux City road at Sheldon, a town in Iowa between Le Mars and the Minnesota line. And in 1879 the Milwaukee company instituted a suit in the Circuit Court of the United States for the District of Iowa against the Sioux City company and others for a decree determining the respective rights of itself and the Sioux City company in the lands at and near the point of intersection, where the grants for the road from Sioux City to the Minnesota line and the grant to the McGregor company necessarily came in conflict. That case came to this court upon the appeal of the Sioux City company, and it was here adjudged: 1. That the odd sections within the ten-mile limits of the Sioux City road, and not within the ten-mile limits although within the twenty-mile limits of the Milwaukee road, belonged exclusively to the Sioux City company. 2. That like sections within the ten-mile limits of the Milwaukee road, and not within the ten-mile limits although within the twenty-mile limits of the Sioux City road, belonged exclusively to the Milwaukee company. 3. That the lands

within the ten-mile limits of both roads belonged to the companies in equal undivided moieties. 4. That the lands within the twenty-mile or indemnity limits of both roads, and not within the ten-mile or absolute grant limits of either road, the title to none of which could accrue until selection was made for one road or the other, should, in view of the situation in which the title had been placed by the action of Federal and state officers, be equally divided between the companies. *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406.

The principles of this decision were carried into a decree of partition in the Circuit Court. From that decree it appears that of the 322,418.81 acres conveyed by the State, under the act of May 12, 1864, to the Sioux City company, there remained to that corporation 280,725.29 acres, after deducting the lands set apart to the Milwaukee company.

It is necessary now to refer to certain facts in relation to the line of road which the Sioux City company located, but never constructed, between Sioux City and Le Mars.

By an act of Congress, approved May 15, 1856 — more than eight years before the grant in aid of the construction of the road from Sioux City to the Minnesota line — a grant of lands was made to the State of Iowa to aid in the construction of a railroad from Dubuque to a point on the Missouri River at or near Sioux City. 11 Stat. 9, c. 28. This grant was accepted by an act of the Iowa legislature approved July 14, 1856, and the lands were granted and conferred upon the Dubuque and Pacific Railroad Company, which located its line or route and filed its map of definite location with the Secretary of the Interior. Laws of Iowa, 1856, Special Session, 1, c. 1. And, in 1870, that road was completed from Le Mars southwardly to Sioux City by the Iowa Falls and Sioux City Railroad Company, the successor of the Dubuque and Pacific Railroad Company.

In the year 1879 the Sioux City company conveyed to the St. Paul and Sioux City Railroad Company, a Minnesota corporation, its roadbed, rolling stock, depots, depot grounds, and other property and franchises in connection with its railroad;

and the latter company in 1881 sold and conveyed the same property and franchises to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, which still owns and operates the road constructed by the Sioux City company north of Le Mars. The last-named company has remaining no other property or assets, except such land as may inure to it under the grant of Congress of May 12, 1864, out of the lands patented to the State but not conveyed to that corporation, all of which are pledged, so far as that could be legally done, to secure the debts specified in the mortgages in which Drake and Wilder were trustees. One of those mortgages was executed August 26, 1871; the other February 5, 1884. The original debts secured by the mortgages aggregated $2,800,000, all of which has been paid off by sales of lands, except $660,000.

The preamble of an act of the legislature of Iowa, approved March 16, 1882, referred to the act of May 12, 1864, providing that if the road from Sioux City to the Minnesota line was not completed within ten years from the acceptance of the grant, the lands granted and not patented should revert to the State for the purpose of securing the completion of the road, and also to the statute of Iowa of April 3, 1866; and after reciting the failure of the Sioux City company to complete, or cause to be completed, any road on the line adopted therefor from Sioux City to Le Mars or any road in lieu thereof, it was declared "that all lands, and all rights to lands, granted or intended to be granted to the Sioux City and St. Paul Railroad Company by said acts of Congress and of the general assembly of the State of Iowa, which have not been earned by said railroad company by a compliance with the conditions of said grant, be and the same are hereby absolutely and entirely resumed by the State of Iowa, and that the same be and are absolutely vested in said State as if the same had never been granted to said railroad company." Laws of Iowa, 1882, 102, c. 107.

On the 27th day of March, 1884, the State passed another act, by the first section of which it relinquished and conveyed to the United States all lands and rights to land resumed and intended to be resumed by the above act of March 16, 1882, § 1.

By the second section of that act the governor was directed to certify to the Secretary of the Interior all lands not theretofore patented to the State to aid in the construction of the Sioux City road, the lands so certified to be deemed those above relinquished and conveyed to the United States by the first section, "provided, that nothing in this section contained shall be construed to apply to lands situated in the counties of Dickinson and O'Brien." Laws of Iowa, 1884, 78, c. 71.

Pursuant to the latter act the governor, on the 12th day of January, 1887, relinquished and conveyed to the United States 26,017.33 acres of the 85, 457.40 acres of land which, as already stated, had been patented to the State for the benefit of the Sioux City company, but which were never certified to that company. Those lands are in Plymouth and Woodbury Counties, and do not embrace the lands in dispute.

The Sioux City road was so constructed as to form a continuous line with the railroad of the St. Paul and Sioux City Railroad Company, a Minnesota corporation, to aid in the construction of which from St. Paul and St. Anthony to the southern boundary of that State Congress made the grant of March 3, 1857. The latter is the road referred to in the seventh section of the act of May 12, 1864. Upon the construction by the Sioux City company of the road from the Minnesota line to Le Mars, that corporation obtained by lease the right to run and operate its cars over the road of the Iowa Falls and Sioux City railroad extending from Le Mars to Sioux City, (and now operated by the Illiniois Central Railroad Company,) from which time the Iowa and Minnesota corporations and their grantees have continued to run and operate their roads as one continuous line from St. Paul to Sioux City.

Part of the lands in controversy here were entered upon by different persons between 1882 and 1885, claiming under the homestead and preëmption laws of the United States, and making formal applications to enter such lands. Their applications were rejected, but they appealed from those decisions, continuing to improve and cultivate the lands under their claims, and, in some instances, making valuable improvements.

And before the bringing of this suit the Sioux City company had commenced actions in ejectment in one of the state courts against the parties in possession.

In 1887 application was made to the Secretary of the Interior on behalf of certain persons, in O'Brien County, who had settled on the lands in controversy, as well as on lands referred to in the above partition decree, requesting suit to be brought by the United States to assert its title to said lands. After argument before the Secretary by counsel severally representing the settlers as well as the Sioux City and Milwaukee companies, that officer — Secretary Lamar — rendered an elaborate opinion, in which the whole subject was reviewed. 6 Land Dec. 50, 62.

Mr. George B. Young, (with whom was *Mr. J. H. Swan* on the brief,) for appellants.

Mr. Assistant Attorney General Dickinson for appellees.

Mr. William L. Joy, for settlers, filed a brief on behalf of the United States.

Mr. William Lawrence, representing settlers on the lands in controversy, filed a brief for the United States.

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

1. The lands now in dispute are part of the 85,457.40 acres patented by the United States to Iowa for the use and benefit of the Sioux City company, but never conveyed by the State to that company.

If the company has received as much of the public lands as it was entitled to have on account of constructed road, may not the lands in dispute — the time limited by Congress for the completion of the entire road having passed — be regarded as "undisposed of" within the meaning of section four of the act of 1864, and may they not, therefore, be claimed by the government as belonging to the United States? According to that section, if the two roads named

in it were not completed within ten years from the several acceptances of the grant, the lands granted and not patented were to revert to the State "for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the State shall determine." And the second proviso was to the effect that said lands should not in any manner be disposed of or incumbered, except as the same were patented under the provisions of the act; "and should the State fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States."

If the terms of an act of Congress, granting public lands, "admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them." *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733, 740. Acts of this character must receive such construction "as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625. "Nothing is better settled," this court has said, "than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion." *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59.

Giving effect to these rules of statutory interpretation, we cannot suppose that Congress intended that the railroad company should have the benefit of more lands than it earned. As the lands granted could only be devoted to the construction of the Sioux City road from Sioux City to the Minnesota line, and as the State, holding the legal title in trust, has not disposed of and does not intend to dispose of them for the purpose of completing that part of the road located between Sioux City and Le Mars, we perceive no sound reason why, within the meaning of the act of 1864, these lands may not

be regarded as "undisposed of," and equitably the property of the United States, if it be true that the railroad company has received as much of the public lands as it was entitled to have on account of constructed road certified by the governor of the State. This was the interpretation placed by the State upon the act of Congress; for, by the act of the Iowa legislature of March 16, 1882, the State, because of the failure of the Sioux City company to construct any road between Sioux City and Le Mars, resumed the title to all lands that had not been "earned" by the railroad company; and by the subsequent statute of March 27, 1884, it relinquished and conveyed to the United States all lands and rights of land resumed and intended to be resumed by a previous act.

It is apparent, therefore, that the fundamental question in the case is, whether the Sioux City company, having failed to complete the entire road from Sioux City to the Minnesota line, has received as many acres of the public lands as it could rightfully claim under the act of 1864? If this question be answered in the affirmative, the company cannot complain of the final decree as one to the prejudice of its substantial rights. Before considering this question it is necessary to examine certain propositions relating to the quantity of lands to which the Sioux City company was entitled for constructed road.

2. On behalf of the company it is contended that in ascertaining the extent of the grant, we must assume that *each* odd-numbered section in the place limits contained its full complement of six hundred and forty acres, and that if any section contained, in fact, less than that quantity, the United States was under a legal obligation to make good the difference. Clearly, the act of 1864 does not admit of this construction. The record shows that many sections in the granted limits, as surveyed and marked, contained less than 640 acres. The grant was of the odd-numbered sections for ten sections in width on each side of the road, whether they contained six hundred and forty acres, or more or less than that quantity. The United States did not undertake that the granted sections should contain any given number of acres.

If it appeared, at the time the line of the road was located, that the United States had sold or reserved any particular section, the selection from the public lands, nearest to the tiers of the granted sections, to supply that loss, was limited by the act to the quantity of lands actually in the section so sold or reserved. The court below well said that there was no guaranty by the United States that the quantity of land covered by the grant should equal any fixed number of acres either for the construction of the entire road or any portion thereof, and that the exceptions named in the act clearly show that the company undertaking the construction of the line of the proposed railway was to get only the quantity of land that was ultimately found to be, in fact, covered by the grant.

3. The company, also, contends that it was entitled to lands for the whole number of miles of road actually constructed by it; that is, for the fifty miles certified by the governor to have been completed, and, also, for the fraction of six miles and a quarter immediately north of Le Mars, which was never certified to the Secretary of the Interior. We cannot assent to this construction of the act of Congress. Congress evidently had in view the construction of an entire road from Sioux City to the Minnesota state line. And to that end, the first section of the act of 1864 grants to the State every alternate section of land designated by odd numbers for ten sections in width on each side of the road. But that section must be taken in connection with the fourth section prescribing the mode in which the grant shall be administered. By the latter section, it is provided that the State shall not dispose of the lands granted, except for the purposes indicated by Congress *and in the manner* prescribed; further, that "said lands shall not in any manner be disposed of or incumbered, except as the same are patented under the provisions of this act." Now, the manner prescribed for disposing of the lands granted was, that patents should be issued to the State for one hundred sections of land for each section of ten consecutive miles, *when* the governor certified to the completion of such section in good, substantial, and workman-

like manner as a first-class railroad. This was evidently the interpretation given by the State to the act of Congress, for the governor never certified to the construction of any section of road less than ten consecutive miles in length.

It does not follow from this interpretation of the act that the company could never get lands for a fractional part of constructed road, less than ten consecutive miles. Provision was made for such cases by the clause directing patents to be issued to the State, as each section of ten consecutive miles was constructed, and was properly certified by the governor, "*until* said roads, or either of them, are *completed*, *when* the *whole* of the lands hereby granted shall be patented to the State for the uses aforesaid and none other." In other words, for a completed road, the State should have the full quantity of lands granted and found in odd-numbered sections, with the right to select other lands to supply any losses in either of the modes specified in the act of Congress. But the time never came when the State could rightfully demand patents for the whole of the lands granted. The road was never completed, and, therefore, patents could not be legally issued, except for one hundred sections of land for each section of ten consecutive miles of road, certified by the governor of the State to have been constructed in the mode required by Congress. The result of this view is, that the Secretary of the Interior was without authority to issue patents, except for the five sections of ten consecutive miles each, that is, for fifty miles of constructed road certified by the governor of the State. The State could not, without completing the road, or causing it to be completed, demand patents on account of the construction of less than a section of ten consecutive miles. This was the view taken by Secretary Lamar, who said that "a careful consideration of the granting act convinces me that there is no authority of law for patenting any lands on account of the six and a quarter miles of road, [immediately north of Le Mars,] and that no lands have been earned by the construction thereof." 6 Land Dec. 51.

4. Another contention is, that upon the issuing of the patents of 1872 and 1873 to the State for the use and benefit

of the railroad company the title vested absolutely in the company, and the lands were thereby freed from restraints of alienation, from conditions subsequent, or from liability to forfeiture. In support of this contention reference is made to *Bybee* v. *Oregon & California Railroad*, 139 U. S. 663, 674, 676–7; *Van Wyck* v. *Knevals*, 106 U. S. 360; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 6. But these are cases, as an examination of them will show, in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself. In the case now before us, the statute directed patents to be issued to the State for the benefit of the company. So that, until the State disposed of the lands, the title was in it, as trustee, and not in the railroad company. *Schulenberg* v. *Harriman*, 12 Wall. 44, 59; *Lake Superior Ship Canal &c. Co.* v. *Cunningham*, 155 U. S. 372. See also *McGregor &c. Railroad* v. *Brown*, 39 Iowa, 655; *Sioux City & St. Paul Railroad* v. *Osceola County*, 43 Iowa, 318, 321. In the case last named, the Sioux City company was relieved from the payment of taxes upon some of the lands patented to the State for its benefit, upon the ground that the legal title was in the State, and the lands for that reason were not taxable. The question is altogether different from what it would be if patents for these lands had been issued, or if the State had conveyed them directly, to that company.

5. The company, also, contends that any calculation of the quantity of lands that the railroad company was entitled to receive, on account of constructed road, duly certified, must be on the basis, that it was entitled to lands, in lieu of those awarded to the Milwaukee company in the common place limits of the two intersecting roads. In this interpretation of the statute we cannot concur.

The rule is well settled that when lands are granted by acts of Congress of the same date, or by the same act, to aid in the

construction of two railroads that must necessarily intersect, or which are required to intersect, each grantee — the map of definite location having been filed and accepted — takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines. *Sioux City &c. Railroad* v. *Chicago, Milwaukee &c. Railway*, 117 U. S. 406, 408; *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720, 727; *Missouri, Kansas & Texas Railway* v. *Kansas Pacific Railway*, 97 U. S. 491, 501; *Cedar Rapids &c. Railroad* v. *Herring*, 110 U. S. 27; *Grinnell* v. *Railroad Co.*, 103 U. S. 739. In *Donahue* v. *Lake Superior Canal &c.*, 155 U. S. 386, 387, this court said: "The rule is that where two lines of road are aided by land grants made by the same act, and the lines of those roads cross or intersect, the lands within the 'place' limits of both, at the crossing or intersection, do not pass to either company in preference to the other, no matter which line may be first located or road built, but pass in equal undivided moieties to each."

The grants for the Sioux City and Milwaukee roads were by the same act. Of the granted sections in place limits common to both roads, each company, having filed its map of definite location, took, as of the date of the grant, an equal undivided moiety — no more. The equal undivided moiety granted for one road was not granted, nor could it be used, for the other road. Congress knew, when it passed the act of 1864, that there would be an overlapping of place limits at the required point of intersection of the two roads. And the Sioux City company when it accepted the benefit of the grant knew that such must be the case. As the act did not provide for a selection of lands for either road, on account of the undivided moiety of place lands granted for the other, we may not assume that the right to such selection was intended to be reserved. Lands lost to the Sioux City company in one of the modes named in the act of Congress, and for which other lands could be selected, were lands granted for that company, not lands granted to another company for a different road. The lands which the Sioux City company claims to have so lost —

namely, the undivided moiety granted, and subsequently awarded, to the Milwaukee company out of the common place limits — were never granted for the Sioux City road, but were granted for the McGregor or Milwaukee company.

This question was examined in 1887 with great care by Secretary Lamar. The claim was made before him by the Sioux City and the Milwaukee companies that each was entitled to indemnity for the lands which it claimed to have lost by reason of the grant for the other company of an equal undivided moiety within the conflicting place limits. The Secretary said: "I am unable to conclude that such was the intention of Congress in making the grant. To say that it was would be to say in effect that, in so far as the ten-mile limits of the two grants overlap, the purpose of the granting act was to make what would amount to a double grant. Each company got a moiety of the lands in odd-numbered sections within the common granted limits. Now, should there be allowed to each company indemnity for the moiety lost by grant to the other, a quantity of land equivalent to all the odd and even-numbered sections in said common granted limits would be passed under the granting act. This, I think, could not be justified by any proper construction of the act, nor can I conceive it to have been intended by Congress. The grant was of a moiety for each road within the common granted limits of both roads. This accords with the view expressed by the Supreme Court in the case of *St. Paul & Sioux City Railroad* v. *Winona & St. Peter Railroad*, 112 U. S. 720. Either this is true, or Congress by the same act twice granted the same lands. To say that it did, or intended to do, this, would be to say that it acted unreasonably, or without a proper understanding of what it was doing. Now, since indemnity is allowed only for lands granted and lost from the grant, and since in the common ten-mile limits of these two roads only a moiety was granted, it follows that neither company has any legal claim for indemnity on account of the moiety granted to the other." 6 Land Dec. 54, 62.

6. In the light of these principles we come to the practical question presented for determination, namely, whether the

Sioux City company, having failed to complete the road for the benefit of which the grant was made, has received as much of the public lands as it was entitled to receive under the act of 1864? This is entirely a matter of figures.

As heretofore shown, the State patented or certified to the railroad company 322,412.81 acres out of the 407,870.21 acres patented by the United States. We have seen that of the 322,412.81 acres so transferred to the company, 41,687.52 acres were taken from the Sioux City company and given to the Milwaukee company by the decree of the Circuit Court, pursuant to the mandate of this court in *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406. This, as has been stated, left the Sioux City company with title to 280,725.29 acres, which it has disposed of or sold, and about which no question is made in this case by the United States.

Was the company entitled to a larger quantity of lands on account of the fifty miles of road certified by the governor of Iowa to have been properly constructed?

We have said that the Sioux City company was only entitled to the sections as surveyed and as they appeared on the public records, whether they contained more or less than 640 acres each. Upon examination of the certified list of lands, *based on the diagram originally furnished by the railroad company to the Secretary of the Interior* and transmitted by the General Land Office to the local land office on the 26th of August, 1867, it is found that the actual area of the odd-numbered sections within the place limits of the Sioux City road, *excluding* odd-numbered sections within the conflicting place limits of the two roads, contained only 247,476.85 acres; and the actual area within the conflicting place limits of the two roads, *according to the same diagram*, was 70,705.29 acres. Of the latter quantity one-half, or 35,352.64 acres, belonged to the Milwaukee company as its equal undivided moiety of the lands in the common place limits. Apparently, therefore, if this diagram be taken as a basis of calculation, the railroad company could have earned, on account of the fifty miles of constructed road, only 247,476.85 acres outside of the conflicting

place limits and 35,352.64 acres within such limits; in all, 282,829.49 acres, or 2104.21 acres more than the 280,725.29 acres actually received by it, and about which no question is here made by the government.

But there are exhibits in the case made part of the agreed statement of facts that lead us to a different result. In 1887 the Commissioner of the Land Office, having before him the question of how much of the public lands the Sioux City company was entitled to receive, caused an accurate measurement to be made of the area of the odd-numbered sections and parts of sections lying within the grant made by the act of May 12, 1864, for the construction of the Sioux City road. The record shows, if that measurement be regarded, that within the common place limits of the two roads there were only 69,825.99 acres, of which the Sioux City company was entitled to one-half, or 34,912.99 acres, and that outside of the conflicting limits, and within the place limits of the Sioux City road, there were only 243,807.41 acres. So that, on the basis of the measurement of 1887, the company could have earned for the fifty miles of certified road only 278,720.40 acres, that is, less, by 2004.89 acres, than it has actually received and holds or has sold.

The result is, that if the diagram furnished by the railroad company in 1867 be followed, the Sioux City company is entitled to 2104.22 acres in addition to what it has received; whereas, if the measurement of 1887, made under the direction of the Land Office, be accepted, that company has received 2004.89 acres more than should in any case have been awarded to it.

We are of opinion that the measurement of 1887 should be taken as the basis for determining the area of the odd-numbered sections within place limits. In the agreed statement of facts reference is made to a list, certified from the General Land Office, of the odd-numbered sections and parts of sections lying within the conflicting place limits of the Sioux City and Milwaukee roads, and it is agreed that that list is correct according to the limits laid down on the map of 1887, "and correctly shows the area of each of said tracts." In the agreed

statement of facts reference is also made to another list, certified from the General Land Office, and it is stated to be a correct list of the odd-numbered sections and parts of sections within the place limits of the Sioux City road outside of the conflicting limits, "and the areas thereof," as defined and certified on the map of 1887.

These lists were objected to by the railroad company as immaterial and irrelevant. But we do not perceive any good reason why they are not competent as evidence — as much so as the diagram of 1867 and the lists based upon it. Surely it was competent for the land office, when determining whether the Sioux City company was entitled to additional lands, to ascertain, by careful remeasurement, the exact area of the odd-numbered sections covered by the grant of 1864, and thus determine whether the map furnished by the railroad company in 1867 was, in all respects, accurate. By examining the maps of 1867 and 1887 it was easy to perceive in what particulars they differed; and, by proof, to show which was correct. But the defendant took no proof to discredit the map of 1887, and rests this part of the case upon the general proposition that, after the lapse of so many years, the court should base its decree on the map of 1867, which was accepted by the government and was not questioned until the measurement of 1887 was made by the General Land Office. This view is, of course, entitled to great weight, and might be accepted, if the determination of this question of evidence and the acceptance of the measurement of 1887 would affect the rights of third parties to specific lands. The matter to be ascertained is the number of acres in each one of certain sections, the exterior boundaries of which are not in dispute. Now, it would seem that, as between the United States and the railroad company, and for the purpose of ascertaining the quantity in acres of public lands which the company earned, or could have earned, on account of the construction of the fifty miles of road, the latest official measurement of the area of the granted limits, not charged to have been fraudulently made, may be accepted as the best, if not conclusive, evidence.

It is said that a contrary view was announced in *United*

States v. *Hancock*, 133 U. S. 193, 196. That was a suit to set aside a patent based upon a decree confirming a claim to certain lands within specified boundaries. The court, following previous decisions, held that "when a *decree* gives the boundaries of the tract to which the claim is confirmed, with precision, and *has become final by stipulation of the United States, and the withdrawal of their appeal therefrom*, it is conclusive, not only on the question of title, but also as to the boundaries which it specifies." That was a case in which the rights of third parties were involved, and it is scarcely necessary to say that nothing we have said is in conflict with the principle settled in it.

Our conclusion, then, is that the Sioux City company, having failed to complete the entire road, for the construction of which Congress made the grant in question, was not entitled to the whole of the lands granted, but, at most, only to one hundred odd-numbered sections — as those sections were surveyed, whatever their quantity — for each section of ten consecutive miles constructed *and certified by the governor of the State;* and, that, according to the measurement of 1887, which is accepted as the basis of calculation, the railroad company had, prior to the institution of this suit, received more lands, on account of the fifty miles of constructed road, certified by the governor, than it was entitled to receive. Under this view, it is unnecessary to inquire whether the particular lands here in dispute should not have been assigned to the company, rather than other lands, containing a like number of acres, that were, in fact, transferred to it, and which cannot now be recovered by the United States, by reason of their having been disposed of by the company. If the company has received as much, in quantity, as should have been awarded to it, a court of equity will not recognize its claim to more in whatever shape the claim is presented.

It is proper to say in this connection that the United States in its bill alleges that the excess of lands received by the company was 1288.13 acres. We have found the excess to be 2004.89 acres. The bill also states that the lands in Dickinson and O'Brien Counties, here in dispute, aggregate 21,979.85

acres, and so the decree below assumes. The amount appears to be 21,692.18 acres, and it was so stated by Secretary Lamar. 6 Land Dec. 63. But these differences are immaterial on the present appeal, for we adjudge that although the lands in dispute were patented to the State for the use and benefit of the Sioux City company, the latter is not entitled to any of them, whatever may be the aggregate quantity of acres. It is not claimed by the company that any of these lands constitute a part of those actually certified to by the State.

7. The last contention of the appellants is that the claim of the United States ought not to prevail against the trustees in the mortgages executed by the railroad company, and which constitute the only security for *bona fide* holders of bonds secured by those mortgages. The first of these mortgages was executed August 1, 1871, before any lands were patented to the State, and before the railroad company had commenced the construction of its road; the second, on the 25th day of February, 1884, long after the Iowa legislature — which had authority under the act of 1864 to dispose of lands not earned — had declared the resumption by the State of the title to all lands patented to the State under the act of Congress, and not earned, and more than fifteen years after the railroad company accepted the act of the State that conferred upon it the benefits of the grant.

In reference to this claim by the trustees in those mortgages — assuming that they properly represent, in this matter, the holders of bonds — it is sufficient to say that the Secretary of the Interior was without authority to issue any patents to the State for the use and benefit of the railroad company, except for the fifty miles of road, certified by the governor to have been constructed in the manner required by the act of Congress. The trustees, and all holders of bonds secured by the mortgages, were bound to know the extent of the Secretary's authority under the act of Congress. The utmost that the trustees could claim is that the mortgages covered one hundred sections for each ten consecutive miles of road certified by the governor of the State to have been properly constructed. Lands to that extent have been received by the

Counsel for Parties.

company. The 85,457.40 acres of which the lands in dispute were part, and which remained with the State after transferring to the company 322,412.81 acres of the 407,870.21 acres patented to the State for the use of the company, were not, and could not legally have been, covered by the mortgages.

Upon the grounds stated in this opinion, we adjudge that the decree below did not prejudice any right of the appellants, or of either of them, and it is, therefore,

Affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *v.* UNITED STATES.

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

No. 47. Argued April 16, 17, 1895. — Decided October 21, 1895.

Congress, in the grant made by the act of May 12, 1864, 13 Stat. 72, had in view two railroads, one extending from Sioux City to the Minnesota line, the other from South McGregor by a named route to a point of intersection with the Sioux City road; and the Chicago, Milwaukee & St. Paul Railway Company, as the successor in right of the McGregor Company, is in no position to question the decree just affirmed in *Sioux City & St. Paul Railroad Company* v. *United States*, establishing the title of the United States as against the Sioux City Company, and is estopped by the decree in *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406, from making any claim whatever to the lands in controversy in this suit.

Neither of the railroad companies named in said act of May 12, 1864, could get the benefit of the moiety of lands granted for the building of the other, in the overlapping limits of the two roads, by reason of the failure of the other to construct its road.

THE case is stated in the opinion.

Mr. W. H. Norris for appellant.

Mr. Assistant Attorney General Dickinson for the United States.

Mr. William Lawrence for homestead and preëmption claimants.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

After the Circuit Court had announced its conclusions in the case of *Sioux City and St. Paul Railroad Company* v. *United States*, just decided, the Milwaukee company obtained leave to intervene as a defendant, and by cross-bill assert its right to the lands in Dickinson and O'Brien Counties, originally patented to the State of Iowa for the use of the Sioux City and St. Paul Railroad Company, and *within the conflicting place limits of the two roads*, but which the State held and never conveyed to that company, and which the court below found to be the property of the United States as against the Sioux City company and the trustees in the mortgages executed by it.

Such a cross-bill was filed before the entry in the court below of a final decree on the original bill, and the cause was left undetermined as to the claims asserted by the Milwaukee company in its cross-bill.

Benjamin Olson, Peter Anderson, and others, parties defendant in the original suit, intervened, with leave of the court, as defendants, and, by a cross-bill against the Milwaukee company and the Sioux City company, asserted rights to portions of the lands in controversy — having settled, they alleged, on such lands, under the laws of the United States, between the years 1881 and 1887, and made valuable improvements thereon.

The United States answered the cross-bill of the Milwaukee company, and also filed an amended bill, in which it prayed that by final decree its title to the lands awarded to it by the original decree as against the Sioux City company, be established and quieted as against the Milwaukee company.

The court below rendered a decree in favor of the United States on this amended bill, and dismissed the cross-bill of the Milwaukee company.

The cross-bill of Olson and others was dismissed without prejudice. This was done because the pleadings presented no issue as between the settlers and the United States; the cross-bill of the settlers being against the railroad companies only.

We are of opinion that the appellant has no reason, in law, to complain of the decree of the Circuit Court.

Although the act of May 12, 1864, would, if its title alone were consulted, furnish some slight ground for the contention that the object of the grant therein was to aid in the construction of "a railroad," its provisions plainly show that Congress had in view two railroads; one extending from Sioux City to the Minnesota line; the other from South McGregor, by a named route, to a point of intersection, in the county of O'Brien, with the Sioux City road.

The grant was of every alternate section, designated by odd numbers, for ten sections in width, "on each side of said roads," and, therefore, for the benefit of the roads separately. As decided in the other case, no part of the lands granted in aid of the construction of one road could be applied in aid of the other road. The act is to be interpreted as if Congress by one act made a grant to the State in aid of the construction of the Sioux City road on the route designated, and, by another and separate act, passed at the same time, made a grant to the State in aid of the construction of the other road from South McGregor to a point of intersection with the Sioux City road.

It appeared in the original case, and appears in the present case made by the cross-bill of the Milwaukee road — and Congress, in requiring an intersection of the two roads, must have anticipated such a condition of things — that because of the conflict between the two grants, it was impossible to set apart for each road every alternate odd-numbered section for ten sections in width on each side of every part of its located line. Consequently, in the suit brought against the Sioux City company by the Milwaukee company as the last successor to the McGregor Western Railroad Company, by a final decree framed pursuant to the directions given by this court in *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406, the lands within the conflicting lines were, prior to the institution of the present suit, partitioned between the two companies.

The claim of the Milwaukee company now is, that it is

entitled, under the act of May 12, 1864, to the lands involved in the present controversy, although by the decree in *Sioux City & St. Paul Railroad* v. *Milwaukee & St. Paul Railway*, and which is conclusive between those companies, they have been withheld from it upon the specific ground that they were never granted by Congress to aid in the construction of the McGregor or Milwaukee road, but were granted in aid of the construction of the Sioux City road and for no other purpose. If, as matter of law and fact, these lands were never granted for the benefit of the Milwaukee road, but were granted in aid of the construction of the Sioux City road, and for no other purpose, they could never — consistently with the act of Congress — have been used by the State for the benefit of the Milwaukee road. *Sioux City & St. Paul Railroad* v. *United States*, *ante*, just decided.

It is, therefore, of no concern to the Milwaukee company, as the successor in right of the McGregor company, what was done with them by the State, nor whether the United States legally reacquired title to them as against the Sioux City company. It is in no position to question the decree on the original bill establishing the title of the United States as against the Sioux City company, and it is estopped by the decree in the suit which it brought to make any claim whatever to these lands. If, as has been conclusively adjudged, the Milwaukee company was without title or claim as against the Sioux City company, no rights could subsequently accrue to it by reason of the decree declaring that these lands reverted to the United States by reason of the failure of the Sioux City company and of the State to construct the road over the entire route from Sioux City to the Minnesota line. As these lands were set apart exclusively for the construction of the Sioux City road, no failure to construct that road by the State or by the corporation charged with the duty of building it, could, in any case, without the assent of Congress, justify their being applied in aid of the construction of another and distinct road.

The defendant rests its claim in part upon the act of the Iowa legislature of February 27, 1878, c. 21. By that act

the State resumed all lands and rights theretofore granted to the McGregor and Sioux City Railway Company, the immediate successor of the McGregor Western Railroad Company, and conferred upon the Chicago, Milwaukee and St. Paul Railway Company (which succeeded, in right, the McGregor and Sioux City Railway Company) "all lands and rights of lands, whether in severalty, jointly, or in common, and including all lands or rights to lands or any interest therein or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants or roads made and described by the act of Congress hereinafter designated, [the act of May 12, 1864,] granted to the State of Iowa to aid in the construction of a railroad" from South McGregor to intersect with the road from Sioux City to the Minnesota line. It is contended that when it became certain that the Sioux City company had, by failure to construct its road within the time specified by the act of Congress, lost *its* right to the lands, the State, to which they had been patented specifically for the use and benefit of the Sioux City road, could pass to the Chicago, Milwaukee and St. Paul Company the title to any lands within the overlapping limits, that had not been, and could not, nor would not, be applied to the Sioux City road.

This position cannot be sustained upon any theory that would be consistent with the act of Congress. As we have already said in *Sioux City & St. Paul Railroad* v. *United States*, the grant of an equal undivided moiety of lands in the overlapping limits of two roads was a grant for the benefit of each road, of the particular moiety of lands dedicated by the act of Congress to its construction. Neither road could get the benefit of the moiety of lands granted for the building of the other road, by reason of the failure of the company constructing the latter road to earn *its* moiety of the lands. This results from the explicit declaration by Congress of the purposes for which the lands were to be used, and by express words, excluding all others. The provision that the lands "hereby granted shall be disposed of by said State for the purposes aforesaid only," precludes the idea that the State

could, without a breach of trust, apply lands for the benefit of one road that had been granted to aid the construction of another road.

Besides, it is manifest from the face of the act of the Iowa legislature of 1878 that there was no purpose to give the Milwaukee or McGregor road the benefit of any lands not granted to aid in its construction. For the language of that act was that "when said railroad [the McGregor road] shall have been built and constructed to the point of connection with the Sioux City and St. Paul Railroad, then and thereupon the governor of this State shall patent and transfer to said Chicago, Milwaukee and St. Paul Railway Company all the remaining lands belonging to or embraced in said grant *appertaining to their line of railroad*, including all or any part or moiety of the lands in said overlapping limits which, by the terms of said act of Congress, *appertain to their line of road.*" § 3.

It having been finally adjudged as between the Sioux City company and the Milwaukee company that these lands did not appertain to the latter road, there is no foundation for a suit by the Milwaukee company to compel the United States to surrender any title it may have or claim, however such title may have been acquired.

Decree affirmed.

SIOUX CITY AND ST. PAUL RAILROAD COMPANY *v.* COUNTRYMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 30. Argued April 16, 17, 1895. — Decided October 21, 1895.

At the time when the United States instituted the suit against the plaintiff in error which has just been decided, the plaintiff in error had no interest whatever in the 26,017.33 acres of land certified back to the United States by the governor of Iowa, pursuant to a statute of that State, and all such land was then subject to entry under the preëmption and homestead laws.

THE case is stated in the opinion.

Mr. George B. Young, (with whom was *Mr. J. H. Swan* on the brief,) for plaintiff in error.

Mr. M. B. Davis for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The history of the lands, of which those here in dispute form a part, is fully stated in the opinion just delivered in *Sioux City & St. Paul Railroad Co.* v. *United States.*

By reference to that opinion it will be seen that the only certificates given by the governor for the benefit of the Sioux City company were certificates showing the construction by it of fifty miles, or five sections of ten consecutive miles each; that, in 1872 and 1873, the Secretary of the Interior caused to be issued patents to the State for 407,870.21 acres, of which 322,412.81 acres were certified by the State to the company, the State retaining within its control 85,457.40 acres; that of the 322,412.81 acres 41,687.52 acres were awarded to the Milwaukee company, as successor in right of the McGregor Western Railroad Company, leaving with the Sioux City company 280,725.29 acres that it has disposed of, and about which no question is here made; that out of the 85,457.40 acres 37,747.89 acres were awarded to the Milwaukee company; and that of the 85,457.40 acres, 21,692.38 acres were those in dispute in *Sioux City & St. Paul Railroad Co.* v. *United States*, and 26,017.33 acres were formally relinquished and conveyed by the governor of Iowa, pursuant to the act of the Iowa legislature of March 27, 1884. Laws of Iowa, 1884, 78, c. 71; Laws of Iowa, 1882, 102, c. 107.

After this conveyance by the governor of Iowa, the question as to the disposition of these 26,017.33 acres came up for consideration in the Department of the Interior. Upon the hearing of this question, Secretary Lamar said: "The certification by the governor under this act was not made without an effort on the part of the railroad to prevent it. He was enjoined by the company, but the injuction was dissolved, and the cer-

tification followed. The company is still opposing reassertion of title by the United States, and is now here, by its president and by counsel, claiming in effect that the grant for the benefit of the company was one of quantity and not lands in place, and that, therefore, the company has earned the lands in question, notwithstanding they are outside of the fifty-mile terminal limits." The conclusion of the Secretary is thus stated: "I must conclude, after a careful examination of the matter as presented, that neither the State of Iowa nor the Sioux City and St. Paul Railroad Company ever had any title under the granting act of 1864 to the lands in question beyond the *prima facie* legal title which would appear from the face of the patents, which, so far as these lands are concerned, were improperly and illegally issued. This title, such as it was, had gone no further than the State, for it had not patented or certified the lands in question to the company. The State having relinquished and reconveyed to the United States such title as it had, I have no hesitation in concurring in your recommendation that the lands so certified and conveyed be restored to entry under the settlement laws of the United States. You will, therefore, treat them as public lands and they will be thrown open to settlement and entry, as are other public lands of the United States." 6 Land Dec. 47, 53.

By an order of the Interior Department made August 4, 1887, these 26,017.33 acres were restored to entry under the preëmption, homestead, and timber-culture laws of the United States. Entries were made September 12, 1887, as follows: By defendants in error, Lewis Countryman and Adam Phillips, respectively, under the homestead laws; and by defendants in error, Washington Royer and Basil D. Battin, respectively, under the preëmption laws.

The railroad company brought separate actions of ejectment in the District Court of Woodbury County, Iowa, against these persons, in which it asserted title to the lands so entered by the respective defendants. By stipulation of the parties the four cases were heard and determined together. Judgment in each case was rendered for the defendant, and upon

error to the Supreme Court of Iowa each judgment was affirmed.

For the reasons stated in the opinion in *Sioux City & St. Paul Railroad Company* v. *United States*, just decided, it must be held that the railroad company did not have, at the time those actions were instituted, any interest whatever in the 26,017.33 acres, or any of them, certified back to the United States by the governor of Iowa pursuant to a statute of that State. It had previously received its full complement of public lands under the act of May 12, 1864, on account of road certified by the governor of the State as having been constructed in accordance with the requirements of that act.

The judgment, in each case, is

Affirmed.

SWEET *v.* RECHEL.

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

No. 18. Argued December 14, 1894. — Decided October 21, 1895.

The authority of a legislature to enact provisions for taking private property for public use rests upon its right of eminent domain; and it is a condition precedent to its exercise that the statute conferring the power make reasonable provision for compensation to the owner of the land.

Unless the constitution of the State in which the lands are situated requires payment or tender of payment for land so taken for public use before the rights of the public therein can become complete, a statute which authorizes the taking of the property for public use and directs the ascertainment of the damages without improper delay and in a legal mode, and which gives the owner a right to judgment therefor, to be enforced by judicial process, is sufficient to transfer the title.

The act of the legislature of Massachusetts of June 1, 1867, c. 308, to enable the city of Boston to abate a nuisance, and for the preservation of the public health in said city, and which provided for the taking of certain private lands therein, and for their improvement, filling up, and complete draining, so as to abate an existing nuisance and preserve the health of the city, and which further provided for the payment of the cost of the lots so taken through judicial proceedings, was within the

Statement of the Case.

constitutional power of the legislature of that State, and the fee in said lands, when acquired by the city, passed to it under the act, and the previous owners ceased to have any interest in them, but were only entitled to reasonable compensation, to be ascertained in the manner provided by the act.

The real estate — the title to which is involved in the present writ of entry — formerly belonged to Peleg Tallman, Sen., of Maine, who died on the 12th day of March, 1840, having made a will which was duly admitted to record in that State, and a copy whereof was admitted to probate, May 10, 1841, in Suffolk County, Massachusetts, where the premises in controversy are situated.

The parcel of land in dispute, with other real estate, was devised to Henry Tallman, to hold for life, and at his decease to descend to his son Peleg Tallman, Jun. The devisee in remainder was born April 18, 1836, and died April 15, 1863, leaving two children, Frank G. Tallman and Peleg H. Tallman; also a widow, who subsequently intermarried with William A. Sweet, one of the plaintiffs in error.

The plaintiffs in error, who were the plaintiffs below and are citizens of New York, claim title under the will of Peleg Tallman, Sen.

The defendant, a citizen of Massachusetts, claims title under proceedings instituted by the guardian of the devisee in remainder in the probate court of Suffolk County, Massachusetts, by the order of which court, and in full compliance therewith, as is contended, the interest of Peleg Tallman, Jun., in certain real estate, including the lot in dispute, was sold in 1844 — Henry Tallman, the owner of the life estate, becoming the purchaser. In the same year the latter conveyed, with warranty, to Robert Knott who purchased in good faith at the price of $2900. In 1869, Knott conveyed by warranty deed to the defendant Rechel, for the sum of $4800 in cash or its equivalent. Rechel bought in good faith, for full value, without actual notice of any alleged defect in the title, and erected buildings and made improvements on the premises in dispute at a cost of $8575.

The defendant also claims that the title to the lot in con-

troversy was taken by the city of Boston in 1867 — the title being, at that time, apparently, in Knott — under a statute of Massachusetts, approved June 1, 1867, entitled "An act to enable the city of Boston to abate a nuisance existing therein, and for the preservation of the public health in said city." Laws of Mass. 1867, c. 308.

By reason of its grade being lower, and because it was incapable of being properly drained, the condition of the territory, of which the lot in controversy was a part, was such during the period between the years 1860 and 1870 as to endanger the public health. Various plans having been suggested for the raising of the grade and for the proper drainage of that territory, the legislature passed the act of June 1, 1867.

By that act it was provided that the city of Boston "may purchase or otherwise take the lands or any of them in said city, with the buildings and other fixtures thereon," situated within a certain defined district which included the lands here in dispute; that the "city shall within sixty days from the time they shall take any of said lands, file in the office of the registry of deeds for the county of Suffolk, a description of the lands so taken, as certain as is required in a common conveyance of lands," with "a statement that the same are taken pursuant to the provisions of this act, which said description and statement shall be signed by the mayor of said city;" that "*the title* to all land so taken *shall vest in the city of Boston*, and if any party whose land is taken shall agree with the said city upon the damage done to him by the said taking, *the same shall be paid to him by the said city forthwith.*" It was made "the duty of the city of Boston forthwith to raise the grade of said territory so taken or purchased, laying out and filling up the same with good materials, with reference to a complete drainage thereof, so as to abate the present nuisance and to preserve the health of the city." § 1.

Any person having an interest in the land taken, was at liberty, within one year after the same was taken, as well in his own behalf as in behalf of all other persons having estates therein, to file a bill in equity in the Supreme Judicial Court, in the county of Suffolk, setting forth the taking of

the complainant's land, the condition of the same in respect to its capacity for drainage, and whether the complainant claimed any and what damages against the city or the Boston Water Power Company, or other corporation or person, "by reason of any and what wrongful act or omission by their causing a diminution in the value of his land at the time of said taking, and praying an assessment of damages against such parties" — notice of such bill being given to the parties named therein as defendants, according to the course of courts of equity, and also public notice thereof, to all persons in whose behalf such bill was filed, to appear and become parties thereto, if they thought fit to do so. It was made the duty of the court to prescribe how such public notice should be given, and what length of time should be allowed for appearing and becoming a party to the suit. Any one interested who failed to appear and become a party within the time prescribed by the court was forever barred from recovering any damages on account of such taking. Each person appearing and becoming a party, having filed a written description of the land in which he claimed an estate, together with a plan thereof, so as clearly to distinguish the same from all other lands, was required to declare what estate he claimed therein. If he claimed that the value of said lands at the time of the taking was lessened by any unlawful act or omission of the city of Boston, or of the Boston Water Power Company, or of any other corporation or person, "so that the value of the land in its condition when taken would not be a just compensation for all the estate and rights of the party in and in reference to the same," he was also to state "what such injury is, and how and by whom the same had been, or is, caused, and what right or title of the party is violated, and what amount of damages in gross is claimed by him, as compensation therefor, from each of the parties defendant." § 2.

Other sections of the act provided for the appointment of commissioners to hear the parties, after due notice, to assess the value of the land taken, and to make report to the court of their doings. Any party aggrieved by the report might except thereto and have his exception heard as in a suit in

equity, or might apply for the framing of proper issues to be tried by a jury.

The seventh section provides: "When it shall be finally determined what amount of damages any party is entitled to recover against the city of Boston, or the Boston Water Power Company, or any other party defendant, a separate decree shall be entered accordingly and execution therefor shall be issued, without regard to the pendency of the claims of any other party or parties, or of other claims of such complainant."

The city council approved and spread upon its records an instrument reciting the act of 1867, and stating that, pursuant to its provisions, the city "has taken, and by these presents does take," a certain parcel of land "belonging to Robert Knott" — in whose name, as we have seen, the title then stood of record — "to have and to hold the same to the said city of Boston, its successors and assigns, to its and their sole use and behoof forever, agreeably to the provisions of the said act." This instrument was approved by the mayor, who certified that "the lands described in said instrument were and are taken pursuant to the provisions of the said act." Within sixty days of the taking of the land, to wit, on May 22, 1868, that instrument was filed in the Suffolk registry of deeds, and was fully recorded.

It was admitted at the trial that the city followed the provisions of the statute, and that the premises were held by the defendant under Knott and the city; also, that the city forthwith performed the duty imposed on it by the statute at an immense outlay; that "the grade of the land was raised and the buildings thereon, the territory was laid out and filled, a complete and effective system of drainage was provided, the nuisance abated, and the value of the land was greatly enhanced. The lot in suit was filled in to a depth of several feet, the buildings were raised and underpinned, and the value increased."

Subsequently, a settlement was had with the assignee of Knott, in relation to the taking of the land, and — Knott having executed a release — the city conveyed, by deed of

Argument for Plaintiffs in Error.

March 14, 1870, to the defendant Rechel, the deed reciting that the property had been previously taken by the city under the above act of 1867.

It was also admitted that no compensation was ever paid to the plaintiffs by reason or on account of any proceedings by the city under the act of June, 1867. And it was agreed that "in 1869 a bill in equity was brought under the statute, reported in 109 Mass. 438, the case being *Cobb* v. *Boston*, on behalf of Cobb and all others entitled to have damages assessed for this taking; that this case was pending in the Supreme Court until the April term, 1882; that it was ordered by the court in this case that the time from December 23, 1869, to first Tuesday of April, 1870, be allowed to parties to bill; that notice was published in papers on said order, and that such persons as came in had their damages assessed under said bill."

Mr. Thomas A. Jenckes, (with whom was *Mr. James E. Leach* on the brief,) for plaintiffs in error, argued, (1) that there were defects of procedure in the Probate Court and in the subsequent acts of the guardian to divest the ward of his title to this real estate; and (2) that the proceedings under the act of June 1, 1867, did not divest the plaintiff in error of his title. The view taken of the case by the court renders it unnecessary to notice the position of counsel with respect to the first of these points. In regard to the second be contended as follows:

The provisions in this act that the city shall take the land, that the title to the land taken shall vest in the city, that the owner shall agree with the city upon the damage done to him by the taking and the payment therefor, that in case the owner and city cannot agree, a mode for ascertaining payment is provided, by suit and appointment of commissioners to assess the damages, and an appeal to a jury, upon proper issues, are all inconsistent with the idea that the act was framed for the purpose of exercising the general police or superintending power over private property, which is vested in

the legislature, or in order to prohibit a use of it, which was deemed injurious to or inconsistent with the rights and interests of the public. If such were the object of the statute, there would be no necessity for the appointment of commissioners, — or for the provisions making compensation to those injured in their property thereby. Such enactments would be unusual in a statute intended only for a prohibition and restraint upon the appropriation or use of private property by its owners; but are the necessary and ordinary provisions where the legislature intend to exercise the right to take it for a supposed public use. *Talbot* v. *Hudson*, 16 Gray, 417.

It has been determined, by a course of decisions in Massachusetts, that the power of the legislature to pass this and similar acts lies in the provision of the Constitution, Part II, c. 1, art. 4, that, "full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without; so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth." *Dingley* v. *Boston*, 100 Mass. 544; *Lowell* v. *Boston*, 111 Mass. 454; *Turner* v. *Nye*, 154 Mass. 579.

If, therefore, the act of June 1, 1867, was passed under the authority "to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, — so as the same be not repugnant or contrary to this constitution" (as *Dingley* v. *Boston* decides,) and if this "provision above quoted does not authorize the legislature to take property from one person and give it to another, nor to take private property for public uses without compensation," (*Turner* v. *Nye*,) then it is submitted that no title to the land in question ever passed to the city of Boston, because no compensation was ever actually paid to the owners.

It is urged by the defendant that the act in question, because it provides a mode for ascertaining the amount of compensation, is constitutional, and to that proposition the plaintiffs in error make no dissent; but unless compensation for

the land taken and appropriated is actually made, no title passes; in other words, the plaintiffs in error assert that the title to the land did not *vest* in the city of Boston, unless compensation had, in a form to comply with the requirements of the constitution, actually been made. For it is a prime requisite that compensation shall be made for the appropriation of lands for public purposes.

It is incumbent on the party taking or his grantee to prove that this constitutional provision has been complied with, or else title derived under the act of condemnation will be invalid. The construction and application of this constitutional provision should be vigorously upheld in its full extent and fair meaning, as affording the only adequate security and protection to private property. *People* v. *McRoberts*, 62 Illinois, 38; *Stacey* v. *Vermont Cent. Railroad*, 27 Vt. 39; *Balt. & Susquehanna Railroad* v. *Nesbit*, 10 How. 395.

In all the cases which we have examined, where the fee of the condemned land has become vested in a municipal or other corporation, the compensation for the land taken has been made, and the courts have all declared such to be a constitutional prerequisite to the vesting of the title. In all where there have been attempts on the part of the former owners, although they have been paid the full value of the land taken, either to recover subsequently the land itself or to prevent the municipal or other corporation from selling or disposing of it, on the ground that the municipal or other corporation, upon an abandonment or vacation of the use for which it was originally taken, had no right to put the property to a different use than the one contemplated by the special act, compensation had been made. In no case, however, have we found that where compensation has not been made, has the title vested, either by virtue of the act of the legislature or by the taking and use of the land, without first having compensated the owner. *Water Works Co.* v. *Burkhart*, 41 Indiana, 364; *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234; *Coster* v. *New Jersey Railroad*, 23 N. J. Law, (3 Zabriskie,) 227; *De Varaigne* v. *Fox*, 2 Blatchford, 95; *Wheeler* v. *Rochester & Syracuse Railroad*, 12 Barb. 227;

Baker v. *Johnson*, 2 Hill, 342; *Heyward* v. *New York*, 7 N. Y. 314; *Bloodgood* v. *Mohawk & Hudson River Railroad*, 18 Wend. 9; *Walther* v. *Warner*, 25 Missouri, 277; *San Francisco* v. *Scott*, 4 California, 114; *Fox* v. *Western Pacific Railroad*, 31 California, 538; *Henry* v. *Dubuque & Pacific Railroad*, 10 Iowa, 540; *Ferris* v. *Bramble*, 5 Ohio St. 109; *State* v. *Graves*, 19 Maryland, 351; *Bonaparte* v. *Camden & Amboy Railroad*, Baldwin, 205; *Nichols* v. *Somerville & Kennebec Railroad*, 43 Maine, 359.

In *Kennedy* v. *Indianapolis*, 103 U. S. 599, the facts were these: An act of the legislature of Indiana, passed January 27, 1836, authorized the board of internal improvements to construct the Central Canal, and for this purpose to enter upon, take possession of and use any lands necessary for the prosecution and completion of the work; and provided that persons injured by what was done could claim damages, which were to be appraised in a certain way, but in making the appraisement the benefits resulting to the claimant were to be taken into consideration, and any sum found to be due was to be paid by the board, but no claim could be recovered or paid unless made within two years after the property was taken possession of. The board was also authorized to acquire, by donation or purchase for the State, the necessary ground for the profitable use of any water power that might be created by the construction of the canal, and to lease for hydraulic purposes any surplus of water there might be over and above what was required for navigation. Section 7, Art. 1, of the constitution of Indiana provided, "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without a just compensation being made therefor."

The canal was built, and the land involved in the suit was taken, but no compensation was ever made to the then owner. In 1850 the legislature passed an act to sell the canal, and the land in question was sold, and the question as presented, was the appropriation by the State sufficient to divest the owners of their title, and convey to the purchasers under the act of 1850 any title to the premises. The case was a bill in

equity brought to quiet the title to these lands by the grantees from the purchaser under the sale thereof by virtue of the act of 1850.

Chief Justice Waite says, in reviewing the Indiana cases: "But, so far as we have been able to discover, it has never yet been held that the title passed out of the owner until 'just compensation' had actually been made. In fact the decisions appear to have been uniformly to the effect that it did not." After referring to the New York and Maine cases he says: "Not to multiply cases further, it seems to us that on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him. . . . It is not contended that compensation in money was ever made for any of the land in dispute. . . . To hold that the title passed by mere appropriation, if no claim for damages was made within the two years, would be in effect to decide that if the State entered on land for a particular use and kept possession as against the owner for two years, it got a title in fee whether the property was ever put to the use or not. Such we cannot believe to be the law."

If possession of the property has been actually taken without compensation to the owner, then the owner becomes entitled to recover possession by an action of ejectment. *Doe* v. *Georgia Railroad and Banking Co.*, 1 Georgia, 524; *Gardiner* v. *Tisdale*, 2 Wisconsin, 153; *Weisbrod* v. *Chicago & Northwestern Railway*, 21 Wisconsin, 602; *Wager* v. *Troy Union Railroad*, 25 N. Y. 526; *Lezier* v. *New York Central Railroad*, 42 Barb. 466; *Nichols* v. *Lewis*, 15 Conn. 137; *McClinton* v. *Pittsburg, &c. Railroad*, 66 Penn. St. 404; *Chicago, Burlington &c. Railroad* v. *Knox College*, 34 Illinois, 195.

The fact that opportunity was provided in the act for compelling compensation is not sufficient, and there is no obligation imposed on the owner to resort to a legal tribunal to enforce payment.

Argument for Plaintiffs in Error.

The Circuit Court decided that the land was not taken under the right of eminent domain, but under the police power of the State. The case of *Bancroft* v. *Cambridge*, 126 Mass. 438, is cited in its opinion not as conclusive of the present case, but as illustrative that the present act was passed in exercise of the police power of the legislature, and that the act in question can be justified under that power. From a comparison of the act commented upon in that case, it will be seen that it is totally different from the act involved in this case. The act in *Bancroft* v. *Cambridge* was a regulation or restraint solely upon the owners in the use of their property, and it gave the municipality authority to raise the grade of the land, and made the expenses a lien or charge on the lands filled to be collected in the manner provided for the collection of taxes on real estate. In other words, it belonged to that class of cases, in which the owners of lands are required to make an improvement for the benefit of the public, and the whole expense thereof is charged to them. It is based, however, upon the theory that there is a consequent increase in the value of the owners' lands. See also *Dingley* v. *Boston*, 100 Mass. 544; *Hingham & Quincy Bridge and Turnpike Co.* v. *Norfolk County*, 6 Allen, 353; *Lowell* v. *Boston*, 111 Mass. 454. In this case there was a taking of property from an individual, and giving it to another without compensation, and no court has heretofore justified such a proceeding. It is contrary to the principle under which acts of the legislature in exercise of the police power have been passed. It is not the owner's use of the property which is destroyed, but the property itself which is taken. It is not a regulation of the use of the property under the maxim, "*sic utere tuo ut alienum non lædas*," but is a confiscation and appropriation of property without compensation.

In *Commonwealth* v. *Alger*, 7 Cush. 53, Chief Justice Shaw forcibly presented the difference between the exercise of the police power of the State and the assertion of its right of eminent domain. But in no case in Massachusetts has the police power been enlarged to include the taking of private property, except in case of forfeiture for crime. *Dingley* v.

Boston, 100 Mass., 544; *State* v. *Tewksbury*, 11 Met. 55; *Fisher* v. *McGirr*, 1 Gray, 1; *Talbot* v. *Hudson*, 16 Gray, 417; *Salem* v. *Eastern Railroad Company*, 98 Mass. 431; *Blair* v. *Forchand*, 100 Mass. 136; *Watertown* v. *Mayo*, 109 Mass. 315; *Young* v. *Blaisdell*, 138 Mass. 344; *Rideout* v. *Knox*, 148 Mass. 368.

Mr. Samuel J. Elder, (with whom was *Mr. Charles T. Gallagher* on the brief,) for defendant in error.

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

The grounds upon which the plaintiffs impeach the validity of the sale of 1844 are: That the notice required to be given of the proceedings in the Suffolk Probate Court was not shown to have been published as often as required, and, therefore, such jurisdiction of the ward was not acquired as authorized an order for the sale of his property; that the notice of the sale did not specify both the time and place of sale; that the guardian could only sell for money in hand, and was without authority to sell and convey and immediately take, as was done, a mortgage back for the purchase money; that no return of the proceeds of sale was ever made by the guardian; and that an affidavit setting forth the time and place of the sale was not filed by the guardian within the time prescribed by the statute.

But, obviously, the question to be first considered is whether an absolute title passed to the city of Boston. If the title passed in virtue of what was done under the act of 1867, it will become unnecessary to determine whether the sale made by the guardian of Peleg Tallman, Jun., in 1844 was invalid upon any of the grounds assigned by the plaintiffs. For, if that sale was, in itself, ineffectual to divest the title of the devisee in remainder, and if, at the time the city proceeded under the statute of 1867, the title was not, in law, in Knott or in the defendant Rechel, but in the children and widow of the devisee in remainder upon his death in 1863, the title nevertheless passed to the city, if the provisions of that statute

were followed, unless, as plaintiffs contend, the statute was unconstitutional and void.

The constitution of Massachusetts recognizes the right of each individual to be protected in his life, liberty, and property, according to standing laws; declares his obligation to contribute his share to the expense of such protection; and provides that "no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." And "whenever the public exigencies require, that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Mass. Const. Part 1, art. 10. The legislative department of the Commonwealth has, however, full power "from time to time to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this Commonwealth, and for the government and ordering thereof." Part 2, c. 1, art. 4.

The authority for the enactment of the statute of 1867 is found in these constitutional provisions. The territory of which the lot in controversy formed a part, was in such condition, for many years, as to require, or at least to justify, legislative interference under the power to ordain and establish wholesome and reasonable regulations conducive to the good and welfare of the people, and not inconsistent with the fundamental law of the Commonwealth. And no restrictions are imposed by the Massachusetts constitution upon the mode in which this power may be exerted, except that it is expressly required that the orders, regulations, and statutes prescribed by the legislature must not be repugnant to the constitution, and it was necessarily implied that the exercise of the power must have some real, substantial relation to the general good and welfare. But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in

favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed. *Talbot* v. *Hudson*, 16 Gray, 417, 422; *Fletcher* v. *Peck*, 6 Cranch, 87, 128; *Sinking Fund Cases*, 99 U. S. 700, 718.

We must, therefore, assume that the act of 1867 had for its real object the protection of the public health, and not the mere acquisition of the property in question for purposes of sale and profit, after it had increased in value by reason of the grade being raised. It is not alleged in the pleadings, nor was there any evidence tending to show, that the cost of raising the grade would have been so slight, compared with the real value of the property, that a due regard to the constitution demanded that the owner should have been given opportunity to raise the grade at his own expense, and retain the property in its improved condition. On the contrary, it appears that the public health justified prompt action and the use of such means as could be effectively supplied only by municipal authority acting under legislative sanction.

In *Dingley* v. *Boston*, 100 Mass. 544, 554–60, this act of 1867 was assailed upon various grounds. It was there adjudged that the statute authorized the property described in it to be taken by the city for public purposes; that its language imported a title in fee simple. The point was pressed that the legislature had assumed the power to declare the existence of a public nuisance on the land of the plaintiff, and that this was an exercise of judicial power because it charged him with an offence, and decided the question without giving him an opportunity to be heard, and then proceeded to deprive him of his land. But this point was overruled, the court holding that the statute did not regard him as an offender in any sense, because it gave him a right to compensation, not only for all damage occasioned by the taking of his land, but for its deterioration in value before the taking; that it regarded

him as an innocent person whose land was taken on the ground of public necessity in order to protect the health of the city; and that upon the facts stated, it was apparent that no indictment would lie against him, notwithstanding the nuisance, for it had been created by the acts of others which were beyond his control, and it was not in his power to remove it.

After observing that the work specified in the act was regarded by the legislature as a great public enterprise to accomplish a highly important object, one that needed to be prosecuted by legislative authority, and which could not have been dealt with by a judicial tribunal under any known forms of proceeding, the court proceeded: "Where the sanitary condition of a large city requires an interference with the real estate of a great number of persons, making expensive and essential changes in the condition and character of the land, a case is presented within that clause of the constitution which confers authority upon the legislature to make 'all manner of wholesome and reasonable laws, so as the same be not repugnant or contrary to this constitution.' Part 2, c. 1, § 1, art. 4. In *Hingham & Quincy Bridge and Turnpike Co.* v. *County of Norfolk*, 6 Allen, 353, Bigelow, C. J., says one of the main purposes of this clause was to vest in the legislature a superintending and controlling authority, under and by virtue of which it might enact all laws not repugnant to the constitution of a police and municipal nature, and necessary to the due regulation of the internal affairs of the Commonwealth."

In the same case it was objected, that as the act authorized the city to first take the land and thereby transfer to itself the fee without the consent of the owners, and as the only object of the legislature was to abate a nuisance, the act should only have granted power to occupy the land until its object was effected by raising the grade, which being done, the land should have been restored to the owners, applying the benefit received therefrom in offset to the damages. That objection was fully met. Conceding it to be true that the raising of the grade did not require an occupation of the

land for a great length of time, and that when the work was completed the nuisance was abated, and the land in a condition to be occupied by private persons, the court said: "But its condition will be greatly changed; almost as much as raising flats into upland. The former surface will be deeply buried under the earth that will have been brought upon it, and the changed condition is to be perpetual. If the old property is restored, the new property which has been annexed to it must go with it. This would be very unjust to the city, which has been compelled to incur the great expense of destroying the nuisance, unless the owner were required to make a reasonable compensation, which might be far beyond the amount of the damages to which he would be entitled. It would be difficult to adjust the matter; and in many cases it might operate harshly upon the owner to compel him to take and pay for the improvements. On the whole, therefore, the plan of compelling the city to take the land in fee simple, and the owner to part with his whole title for a just compensation, would seem to be the most simple and equitable that could be adopted; unless there is some objection on the ground that a fee simple is more sacred than an estate for life or years, or than an easement of greater or less duration. We can see no ground for regarding one of these titles as more sacred than another, or for regarding land as more sacred than personal property." Again: "Whether land be taken under the clause authorizing the making of wholesome and reasonable laws, or by virtue of the clause authorizing the appropriation of private property to public uses, it must in either case be left to the legislature to decide what quantity of estate ought to be taken in order to accomplish its purpose, and do the most complete justice to all parties. . . . The constitution provides for the protection of all private property, and it provides that when the public exigencies require that the property of any individual shall be appropriated to public uses, he shall receive a reasonable compensation therefor. But it leaves the legislature, without any restriction, express or implied, to decide in each case as it arises, what constitutes such exigency; and, if land is to be taken, what estate in it shall pass."

But the validity of the act of 1867 is questioned on the ground — not suggested in *Dingley* v. *Boston* — that it did not provide for compensation to be made to the owners of the property in advance of its actual appropriation by the Commonwealth.

Upon this point the defendant insists that the statute was enacted under the authority to ordain and establish laws and regulations reasonably adapted to secure the good and welfare of the people, and that statutes, having such objects in view, which deprive individuals of the control and use of their property, need not make provision at all for compensation to such individuals.

In support of this position reference is made to *Bancroft* v. *Cambridge*, 126 Mass. 438, 441. That case arose under a statute empowering the city of Cambridge to require the owners of certain lands to fill them to a prescribed grade in order to abate a nuisance. If the owners failed to do so, then the city was authorized to raise the grade, the expense thereby incurred to become a lien on the land filled. If any one gave due notice of his dissatisfaction with the assessment of the expense of raising the grade, the city was thereupon required to "take" the land, and, within a named time, file in the registry of deeds a description of it, together with a statement that it was taken under the statute. If the parties did not agree as to the amount of damage done by the taking, then the question of damage was to be determined by a jury, proper allowance being made for the improvement by reason of the grade of the land being raised.

The court said that the compensation to which the owner was entitled was the value of the land at the time of the taking, making due allowance for the improvement; that this excluded loss or inconvenience caused to the owner by proceedings prior to the taking; that the purpose of the statute was to give to each owner the right to elect whether he would pay the expenses of filling his land and retain his estate, or surrender his estate to the city for a fair compensation; and that the act gave no right either to the owner who surrendered, or to the owner who did not surrender, to recover for previous

loss or inconvenience. "Nor," the court said, "is the statute made unconstitutional by this construction. It is entitled an act to provide for the prevention and abatement of nuisances and the preservation of the public health. It was not passed to delegate the right of eminent domain, but under the police power of the Commonwealth. Laws passed in the legitimate exercise of this power are not obnoxious to constitutional provisions, merely because they do not provide compensation to the individual who is inconvenienced by them. He is presumed to be rewarded by the common benefits secured. Instances of its exercise are found in all quarantine and health regulations, and in all laws for the abatement of existing and the prevention of threatened nuisances. . . . The legislature is ordinarily the proper judge of the necessity for the exercise of the power, and there is nothing in this case which shows that this act was not required for the preservation of health and protection against a nuisance."

That case does not sustain the view advanced in behalf of the present defendant. The statement, in the opinion of the court, that laws passed in the legitimate exercise of the police power are not to be held objectionable, on constitutional grounds, *merely* because they do not provide for compensation to the individual inconvenienced by them, had reference only to so much of the statute then under examination as directed, in the interest of the public health, the abatement of the nuisance created by the condition of the property in question. The abatement of a nuisance — nothing more being required or done — is not of itself, and within the meaning of the constitution, an appropriation of property to public uses. The court did not say that private property, the condition of which was such as to endanger the public health, could be legally taken by the Commonwealth *and appropriated to public use* without reasonable compensation to the owner. On the contrary, the statute there under examination contemplated that if the owner did not himself abate the nuisance in the mode prescribed, then the *property*, the condition of which was the cause of the nuisance, was to be *taken* by the city, the owner to receive such damages as a jury awarded, allowance

being made for the improvement that resulted from the raising of the grade at the expense of the city. That case, it is manifest, proceeded upon the ground that the provisions of the constitution above quoted are to be construed together, so that if private property be actually taken and appropriated for public uses, although taken or appropriated in virtue of a statute having as its main or primary object the conservation of the public health, reasonable compensation must be made to the owner. This necessarily follows from the restriction imposed by the constitution to the effect that statutes passed in the exercise of the police power of the Commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is, that the owner of private property, *appropriated to public uses*, shall receive a reasonable compensation therefor. And it was so appropriated when the city took the fee, and thereby acquired a right to sell the property after it was improved, and put the proceeds into its treasury. *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y. 234, 244.

Undoubtedly, the State, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. For, as said by Chief Justice Shaw in *Commonwealth* v. *Alger*, 7 Cush. 53, 84, "it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall be so regulated that it be not injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." This, the court said, was not the power of eminent domain, but rather

the police power, "the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same."

When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain — a right vital to the existence and safety of government. But it is a condition precedent to the exercise of such power that the statute make provision for reasonable compensation to the owner.

The difference between an act passed with exclusive reference to the police power of the State, without any purpose to take and apply property to public uses, and a statute like the one here involved, which, for the general good, ordains and establishes regulations declaring the existence of a nuisance created by the condition of particular property, and, *in addition*, and as the best mode of accomplishing the end in view, authorizes the same property to be appropriated by the public, is illustrated by *Commonwealth* v. *Tewksbury*, 11 Met. 55, 59. That case related to a statute of Massachusetts, which, for the protection of the harbor of Boston, forbade, under penalties, the removal of any stones, gravel, or mud from any of the beaches in the town of Chelsea. The court, observing that all property was acquired and held under the tacit condition that it should not be so used as to injure the equal rights of others, or to destroy or greatly impair the public rights and interests of the community, said that "a law prohibiting an owner from removing the soil composing a natural embankment to a valuable, navigable stream, port or harbor, is not such a taking, such an interference with the right and title of the owner, as to give him a constitutional right to compensation, and to render an act unconstitutional which makes no such provision, but is a just restraint of an injurious use of the property, which the legislature have authority to make."

The principle is also illustrated by the case of *Turner* v. *Nye*, 154 Mass. 579, 581, 582. That case involved the validity of a statute authorizing the flowage of certain lands or flats, upon prescribed terms and conditions, for the purpose of creating and raising a pond for the cultivation of useful fishes. Referring to the constitutional provision giving power to enact all manner of wholesome and reasonable laws for the general good, (Const. Mass. Part 2, c. 1, art. 4,) the court in that case said: "The provision above quoted does not authorize the legislature to take private property from one person and give it to another, nor to take property for public uses without compensation, nor wantonly to interfere with private rights. These are always to be carefully guarded and protected. But of necessity cases will arise where there will or may be a conflict of interests in the use or disposition of property, and questions may and will come up affecting the public welfare in regard to the use which shall or shall not be permitted of certain property." *Salem* v. *Eastern Railroad Co.*, 98 Mass. 431, 437.

But must compensation be actually made or tendered in advance of such taking or appropriation? Is it not sufficient, in order to meet the requirements of the constitution, if adequate provision be made for compensation?

The constitutions of some of the States expressly require that compensation be first made to the owner before the rights of the public can attach. But neither the constitution of Massachusetts nor the Constitution of the United States contains any such provision. The former only requires that the owner "shall receive a reasonable compensation;" the latter, that private property shall not be taken for public use "without just compensation." Reasonable compensation and just compensation mean the same thing.

In *Haverhill Bridge Proprietors* v. *Essex County Commissioners*, 103 Mass. 120, 124, the court said: "The duty of paying an adequate compensation, for private property taken, is inseparable from the exercise of the right of eminent domain. The act granting the power must provide for compensation, and a ready means of ascertaining the amount.

Payment need not precede the seizure; but the means for securing indemnity must be such that the owner will be put to no risk or unreasonable delay."

A leading case upon this point is *Connecticut River Railroad* v. *Franklin County Commissioners*, 127 Mass. 50, 52, 54, 55, 56. That case arose under a statute of Massachusetts authorizing the manager of a railroad owned by the Commonwealth to take land for a passenger station to be used by that and other railroads, and providing no other mode of compensation to the owner than that the land should be paid for out of the earnings of the railroad. The statute was held to be void.

The court said: "It has long been settled by the decisions of this court, that a statute which undertakes to appropriate private property for a public highway of any kind, without adequate provision for the payment of compensation, is unconstitutional and void, and does not justify an entry on the land of the owner without his consent" — citing among other cases *Boston & Lowell Railroad* v. *Salem & Lowell Railroad*, 2 Gray, 1, 37. Again: "Statutes taking private property for a public highway, and providing for the ascertaining of the damages, and for payment thereof out of the treasury of the county, town or city, have often been held to be constitutional. But, in the cases in which it has been so held, the liability to pay the damages rested upon the whole property of the inhabitants of the municipality, and might be enforced by writ of execution or warrant of distress, or by mandamus to compel the levy of a general tax. The rule has not been extended to cases in which only a special fund was charged with the payment of the damages, and the municipality had no power to levy a general tax to pay them." "When," the court said, "private property is taken directly by the Commonwealth for the public use, it is not necessary or usual that the Commonwealth should be made subject to compulsory process for the collection of the money to be paid by way of compensation. It is sufficient if the statute which authorizes the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the Com-

monwealth, and authorize the governor to draw his warrant therefor."

Much stress was placed by counsel in that case upon the admitted fact that the earnings of the railroad owned by the Commonwealth would probably be sufficient to meet and extinguish all claims for damages for lands taken. But that, the court well said, fell short of the constitutional requirement that the owner of property shall have prompt and certain compensation, without being subjected to undue risk or unreasonable delay.

In the later case of *Brickett* v. *Haverhill Aqueduct Co.*, 142 Mass. 394, 396, the language of the court was that "a statute which attempts to authorize the appropriation of private property for public uses, without making adequate provision for compensation, is unconstitutional and void."

In view of these authorities, it is clear that as the constitution of Massachusetts does not require compensation to be first actually made or tendered before the rights of the public, in the property taken or applied, become complete, the requirements of that instrument are fully met where the statute makes such provision for reasonable compensation as will be adequate and certain in its results. It is equally clear that an adequate provision is made when the statute, authorizing a public municipal corporation to take private property for public uses, directs the regular ascertainment, without improper delay and in some legal mode, of the damages sustained by the owner, and gives him an unqualified right to a judgment for the amount of such damages which can be enforced, that is, collected, by judicial process.

Substantially the same principles have been announced by this court when interpreting the clause of the Constitution of the United States that forbids the taking of private property for public use without just compensation. In *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 659, it was suggested that the act of Congress there involved violated the Constitution of the United States in that it did not provide for compensation to be made to the plaintiff before the defendant entered upon lands taken for the purpose of constructing

its road over them. This objection was not sustained. The court said: "The Constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain, and adequate provision before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the company is required to pay into court double the amount of the award to abide its judgment; and, that being done, the company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain, and adequate to secure the just compensation to which the owner is entitled. The plaintiff asks, what will be its condition, as to compensation, if, upon the trial *de novo* of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is if, by the terms of the act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter — having made the required deposit in court — is authorized to enter upon the land pending the appeal, and to proceed in the construction of its road. But clearly [under the act of Congress] the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, [and under that act,] the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and being paid the title passes from the owner."

In *Kennedy* v. *Indianapolis*, 103 U. S. 599, 603, cited by the plaintiffs, the controlling question was whether the owner of certain lands, taken under an Indiana statute for a public object, had been divested of his *title*. And that question depended upon the construction of the clause of the state constitution, providing "that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Const. Indiana, 1816, art. 1, § 7. It should be here stated that the Indiana statute Rev. Stat. Indiana, 1838, p. 337, c. 55 contained no clause expressly declaring at what stage of the proceedings the owner's title should be divested. Necessarily, therefore, it was held that, under the Indiana constitution, the owner was not divested of title until he was compensated. After referring to adjudged cases in that and other States, this court, speaking by Chief Justice Waite, said: "Not to multiply cases further, it seems to us that both on principle and authority the rule is, under such a constitution as that of Indiana, that the right to enter and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but the title does not pass from the owner without his consent until just compensation has been made to him."

But that case by no means controverts the doctrine that the legislature may authorize a municipal corporation to take, for public use, at the outset, the absolute title to specific private property, if either the statute under which that is done, or a general statute, recognizes the absolute right of the owner, upon his property being taken, to just or reasonable compensation therefor, and makes provision, in the event of the disagreement of the parties, for the ascertainment, by suit, without unreasonable delay or risk to the owner, of the compensation to which under the constitution he is entitled, and to a judgment in his favor, enforceable against such corporation in some effective mode, so that the owner can certainly obtain the amount of such compensation. The Massachusetts statute of 1867, unlike the Indiana statute,

expressly declares that from the moment the property was taken in accordance with its provisions, the title should be vested in the city of Boston; that the city should thereupon proceed forthwith with the work of raising the grade; and that the owner should have the right, for the prompt enforcement of which adequate provision was made, to obtain reasonable compensation for his property.

Numerous authorities have been cited which, it is supposed, are in conflict with the views we have expressed. But a careful examination will show that the cases cited are distinguishable from those to which we have referred.

In *Baltimore & Susquehanna Railroad* v. *Nesbit*, 10 How. 395, 398, 399, it was said that it was the payment or tender of the value assessed by the inquisition that gave title to a railroad company that had taken private property for its road, and, consequently, without such payment or tender, no title could pass. But it was so declared because, by the very terms of the statute, the company was entitled to the estate and interest of the owner in the land condemned *when* it paid or tendered the value so ascertained.

In *Bloodgood* v. *Mohawk & Hudson Railroad*, 18 Wend. 9, 17, 18 — which was a case of private property taken for a railroad company — Chancellor Walworth said that the payment of the damages awarded, or the deposit of the amount as prescribed, was in the nature of a condition precedent, not only to the acquisition of the legal title to the land, but also to the right to enter and take permanent possession of the land for the use of the corporation. But that was said with reference to a statute providing that upon the payment of the damages awarded, with the costs of the appraisement, or upon the deposit of the amount in a bank in a named city to the credit of the owner, of which notice should be given, the railroad company should "be deemed to be seized and possessed of the fee simple of all such land or real estate as shall have been appraised." That the chancellor did not hold to the doctrine that payment or tender of payment must in every case precede the divestiture of the owner's title, is clear from the preceding parts of his opinion. He said: "It certainly was

not the intention of the framers of the constitution to authorize the property of a citizen to be taken and actually appropriated to the use of the public, and thus to compel him to trust to the future justice of the legislature to provide him a compensation therefor. The compensation must be either ascertained and paid to him before his property is thus appropriated, *or an appropriate remedy must be provided, and upon an adequate fund;* whereby he may obtain such compensation through the medium of the courts of justice if those whose duty it is to make such compensation refuse to do so." "The public purse, or the property of the town or county upon which the assessment is to be made, may justly be considered an adequate fund. He has no such remedy, however, against the legislature to compel the passage of the necessary laws to ascertain the amount of compensation he is to receive, or the fund out of which he is to be paid."

So, in *People* v. *Hayden*, 6 Hill, 359, 361, Chief Justice Nelson said: "Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as it respects the State itself, that, at least, certain and ample provision must be first made by law, (except in cases of public emergency,) so that the owner can coerce payment through the judicial tribunals or otherwise without any unreasonable or unnecessary delay." See also *Brinckerhoff* v. *Wemple*, 1 Wend. 470, 471, 472; *Rogers* v. *Bradshaw*, 20 Johns. 735, 741; *Baker* v. *Johnson*, 2 Hill, 342, 347.

In *Stacey* v. *Vermont Cent. Railroad*, 27 Vermont 39, the court said that the railroad company derived no title to the condemned land nor any easement growing out of it, and acquired no right to enter upon it or exercise ownership over the same, until it paid the damages awarded to the owner, or deposited the money as prescribed by the statute. The reason given for this was that the statute expressly provided that that should be done before any right in the land accrued to the company.

The case now before us differs from all, or nearly all, of

those cited by the plaintiffs in this, that in the latter the statute, under which the property was taken, either expressly, or by necessary implication, made the payment or tender of the compensation awarded to the owner of the property appropriated to public use, a condition precedent to the acquisition of title by the party at whose instance the property was taken; whereas, in the present case, the statute vests the title in the city of Boston from, at least, the time it filed in the office of the registry of deeds a description of the lands taken by it describing them with as much certainty as is required in a common conveyance of lands, and stating that the same were taken pursuant to the provisions of the statute. As soon as they were so taken, the city — invested from that time with the title — had the right forthwith to raise the grade, and could not throw the property back upon the former owner, or compel him to pay the cost of raising the grade; and the owner became from the moment the property was taken absolutely entitled to reasonable compensation, the amount to be ascertained without undue delay, in the mode prescribed, and its payment to be assured, if necessary, by decree against the city, which could be effectively enforced.

We are of opinion that, upon both principle and authority, it was competent for the legislature, in the exercise of the police powers of the Commonwealth, and of its power to appropriate private property for public uses, to authorize the city to take the fee in the lands described in the statute, prior to making compensation, and that the provision made for compensating the owner was certain and adequate.

It results that, as a title to the lands here in question passed to the city of Boston when such lands were actually taken in the mode prescribed in the statute of 1867, the persons who were then the owners, whoever they were, had thereafter no interest in them, but were only entitled to reasonable compensation.

If the proceedings in the probate court of Suffolk County were so defective that the title of the ward was not legally divested by the sale in 1844 — upon which question it has become unnecessary, in the present case, to express any opin-

ion — nevertheless, the title passed, under the act of 1867, to the city of Boston, when, following the provisions of that statute, it took these lands. In this view, no action can be maintained by the plaintiffs to recover the land under the title of the owner as that title existed prior to the acquisition of the property by the city.

The judgment is affirmed.

BORGMEYER, Administrator, *v.* IDLER.

ERROR TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 582. Submitted October 15, 1895. — Decided October 28, 1895.

Colorado Central Mining Co. v. *Turck*, 150 U. S. 138, affirmed and applied to this case upon the points: (1) that when the jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction was invoked; and (2) that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case.

The mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under a treaty with a Foreign Power, providing for the submission of claims against that Power of arbitration, does not in any way draw in question the validity or the construction of that treaty.

BORGMEYER, administrator of the estate of Alexander Chataing, deceased, under letters granted September 14, 1892, brought an action September 15, 1892, against William Idler and John W. Hazeltine, administrators *de bonis non* of the estate of Jacob Idler, deceased, in the Circuit Court of the United States for the Eastern District of Pennsylvania, averring that he was a citizen of the State of New Jersey and that the defendants were citizens of the State of Pennsylvania.

Plaintiff's statement of claim or declaration, filed September

22, alleged the recovery by Jacob Idler, after prolonged litigation, of a judgment against the Republic of Venezuela in September, 1832, and that throughout the litigation Chataing was Idler's attorney and counsel, and that he had advanced Idler the sum of 4400 pesos. The statement then continued thus: "Thereupon, after obtaining said judgment, the said Jacob Idler executed in favor of said Chataing, in consideration of his then past services and advances, two promises in writing, expressed in the Spanish language, a copy of each of which, bearing date at Caracas, together with a translation of each, is hereby appended, marked respectively B and A. By the first of these, dated September 25, 1832, the said Jacob Idler promised to pay to the said Chataing ten per cent (10%) of the amount of said judgment at such time and in such manner as Venezuela should make payment upon the latter; by the second, dated January 9, 1833, he further promised to repay to the said Chataing, out of the first money which should be paid by Venezuela upon said judgment, the said four thousand four hundred (4400) pesos. After very great and unlooked for delays upon the part of Venezuela in satisfying the said judgment, it was made the basis of awards against the Republic in favor of the said Jacob Idler, and the defendants, by certain mixed commissions, authorized thereto by the United States and that Republic in the years 1868 and 1890; and under said awards, since September 3, 1890, and up to the present date, Venezuela has paid to, and to the order of, the said Jacob Idler, or the defendants, by instalments as awarded, a portion of the said judgment, deducting from which portion certain legitimate expenses by the latter incurred in obtaining said awards, there has as yet come to the hands of said Jacob Idler or the defendants, in all, ninety-three thousand nine hundred and eighty-six dollars and sixty-five cents ($93,986.65) for principal and interest;" and plaintiff claimed to recover a commission of ten per cent under the paper of September 25, 1832, and a balance due on the advance of 4400 pesos.

Defendants filed an affidavit of defence, setting up as to the ten per cent commission, that the judgment was annulled in

1839 by the highest court in Venezuela and no payment had ever been made thereon; that Chataing died August 30, 1836, and Idler employed other agents to endeavor to obtain payment of the claim, and that after Idler's death, May 26, 1856, William Idler continued these efforts and employed other agents and counsel; that an award was made in favor of Idler and his associates in 1868 by a mixed commission created under a treaty of 1866, and that in 1871 there was paid by the Department of State of the United States, under this award, $17,696.98, and in 1876 the further sum of $20,225.12; that by a treaty of June 4, 1889, all the awards were reopened and a mixed commission appointed under that treaty which heard and determined, in the city of Washington in 1890, the validity of the claim of Idler and his associates *de novo;* that no claim was made before this commission for or on account of any interest in this award by Chataing or his estate; that the commission reopened the award made under the treaty of 1866 and heard and decided as to the validity of the claim, reduced the award, and made a division between all who, the court decided, had interests therein; that from 1833 to 1891 no claim or demand of any nature was made by Chataing in his lifetime, nor after his death, against Idler in his lifetime or his associates; nor was any claim or demand of any nature or kind against the estate of Idler, or against his associates, made by the estate of Chataing or any person for his estate or heirs, for or on account of the claims in this suit until 1891, a period of fifty-eight years; and defendants set up the bar of the statute of limitations, payment, etc.

At the trial the Circuit Court directed a verdict for plaintiff, reserving all the questions of law, and subsequently entered judgment in favor of plaintiff on the verdict. Defendants took the case on error to the Circuit Court of Appeals for the Third Circuit, which reversed the judgment of the Circuit Court and entered judgment for the defendants, notwithstanding the verdict, on the points of law reserved at the trial. The Court of Appeals held as to the claim for commission that the record disclosed the fact that Idler's judgment in Venezuela had been annulled by the courts of that country, and that

nothing had been paid by Venezuela on the footing of that judgment, and the court observed:

"Idler's judgment having thus been swept away, the consideration for his promise to pay to Chataing a commission thereon wholly failed. The event upon which the commission was to be paid never occurred. Very certain is it that nothing was paid by Venezuela to Idler or to the personal representatives on the footing of the judgment. To apply then the writing of September 25, 1832, to the state of affairs brought about more than half a century afterwards by the award made by a mixed commission acting under an international treaty would be a perversion of the paper, and would work the greatest injustice to the estate of Idler. The whole situation had radically changed without his fault. His judgment had utterly failed him. The allowance of the claim was ultimately secured by the action of an independent tribunal proceeding upon original grounds. The favorable result was due to the long continued personal exertions of Idler and his associates and the services at a vast expense of other agents and attorneys. All this the evidence shows. To the result neither Chataing nor his personal representatives contributed aught.

"We do not consider it a matter of any moment that in pressing their claim before the mixed commissions Idler's administrators relied upon the Venezuelan judgment of 1832. That judgment was a part of the complicated transactions between their intestate and the government of Venezuela. It perhaps afforded some evidence of the correct amount of the indebtedness in dispute. Nor is it important how the majority of the commissioners may have regarded that judgment. Neither its correctness nor its existence was recognized by either of the treaties. The mixed commissions were to decide with reference to the merits of all claims submitted to them. The opinion filed on behalf of the majority of the last commission shows that the Idler claim was investigated and sustained by them upon its original merits. They were at liberty, had the facts so warranted, to have found against the claim altogether. That they awarded the face amount of

the judgment with interest is of no consequence. The reasons for their award are immaterial here. The important fact is that whatever moneys Venezuela paid on the Idler claim were paid on the awards of the mixed commissions and not otherwise. Construing the paper of September 25, 1832, with reference to its terms, its subject-matter, and the situation of the parties, we conclude that no payment or satisfaction of the judgment therein recited was ever made or realized within the true intent of the parties, and that the stipulated commission to Chataing never became payable. It follows, therefore, that the reserved questions of law appertaining to this branch of the case should have been decided in favor of the defendants."

As to the claim for a balance of the 4400 pesos and interest, the Circuit Court of Appeals held that the proof of its actual payment by Idler in his lifetime was remarkably full considering its antiquity, and that its non-assertion for over fifty years was inexplicable except upon the hypothesis of full payment in the lifetime of Chataing, but that independently of the proof of payment, the presumption of payment arose after the lapse of twenty years, and that even on plaintiff's own view the moneys received in 1871 on the first award were in excess of the 4400 pesos, and consequently that presumption had operated against the debt before suit was brought. The opinions of the Circuit Court and of the Circuit Court of Appeals are reported in 65 Fed. Rep. 910. A writ of error to this court having been allowed, the cause came on on a motion to dismiss or affirm.

Mr. M. Hampton Todd and *Mr. Edward H. Weil* for the motion.

Mr. Samuel F. Phillips, *Mr. Frederick D. McKenney*, and *Mr. Henry R. Edmunds* opposing.

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

In *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, we held that when the original jurisdiction of a Circuit Court of the United States is invoked upon the ground that the deter-

mination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. It was there said: "By the judiciary act of March 3, 1891, it is provided that the review by appeal, by writ of error, or otherwise, from existing Circuit Courts shall be had in this court, or in the Circuit Courts of Appeals thereby established, according to the provisions of the act regulating the same. The writ of error in this case was brought under section six of that statute, which provides that 'judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States,' and also that 'in all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs.' 26 Stat. 826, 828, § 6, c. 517. If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different States."

Applying these principles to the case at bar, it is apparent that this writ of error will not lie. The jurisdiction of the Circuit Court was invoked by the issue of summons September 15, 1892, followed by the filing of the statement of claim or declaration, September 22, 1892, and therefrom it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, and it did

not appear therefrom that jurisdiction was rested or could be asserted on any other ground.

By the fifth section of the act of March 3, 1891, appeals or writs of error from the District and Circuit Courts of the United States to this court were allowed, among other cases, "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question," but it was not suggested in the summons and statement of claim that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the Circuit Court or the Circuit Court of Appeals. It is unreasonable to contend that any question was raised directly touching the validity or construction of either of the treaties of Venezuela by plaintiff's statement of claim or by clear and necessary intendment therefrom, and, under the rule laid down in *Turck's case*, this writ of error must be dismissed. The jurisdiction of the Circuit Court depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. Had the case been brought to this court from the Circuit Court the writ of error could not have been entertained.

We do not think, indeed, that the validity or construction of either of the treaties was actually drawn in question, and the ground of the judgment really involved neither such validity nor construction.

The point was long ago settled in principle upon the record of a suit in a state court.

The twenty-fifth section of the judiciary act of September 24, 1789, c. 20, 1 Stat. 73, 85, provided that a writ of error would lie to a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, "where is drawn in question the validity of a treaty or statute of . . . the United States, and the decision is against their validity, . . . or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United

States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission."

In *Gill* v. *Oliver*, 11 How. 529, 545, on error to the Court of Appeals of Maryland, it was held, where an award had been obtained under a treaty with Mexico and both parties claimed under the award, that the introduction of the treaty and the award merely as part of the history of the case did not in any way involve the validity of the treaty or its construction and that the writ of error could not be maintained. See *Williams* v. *Oliver*, 12 How. 111; *Baltimore & Potomac Railroad* v. *Hopkins*, 130 U. S. 210, 225.

Writ of error dismissed.

CALIFORNIA *v.* HOLLADAY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 566. Submitted November 1, 1895. — Decided November 11, 1895.

This case is dismissed for want of jurisdiction, on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65; *Beatty* v. *Benton*, 135 U. S. 244; and *Eustis* v. *Bolles*, 150 U. S. 361; and cases cited.

MOTION to dismiss. The action was brought on behalf of the people of California to remove buildings and fences of the defendants from what was claimed to be a public park. The defendants were in possession of the land, under claim of title, and had been for many years.

The complaint alleged that a certain piece of land (describing a tract four blocks in extent, including the part thereof here in dispute) " was heretofore, to wit, on the eleventh day of March, A.D. 1858, by the lawful owner and proprietor thereof, lawfully dedicated to public use as a public square, by the name of 'Lafayette Park,' and such dedication accepted by the public, and then was and still is laid down upon the official

map of said city and county as a public square as aforesaid:" that the defendants had erected fences within said public square, which enclosed, and were the means of excluding plaintiffs from, a certain piece or parcel of said public square (describing the land in dispute), and that defendants had erected and maintained a dwelling-house and other permanent improvements within and upon the premises, which interfered with and hindered the use by the public of said public square, and which were accordingly public nuisances, and the prayer was that they be abated, etc. The defendants answered, denying that the land ever was dedicated; admitting their occupation of the six fifty-vara lots in dispute, and their intention to keep out the public; and as special defences they pleaded three judgments in bar and estoppel. One of the judgments so pleaded was against the people of the State of California, and two of them was against the city and county of San Francisco. The actions in which those judgments were made in each instance involved the same land and the same question of dedication as here in dispute; and the prevailing parties were these defendants or their predecessor in interest.

The trial court decided that each of the two judgments against the city and county of San Francisco was, as a plea a bar and as evidence conclusive against the claim of dedication made by the plaintiffs in the present action; and that the court was thereby precluded from again inquiring into the question or claim of dedication made by the plaintiffs in this action. That decision was affirmed by the Supreme Court of the State.

To that judgment this writ of error was sued out by the State; and the defendants moved to dismiss it for want of jurisdiction, on the ground that no Federal question was involved. On behalf of the State of California it was contended that a Federal question was involved, as follows: "The Supreme Court of the State of California first decided that the land in controversy was in fact dedicated to the public, as alleged in the complaint, by the Van Ness Ordinance, the act of the legislature of California, and the act

of Congress of July 1, 1864, entitled 'An act to expedite the settlement of titles to land in California.' It then decided that the dedication was annulled by the judgments given in the suits of *S. W. Holladay* v. *The City and County of San Francisco*, and of *The City and County of San Francisco* v. *S. W. Holladay and others*. To these two records the people of the State of California were strangers. The State never consented that the city and county might submit the rights of the public to judgment in either of those actions. Hence they claim, that those judgments, so far as the people are concerned, were given without due process of law."

Mr. S. W. Holladay in person, and *Mr. E. Burke Holladay* for the motion.

Mr. W. F. Fitzgerald, Attorney General of the State of California, *Mr. William Matthews*, and *Mr. William Craig* opposing.

THE CHIEF JUSTICE: The opinions of the Supreme Court of California in this case are reported 68 California, 439; 93 California, 241; 102 California, 661. The motion to dismiss is sustained on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65; *Beatty* v. *Benton*, 135 U. S. 244; *Eustis* v. *Bolles*, 150 U. S. 361; and cases cited. And see *Hoadley* v. *San Francisco*, 94 U. S. 4; *Hoadley* v. *San Francisco*, 124 U. S. 639.

Writ of error dismissed.

SONN *v.* MAGONE.

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

No. 16. Argued October 15, 1895. — Decided November 11, 1895.

Lentils and white medium beans in a dry state, both mature and ordinarily used for food, though sometimes sold for seed, imported into New York in the years 1887 and 1888, were properly classified by the collector as

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vegetables under paragraph 286 of Schedule G of the act of March 3, 1883, c. 121, and as such were subject to a duty of ten per cent *ad valorem*.

Maddock v. *Magone*, 152 U. S. 368, affirmed to the point that "in construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal."

Whether the lentils and beans were properly classified by the collector was a matter for the court to decide.

THIS was an action to recover duties exacted by the collector of customs of the port of New York, and paid by the importers under protest in order to get their goods. The importations were made in the years 1887 and 1888, and the articles were invoiced in four of the six invoices as "white hand-picked Danubian beans;" in one as "haricots;" and in another as "Bohemia lentils."

By section 2502 of the customs duties act, passed March 3, 1883, 22 Stat. 488, c. 121, as a substitute for Title XXXIII of the Revised Statutes, duties were levied on the following articles: Under Schedule A, entitled "Chemical products," paragraph 94, "All barks, beans, berries, balsams, buds, bulbs, and bulbous roots and excrescences, such as nut-galls, fruits, flowers, dried fibres, grains, gums, and gum-resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds, (aromatic, not garden seeds,) and seeds of morbid growth, weeds, woods used expressly for dyeing, and dried insects, any of the foregoing of which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specifically enumerated or provided for in this act, ten per centum *ad valorem*." Par. 16. "Castor beans, or seeds, fifty cents per bushel of fifty pounds."

Under Schedule G, entitled "Provisions," paragraph 259: "Wheat, twenty cents per bushel." Par. 260. "Rye and barley, ten cents per bushel." Par. 263. "Indian corn or maize, ten cents per bushel." Par. 264. "Oats, ten cents

per bushel." Par. 285. "Potatoes, fifteen cents per bushel of sixty pounds." Par. 286. "Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum *ad valorem*." Par. 287. "Vegetables, prepared or preserved, of all kinds, not otherwise provided for, thirty per centum *ad valorem*."

Under Schedule N, entitled "Sundries," Par. 452: "Hemp seed and rape seed, and other oil seeds of like character, other than linseed or flaxseed, one quarter of one cent per pound." Par. 465. "Garden seeds, except seed of the sugar beet, twenty per centum *ad valorem*." Par. 466. "Linseed or flaxseed, twenty cents per bushel of fifty-six pounds; but no drawback shall be allowed on oil cake made from imported seeds."

By section 2503 the following articles were exempted from duty:

Par. 636. "Drugs, barks, beans, berries, balsams, buds, bulbs, and bulbous roots and excrescences, such as nut-galls, fruits, flowers, dried fibres; grains, gums, and gum-resin; herbs, leaves, lichens, mosses, nuts, roots, and stems; spices, vegetables, seeds aromatic, and seeds of morbid growth; weeds, woods used expressly for dyeing, and dried insects, any of the foregoing of which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act."

Par. 760. "Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds except medicinal seeds not specially enumerated or provided for in this act." Par. 761. "Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States Botanical Garden." Par. 778. "Seed of the sugar beet." Par. 808. "Tonquin, Tonqua or Tonka beans."

The importations were classified by the collector as vegetables under paragraph 286 and subjected to duty accordingly; while the importers claimed that they should have been classified as seeds under paragraph 760 and admitted free. The Circuit Court directed a verdict for the defendant, and judg-

ment having been rendered thereon, this writ of error was brought.

Mr. Henry Edwin Tremain, (with whom was *Mr. Mason W. Tyler* on the brief,) for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

These articles were not string beans or beans in the pod, but mature beans in a dry state, consisting of two varieties, lentils and white medium beans. It appeared that the main use of both lentils and beans was for food, though sometimes they were sold for seed, and that they were never bought and sold under the name of vegetables or under the name of seeds, but simply as beans or lentils, as the case might be. Some evidence was adduced to the effect that although the seed, root, or top of the plant might properly be called a vegetable if green, yet that if the article were mature and dried, it thereupon ceased to be a vegetable and became a seed. But, as the Circuit Judge well said, the testimony did not deal in the commercial designation of the article or what it was called in trade and commerce, but only tended to show how the witnesses thought it should be classified. It is true that one of the plaintiffs stated that if a customer inquired for a certain kind of field bean, he would ask him whether he wanted the "field pea bean," or "the seed of the field pea bean," or "the seed of the white medium bean," or what kind of beans he wanted; and that they imported the seeds of the lentil and the seeds of the bean, though they did not import the seed of the wheat plant, of the rye plant, or of the oat plant. It would be absurd to regard this as tending to establish a commercial designation.

In construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former

prevail over the latter, it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal. *Maddock* v. *Magone*, 152 U. S. 368.

The articles were known in trade and commerce as lentils and beans. They did not come within the paragraphs of the tariff, specially enumerating certain beans and seeds, or referring to inedible beans, seeds, and vegetables; but the words "seeds" and "vegetables" are employed in other paragraphs, and it is conceded that these articles fell under the one or the other. The word "seeds," as found in paragraph 760 in the free list, is joined with "plants, trees, shrubs, and vines," the obvious intention being to encourage agriculture, horticulture, and arboriculture by facilitating seeding and transplanting, and the words being applicable to seeds used for seeding purposes — in common understanding, for propagation. The word "vegetables" is found in paragraph 286, under the heading "Provisions," and in common parlance applies to articles of food. The predominant use of lentils and beans is for food, and as so used they are commonly called vegetables, although they may be regarded botanically as seeds, and may sometimes be used for seeding purposes. Under such circumstances, ordinary use, not occasional or subsequent use, furnishes the guide for classification. *Maillard* v. *Lawrence*, 16 How. 251; *Worthington* v. *Robbins*, 139 U. S. 337; *Magone* v. *Heller*, 150 U. S. 70. The words "seeds" and "vegetables" are words of common speech, and there is no room here for the contention that they had acquired a special signification by usage or had a scientific, different from the popular, meaning. Whether the articles were properly classified as vegetables was a matter for the court to decide. The interpretation of words of common speech is within the judicial knowledge and matter of law. *Marvel* v. *Merritt*, 116 U. S. 11; *Nix* v. *Hedden*, 149 U. S. 304; *Cadwalader* v. *Zeh*, 151 U. S. 171; *Saltonstall* v. *Wiebusch*, 156 U. S. 601.

As stated by counsel for the government, a verdict should

not be directed where, before the meaning of the statute can be known, it is necessary to learn from conflicting evidence the controlling use of the article in question; or its similitude to some other article; or the values of its component materials; or its weight and fitness; or whether labor is necessary to fit it for use by the consumer; or its commercial designation; but we have no such case before us.

We entirely concur with the Circuit Court in the course pursued, which was in harmony with the ruling in *Robertson* v. *Salomon*, 130 U. S. 412. There practically the same question was raised, that is, whether beans were free of duty as seeds or dutiable at ten per cent as vegetables, and Mr. Justice Bradley, in delivering the opinion of the court, after stating that beans were seeds in the language of botany and natural history, but not in commerce or in common parlance, said: "On the other hand, in speaking generally of provisions, beans may well be included under the term 'vegetables.' As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced. But, on the trial, the parties deemed it important to introduce a great deal of testimony. The court, however, did not allow the defendant to prove the common designation of beans as an article of food. . . . The common designation as used in every-day life, when beans are used as food, (which is the great purpose of their production,) would have been very proper to be shown in the absence of further light from commercial usage. We think that the evidence on this point ought to have been admitted. In addition to this, the court told the jury that 'the commercial designation of the article, or what the article is called in trade and commerce, or the name bean, has nothing to do with the question.' We think the court erred in this instruction. The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. . . . But if the com-

mercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred both in its charge and in the exclusion of the evidence offered; especially as, without any evidence, and with the common knowledge which we all possess, the court might almost have been justified in directing a verdict for the defendant." In this case the court was not only almost but altogether justified in such direction, and while there are expressions in that opinion which have been laid hold of as qualifying the general rule as to judicial knowledge, they must be treated as induced by the state of the record, and are not to be regarded as having that effect.

Many exceptions were taken to the exclusion and admission of evidence, and to the refusal of the court to give instructions asked on plaintiff's behalf, but we find no reversible error in either of the rulings thus questioned and they need not be discussed.

Judgment affirmed.

THORN WIRE HEDGE COMPANY *v.* WASHBURN AND MOEN MANUFACTURING COMPANY.

WASHBURN AND MOEN MANUFACTURING COMPANY *v.* THORN WIRE HEDGE COMPANY.

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

Nos. 57, 58. Argued April 29, 30, 1895. — Decided November 11, 1895.

The parties to these suits having had extensive dealings founded upon mutual agreements and arrangements respecting the manufacture of and licenses to manufacture patented articles, and having had serious misunderstandings touching their accounts, came to an agreement whereby the Thorn Company, in consideration of the sum of $10,000 paid to it by the Washburn and Moen Company, released and discharged the latter from all claims and demands of every kind and nature whatso-

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ever, which it had or could have against that company for and on account of any moneys, properties, or valuable things which the Washburn Company had received from any persons in settlement for damages or profits accruing to it, on account of infringements committed upon any letters patent, and also on account of any moneys which it had received by way of bonuses or premiums paid to it by parties receiving licenses from it; and discharged and released the Washburn Company from any obligation to account to the Thorn Company for any sums which it might thereafter receive in settlement of claims for damages for infringements prior to the date of that agreement, or for moneys which it should thereafter receive for bonuses or premiums for licenses. The parties worked under this agreement for several years, the Washburn Company paying and the Thorn Company receiving, without objection, from time to time considerable sums as royalties, etc., due thereunder, the Washburn Company settling with parties from whom the royalties were due, sometimes receiving cash in full, sometimes notes, and sometimes compromising on receipt of a lesser sum. After the lapse of about eight years the Thorn Company filed its bill in equity to set aside the agreement and the settlements made under it, claiming that it was entitled to a much larger sum than it had received; and the Washburn Company in its answer denied this claim and filed a cross-bill claiming to recover from the Thorn Company large sums which it had been obliged to yield to licensees in compromising settlements with them. *Held*,

(1) That the agreement released the Washburn Company from claims for damages due at its date, but received subsequent thereto, and from claims for royalties due on its own products, or products of its licensees sold prior to its date;

(2) That under the circumstances disclosed it was not open to the Thorn Company to claim that $10,000 was not a sufficient consideration for such release;

(3) That the Thorn Company, by receiving, for so long a period, royalties as accruing and receipting for them as collected without challenging the accounts rendered, and by its delay in setting up claims for moneys received by the Washburn Company before the date of the agreement, and its delay in contesting settlements and compromises made by that company, must be deemed to have acquiesced in the construction put upon the contract by the Washburn Company, and to have assented to its settlements with licensees; and that the evidence showed no want of diligence or good faith by the latter company in this respect;

(4) That the Washburn Company was not entitled to recover the sums claimed in its cross-bill.

In the year 1875 the Washburn and Moen Manufacturing Company, a Massachusetts corporation doing business at Worcester, Massachusetts, was engaged extensively in the

manufacture of wire. Having had its attention directed to barbed fence wire, an article then little known or used, the company determined to begin the making of it, conceiving that the future demand for such wire might serve to increase the output of its mill. There being no machine then in use for making barbed wire by steam power, the company contracted with H. W. Putnam, of Bennington, Vermont, for the invention of one; and in the fall of 1875 such a machine was made in accordance with Putnam's plans, and a patent for it granted to him on February 15, 1876. The rights of Putnam in the invention were purchased by the company on September 28, 1875, the consideration being the sum of 25 cents per 100 pounds on all barbed fence wire that might thereafter be made by the company and its licensees, the company reserving the right, however, to cease the payment of such sums by paying at any time a sum of money which, added to the amounts previously paid, should equal $150,000.

The persons engaged in the barbed wire business in the spring of 1876 were J. F. Glidden and I. L. Ellwood, of De Kalb; Jacob Haish, of De Kalb; H. B. Scutt, of Joliet, and Charles Kennedy, of Aurora, all of the State of Illinois; Doolittle & Co., (licensees of Kennedy,) of Bridgeport, Connecticut, and the Thorn Wire Hedge Company, a corporation organized under the laws of Illinois, and having its place of business at Chicago.

Various patents had been granted for barbed fence wire and machines for making the same, and of these J. F. Glidden, I. L. Ellwood, and Charles Kennedy owned the W. D. Hunt reissued patent No. 6976, dated March 7, 1876, and the L. B. Smith reissued patent No. 7137, dated May 23, 1876; J. F. Glidden and I. L. Ellwood owned the J. F. Glidden patent, No. 157,124, dated November 24, 1874, and the J. F. Glidden reissued patents, No. 6913 (division A), dated February 8, 1876, and No. 6914 (division B), dated February 8, 1876, being divisions of a reissue of an original patent, No. 150,683, dated May 12, 1874; Charles Kennedy owned the Charles Kennedy patents, No. 153,965, dated August 11, 1874, and No. 164,181, dated June 8, 1875; Jacob Haish owned, besides other patents,

the Jacob Haish patent, No. 167,240, dated August 31, 1875; and the Thorn Wire Hedge Company owned the Michael Kelly reissued patent, No. 6902, dated February 8, 1876, and the Michael Kelly reissued patents, No. 7035 (division A), dated April 4, 1876, and No. 7036 (division B), dated April 4, 1876, being divisions of a reissue of an original patent, No. 84,062, for an improvement in "metallic fences," dated November 17, 1868. Of the machine patents, the Washburn and Moen Manufacturing Company owned the Putnam patent; J. F. Glidden and I. L. Ellwood owned the J. F. Glidden and P. W. Vaughan patent, No. 157,508, dated December 8, 1874; and the Thorn Wire Hedge Company owned the E. W. Mitchell patents, No. 172,760, dated January 25, 1876, and No. 173,491, dated February 15, 1876.

On May 10, 1876, the Washburn and Moen Manufacturing Company purchased the interest of J. F. Glidden in the said Hunt, Smith, and Glidden wire patents, and in the Glidden and Vaughan machine patent, paying him therefor the sum of $60,000, and agreeing to pay him, in addition, 25 cents per 100 pounds on all wire manufactured and sold under those patents after the date of the purchase; and on the 23d of the same month the company bought of Kennedy his own patents, and his interest in the Hunt and Smith patents, the consideration being the payment to him of 25 cents per 100 pounds on all wire that should thereafter be manufactured and sold under the patents in which the company, by this purchase, acquired his interest, until the aggregate of the amounts paid should equal $100,000.

At the same time that the Washburn and Moen Manufacturing Company purchased the interest of Glidden in the patents, it purchased also his interest in the manufacturing business of Glidden and Ellwood, and a new partnership was formed for the purpose of making barbed fence wire at De Kalb, Illinois, under the style of I. L. Ellwood & Co.; C. F. Washburn, as trustee of the company, becoming a partner with Ellwood.

On July 3, 1876, the company purchased of the Thorn Wire Hedge Company the said Kelly patents, agreeing to pay for them, as appears by a contract in writing executed by the com-

panies on that date, the sum of $37\frac{1}{2}$ cents per 100 pounds upon all barbed fence wire which the Washburn and Moen Manufacturing Company should manufacture and sell and cause to be manufactured and sold, under the said (Kelly) patents, or any one of them, and also upon all barbed fence wire which might be manufactured and sold by others under any license which might be granted by it under the said patents, or any one of them, for which pay should have been received by such licensees, for and during the term of the said patents. It was agreed, as further appears by the written contract, that the Washburn and Moen Manufacturing Company should keep separate and accurate accounts of the entire product manufactured and sold under the said patents, and of the part of the product for which they should actually receive pay in any form; that the Washburn and Moen Manufacturing Company should enter upon the manufacture of barbed fence wire under the said patents, and should use reasonable and diligent efforts "to supply the demand for this article" throughout the country, and should also use proper and reasonable diligence in prosecuting infringers of the said patents, or any of them, to the end that the said patents might be fully enforced and sustained; that the consideration received by the Thorn Wire Hedge Company for the said patents was to be the payment to them of the percentage upon sales as above specified, and that if at any time the Washburn and Moen Manufacturing Company should, for any reason whatever, discontinue permanently the manufacture of barbed fence wire under the said patents, then the said patents should be retransferred to the Thorn Wire Hedge Company within ninety days from the receipt of a written demand from it for such retransfer; that the Thorn Wire Hedge Company should assign all its interest in all claims for damages and profits for past infringements of the said several patents and each of them; and that the Washburn and Moen Manufacturing Company might prosecute in the name of the Thorn Wire Hedge Company all suits that they might wish to institute against past infringers of the said several patents, or any of them. The agreement also contained, among other provisions, the following: "Said Washburn and Moen

Manufacturing Company, party of the second part, agrees that three-eighths of one cent per pound shall be paid on all the barbed fence wire which was made by Glidden and Ellwood and I. L. Ellwood & Company, from the dates of the several reissue patents aforesaid up to the date hereof; and also the same amount per pound upon all wire upon which they shall recover from past infringers of said reissue patents, or either of them, under any suit or suits which they may hereafter institute and prosecute to final judgment, or which may be settled without judgment by payment of royalty by the defendants."

At the same time, July 3, 1876, the Thorn Wire Hedge Company assigned the said Mitchell patents to the Washburn and Moen Manufacturing Company, and the latter granted to the former a license to use the Mitchell machines, under the Mitchell patent, at a single shop or factory in Chicago, or elsewhere, and a license to manufacture and sell the forms of wire described in the Kelly patents at a single shop or factory in that city, or elsewhere after giving thirty days' notice of intention to remove.

The Washburn and Moen Manufacturing Company and I. L. Ellwood & Company began the manufacture and sale of barbed fence wire in the spring of 1876. The rights which the company asserted under the patents acquired by it were not at once generally acquiesced in, and the making and selling of barbed fence wire was for a time carried on by a few persons without the company's authority. Licenses were granted on December 7 and 18, 1878, to the Ohio Steel Barb Fence Company, of Cleveland, Ohio, and to H. B. Scutt, doing business as H. B. Scutt & Co., (successor to the Joliet Wire Fence Company,) of Joliet, Illinois. In granting these licenses the company released all claims it might have against the licensees on account of damages for past infringement of its patents. The company granted no other licenses until January, 1881.

Some matters of dispute having arisen between the Thorn Wire Hedge Company and the Washburn and Moen Manufacturing Company as to the time in which payments were to be made on wire previously made by the firm of Glidden &

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Ellwood, and the suggestion having been made by the latter company that the former, in using the Mitchell machines, was infringing the Putnam patent, and it being thought for some reason that the 37½ cents per 100 pounds provided for in the agreement of July 3, 1876, should be reduced, the companies, on December 2, 1878, executed another agreement, as an amendment and supplement to that of July 3, 1876. This contract made provisions adjusting the matters of difference between the companies, and reduced the amount required to be paid to the Thorn Wire Hedge Company to 25 cents per 100 pounds. A portion of the contract was as follows: "The party of the first part [the Washburn and Moen Manufacturing Company] hereby covenants and agrees that it will make monthly reports of the amount of wire reported as sold by each of its licensees, said report to be on or before the 15th of each and every month, and to embrace the report of the sales of the licensees made during the previous month, or any month not previously reported, and that it will pay over to the party of the second part, or its legal representatives, the money that it collects of said licensees, that is to be paid to the party of the second part hereto quarterly; that is to say, on or before the last day of each January, April, July, and October it will pay the party of the second part such proportion of the money that it has received from its licensees during the previous quarter as royalties, as one-fourth of a cent per pound is to the entire amount per pound which said licensees agree to pay as royalty; and the said party of the second part hereby agrees to waive and does hereby relinquish any and all claim on the said first party, for royalties on barbed wire, made by its licensees, which it may so fail to collect, after using due diligence and lawful means to collect the same, but in that case the party of the first part shall make a report to the party of the second part of all such royalties as it shall fail to collect and from whom due and the cause of such failure to collect, and the first party agrees to make each of its licensees agree to pay it for the second party one-quarter of a cent a pound on all the barbed wire it makes and sells during the term of the Kelly patents, and to use its best endeavors to

collect the same." The agreement also provided: "And the party of the second part also releases all right and claim it may have on the party of the first part and the parties hereinafter named on account of the infringement of any of the Kelly patents, so called, which it formerly owned, by the Ohio Steel Barb Fence Company, Jacob Haish, the Joliet Wire Fence Company and H. B. Scutt, and James Ayres and Alexander C. Decker and their customers on account of selling their respective barbed wires; provided, however, the party of the first part makes a settlement with them or either of them whereby it condones or waives the past royalties or damages in the settlement of the suits which it, or it and I. L. Ellwood now have pending against them or either of them, then and in that case the party of the second part releases as aforesaid as to the party so settled with."

About the time such reduction was made in the amount required to be paid to the Thorn Wire Hedge Company, reduction was also made by another of the assignors, thus reducing the aggregate of the amounts to be paid by the Washburn and Moen Manufacturing Company to the assignors of the patents, to 87½ cents per 100 pounds.

As already shown, the Washburn and Moen Manufacturing Company, a short time after the execution of the agreement, granted licenses to the Ohio Steel Barb Fence Company and H. B. Scutt & Co. Other persons engaged in making barbed wire refused, however, to become licensees and pay royalty, and in January, 1879, they formed an association for the purpose of resisting the efforts which, by litigation and other means, were being made by the company to stop infringement by them of the patents, and to induce them to take licenses. The Ohio Steel Barb Fence Company reported sales of wire under its license for the months of March, April, and May, 1879, but refused to pay royalties after April 30, 1879. H. B. Scutt & Co. continued to manufacture under their license, and paid royalty at the rate of 137½ cents per 100 pounds.

On August 7, 1879, the Washburn and Moen Manufacturing Company and the Thorn Wire Hedge Company executed a third agreement, supplemental to the contracts of July 3,

1876, and December 2, 1878, a part of which was as follows: "That for the purpose of increasing the manufacture and sale of the barbed fence wire mentioned in said agreements and license, and inducing other parties to pay royalties thereon, it is mutually agreed by the parties hereto that the party of the second part [the Thorn Wire Hedge Company] will reduce the amount to be paid to it per pound by the party of the first part on all barbed fence wire hereafter manufactured or caused to be manufactured and sold by it, as provided by the said contracts of July 3, 1876, and December 2, 1878, to 15 cents per 100 pounds; and it is understood and agreed that all the provisions and agreements hereinbefore referred to, relating to the price per pound in said agreements agreed to be paid by the party of the first part to the party of the second part, shall apply to the price per pound to be paid as reduced by this supplemental agreement; and the said party of the first part agrees to reduce the royalty or amount required to be paid to it on account of its ownership of any patents used in the manufacture of said wire by it or its licensees, or persons manufacturing or selling barbed fence wire under its authority, or who shall hereafter be so licensed by it, to at least seventy-five cents per hundred pounds of said barbed fence wire so manufactured and sold."

Reductions were also made by other assignors, so that after August 7, 1879, the aggregate of the amounts required to be paid by the Washburn and Moen Manufacturing Company on account of the various patents was $68\frac{3}{4}$ cents per 100 pounds.

On August 10, 1879, the company reduced the royalty payable to it by H. B. Scutt & Co. to $81\frac{1}{4}$ cents on general sales and $56\frac{1}{4}$ cents on Texas sales; and on August 1, 1880, a further reduction was made to 50 cents on all sales of that firm.

The company and I. L. Ellwood continued the prosecution of suits against alleged infringers of the patents, and in 1880 about fourteen of these suits were pending in the Circuit Court of the United States for the Northern District of Illinois, and were being contested by the association of unlicensed manufacturers. A final decision was reached in the cases on De-

cember 15, 1880, by which the Kelly reissued patent No. 6902 and the Hunt and Glidden patents were held valid, and subsequently decrees were entered referring the causes to a master to ascertain and report the amounts of damages. The Kelly reissued patent No. 7035, in so far as it may have been relied upon to affect the cases, was held invalid. It did not appear to the court that any of the defendants had infringed the Smith patent, and, therefore, the question of its validity was not passed upon. *Washburn & Moen Manufacturing Co.* v. *Haish*, 4 Fed. Rep. 900; 7 Fed. Rep. 906. After this decision was announced, a large number of manufacturers recognized the rights asserted by the company under the patents, and applied to it for license. C. F. Washburn, vice-president of the company, and I. L. Ellwood met the applicants in the city of Chicago, and in January and February, 1881, granted more than forty licenses. Each of the persons licensed paid to the company either damages for past infringement, estimated at 60 cents per 100 pounds on all wire that the licensee had theretofore made, or a bonus of from five to ten dollars for each ton of wire authorized to be made in any one year thereafter, and in most instances both damages and bonus were exacted. The company also required all the licensees, except two, to assign to it whatever patents they owned.

The licenses were printed, and were all of the same form, with the exception of the date, name of licensee, and amount of tonnage authorized; and each license provided for the payment of royalty at the rate of three-fourths of a cent per pound. The printed form contained this provision: "And the royalty to be paid under this license shall not be greater than that charged to any other party licensed after the —— day of December, A.D. 1880, under the said several letters patent, or any of them, hereinbefore mentioned by date and number, by said Washburn and Moen Manufacturing Company; that is, if said Washburn and Moen Manufacturing Company shall hereafter conclude to and does license any other party or parties during the continuance of this license to manufacture and sell barbed fence wire in the United States and Territories, and this license is confined to the United States and Territories, under

said letters patent, or any of them, hereinbefore mentioned by date and number, at a less sum per pound than —— of a cent, then and thereafter the royalty to be paid by said ——— to said Washburn and Moen Manufacturing Company under this license shall be the same as such reduced royalty."

When the licenses were granted in January and February, 1881, the Thorn Wire Hedge Company requested Mr. C. F. Washburn to furnish it a statement of the amount of the said back damages and bonuses. The statement not being furnished, the Thorn Wire Hedge Company wrote to the Washburn and Moen Manufacturing Company on March 21, 1881, saying: "We have not yet received report of sales for month of February, nor official notice of settlements with the various infringing companies, all of which should be due by the 15th of this month." On the 28th of the same month the Washburn and Moen Manufacturing Company answered: "With reference to official notice of settlements with the various infringing companies, etc., we shall defer making our report on that subject until we have had an opportunity of seeing Mr. Ellwood here in Worcester, which will happen early in the month of April." On April 25, 1881, the Washburn and Moen Manufacturing Company wrote again, to the effect that it was under no obligation to pay the Thorn Wire Hedge Company any part of the damages recovered or received in settlement for past infringement of the patents, or any part of the bonus money. The Thorn Wire Hedge Company answered this letter on May 16, 1881, and submitted an opinion of its counsel, asserting its right to a share in the back damages.

More correspondence followed, but no adjustment of these differences between the companies was made until one was effected by an agreement in writing, dated July 27, 1881. About that time there was also made what is called in the testimony and argument the "Haish settlement," which it is necessary here to explain.

Jacob Haish was one of the persons against whom the above-mentioned decision was rendered at the suit of the Washburn and Moen Manufacturing Company on December

15, 1880. An interlocutory decree had previously been entered requiring Haish to pay into court an amount equal to 75 cents per 100 pounds on all wire made by him after such decree, and up to the entry of the final decree against him he had paid into court the sum of $25,000. After the decision of December 15, 1880, Haish, instead of following the course which was adopted by all the other defendants and making settlement with the company, refused to become its licensee, and continued his opposition to its patents. This placed the company, as it believed, in a very unfavorable position. Haish was the owner of patents which the company feared might be used by him to disturb its licensees, and for various reasons his persistent opposition was regarded by the company as harmful to its interests. Vigorous efforts were therefore made to effect a settlement with him, and these resulted in a statement by him on June 29, 1881, of the terms upon which a settlement would be consented to. The terms proposed by him were, (1) a release from all claims for back damages; (2) each party to pay his own costs in court; (3) a license to him from the company to manufacture 10,000 tons of barbed wire a year, he to pay royalty at the rate of 75 cents per 100 pounds; (4) he to assign to the company all his patents and to receive from it an exclusive license under the same; (5) the company to pay him for the patents $10,000 cash and 75 cents per 100 pounds on all barbed wire made by himself up to the quantity of 4000 tons per year, and the further amount of 25 cents per 100 pounds on the next 4000 tons made by him in the same year.

Under date of July 26, 1881, the Washburn and Moen Manufacturing Company and Haish executed an agreement in writing which recited that the company had theretofore granted divers licenses under several patents for barbed wire fencing and for machinery; that Haish claimed that some of the licensees were infringing patents owned by him; that for the better protection of the licensees it had become necessary for the company to acquire, by purchase from Haish, all his patents relating to barbed fencing or machinery; that Haish, by an instrument of even date, had assigned all his patents to

the company, and transferred to it all claims for damages for the infringement of the same, and had released the company and its licensees from all claims for damages for infringement of the patents; and that Haish had accepted from the company a license to manufacture 10,000 tons of barbed fence wire annually under the patents, and agreed to pay royalty at the rate of 75 cents per 100 pounds. The agreement then provided, in substance, that the company or its licensees should manufacture 8000 tons of barbed fence wire every year until February 27, 1894, and should pay to Haish until that time 75 cents per 100 pounds on the wire so manufactured not exceeding 4000 tons each year, and a further sum of 25 cents per 100 pounds on any excess over that quantity each year, up to, but not exceeding, 4000 tons; that the company should not, however, pay any part of such sum to Haish unless he should first have paid or tendered to the company, as royalty under the license accepted by him, a sum equal to the amount which he should demand from the company.

On the same day Haish assigned his patents to the company and Ellwood, and released the company and its licensees and Ellwood from all damages for past infringement of the same, and received from the company the license mentioned in the recitals of the above agreement, and exclusive licenses to make barbed fence wire and to use machinery under the patents assigned by him to the company without paying royalty. He also received from the company and Ellwood a release of all claims for damages for infringement of their patents, and the company paid him the sum of $10,000 in cash, and agreed that he might withdraw the money which he had paid into court, and that decrees might be entered in the suits against him for nominal damages without costs.

Under date of July 27, 1881, the Thorn Wire Hedge Company executed the following instrument: "In consideration of the sum of one dollar and other valuable considerations to it paid, the Thorn Wire Hedge Company, a corporation duly organized under the laws of the State of Illinois, and located at the city of Chicago, in said State, does authorize the Washburn and Moen Manufacturing Company and Isaac L. Ellwood

to make settlement with Jacob Haish, of De Kalb, Illinois, for his past infringements of the letters patent for barbed fence wire and machinery for making the same, owned by the Washburn and Moen Manufacturing Company, or by said company and Isaac L. Ellwood, and to grant to the said Haish a license to manufacture and sell annually ten thousand tons of barbed fence wire under said patents, as provided in a proposed agreement between the Washburn and Moen Manufacturing Company and the said Jacob Haish, and assented to by Isaac L. Ellwood, (copies of which proposed agreement and license being hereto attached,) and does release the said Washburn and Moen Manufacturing Company from all its agreements with the said Thorn Wire Hedge Company, dated respectively July 3, 1876, December 2, 1878, and August 7, 1879, to account for any proportion of the moneys received from the said Jacob Haish whether in settlement of past infringements or for royalties hereafter paid under the said license, which may be required to be expended or remitted in the settlement with said Jacob Haish, or in payment of the consideration money for the transfer and conveyance of all the patent rights to letters patent and inventions, which are or shall be conveyed by the said Haish to the said Washburn and Moen Manufacturing Company and Isaac L. Ellwood, as provided in said proposed agreement."

On the same day that the settlement with Haish was consummated the companies, as already stated, reached an agreement with regard to the back damages and bonuses. This agreement was expressed in an instrument of writing, bearing date July 27, 1881, a portion of which was as follows:

"Whereas there are certain agreements in writing subsisting between the parties above named, bearing date, respectively, July 3, 1876, December 2, 1878, and August 7, 1879, to which reference may be had for all matters therein contained; and whereas the Thorn Wire Hedge Company claims that under the effect of said agreements it is entitled to a share of the damages or moneys or other valuable things which the Washburn and Moen Manufacturing Company have received from the different persons, firms, or corporations who have infringed

upon the patents owned by the said Washburn and Moen Manufacturing Company and I. L. Ellwood, and have accepted licenses from them to manufacture barbed fence wire under the several patents owned and controlled by them; and also claims that it is entitled to share in certain bonuses or premiums which have been paid by various licensees for the privilege of obtaining a license; and for other causes makes other claims for damages or compensation on various grounds against said Washburn and Moen Manufacturing Company:

"Now, therefore, in consideration of the premises and of the sum of ten thousand dollars to it paid, the said the Thorn Wire Hedge Company does by these presents hereby release and discharge the said Washburn and Moen Manufacturing Company from all claims or demands of every kind and nature whatsoever, which it has or can have against said company for and on account of any moneys, properties, or valuable things which the said Washburn and Moen Manufacturing Company has received from any persons in settlement for damages or profits accruing to it, or to it and I. L. Ellwood, on account of infringements committed upon any letters patent for barbed fence wire or machinery for making the same, and also for and on account of any moneys which it has received by way of bonuses or premiums paid to it by parties receiving licenses from it and from I. L. Ellwood to manufacture barbed fence wire; and does also discharge and release the said Washburn and Moen Manufacturing Company from any obligation to account to the Thorn Wire Hedge Company for any sums of money or valuable things which it shall or may hereafter receive or acquire from any parties in settlement of suits or claims for damages for the infringements, prior to the date of this agreement, of letters patent owned by the said Washburn and Moen Manufacturing Company, or by it and I. L. Ellwood, or for moneys which it shall hereafter receive for bonuses or premiums paid for licenses.

"Furthermore, in the execution of the existing agreements between the parties, bearing date July 3, 1876, December 2, 1878, and August 7, 1879, before referred to, providing for

the payment of fifteen cents by the Washburn and Moen Manufacturing Company to the Thorn Wire Hedge Company, as consideration money for the Kelly patents, upon every one hundred pounds of barbed fence wire manufactured and sold by it, or its licensees, or by its authority, the said the Thorn Wire Hedge Company does release and surrender any claim against the Washburn and Moen Manufacturing Company for any share in or proportion of the license fees or royalties which it shall receive from Jabob Haish, under the agreement between the Washburn and Moen Manufacturing Company and the said Jacob Haish, (a copy of which has been furnished to the Thorn Wire Hedge Company,) which shall be required under said agreement to be applied by the Washburn and Moen Manufacturing Company or used in the payment of any consideration for the purchase from said Haish of certain patent properties, and the release of claims for infringements against licensees under said agreement."

As heretofore stated, most of the manufacturers of barbed fence wire throughout the country applied to the Washburn and Moen Manufacturing Company in January and February, 1881, and obtained licenses. Subsequently, however, some persons in Iowa and Missouri began manufacturing without license, and the company thereupon brought suits against them for infringement of the patents which had been held valid in the Northern District of Illinois. The Circuit Court of the United States for the Eastern District of Missouri, in which some of these cases were heard, decided adversely to the company on June 4, 1883, holding that the Kelly and Glidden reissued patents were void. *Washburn and Moen Manufacturing Company* v. *Fuchs*, 16 Fed. Rep. 661. This decision, although its direct effect was confined, of course, to the States composing the Eighth Circuit, tended greatly to weaken the company's control over the barbed wire business, and in order to maintain its position as a receiver of royalties it became necessary for it to reduce the royalties required to be paid by its licensees to 30 cents per 100 pounds. The more important of the Kelly patents having been held valid in the Seventh Circuit, the company was not disposed to exercise its

option, provided for in its contract with the Thorn Wire Hedge Company of July 3, 1876, of discontinuing its manufacture under those patents and reassigning them to the last named company, but entered into an agreement in writing with that company, dated June 12, 1883, by which the Thorn Wire Hedge Company agreed to reduce the amounts to be paid to it to five cents per 100 pounds, and to shorten the time for which the payments should continue to be made from November 17, 1885, to February 12, 1885. Among the provisions of this agreement were the following:

"Seventh. Said Washburn and Moen Manufacturing Company agree to pay said reduced royalty of five cents on each and every one hundred pounds of barbed fence wire which it shall license to be made, or which shall be sold under a license from it, on and after June 1, 1883, to and including February 11, 1885. Payments of said reduced royalty of five cents for each one hundred pounds on licensed wire to be made in accordance with the said original agreement and the amendment thereof; but no payments or royalty on licensed wire to be made until it shall have been first collected by said Washburn and Moen Manufacturing Company.

"Eighth. Said party of the second part [the Washburn and Moen Manufacturing Company] further covenants and agrees with the party of the first part, its successors or assigns, that it will pay the said reduced royalty of five cents per one hundred pounds to the party of the first part, its successors or assigns, on the barbed wire made and sold by itself, I. L. Ellwood & Co., or its licensees, at the time, in the manner, and on the same terms and conditions as payments are now required to be made by the provisions of the agreements now existing between the parties hereto, and that such payments when due and payable shall be promptly and punctually made to said party of the first part, or its successors or assigns, without any delay or rebate on account of any claim or demand, or question of claim or demand, of said party of the second part, or said I. L. Ellwood & Co., against said party of the first part, and independently of any and all questions of dispute or otherwise which may arise between said party of

the first part and said party of the second part, or said I. L. Ellwood & Co., or any or either of them."

After February 12, 1885, the Thorn Wire Hedge Company made certain demands upon the Washburn and Moen Manufacturing Company, asserting that that company had failed in various ways to perform its obligations under the several contracts. The justice of these demands having been denied, the Thorn Wire Hedge Company, on June 6, 1887, filed its bill in equity in the Superior Court of Cook County, Illinois, against the Washburn and Moen Manufacturing Company, setting up the grounds of its complaint and praying for discovery and an accounting. Upon petition of the defendant the cause was removed, on June 21, 1887, into the Circuit Court of the United States for the Northern District of Illinois, where the defendant company filed its answer on July 2, 1887. After the greater part of the testimony had been taken, the complainant, on June 19, 1889, filed an amended bill, and the defendant, on the 21st of the same month, filed an amended answer and a cross-bill. The complainant filed its answer to the cross-bill on June 29, 1889. The taking of testimony was resumed and completed, and the cause having been heard in the said Circuit Court upon the pleadings and evidence a final decree was entered on November 29, 1889, dismissing both the bill and the cross-bill for want of equity. Thereupon both parties appealed to this court.

Mr. George C. Fry for the Thorn Wire Hedge Company.

Mr. F. W. Lehmann and *Mr. C. C. Washburn* for the Washburn and Moen Manufacturing Company.

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

This record contains nearly thirteen hundred pages, consisting chiefly of evidence. There were no findings of facts, nor did the court below file any opinion. It has hence been necessary to make a long statement, of no interest except to the parties, which will occupy many pages of the reports.

The Thorn Wire Hedge Company sought, by its bill of

complaint, to compel the Washburn and Moen Company to account for moneys claimed to be due under certain contracts subsisting between the companies.

It was one of the provisions of those contracts that the Washburn and Moen Company should pay, at a stipulated rate, a royalty upon all barbed fence wire which should be manufactured and sold by third parties under licenses granted them by said company; and one of the complaints in the bill is that the Washburn and Moen Company had not correctly reported to the complainant, from time to time, the issuing of licenses and the amount of moneys collected or of settlements made. Further complaints are that the Washburn and Moen Company had, in some instances, accepted notes from its licensees, and refused to account to complainant for its proper share thereof; that the Washburn and Moen Company had received moneys from infringers for damages and certain bonuses, which had not been accounted for; and that, after the making of the supplemental agreement of August 7, 1879, whereby the rate of royalties to be paid by the licensees was reduced, the Washburn and Moen Company did not, in point of fact, in some cases, reduce said royalties, but continued to collect at the old rate, and had failed to account therefor. To meet these charges the Washburn and Moen Company put in evidence the agreement and release, dated July 27, 1881. Thereupon the complainant amended its bill by adding allegations respecting the said release, seeking to have it declared void because executed in ignorance of all the facts and because the complainant was fearful that legal proceedings against the Washburn and Moen Company would imperil complainant's royalties for the remaining four years of the term of contract. The Washburn and Moen Company, by amendments to its answer, denied the allegations attacking the release and settlement, and averred that the complainant had executed the same with full knowledge.

Did this agreement of July 27, 1881, legally import a settlement and release of the claims in question? and, if so, were the facts and circumstances attending its execution such as to relieve the complainant from its operation?

The complainant's contention is that the release was, when drawn and executed, intended only to apply to the bonuses and damages received by and unaccounted for by the Washburn and Moen Company prior to the date of said release; that it does not purport to release that company from back damages received subsequent to its date, or for royalty due upon the product of the Washburn and Moen Company, or upon the product of its licensees previously sold under licenses granted by said company.

We are unable to accept this view of the scope and effect of the release. Its language plainly was that, in consideration of the payment of ten thousand dollars and of a release by the Washburn and Moen Company of certain specified claims made by said company against the company complainant, the latter would and did "release and discharge the said Washburn and Moen Manufacturing Company from all claims and demands of every kind and nature whatsoever, which it has or can have against said company for and on account of any moneys, properties, or valuable things which the said Washburn and Moen Manufacturing Company has received from any persons in settlement for damages or profits accruing to it, or to it and I. L. Ellwood, on account of infringements committed upon any letters patent for barbed wire fence or machinery for making the same, and also for and on account of any moneys which it has received by way of bonuses or premiums paid to it by parties receiving licenses from it and from I. L. Ellwood to manufacture barbed fence wire; and does also discharge and release the said Washburn and Moen Manufacturing Company from any obligation to account to the Thorn Wire Hedge Company for any sums of money or valuable things which it shall or may hereafter receive or acquire from any parties in settlement of suits or claims for damages for the infringements, prior to the date of this agreement, of letters patent owned by the said Washburn and Moen Manufacturing Company, or by it and I. L. Ellwood, or for moneys which it shall hereafter receive for bonuses or premiums paid for licenses."

It is, indeed, true, as argued by complainant's counsel, that general expressions in a release may not carry its effect

beyond the particular matters which the parties had in view, but the language in the present instance seems to us to be clear and explicit, and to be unmistakably applicable to the matters complained of in the bill.

But it is claimed that, in the circumstances disclosed by this record, a court of equity should not permit the release to stand.

The first reason urged is that the payment of ten thousand dollars was not a sufficient consideration for the release. It has often been held that where the party executing the release, by reason of youth or advanced age, was incapacitated to act judiciously, or where the release was executed during the existence of fiduciary relations, calculated to beget unquestioning confidence, courts of equity will grant relief where the consideration was plainly inadequate. It is enough to say that the present is not such a case. The parties, in respect to their capacity to act, stood upon an equal footing. We are scarcely prepared to extend a doctrine, devised in equity to protect those who are disabled by age or inexperience, to cover the case of a business corporation, whose affairs are managed by a president and board of directors. Moreover, it is not clear that the consideration, in the present case, was inadequate. While it is true that the evidence tends to show that, upon the theory of the complainant's bill, a much larger sum than ten thousand dollars was due, yet the release discloses that, in addition to the payment of that amount, and as a further consideration, the Washburn and Moen Company released the complainant from claims theretofore made by the former, and also agreed to protect the complainant from any suit for infringement of the patents held by Jacob Haish.

The validity of the release is also assailed because neither the complainant nor its counsel were fully advised as to the facts, and because the Washburn and Moen Company falsely misrepresented and fraudulently concealed the facts from the complainant.

This contention presents an issue of facts under the allegations of the amended bill and answer. Although an oath to the answer was waived and thereby the force of the latter

as evidence was prevented, still the burthen of proof to set aside a settlement deliberately executed is upon the complainant, and that burthen is greatly increased by the fact that eight years had elapsed before the complainant attempted to avoid the operation of such settlement by the allegations of its amended bill.

We do not think it necessary to extend this opinion by a minute analysis of the evidence adduced under this issue. That evidence consists of a large amount of testimony and of a correspondence by letter between the parties for a period of several years. We have examined and considered this evidence and the full and able discussion of it found in the briefs of the counsel. Our conclusion is that the complainant has failed to show such a state of facts as would warrant a court of equity in holding the release and settlement of July 27, 1881, to be void, either for gross inadequacy of consideration, or by reason of any false statements or fraudulent concealment on the part of the Washburn and Moen Manufacturing Company. Not only is there a failure of convincing affirmative evidence on the part of the complainant, but the long period during which the settlement was allowed to stand is, of itself, almost enough to estop the complainant. The effort made to explain and extenuate such delay does not help the complainant's case. It is said that complainant was constrained to execute the release and rest under it, because it feared that litigation to recover its demands would imperil its receipt of future royalties under the contract. Courts of equity, it has often been said, will not assist one who has slept upon his rights, and shows no excuse for his laches in asserting them. The complainant's excuse, in this instance, that it preferred for prudential reasons to receive money and an acquittance of claims from the Washburn and Moen Company, and to abide by the settlement for a period of several years, rather than to assert its existing demands, is entitled to a less favorable consideration by a court of equity than if its conduct had been that of mere inaction. *Lane & Bodley Co.* v. *Locke*, 150 U. S. 193, 201; *Hager* v. *Thomson*, 1 Black, 80.

Besides the claims covered by the settlement of July 27,

1881, there were certain other demands made by the complainant which shall now receive our attention.

It appears that on June 12, 1883, the parties entered into a supplementary agreement, whereby the royalty which the Washburn and Moen Company was to pay to complainant on barbed wire made by itself or its licensees was reduced from fifteen cents to five cents per hundred pounds from June 1, 1883, to February 12, 1885; and it is now claimed that complainant did not pay for royalties payable by its licensees at the rate of fifteen but at the rate of five cents per hundred pounds for the month of May, 1883, and that hence the Washburn and Moen Company owes complainant for barbed wire made by the licensees of the former during said month the difference between five and fifteen cents per hundred pounds. As against this claim, the Washburn and Moen Company point to a clause of said agreement which provides that said company "shall not be under obligation to pay said royalty on the barbed wire manufactured and sold by its licensees until after it shall have collected the same from its said licensees," and gave evidence tending to show that they only collected from their licensees, for the complainant, royalties at the rate of five cents per hundred pounds for the month of May, 1883. It is plausibly contended on behalf of the complainant that the clause cited did not relieve the Washburn and Moen Company from accounting for the higher rate of license until and after June 1, 1883, and if, indeed, the Washburn and Moen Company had actually received from its licensees royalties at the rate of fifteen cents per hundred pounds for the month of May, 1883, it would apparently be accountable therefor. As, however, that company only received royalties for said month for the complainant at the rate of five per cent and so reported to the complainant, which receipted for the royalties so collected, and as the matter stood unchallenged for so long a period, we think no injustice is done by leaving the settlement undisturbed. It is permissible to infer from the conduct of the complainant that it acquiesced in the construction put by the Washburn and Moen Company on the clause in question, as exonerating them from liability

for license fees which were not actually paid to and received by it for the month of May, 1883.

The fourth, fifth, and seventh assignments claim error in the failure of the court below to decree that complainant was entitled to recover from the Washburn and Moen Company royalty upon barbed fencing made and sold by divers licensees of said company prior to February 12, 1885, the royalty accruing on which was abated, released, or compromised by the said company. To dispose of these errors we must turn our attention to a settlement or agreement made by the Washburn and Moen Company with one Jacob Haish.

Haish was the owner of certain patents relating to barb wire and barb wire machinery. Litigation had arisen between him and the Washburn and Moen Company, as the owner of the Kelly and other patents, on questions of infringement. Ultimately the Washburn and Moen Company deemed a settlement with Haish to be for the benefit of all concerned, and hence, on July 26, 1881, such settlement was effected, whereby the Washburn and Moen Company and Ellwood purchased from Haish his patents, and he took a license from them authorizing him to manufacture ten thousand tons of barb wire per annum. As a condition of this settlement the Thorn Wire Hedge Company executed a collateral agreement, authorizing the Washburn and Moen Company to make said settlement with Haish, and releasing said company from all obligation under its agreements with the Thorn Wire Hedge Company "to account for any proportion of the moneys received from the said Jacob Haish whether in settlement of past infringements or for royalties hereafter paid under the said license, which may be required to be expended or remitted in the settlement with said Jacob Haish, or in payment of the consideration money for the transfer and conveyance of all the patents, rights to letters patent, and inventions, which are or shall be conveyed by the said Haish to the said Washburn and Moen Manufacturing Company and Isaac L. Ellwood, as provided in said proposed agreement."

Subsequently, certain other licensees of the Washburn and Moen Company refused to pay their royalties because of the

settlement made by that company with Haish. They claimed that the agreement with Haish in effect gave him a free license for four thousand tons annually, and a license at fifty cents per hundred pounds for four thousand tons more. Owing to this contention, the Washburn and Moen Company was disabled from collecting royalty from some of their licensees until new arrangements were made with them, and the claims of the Thorn Wire Hedge Company we are now considering are for its proportion of the royalties made uncollectible or released by the Haish settlement. The complainant construes the release which it had given to the Washburn and Moen Company as extending only to the royalty accruing to it on Haish's own manufacture, and not to the royalty upon wire manufactured and sold by any other licensee, and as not releasing the Washburn and Moen Company from its duty to "use due diligence and lawful means" to collect such royalties.

That the settlement with Haish was made with the full knowledge and approval, as to substance and terms, of the Thorn Wire Hedge Company cannot be denied. That such settlement would operate to release any other licensees, in whose royalties both the Washburn and Moen Company and the Thorn Wire Hedge Company had interests was probably not foreseen by either party. When it was subsequently determined by the Supreme Court of Illinois, in the case of *Washburn and Moen Manufacturing Company* v. *Chicago Galvanized Wire Fence Co.*, 109 Illinois 71, 119 Illinois 30, that the other non-assenting licensees of the latter company had a right to object to those terms of the settlement with Haish which, to some extent, relieved him from license fees, and it hence became necessary for the Washburn and Moen Company to make new terms with such licensees, we think it by no means follows that the Washburn and Moen Company became liable to the Thorn Wire Hedge Company to make good the loss thereby occasioned. On the contrary, such a result of the settlement with Haish must be deemed to have been an incident thereof, and to have been, in a legal sense, within the contemplation of the Thorn Wire Hedge Company.

Nor do we find any satisfactory evidence that, in the litigation, or in the settlements made with the other licensees, the Washburn and Moen Company were guilty of negligence, passive or active, which would create any liability on its part to the complainant company. To occasionally take promissory notes from licensees in lieu of cash for accrued royalties would, if done in good faith, not be so far out of the course of ordinary business transactions as to render the Washburn and Moen Company liable for losses occurring through the insolvency of any of the licensees. The contract was to pay quarterly to the Thorn Wire Hedge Company its share of royalties that had been collected and received by the Washburn and Moen Company, obviously showing that the parties contemplated that the royalties would not necessarily be paid as they accrued.

Upon this part of the case our conclusion is, that the contracts between these parties did not import that the Washburn and Moen Company should guarantee the payment by the licensees of the royalties, but should exercise reasonable diligence in their collection; and that the evidence does not disclose any such want of diligence or of good faith as to create the liability asserted in the bill.

The tenth assignment avers error in the court below in not decreeing that appellant was entitled to have and recover of and from the appellee royalty upon the barbed fencing manufactured and sold by defendant under the designation of Brinkerhoff Barbed Fencing.

The allegation of the bill touching this ground of complaint was as follows: "There was manufactured and dealt in by the defendant a certain patented barbed wire, known as the 'Brinkerhoff Patent;' that the form or construction of such wire was slightly different from the barbed wire made under the Kelly patent, heretofore mentioned, but orator claims that the same was and is *barbed wire* within the meaning of said contracts."

In respect to this the defendant in its answer stated: "It admits that there was manufactured and sold by it a certain patented article known as the 'Brinkerhoff Fencing,' but says

that the form and construction of such fencing was widely different from the barbed wire made under the Kelly patent heretofore mentioned, and says that the same was not and is not *barbed wire* within the meaning of said contracts."

The evidence discloses that the Washburn and Moen company manufactured and sold, prior to February 19, 1885, upwards of 4000 tons of Brinkerhoff barb wire, upon which it paid no royalty to appellant. The contract provided that the Washburn and Moen Company should enter upon the manufacture of barbed fence wire under the Kelly patents aforesaid, and use reasonable and diligent efforts to supply the demand for this article throughout the country, and also should use proper and reasonable diligence in prosecuting infringers of the several letters patent as aforesaid, or any of them, to the end that said patents might be fully enforced and sustained.

If the issue thus raised under the pleadings presented the question whether the Washburn and Moen Company should account for royalty received by it from the sale of Brinkerhoff barb fencing, because such fencing was an infringement of the Kelly patents, and thus within the terms of the contract, it would be necessary for us to investigate the state of the art at the time the patents were granted, as well as to compare the several claims of the respective patents, and our inspection of this record has not disclosed to us the materials necessary to enable us to do this intelligently.

We do not, however, perceive that such an issue or question was raised by the pleadings or was intended by the parties. That the complainant did not intend to raise an issue under the patent laws of the United States is seen in the fact that it filed its bill of complaint in a state court. Nor did the defendant, in its petition for removal, place the right to remove upon any allegation that the subject matter of the suit belonged exclusively to the Federal court, but upon the diverse citizenship of the parties. But any doubt upon this subject is removed by the admission of the appellant's counsel, who, in his careful brief, says: "The question of infringement upon the Kelly letters patent is not raised by the pleadings in this case. The bill is not drawn in the form of, nor does it contain,

the usual allegations requisite to a bill for infringement of letters patent. The answer does not aver that the Brinkerhoff patent does not infringe the Kelly patents, or any of them. This issue is not presented."

The learned counsel then proceeds to state and discuss the question as he claims it to be, and that is, that the terms of the contract import a covenant, on the part of the Washburn and Moen Company, not to manufacture and sell barb wire under any other letters patent than the Kelly patents, and to use reasonable diligence to supply the demand for the article made under the Kelly patents, and not made under patents in competition with them.

Our reading of the contract between the parties fails to reveal any express covenant to the effect claimed, nor do we perceive that such a covenant can be fairly implied from the language used, even when read in the light of all the facts and circumstances.

The provision of the contract is that the Washburn and Moen Company shall pay royalty on all barb fence wire which shall be made and sold "under said several letters patent or any of them." The letters patent referred to are expressly mentioned, and do not include the Brinkerhoff patent, which indeed was subsequently granted. Nor does the history of the case show any reason for the contention that the Washburn and Moen Company was disabled, by the contract, from buying the Brinkerhoff patent, and making wire under it. If that company had not purchased the Brinkerhoff patent, the owner could have made and sold wire outside of the Kelly patents, and such competition would plainly have been more largely detrimental to the common interests of the parties to this controversy than that which arose under the purchase as made.

It is true that, in 1881, the Thorn Wire Hedge Company claimed that the Brinkerhoff wire strip was covered by the agreement, and demanded an account of royalty thereon. But this claim was then rejected by the Washburn and Moen Company, which, while admitting that no sales under the Brinkerhoff patent had been reported, asserted that it was in no sense subject to the Kelly patents.

No further claim in this behalf was made by the appellant for five years, during which period reports were duly made by the Washburn and Moen Company, without including any statement of sales made by it of wire made under the Brinkerhoff patent, and monthly settlements were made and differences adjusted. So long a period of acquiescence discredits any renewal of the demand.

In the absence, then, of any express covenant, and in view of the long course of dealing between the parties, in which this claim sank out of sight, we think the complainant's claim for an account of royalty for wire made under the Brinkerhoff patent cannot be sustained. We therefore find no error in the decree of the court below dismissing the original and amended bill of complaint.

This brings us to a consideration of the cross-appeal of the Washburn and Moen Manufacturing Company, wherein complaint is made of the court below in dismissing the defendant's cross-bill.

The Washburn and Moen Company seeks by its cross-bill to recover from the Thorn Wire Hedge Company its alleged proportion of moneys which the Washburn and Moen Company had been compelled to refund to certain licensees by reason of its purchase of the Haish patents. But the Thorn Wire Hedge Company was not a party to the purchase. True, as we have seen, it assented to the purchase and released the Washburn and Moen Company from any obligation arising out of it, but we are unable to see that the relation between the parties justifies the demand that the Thorn Wire Hedge Company should return any part of the moneys theretofore or thereafter paid to it. The payments to it were of moneys due to it, and which it had a right to receive. The subsequent disclosure that by its settlement with Haish the Washburn and Moen Company became responsible to its own licensees for damages arising out of the transaction with Haish did not, in our judgment, operate to affect the payments previously made to the Thorn Wire Hedge Company. Besides, the record discloses that the latter company continued to pay over royalty, month by month, to the Thorn Wire Hedge Company after

the date of the filing of the bill by the Chicago Galvanized Wire Fence Company, in September, 1881, down to the time of filing the cross-bill in July, 1889, without abating or diminishing such payments by setting off the moneys now demanded. Moreover, the moneys now sought to be recovered in this cross-bill were for royalties accruing to the Thorn Wire Hedge Company prior to the amendment or supplement of June 12, 1883, and no claim or suggestion was then made on account of the demands of the other licensees, although the adverse decision in favor of the Chicago Galvanized Wire Company had been rendered eight months before. These payments were, therefore, voluntarily made with full knowledge of the facts.

Without pursuing the subject further, our conclusion is that the court below committed no error in dismissing as well the cross-bill as the original and amended bill, and its decree is accordingly

Affirmed: the costs in this court to be paid by the appellant in each case.

UNITED STATES *v.* CHAVES.

APPEAL FROM THE COURT OF PRIVATE LAND CLAIMS.

No. 196. Argued October 28, 1895. — Decided November 11, 1895.

It is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants.

The courts of the United States are bound to take judicial notice of the laws and regulations of Mexico prior to the cessions under the treaty of Guadalupe Hidalgo, and the treaty of December 30, 1853.

It is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and such rule will be applied as a *presumptio juris et de jure* whenever, by possibility, a right may be acquired in any manner known to the law, including occupations of claimants under alleged Mexican grants prior to the said treaties.

On the facts the court decides that the land in controversy in this case was the property of the claimants before the treaties with Mexico, and consequently that its protection is guaranteed as well by those treaties as by the law of nations.

Statement of the Case.

THIS is an appeal on behalf of the United States from a decree of the Court of Private Land Claims, made on the 26th day of September, 1892, in the matter of the claim for certain lands in Valencia County, New Mexico, commonly called the "Cubero" land grant.

The case as presented in the pleadings is as follows:

It is claimed by the petitioners that in the year 1833 the Republic of Mexico, by Francisco Sarricino, the governor of the Territory of New Mexico, granted to Juan Chaves, and about sixty others, "and to the town of Cubero, whose establishment and incorporation were intended and declared by the terms of said grant," a tract of land now situated in the county of Valencia, New Mexico.

The description of the land as claimed is set out in the petition, and is there said to contain about eleven square leagues.

They allege the loss and destruction of said grant and the testimonio as a reason for not being able to state accurately its date or the description of the land or the act of possession.

They allege that the chief alcalde of that jurisdiction did, during the same year, put them in possession, but they are unable to state who was the alcalde or what the date was of such delivery of possession.

That the petitioners are the heirs and legal representatives of the original grantees, except Juan Antonio Duran, who is the only survivor of such grantees.

That they are now in possession and occupation of said land, claiming under said grant.

That said grant was unconditional, except so far as the colonization law imposed conditions.

They charge that preliminarily to the making of the said grant the said governor required the parties petitioning first to purchase certain improvements which had been made upon the said land by one Francisco Baca, a Navajo Indian chief, who had been residing on the tract by permission of the government.

That they did purchase of said Indian chief the said improvements which said Indian chief relinquished to them and vacated the land.

That said preliminary conditions have been performed, the governor and chief alcalde delivered to the grantees a duplicate of the granting decree and of the act of juridical possession, and placed the originals of said decree and act in the Mexican archives at Santa Fé.

They allege that said originals, although once in the custody of the defendant (the United States) after the solemnization of the treaty of Guadalupe Hidalgo, were wrongfully and negligently destroyed or lost by the defendant.

That the duplicates were entrusted by the grantees to Juan Chaves, one of their number, and he kept them until his death in 1846. Since his death they have not been found, and plaintiffs aver that they were stolen and carried away and destroyed or lost by one Vicente Margarito Hernandez.

They charge that the original grant papers having been lost, a controversy arose between the petitioners and the pueblo of Laguna in the year 1841, and in that controversy the boundary line on the side next to Laguna was fixed and adjusted.

They allege that the grant was made to the inhabitants of Cubero at that time for the purpose of establishing a town thereon, and that since that time they have been in possession of the whole of the ground.

The answer of the United States puts in issue all of the allegations of the petition.

It denies that there was ever a grant made by the governor of New Mexico to the alleged grantees, as alleged in the petition.

It denies that the alleged testimonio of said grant was ever lost or destroyed, and that the possession of said plaintiffs or any of them was derived by the act of any official of the Mexican government authorized by the laws of Mexico to grant or deliver the same.

It denies that the duplicate of the alleged granting decree and act of possession was ever delivered by the governor or chief alcalde to the alleged grantees, or was ever placed by the governor among the Mexican archives of Santa Fé.

It avers that, if a grant was made to the alleged grantees

for the purpose of establishing a town, the conditions imposed by law have never been complied with, and, therefore, they are not entitled to confirmation under the act creating the Court of Private Land Claims.

That a large portion of said grant had been disposed of by the United States to the Atlantic and Pacific Railroad Company, and that it was a necessary party defendant, and a misjoiner of parties was pleaded.

On August 29, 1892, the court entered a decree confirming the grant, and denying the right of the Atlantic and Pacific Railroad Company to intervene, except so far as its right of way was concerned, which right was admitted by the plaintiffs, from which decree an appeal was taken by the United States.

Mr. Solicitor General and *Mr. Matthew G. Reynolds* for appellants.

No appearance for appellees.

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

It is provided in the ninth section of the act of March 3, 1891, c. 539, 26 Stat. 854, establishing the Court of Private Land Claims, that, upon any appeal from such court, "the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open."

The present case has been submitted to us on the record of the court below, containing the pleadings, the evidence, and the decree.

The decree finds as follows: "That the complainants are citizens of the United States and residents of the county of Valencia, in the Territory of New Mexico; that in the year 1833 a colony grant of the lands in controversy was made by the proper authority of the Republic of Mexico through the governor of the Territory of New Mexico, Francisco Sarricino,

to Juan Chaves and sixty-one others, for the purpose of colonizing the place of Cubero, and that said colonization was had and made; that the title to the land in controversy in this cause is derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the Territory of New Mexico, within which this land was situated; that the said complainants are in the possession of the said land embraced within the calls of the said grant, and claim the same; that they and their ancestors and predecessors in right have been in the possession of the same since the issuance of the grant by the Mexican government, and that complainants have such a claim and interest in the land as gives them a right to apply to the court for a confirmation of their title; that the lands claimed embraced an area of about sixteen thousand acres, but the exact area cannot be stated, as the same has never been surveyed; that the intervenor, the Atlantic and Pacific Railroad Company, has no right in or to the real estate and lands included within said grant, except to its right of way for its railroad track as now laid down and operated through and across said lands, which right of way was conceded to said railroad company by said complainants on the trial of the cause."

If these findings of fact are sustained by the evidence in the record, the decree of the court below, adjudging the title and claim of the complainants to be good and valid, and confirming the same in them, their heirs, successors, and assigns, should be affirmed.

The act provides that all proceedings subsequent to the petition shall be "conducted as near as may be according to the practice of courts of equity of the United States; . . . and that, by a final decree, the court shall settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty between the United States and the Republic of Mexico in 1848, and the treaty between the same powers in 1853, and the laws and ordinances of the government from which it is alleged to have been derived."

The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson* v. *Poindexter*, 12 Wheat. 530, 535; *United States* v. *Arredondo*, 6 Pet. 691, 712; *United States* v. *Ritchie*, 17 How. 525.

We adopt the language of Chief Justice Marshall in the case of the *United States* v. *Percheman*, 7 Pet. 51, 86, as follows: "It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

We are next directed to consider the stipulations of the treaties between the two governments. The provisions of the treaty of 1848 relevant to the present subject are contained in its eighth article, 9 Stat., 929, and we find that they declare that "Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, . . . retaining the property which they possess in said territories. . . . In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. . . . The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States." And in the ninth article it is further pro-

vided that, pending the admission of such territories into the Union of the United States, Mexicans who reside therein "shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

The sixth article of the treaty of December 30, 1853, 10 Stat. 1035, provides that "no grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day — twenty-fifth of September — when the minister and subscriber to this treaty on the part of the United States proposed to the government of Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, nor will any grants previously made be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico."

With such articles contained in the treaties and their meaning submitted to our consideration, we have no difficulty in holding that the question is whether the land in controversy was the property of the claimants before the treaties, and, if so, that its protection is guaranteed by the treaties as well as the law of nations.

The next guide prescribed by the act is a regard for "the laws and ordinances of the government from which it — the grant — is alleged to have been derived."

In this part of our inquiry we shall draw our information from a treatise on the Spanish and American land laws, recently published by Matthew G. Reynolds, the United States attorney for the Court of Private Land Claims, and which is referred to in the brief filed for the government in the present case. From this we learn that the general constituent Congress of Mexico passed, on August 18, 1824, a colonization law, providing for the colonization of the territories of the Republic; that New Mexico, at the date of the passage of this law, was a territory, and so continued until December 30, 1836, when it became a department.

A code of colonization was adopted on November 21, 1828, which contains regulations for the colonization of the terri-

tories, whereby the political chiefs or governors of the territories are authorized to grant the public lands of their respective territories to contractors, families, or private persons, Mexicans or foreigners, who may apply for them, and are directed, when a grant is definitely made, to sign and give a document to serve as a title to the party in interest, it being stated therein that the grant is made in entire conformity with the provisions of the law, in virtue of which the possession shall be given.

A question is raised in the brief for the government whether the courts of the United States can take judicial notice of the laws and regulations of Mexico pertaining to grants made prior to the cession. It was said in *Fremont* v. *United States*, 17 How. 542, 557, referring to a similar question under the treaties with Spain, ceding territories to the United States, "it is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages."

The same position was asserted in the case of *United States* v. *Perot*, 98 U. S. 428.

It is, indeed, suggested that the seventh section of the act establishing the Court of Private Land Claims, in respect that it provides that "the decree shall in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected," implies a contrary view. We do not so regard that provision, nor do we perceive in any features of the act an intention on the part of Congress to restrict the powers of the court recognized by the previous decisions.

We shall now proceed to apply these principles to the facts of the case.

It is conceded by the government's brief that the claimants or their ancestors did come to Cubero in 1833, and were put in possession of the lands claimed, and have held them ever since.

But it is contended that there is no sufficient evidence that the title asserted by the claimant was lawfully and regularly derived from the government of Spain or Mexico, or from any of the States of the Republic of Mexico having lawful authority to make grants of land, as prescribed by section 13 of the act; and it is said that the only title and interest acquired by the claimants was purchased by these settlers from one Francisco Baca, a Navajo Indian.

We have examined the evidence on this point contained in the record, and are of opinion that it warranted the finding of the court below that the complainants' title was derived from the Republic of Mexico, and was complete and perfect at the date when the United States acquired sovereignty in the Territory of New Mexico, within which the land was situated.

Without undertaking to give the evidence in full, we shall briefly state its principal features.

Penito Baca, a witness on behalf of the claimants, testified that he was eighty years old, and had resided on these lands since the year 1833; that the settlers were put in possession by the government; that Sarracino was governor, who held the government at Santa Fé. He enumerated by name a number of the colonists, and stated that there was in their possession a written grant from the governor, which he had heard read and had seen; that this writing, which was in the custody of Juan Chaves, could not be found after the death of the latter. He also described the boundaries of the grant, and testified that portions of these lands were distributed among the settlers, twenty-five varas to each, and that the remaining land was given for the common use for the stock of all.

Jose Antonio Duran testified that he was ninety-two years of age; that he was one of the settlers of the town of Cubero in the year 1833, and had there resided ever since; that their title was a written title, made to them by Francisco Sarracino, the governor. He gave a description of the boundaries of the land and the names of some of the original settlers of 1833. He stated that Don Juan Chaves and Don Juan Garcia, as commissioners, put them in possession. The witness could read and write Spanish, and he had seen and read the written title

from the governor, Sarracino. He testified that when Juan Chaves died the title paper was missing, and that it was currently reported that one Vicente Margarito Hernandez, who had been his secretary, had carried off the testimonio or official copy of the grant; that since 1833 the settlers and their children have lived upon and cultivated the land. He further stated that when they applied for the grant from the government, an Indian, named Francisco Baca, was on the land, and that it was made a condition that the Indian would abandon it.

Pablo Pino was a witness, eighty-two years of age, and had lived in the town of Cubero for forty-eight years, where he had purchased some land from the original settlers, in possession of which he had remained ever since.

Pedro Molina, eighty years of age, was one of the original settlers in 1833, and had lived with his children on these lands, and cultivated them ever since.

Juan Duran had lived in Cubero since 1833. His father and grandfather were original settlers. He had heard the original grant read. The papers were in the possession and read by Juan Garcia and one Juan Chaves, judge and commissioner. That it was one of the conditions before they were allowed to settle that they should buy the claim of Francisco Baca, the Navajo Indian. This witness testified to the tradition that the title papers of the grant had been stolen or carried away by Vicente Margarito Hernandez. The witness had been a school teacher for many years; could read and write Spanish, and had seen the original testimonio of the grant and heard it read, and that it was given by the governor Francisco Sarracino.

The record likewise contains translations of documents found in the archives of Valencia County, pertaining to a dispute between the town of Cubero and the pueblo of Laguna as to boundaries. These papers were dated in 1835, 1840, and 1841, and disclose a settlement of the dispute, certified to by Jose Francisco Chaves of Baca, judge commissioner in the second district of the department of New Mexico. In this certificate the lands within Cubero are stated to have been purchased from Francisco Baca, the Navajo.

A number of original deeds were likewise in evidence, variously dated from 1841 to 1856, showing sales of parcels of these lands; also a petition by the people of the town of Cubero to the surveyor general of the Territory of New Mexico, dated April 2, 1856, stating that they were in possession under authority of a grant from the Mexican government about the year 1834; that the original documents were lost; and asking that their lands should be surveyed, etc.

The claimants likewise proved, by quite a number of witnesses, residents of the Territory of New Mexico, that about 1870, a considerable portion of the archives of that Territory, containing documents relating to Mexican grants made to lands within that Territory, were lost; that these papers were deposited in the territorial library, where some of the witnesses had seen them in 1868 and 1869; that they were sold as waste papers by the Librarian Bond, and were scattered through the country. Many of these were Spanish documents and pertained to grants of land. When the governor of the Territory heard that there was complaint made by the people of this treatment of public archives, he made efforts to get them returned, but the evidence is clear that many of them were destroyed and lost. The claimants also called as a witness William M. Tipton, who had been employed for several years in the office of the surveyor general of the Territory of New Mexico, and had charge of the Spanish and Mexican archives. He testified that the books and records in that office purporting to contain the registry of land grants made by the Spanish and Mexican governments, prior to the time the government of the United States took charge, are in a disconnected, fragmentary form, and that one of the most important books, containing a record of grants made by the Spanish and Mexican governments, is missing, and is supposed to have been stolen. He also stated that there was not in the surveyor general's office any index of the dates, list of original expedientes or warrants of title to Spanish and Mexican grants.

This evidence was adduced to sustain the allegation in the petition that the governor and chief alcalde delivered to the settlers a duplicate of the granting decree and of the act of

juridical possession of the chief alcalde in the premises, and placed the originals of said decree and act in the Mexican archives at Santa Fé, and that said originals, with a great part of other valuable archives of the Mexican government, although once in the custody of the United States after the treaty of Guadalupe Hidalgo, were negligently destroyed or lost.

The only evidence adduced by the United States was the testimony of Ira M. Bond, who had acted as territorial librarian in 1869 and 1870, and who testified that, under instructions of Governor Pile, he had sold and disposed of a lot of the old records, supposing them to be of no value; that this created quite a talk in the town; that, finally, the governor instructed him to recover them back, and that most, but not all, of them were recovered. This witness said that he could not read Spanish; that these documents were in that language, and that there might have been grants among them.

In view of this large body of uncontradicted evidence we think that the court below was plainly right in finding that the claimants had satisfactorily sustained the allegations of their petition. Not only was there evidence of the existence of an original grant by the government of New Mexico, and of the loss of original records sufficient to justify the introduction of secondary evidence, but there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and enjoyment of this tract of land. The counsel for the government, indeed, contend that the Court of Private Land Claims and this court have no power to presume a grant upon proof of long-continued possession only; that their power is confined to confirming grants lawfully and regularly derived from Spain and Mexico.

It is scarcely necessary for us to consider such a question, because, as we have seen, there is ample evidence from which to find that these settlers were put in juridical possession under a grant from the governor of New Mexico, who, under the laws then in force, had authority to make the grant. However, we do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed

in this case. Without going at length into the subject, it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law. 1 Greenleaf Ev. 12th ed. § 17; *Ricard* v. *Williams*, 7 Wheat. 59, 109; *Coolidge* v. *Learned*, 8 Pick. 503.

Nothing, it is true, can be claimed by prescription which owes its origin to, and can only be had by, matter of record; but lapse of time accompanied by acts done, or other circumstances, may warrant the jury in presuming a grant or title by record. Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim, *nullum tempus occurrit regi*; yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long-continued peaceful enjoyment, accompanied by the usual acts of ownership. 1 Greenl. Ev. § 45.

The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman law and the codes founded thereon, Best's Principles of Evidence, § 366, and was, therefore, a feature of the Mexican law at the time of the cession.

Finally, the rule of the law of nations, that private property in territory ceded by one nation to another, when held by a title vested before the act of cession, should be respected; the express provisions to that effect contained in the treaty between Mexico and the United States; the evidence of the fact of a grant, legal under the forms of Mexican law, and of a juridical possession given thereunder, and the strong presumption growing out of an exclusive and uninterrupted possession and enjoyment of more than half a century, bring us to concur in the decree of the court below.

Statement of the Case.

The objection that the Atlantic and Pacific Railroad Company, as grantee from the United States, of a part of the tract in question, was a necessary party defendant, has not been pressed in argument, and we only notice it to say that, under the provisions of the fifth section of this act, the private rights of third parties are not affected by any proceeding or decree under said act.

The decree of the court below is

Affirmed.

THE INCANDESCENT LAMP PATENT.[1]

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

No. 10. Argued October 29, 30, 1894. — Decided November 11, 1895.

With the exception of the third claim, viz., for "the incandescing conductor for an electric lamp, formed of carbonized paper, substantially as described," the claims in the letters patent No. 317,076, issued May 12, 1885, to the Electro-Dynamic Light Company, assignee of Sawyer and Man, for an electric light, are too indefinite to be the subject of a valid monopoly.

This was a bill in equity, filed by the consolidated Electric Light Company against the McKeesport Light Company, to recover damages for the infringement of letters patent No. 317,076, issued May 12, 1885, to the Electro-Dynamic Light Company, assignee of Sawyer and Man, for an electric light. The defendants justified under certain patents to Thomas A. Edison, particularly No. 223,898, issued January 27, 1880; denied the novelty and utility of the complainants' patent, and averred that the same had been fraudulently and illegally procured. The real defendant was the Edison Electric Light Company, and the case involved a contest between what are known as the Sawyer and Man and the Edison systems of electric lighting.

[1] This is the title of this case in the opinion of the court; but its docket title is, "The Consolidated Electric Light Company, Appellant, *v.* The McKeesport Light Company."

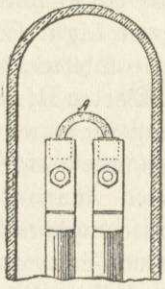
Statement of the Case.

In their application, Sawyer and Man stated that their invention related to "that class of electric lamps employing an incandescent conductor enclosed in a transparent, hermetically-sealed vessel or chamber, from which oxygen is excluded, and . . . more especially to the incandescing conductor, its substance, its form, and its combination with the other elements composing the lamp. Its object is to secure a cheap and effective apparatus; and our improvement consists, first, of the combination, in a lamp chamber, composed wholly of glass, as described in patent No. 205,144," upon which this patent was declared to be an improvement, "of an incandescing conductor of carbon made from a vegetable fibrous material, in contradistinction to a similar conductor made from mineral or gas carbon, and also in the form of such conductor so made from such vegetable carbon, and combined in the lighting circuit with the exhausted chamber of the lamp."

The following drawings exhibit the substance of the invention:

Figure 2.

Figure 3.



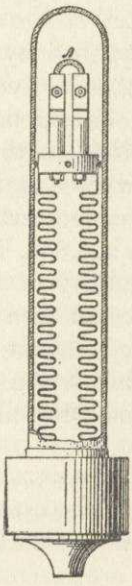
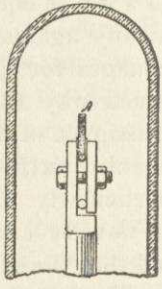


Figure 4.



Statement of the Case.

The specification further stated that:

"In the practice of our invention we have made use of carbonized paper, and also wood carbon. We have also used such conductors or burners of various shapes, such as pieces with their lower ends secured to their respective supports, and having their upper ends united so as to form an inverted V-shaped burner. We have also used conductors of varying contours — that is, with rectangular bends instead of curvilinear ones; but we prefer the arch shape."

"No especial description of making the illuminating carbon conductors, described in this specification and making the subject-matter of this improvement, is thought necessary, as any of the ordinary methods of forming the material to be carbonized to the desired shape and size, and carbonizing it while confined in retorts in powdered carbon, substantially according to the methods in practice before the date of this improvement, may be adopted in the practice thereof by any one skilled in the arts appertaining to the making of carbons for electric lighting or for other use in the arts."

"An important practical advantage which is secured by the arch form of incandescing carbon is that it permits the carbon to expand and contract under the varying temperatures to which it is subjected when the electric current is turned on or off without altering the position of its fixed terminals. Thus the necessity for a special mechanical device to compensate for the expansion and contraction which has heretofore been necessary is entirely dispensed with, and thus the lamp is materially simplified in its construction. Another advantage of the arch form is that the shadow cast by such burners is less than that produced by other forms of burners when fitted with the necessary devices to support them."

"Another important advantage resulting from our construction of the lamp results from the fact that the wall forming the chamber of the lamp through which the electrodes pass to the interior of the lamp is made wholly of glass, by which all danger of oxidation, leakage, or short circuiting is avoided."

"The advantages resulting from the manufacture of the carbon from vegetable fibrous or textile material instead of

mineral or gas carbon are many. Among them may be mentioned the convenience afforded for cutting and making the conductor in the desired form and size, the purity and equality of the carbon obtained, its susceptibility to tempering, both as to hardness and resistance, and its toughness and durability. We have used such burners in closed or hermetically-sealed transparent chambers, in a vacuum, in nitrogen gas, and in hydrogen gas; but we have obtained the best results in a vacuum, or an attenuated atmosphere of nitrogen gas, the great desideratum being to exclude oxygen or other gases capable of combining with carbon at high temperatures from the incandescing chamber as is well understood."

The claims were as follows:

"1. An incandescing conductor for an electric lamp, of carbonized fibrous or textile material and of an arch or horseshoe shape, substantially as hereinbefore set forth."

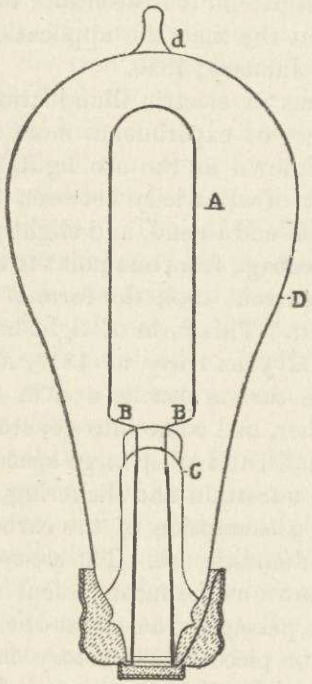
"2. The combination, substantially as hereinbefore set forth, of an electric circuit and an incandescing conductor of carbonized fibrous material, included in and forming part of said circuit, and a transparent hermetically sealed chamber in which the conductor is enclosed."

"3. The incandescing conductor for an electric lamp, formed of carbonized paper, substantially as described."

"4. An incandescing electric lamp consists of the following elements in combination: first, an illuminating chamber made wholly of glass hermetically-sealed, and out of which all carbon-consuming gas has been exhausted or driven; second, an electric-circuit conductor passing through the glass wall of said chamber and hermetically sealed therein, as described; third, an illuminating conductor in said circuit, and forming part thereof within said chamber, consisting of carbon made from a fibrous or textile material, having the form of an arch or loop, substantially as described, for the purpose specified."

The commercial Edison lamp used by the appellee, and which is illustrated below, is composed of a burner, A, made of carbonized bamboo of a peculiar quality discovered by Mr. Edison to be highly useful for the purpose, and having a length of about six inches, a diameter of about five one thou-

sandths of an inch, and an electrical resistance of upwards of 100 ohms. This filament of carbon is bent into the form of a loop, and its ends are secured by good electrical and mechanical connections to two fine platinum wires BB. These wires pass through a glass stem, C, the glass being melted and fused upon the platinum wires. A glass globe, D, is fused to the glass stem C. This glass globe has originally attached to it, at the point *d*, a glass tube, by means of which a connection is made with highly organized and refined exhausting apparatus, which produces in the globe a high vacuum, whereupon the glass tube is melted off by a flame, and the globe is closed by the fusion of the glass at the point *d*.



Upon a hearing in the Circuit Court before Mr. Justice Bradley upon pleadings and proofs, the court held the patent to be invalid, and dismissed the bill. 40 Fed. Rep. 21. Thereupon complainant appealed to this court.

Mr. Edmund Wetmore and *Mr. Leonard E. Curtis*, (with whom were *Mr. John W. Houston* and *Mr. Thomas B. Kerr* on the brief,) for appellant.

Mr. Frederick P. Fish, (with whom was *Mr. Richard N. Dyer*, on the brief,) for appellee.

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

In order to obtain a complete understanding of the scope of the Sawyer and Man patent, it is desirable to consider briefly the state of the art at the time the application was originally made, which was in January, 1880.

Two general forms of electric illumination had for many years been the subject of experiments more or less successful, one of which was known as the arc light, produced by the passage of a current of electricity between the points of two carbon pencils, placed end to end, and slightly separated from each other. In its passage from one point to the other through the air, the electric current took the form of an arc, and gave the name to the light. This form of light had been produced by Sir Humphry Davy as early as 1810, and by successive improvements in the carbon pencils and in their relative adjustment to each other, had come into general use as a means of lighting streets, halls, and other large spaces; but by reason of its intensity, the uncertain and flickering character of the light, and the rapid consumption of the carbon pencils, it was wholly unfitted for domestic use. The *second* form of illumination is what is known as the incandescent system, and consists generally in the passage of a current of electricity through a continuous strip or piece of refractory material, which is a conductor of electricity, but a poor conductor — in other words, a conductor offering a considerable resistance to the flow of the current through it. It was discovered early in this century that various substances might be heated to a white heat by passing a sufficiently strong current of electricity

through them. The production of a light in this way does not in any manner depend upon the consumption or wearing away of the conductor, as it does in the arc light. A *third* system was a combination of the two others, but it never seems to have come into general use, and is unimportant in giving a history of the art.

For many years prior to 1880, experiments had been made by a large number of persons, in various countries, with a view to the production of an incandescent light which could be made available for domestic purposes, and could compete with gas in the matter of expense. Owing partly to a failure to find a proper material, which should burn but not consume, partly to the difficulty of obtaining a perfect vacuum in the globe in which the light was suspended, and partly to a misapprehension of the true principle of incandescent lighting, these experiments had not been attended with success; although it had been demonstrated as early as 1845 that, whatever material was used, the conductor must be enclosed in an air-tight bulb, to prevent it from being consumed by the oxygen in the atmosphere. The chief difficulty was that the carbon burners were subject to a rapid disintegration or evaporation, which electricians assumed was due to the disrupting action of the electric current, and, hence, the conclusion was reached that carbon contained in itself the elements of its own destruction, and was not a suitable material for the burner of an incandescent lamp.

It is admitted that the lamp described in the Sawyer and Man patent is no longer in use, and was never a commercial success; that it does not embody the principle of high resistance with a small illuminating surface; that it does not have the filament burner of the modern incandescent lamp; that the lamp chamber is defective, and that the lamp manufactured by the complainant and put upon the market is substantially the Edison lamp; but it is said that, in the conductor used by Edison, (a particular part of the stem of the bamboo lying directly beneath the silicious cuticle, the peculiar fitness for which purpose was undoubtedly discovered by him,) he made use of a fibrous or textile material, covered by the patent to

Sawyer and Man, and is, therefore, an infringer. It was admitted, however, that the third claim — for a conductor of carbonized paper — was not infringed.

The two main defences to this patent are (1) that it is defective upon its face, in attempting to monopolize the use of all fibrous and textile materials for the purpose of electric illumination; and (2) that Sawyer and Man were not in fact the first to discover that these were better adapted than mineral carbons to such purposes.

Is the complainant entitled to a monopoly of all fibrous and textile materials for incandescent conductors? If the patentees had discovered in fibrous and textile substances a quality common to them all, or to them generally, as distinguishing them from other materials, such as minerals, etc., and such quality or characteristic adapted them peculiarly to incandescent conductors, such claim might not be too broad. If, for instance, minerals or porcelains had always been used for a particular purpose, and a person should take out a patent for a similar article of wood, and woods generally were adapted to that purpose, the claim might not be too broad, though defendant used wood of a different kind from that of the patentee. But if woods generally were not adapted to the purpose, and yet the patentee had discovered a wood possessing certain qualities, which gave it a peculiar fitness for such purpose, it would not constitute an infringement for another to discover and use a different kind of wood, which was found to contain similar or superior qualities. The present case is an apt illustration of this principle. Sawyer and Man supposed they had discovered in carbonized paper the best material for an incandescent conductor. Instead of confining themselves to carbonized paper, as they might properly have done, and in fact did in their third claim, they made a broad claim for every fibrous or textile material, when in fact an examination of over six thousand vegetable growths showed that none of them possessed the peculiar qualities that fitted them for that purpose. Was everybody then precluded by this broad claim from making further investigation? We think not.

The injustice of so holding is manifest in view of the ex-

periments made, and continued for several months, by Mr. Edison and his assistants, among the different species of vegetable growth, for the purpose of ascertaining the one best adapted to an incandescent conductor. Of these he found suitable for his purpose only about three species of bamboo, one species of cane from the Valley of the Amazon, impossible to be procured in quantities on account of the climate, and one or two species of fibres from the agave family. Of the special bamboo, the walls of which have a thickness of about three-eighths of an inch, he used only about twenty-thousandths of an inch in thickness. In this portion of the bamboo the fibres are more nearly parallel, the cell walls are apparently smallest, and the pithy matter between the fibres is at its minimum. It seems that carbon filaments cannot be made of wood — that is, exogenous vegetable growth — because the fibres are not parallel and the longitudinal fibres are intercepted by radial fibres. The cells composing the fibres are all so large that the resulting carbon is very porous and friable. Lamps made of this material proved of no commercial value. After trying as many as thirty or forty different woods of exogenous growth, he gave them up as hopeless. But finally, while experimenting with a bamboo strip which formed the edge of a palmleaf fan, cut into filaments, he obtained surprising results. After microscopic examination of the material, he despatched a man to Japan to make arrangements for securing the bamboo in quantities. It seems that the characteristic of the bamboo which makes it particularly suitable is, that the fibres run more nearly parallel than in other species of wood. Owing to this, it can be cut up into filaments having parallel fibres, running throughout their length, and producing a homogeneous carbon. There is no generic quality, however, in vegetable fibres, because they are fibrous, which adapts them to the purpose. Indeed, the fibres are rather a disadvantage. If the bamboo grew solid without fibres, but had its peculiar cellular formation, it would be a perfect material, and incandescent lamps would last at least six times as long as at present. All vegetable fibrous growths do not have a suitable cellular structure. In

some the cells are so large that they are valueless for that purpose. No exogenous, and very few endogenous, growths are suitable. The messenger whom he despatched to different parts of Japan and China sent him about forty different kinds of bamboo, in such quantities as to enable him to make a number of lamps, and from a test of these different species he ascertained which was best for the purpose. From this it appears very clearly that there is no such quality common to fibrous and textile substances generally as makes them suitable for an incandescent conductor, and that the bamboo which was finally pitched upon, and is now generally used, was not selected because it was of vegetable growth, but because it contained certain peculiarities in its fibrous structure which distinguished it from every other fibrous substance. The question really is whether the imperfectly successful experiments of Sawyer and Man, with carbonized paper and wood carbon, conceding all that is claimed for them, authorize them to put under tribute the results of the brilliant discoveries made by others.

It is required by Rev. Stat. § 4888 that the application shall contain a written description of the device "and of the manner and process of making, constructing, compounding, and using it in such full, clear, concise, and exact terms as to enable any person, skilled in the art or science to which it appertains or with which it is most nearly connected, to make, construct, compound, and use the same." The object of this is to apprise the public of what the patentee claims as his own, the courts of what they are called upon to construe, and competing manufacturers and dealers of exactly what they are bound to avoid. *Grant* v. *Raymond*, 6 Pet. 218, 247. If the description be so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent is void.

It was said by Mr. Chief Justice Taney in *Wood* v. *Underhill*, 5 How. 1, 5, with respect to a patented compound for the purpose of making brick or tile, which did not give the relative proportions of the different ingredients: "But when the specification of a new composition of matter gives only

the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void. And the same rule would prevail where it was apparent that the proportions were stated ambiguously and vaguely. For in such cases it would be evident, on the face of the specification, that no one could use the invention without first ascertaining, by experiment, the exact proportion of the different ingredients required to produce the result intended to be obtained . . . And if, from the nature and character of the ingredients to be used, they are not susceptible of such exact description, the inventor is not entitled to a patent."

So in *Tyler* v. *Boston*, 7 Wall. 327, 330, wherein the plaintiff professed to have discovered a combination of fusel oil with the mineral and earthy oils, constituting a burning fluid, the patentee stated that the exact quantity of fusel oil, which is necessary to produce the most desirable compound, must be determined by experiment. And the court observed: "Where a patent is claimed for such a discovery it should state the component parts of the new manufacture claimed with clearness and precision, and not leave a person attempting to use the discovery to find it out 'by experiment.'" See also *Béné* v. *Jeantet*, 129 U. S. 683; *Howard* v. *Detroit Stove Works*, 150 U. S. 164, 167; *Schneider* v. *Lovell*, 10 Fed. Rep. 666; *Welling* v. *Crane*, 14 Fed. Rep. 571.

Applying this principle to the patent under consideration, how would it be possible for a person to know what fibrous or textile material was adapted to the purpose of an incandescent conductor, except by the most careful and painstaking experimentation? If, as before observed, there were some general quality, running through the whole fibrous and textile kingdom, which distinguished it from every other, and gave it a peculiar fitness for the particular purpose, the man who discovered such quality might justly be entitled to a patent; but that is not the case here. An examination of materials of this class carried on for months revealed nothing that seemed to be adapted to the purpose; and even the carbonized paper and wood carbons specified in the patent,

experiments with which first suggested their incorporation therein, were found to be so inferior to the bamboo, afterwards discovered by Edison, that the complainant was forced to abandon its patent in that particular, and take up with the material discovered by its rival. Under these circumstances, to hold that one, who had discovered that a certain fibrous or textile material answered the required purpose, should obtain the right to exclude everybody from the whole domain of fibrous and textile materials, and thereby shut out any further efforts to discover a better specimen of that class than the patentee had employed, would be an unwarranted extension of his monopoly, and operate rather to discourage than to promote invention. If Sawyer and Man had discovered that a certain carbonized paper would answer the purpose, their claim to all carbonized paper would, perhaps, not be extravagant; but the fact that paper happens to belong to the fibrous kingdom did not invest them with sovereignty over this entire kingdom, and thereby practically limit other experimenters to the domain of minerals.

In fact, such a construction of this patent as would exclude competitors from making use of any fibrous or textile material would probably defeat itself, since, if the patent were infringed by the use of any such material, it would be anticipated by proof of the prior use of any such material. In this connection it would appear, not only that wood charcoal had been constantly used since the days of Sir Humphry Davy for arc lighting, but that in the English patent to Greener and Staite of 1846, for an incandescent light, "charcoal, reduced to a state of powder," was one of the materials employed. So also, in the English patent of 1841 to De Moleyns, "a finely pulverized boxwood charcoal or plumbago" was used for an incandescent electric lamp. Indeed, in the experiments of Sir Humphry Davy, early in the century, pieces of well-burned charcoal were heated to a vivid whiteness by the electric current, and other experiments were made which evidently contemplated the use of charcoal heated to the point of incandescence. Mr. Broadnax, the attorney who prepared the application, it seems, was also of opinion that a broad claim for

vegetable carbons could not be sustained because charcoal had been used before in incandescent lighting. There is undoubtedly a good deal of testimony tending to show that, for the past fifty or sixty years, the word "charcoal" has been used in the art, not only to designate carbonized wood, but mineral or hard carbons, such as were commonly employed for the carbon pencils of arc lamps. But we think it quite evident that, in the patents and experiments above referred to, it was used in its ordinary sense of charcoal obtained from wood. The very fact of the use of such word to designate mineral carbons indicates that such carbons were believed to possess peculiar properties required for illumination, which before that had been supposed to belong to wood charcoal.

We have not found it necessary in this connection to consider the amendments that were made to the original specification, upon which so much stress was laid in the opinion of the court below, since we are all agreed that the claims of this patent, with the exception of the third, are too indefinite to be the subject of a valid monopoly.

As these suggestions are of themselves sufficient to dispose of the case adversely to the complainant, a consideration of the question of priority of invention, or rather of the extent and results of the Sawyer and Man experiments, which was so fully argued upon both sides, and passed upon by the court below, becomes unnecessary.

For the reasons above stated the decree of the Circuit Court is

Affirmed.

RICHARDS *v.* CHASE ELEVATOR COMPANY.

PETITION FOR A REHEARING.

No. 319 of October term, 1894. Received June 3, 1895 — Denied November 11, 1895.

The court, on application to file a petition for rehearing, adheres to its opinion, reported in 158 U. S. 299, that letters patent No. 308,095, issued November 18, 1884, to Edward S. Richards for a grain transferring ap-

Petition for Rehearing.

paratus, are wholly void upon their face, for want of patentable novelty and invention.

While the omission of an element in a combination may constitute invention if the result of the new combination be the same as before; yet, if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention if the elements retained perform the same function as before.

When the result of a combination of old elements is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, there is nothing upon which a claim to invention can be based.

THIS was an application for leave to file a petition for the rehearing of a case decided at October term, 1894, and reported in 158 U. S. 299, and of two other cases, argued with that case and decided in accordance with the decision in it. The petition was as follows:

"And now comes the above named complainant, appellant, and respectfully petitions this honorable court to grant a rehearing in the three several above entitled causes, and for cause therefor says:

"I. It seems to us entirely evident from a reading of the opinion of Mr. Justice Brown in this case, that such opinion was arrived at by two mistaken and erroneous conclusions as to questions of fact in regard to the Richards patent in question, and its relation to the grain elevators of this country. It is assumed in the first place, that the judicial knowledge which this court has of the construction and operation of grain elevators, is such that the court can see no patentable distinction or difference between a grain elevator and the grain transferring and weighing devices of the Richards patent. Buildings denominated elevators in this country for the storage of grain are a distinct classification to themselves. Such buildings are called interchangeably elevators, warehouses and stores, but the entire object and purpose of these elevators, stores and warehouses is to afford the opportunity of housing and storing vast quantities of grain at desired points.

"In the Eastern States these buildings are called 'stores,' in the Middle States, 'warehouses,' and in the principal cities of the Western States, 'elevators.' But their common object

and purpose is the same, namely, the housing and storage of grain in great quantities for indefinite periods of time.

"Now, *the object of Mr. Richards' invention is to entirely obviate and do away with elevators*, and the adoption of the invention of Mr. Richards' patent would mean the conversion of every elevator in this country to other and different commercial purposes. There can be no better practical illustration of the truth of this statement, than to call the attention of this court to the fact, which we think the court will take judicial notice of from simply travelling upon the lines of two of the principal railroad defendants in these cases, in late years, namely, the Michigan Central Railroad Company and the Chicago Grand Trunk Railroad Company. Both of these roads have 'elevators' of all sizes and capacities in connection with and along the lines of their main track and branches. 'Elevators' on the banks of lakes, 'elevators' on the banks of rivers, 'elevators' on the banks of canals, yet neither of these defendant roads will or can use such elevators 'for transferring and weighing grains without mixing the different lots or loads with each other, thus preserving the identity of each lot while it is being transferred from one car to another.' And both of these defendants will let their 'elevators' lie idle and vacant and will build alongside of them the cheap and simple device of Richards' patent, for transferring their grain from one car to another without storage and without mixing, etc.

"This court says: 'We do not feel compelled to shut our eyes to a fact so well known as that elevators have, for many years, been used for transferring grain from railway cars to vessels lying alongside, and that this method involves the use of a railway track, entering a fixed or stationary building; an elevator apparatus; elevator hopper scales for weighing the grain; and a discharge spout for discharging the grain into the vessel.'

"While it may be true that in some part of an 'elevator' building all of the above may be found with no suggestion or capacity of utilization, as described by Richards, we most earnestly contend that the court should not also shut its eyes to the fact that no elevator ever constructed in this country

was ever used or adapted or could be used or adapted for continuous and automatic transfer of grain from one car to another, weighing the grain *in transitu* and preserving the identity of each lot of grain in such transfer.

"There is not the slightest capacity in the grain transferring and weighing devices of Richards for any housing or storage capacity. That element has been entirely eradicated by the employment of the Richards devices and intentionally so. We believe that this whole confusion of the Richards invention at stake with elevators, arises from the fact of the illustrative drawings which Mr. Richards' solicitor saw fit to employ in setting forth Mr. Richards' invention.

"Figure 1 of said drawings furnishes grounds of suggestion of the 'elevator characteristic,' but it will be readily seen, even by reference to figure 1, that such drawing simply discloses a covered framework for weather protection in the employment of the transferring apparatus of Richards from one car to another. There is no possible opportunity of storage or warehouse purposes present in such drawings, as the hopper H is merely a unit part of the hopper scales and serves its only purpose in retaining the grain on the scales until the desired weight is registered. This whole question of 'elevator identity' was raised in the Patent Office, and that office, upon an investigation of the facts, at once recognized the distinction between every and all classes of elevators in this country and the Richards invention, and passed the patent to grant, and all we ask in this case, is that this great court will not itself decide these mechanical questions and the question of mechanical effects, upon a recollection of devices, wherein there is opportunity for mistake and an equal opportunity of making certain disputed questions by testimony in relation to which there can be no mistake.

"Take, for example, where this court finds that in the 'elevators' of this country there can be found 'hopper scales for weighing grain.' This court certainly cannot take judicial notice of the fact, for such fact never exists, that grain is taken from one car and delivered directly to these hopper scales for any purpose whatever; much less for automatically weighing

the grain by such scales and delivering such grain without deposit in the elevator to a companion car for continuous transferring.

"Take, for example again, the quoted reference of the judicial knowledge of this court as to a discharge spout. This court cannot certainly take judicial notice that there has ever existed in any elevator construction a spout connected with hopper scales, wherein grain is weighed by such scales and delivered continuously and instantly therefrom to an awaiting railroad car. To make our position more apparent, supposing Mr. Richards, in the drawings of his patent, had not disclosed the skeleton framework of the building for supporting his transferring and weighing mechanism, but had simply disclosed the means for effecting such transfer, and his claim had read as follows: 'What I claim as new and desire to secure by letters patent is: In combination with two oppositely facing railroad tracks and cars, means for continuously receiving and elevating the grain of one car into elevated hopper scales, means for automatically weighing and registering such elevated grain by such hopper scales, and means for discharging such elevated grain, so weighed, and registered into said oppositely facing railroad car, continuously by one operation.'

"Could there have been any contention that this invention so stated, would be met by any elevator or warehouse in this country, and of which this court could take judicial notice? Yet the above represents the actual invention of Mr. Richards, and we most earnestly contend that the awkward and inartistic description of his invention by such statement of his specification, as associates and connects such invention in the mind of the court with a supposed elevator building, should not stand to the destruction of his patent and invention, without any opportunity given him by a trial and day in court to demonstrate and convince this court of the correctness of his contentions.

"II. The second ground of contention upon which we base this petition for rehearing resides in the statement of Mr. Justice Brown that 'Not a new function or result is sug-

gested by the combination in question.' Most earnestly and emphatically do we take issue with this statement.

"We again state in italics, Mr. Richards' statement of invention as taken from his patent: '*The purpose of my invention is to provide improved means for transferring and weighing grain without mixing the different lots or loads with each other, thus preserving the identity of each lot, while it is being transferred from one car to another.*'

"Every function and result of this means and apparatus is new. What was the new function or result suggested by the combination in question? Briefly stated, such new function and result of Richards' combination, was its continuous transfer by the mechanical means described of a carload or lot of grain from one car to another, weighing the grain in its travel, so that when the grain was lodged in a desired car by a continuous operation its identity had been preserved and its weight actually ascertained. No such function or result in any kind of a combination had ever existed in this country, as can be shown, absolutely, by unassailable testimony, if the opportunity is given, and nothing can be more clearly demonstrated if such opportunity is given, that in no 'elevator,' warehouse or store in this country was such function or result known or capable of employment. In every elevator that exists or ever existed in this country, as can be demonstrated, and proven if the opportunity is offered, it is simply impossible to transfer and weigh the grain without mixing the different lots or loads with each other, and it was and is simply impossible to preserve the identity of one lot or load one from the other in any elevator ever constructed, or to continuously transfer one carload of grain to another, weighing the grain as a part of such transfer, and no contention has ever been made that such function or result could be accomplished in any elevator in this country. The Lake Shore and Michigan Southern Railroad Company paid the patentee Richards more than $100,000 for employing this new function and result, that railroad having elevators galore along the sides of their track at the time they made such payment, and incurred its obligation. Is it too much to ask at the

hands of this court an opportunity to prove the correctness of this statement, that the function and result of this combination is new, especially as the government has so decided and given Richards his grant here in contest therefor?

"We fail to appreciate the relevancy of the suggested parallelism between Mr. Richards' invention of means for transferring and weighing grain 'without mixing different lots;' and the conditions set forth in the opinion of Mr. Justice Brown.

"Take, for example, the statement of the opinion as follows: 'Suppose, for instance, it were old to run a railroad track into a station or depot for the reception and discharge of passengers, it certainly would not be patentable to locate such stations between two railroad tracks for the reception of passengers on both sides, and to add to the accommodation a ticket office, a newspaper stand, a restaurant, and cigar stand, or the thousand and one things that are found in buildings of that character. It might as well be claimed that the man who first introduced an elevator into a private house, it having been previously used in public buildings, was entitled to a patent for a new combination.' What connection have these conditions to do with Mr. Richards' invention when analyzed and applied?

"A fair illustration of the value of Mr. Richards' inventions using the conditions set forth in the above quotation from the opinion can be illustrated as follows: Supposing Mr. Richards had invented an improved means by which the railroad depots and stations for the reception and housing of passengers could be done away with in this country, and the passengers in the different cars, first and second class, and parlor cars, could be transferred to their respective associate and companion cars upon oppositely facing tracks without delay and harmoniously and continuously by mechanical devices without any effort, danger or responsibility upon the part of the passengers themselves, would not the doing away with the passenger stations and depots of this country and the mechanical transferring of passengers from one car to another be an invention of a high order, the principal element of which would have been the avoidance of expense, and delay attendant to the erection,

support and continuance of the railroad stations and depots of the country? Such conditions would be analogous to the inventions of Mr. Richards, who has done away with the elevators of this country, and the housing of grain therein, and has substituted therefor the mechanical devices of his patent for transferring and weighing grain at terminal points without the necessity, use or employment of elevators.

"III. The third ground of complaint we have against the reasoning and opinion of the court in the disposal of Mr. Richards' patent is the closing sentence of the opinion, namely: 'In fact, the combination claimed is a pure aggregation.' It is most difficult to reconcile the above statement with the apparent facts in this case. Having in view, however, the function and result of the combination, namely, the transfer of grain from one car to another, and the weighing of the same in such continuous operation of transfer, keeping each lot and load distinct and separate from the other, wherein can it be contended that any portion of the mechanism or devices utilized to produce this result is in any sense an aggregation. From the track and car where the loaded grain is first taken and acted upon to the track and car where it is taken to and deposited, the operation is continuous and uninterrupted. Every mechanical element entering into the carrying out of and production of this result co-acts either simultaneously or successively with every other element of the combination. Not a single element entering into any one of the mechanical combinations of Richards to transfer and weigh grain, as identified by either claim, can be omitted without destroying the combination and its effectiveness, function and result. How then can it be claimed that a combination of mechanical means and devices, producing a result, co-acting together, wherein no one element of the combination can be omitted without destroying the combination, function and result, is a pure aggregation, we confess we are at a loss to appreciate or understand. Moreover, whether or not an alliance of mechanism is a mere aggregation and juxtaposition of parts is a question which, if disputed, can only be determined by proof, and we most earnestly and confidently contend that if the opportunity

is offered the patentee Richards to determine this question of aggregation, as represented by his combination, abundant proof can be offered that cannot be contradicted, to the effect that every element of his combination enters into and produces the new function and result identified as his invention, and that all parts co-act together to produce this result, and that such result and function would be impossible if any of the identified parts should be omitted from the combination. For the above reasons briefly stated, we submit that this petition for rehearing should be granted, and Mr. Richards should be given his day in court to demonstrate not only the patentability and validity of his patent grant in question, but also its great value commercially, as an invention, over every and all of the old devices that can be arrayed as an anticipation or comparison therewith."

Mr. Charles K. Offield for the petitioner submitted on the petition.

Mr. Justice Brown delivered the opinion of the court.

A petition was filed at the last term for a rehearing in these cases upon the ground that the court erred in assuming judicial knowledge of the construction and operation of grain elevators, and in holding that these elevators contained practically the same elements as the grain transferring apparatus of the Richards patents. The argument is that the object of Mr. Richards' invention was to obviate and do away with elevators, by securing the continuous and automatic transfer of grain from one car to another, weighing it in transit, and preserving the identity of each lot; whereas, in the ordinary elevator, the grain is raised from the car or vessel, deposited in a storage bin where its identity is lost, and other grain is withdrawn, as required, from the storage bin, to take its place.

That the device described may be a convenient and valuable method of transferring grain from one car to another is not denied. The question is whether it involves invention.

There is certainly no novelty in the result, since the grain may be transferred by shovels from one car to a platform or

bin, where it may be weighed, and again transferred to a receiving car, though doubtless this is a slow and laborious process. Is there any novelty in the method by which this is done? The grain is shovelled from one car into a chute, from which it passes into the elevator leg, through which the buckets move upward, and is discharged into a hopper. It is there weighed, without being mixed with other grain, a valve is opened, and the grain discharged into the receiving car. There is clearly no novelty in the individual steps of this transfer. Indeed, the failure to claim either one of the elements separately raises a presumption that no one of them is novel.

The novelty, then, must be in the combination, which differs from the combination of an ordinary elevator only in the omission of the storage feature, by which grain is housed in transit, and its identity lost. While the omission of an element in a combination may constitute invention, if the result of the new combination be the same as before; yet if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention, if the elements retained performed the same function as before. This is well illustrated in the case of *Stow* v. *Chicago*, 3 Bann. & Ard. 92, decided in the same circuit. If, for instance, another person should take out a patent for this same combination, with the weighing hopper omitted, such patent would clearly be void, unless another method of weighing were substituted. The invention in this case is said to consist in the fact that the grain is not stored in transit, but is delivered directly from one car to another. Of course, its identity is not lost, and cannot be lost, since the storage feature, which destroys the identity of the grain in the elevator, is omitted. But this is a mere accident and not a new function of the transferring device. The same thing would happen in the case of an elevator, if, while a cargo of wheat were being transferred from a vessel to a train of cars, there happened to be no other grain in store with which the cargo in question could become mixed. In the Richards' device there is never but one lot of grain being transferred at a time, so that there is no possibility of the grain losing its identity, while the ordinary course of

business in an elevator is for the grain to be dealt with in large cargoes, so that the identity of a particular lot is lost by its being mixed with others. After all, the invention resolves itself into the omission of the storage feature and a necessary incident thereto.

To make a combination of old elements patentable, there must be some new result accomplished, and as the result in this case is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, we see nothing upon which a claim to invention can be based. The device is undoubtedly a convenient one, and appears to have proven profitable to the patentee; but we are unanimously of opinion that it lacks the necessary quality of invention.

The application is, therefore, *Denied.*

ISAACS *v.* UNITED STATES.

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

No. 609. Submitted October 23, 1895. — Decided November 11, 1895.

The action of the trial court upon an application for a continuance is purely a matter of discretion, not subject to review by this court, unless it clearly appears that the discretion has been abused.

The court committed no error in charging that the fact that the man killed was a white man might be shown by the statement of the defendant taken in connection with other facts and circumstances.

It is no ground for reversal that the court omitted to give instructions which were not requested by the defendant.

THE plaintiff in error, Webber Isaacs, a Cherokee Indian, was indicted, with two others, for the murder of a white man in the Indian country. There were four counts in the indictment, two charging that the murdered man was Mike P. Cushing, and two that he was an unknown white man. No witness who testified saw the act of killing; but it was shown

by the testimony of several witnesses, that a peddler, about sixty years of age, with gray whiskers and riding a gray pony, was seen going towards Isaacs' house, several days before the body was found. Some days thereafter, within a mile of Isaacs' house, and off from the public road, the body of a horse, corresponding to the one the peddler was riding, was found. The appearances indicated that he had been shot. Near the horse were the remains of a man, with the clothing and flesh nearly consumed by fire. The ground indicated that the body had been dragged from where the horse lay to where it was found, the feet having tied about them what appeared to be a portion of the bridle, which was found cut up. There was evidence that the remains were those of a white man. Under his chin were some gray whiskers unconsumed by the fire. Near the body were found some bills and letters identified as belonging to Cushing. The head was crushed and there were holes under the arm. Shortly after the killing, several witnesses saw defendant with money.

Defendant admitted that a peddler was at his house on the day that Cushing was last seen alive, and said that he rode away with one Jack Chewey, who told him the next day that he had killed the peddler. He admitted that he had never asked Chewey any questions as to when, how, or where he had killed him, and that he had never told any person that Chewey had told him of the killing. Five witnesses also swore that defendant told them that he and Chewey had killed a white peddler at a time corresponding with the disappearance of Cushing.

The jury found the defendant guilty of murder as charged in the first count of the indictment, and the court sentenced him to be hanged. Whereupon he sued out this writ of error.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error submitted on his brief.

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

Opinion of the Court.

In the absence of an oral argument and of a brief by plaintiff in error, we are compelled to dispose of this case upon the record, and the brief of the Attorney General.

1. The first error assigned is to the action of the court in overruling a motion for a continuance, requested because of the absence of a material witness for the defence.

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. *Woods* v. *Young*, 4 Cranch, 237; *Barrow* v. *Hill*, 13 How. 54; *Crumpton* v. *United States*, 138 U. S. 361; *Cox* v. *Hart*, 145 U. S. 376; *Earnshaw* v. *United States*, 146 U. S. 60, 68; *Means* v. *Bank of Randall*, 146 U. S. 620. It appears that forty-nine days before the case was called for trial, an application was made and granted to have the witness whose testimony was desired, summoned at the expense of the government, the affidavit showing that she was within the jurisdiction of the court. It was not shown that any diligence was used to procure the attendance of the witness; or that any attachment was asked for, although the trial continued for several days, or why the subpœna was not served. The affidavit did not show that the defendant could not make the same proof by other witnesses, or that he could not safely go to trial without the testimony of the witness in question. In fact, all that the affidavit showed that the witness could prove was established by other testimony, including that of the defendant himself. There was clearly no abuse of discretion.

2. The second assignment was to the charge of the court "that the fact that the man killed was a white man might be shown by the statement of the defendant in establishing the *corpus delicti*."

The charge of the court is not accurately set out in the assignment, but was, in substance, that the fact that Cushing was a white man might be shown by the testimony of the defendant as well as by any other means, or that it might be shown by that in connection with other facts and circumstances.

We do not understand that any inference can properly be drawn from this that the court intended to charge that the *corpus delicti* might be shown by the mere statement of the defendant, but only that his statement, taken in connection with other facts, might be used to show that the murdered man was a white man. If any inference could be drawn to the effect that the court intended to charge that the *corpus delicti* might be proved by the confession of the defendant, it is completely removed by the further charge that "that state of case" (namely, the death of Cushing by violence inflicted criminally) "must be proven by circumstances, or by positive proof, one or the other, before the declarations or admissions or confessions of the defendant can be taken as sufficient to warrant a jury in convicting. Now do not make any mistake about this proposition — the proposition called the *corpus delicti* — the fact that a crime was committed, or the fact that the man charged in the indictment, either as Mike P. Cushing, or an unknown white man, was murdered, must be proven by evidence outside of the confession of the defendant;" and that "whenever that state of case is established, then you may take the declarations of the defendant as tending to show his guilt."

As there was abundant evidence in the case, outside of defendant's confession, not only that the man had been murdered, but considerable evidence that he was a white man, we think there was no error committed in the charge that the fact that he was a white man might be shown by the testimony of the defendant, as well as by other means, or by that in connection with other facts and circumstances. The fact that the murdered man was a white man had no bearing upon the question of the *corpus delicti*, or of the fact that the defendant murdered him, and bore only upon the jurisdiction of the court.

3. The next assignment is to the charge "that the *corpus delicti* could be established by circumstantial testimony, without saying that this circumstantial evidence should be such as creates cogent, irresistible grounds of presumption." Without any request on the part of the defendant to add the qualifi-

cation suggested, there was no error in the charge actually given. It is no ground for reversal that the court omitted to give instructions, where they were not requested by the defendant. It is sufficient that the court give no erroneous instructions. *Pennock* v. *Dialogue*, 2 Pet. 1, 15; *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73, 78.

Beyond this, however, any possible misapprehension upon this point would be removed by the charge that the law says that "if the propositions I have named to you make up the crime, and the further proposition that brings the crime home to this defendant are proven beyond a reasonable doubt in the case, that your duty in the premises is imperative: it is to find a verdict of guilty of murder against the defendant. If they are not proven in that way, either one of them — that is, to such a degree of certainty that they come under that legal definition of proof beyond a reasonable doubt — then your duty will be to acquit the defendant." As the court charged the jury repeatedly that the crime and every element thereof must be made out to their satisfaction beyond a reasonable doubt, it is impossible that they could have been misled by the omission of the qualification suggested.

The remaining assignments are either covered by those already considered, or are so obviously frivolous that no discussion of them is necessary. The judgment of the court below is, therefore,

Affirmed.

SHIVER v. UNITED STATES.

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

No. 548. Submitted October 15, 1895. — Decided November 11, 1895.

Land, duly and properly entered for a homestead, under the homestead laws of the United States, is not, from the time of entry, and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the

Statement of the Case.

United States; but, on the contrary, it continues to be the property of the United States for five years following the entry, and until a patent is issued.

Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, he may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps may exchange such timber for lumber to be devoted to the same purposes; but he cannot sell the timber for money, except so far as it may have been cut for the purpose of cultivation; and in case he exceeds his rights in this respect, he may be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead.

In holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed to be the property of the settler, and therefore subject to taxation.

Shiver was tried upon an information filed in the District Court for the Southern District of Alabama for cutting and removing two hundred pine trees from a quarter section of land in Monroe County, which he had entered as a homestead on January 26, 1894. It appeared that the cutting began about the first of April, and that all the standing timber, amounting to about five hundred trees, had been, either before or after complaint was made against him, cut and removed from the land; that the defendant and his family were living on the land, and had erected a box house worth about one hundred dollars; that the lumber was cut and hauled from the land by defendant's procurement; that it had been cut all over the land; that the land cleared amounted to about an acre; that the house was not yet completed; that the timber was taken to the mill of the Bear Creek Mill Company, of which defendant was an employé; that defendant was not living on the land when the cutting began, and that the trees would make upwards of 150,000 feet of lumber; that they were not cut for the purpose of clearing the land for cultivation, and that

such timber was cut within four months after defendant had made his homestead entry; that the trees yielded an aggregate of the sum of $126, while the improvements made upon the land cost $229. The lumber put into the building amounted to 9765 feet.

There was conflicting evidence as to the motives of the defendant in cutting and selling the timber. He claimed that the logs were exchanged for lumber and building material, all of which were put into his improvement; the government claiming that it was cut for the purpose of sale and profit.

The court instructed the jury that defendant had the right to cut timber on his homestead suitable and sufficient to build necessary and convenient houses, fences, etc., for a home, and to have that timber sawed into suitable lumber to make such improvements on his homestead; that he could have exchanged timber for lumber to make such improvements, but only so much as was necessary, and that if he only did this, and did it in good faith, he should be acquitted. On the contrary, that any cutting in excess of the number necessary to make his improvements would be unlawful. That he had no right to cut trees for the purpose of sale for profit, or to pay debts or loans of money, or to pay his expenses, or to buy supplies; in short, he had no right to cut them for sale for any such purpose.

Defendant was convicted, and appealed to the Circuit Court of Appeals, which certified to this court the following questions:

1. Whether lands duly and properly entered for a homestead, under the homestead laws of the United States, are from the time of entry, and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purpose, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the United States?

2. Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which

entry is in all respects regular, can such citizen be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead?

Mr. M. D. Wickersham and *Mr. J. W. Smith* for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendant in error.

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

This case turns upon the question as to what are "lands of the United States" within the meaning of Rev. Stat. § 2461, providing for the punishment of persons guilty of cutting timber upon such lands other than for the use of the navy. Obviously the question is not whether such lands are so far withdrawn from sale as to be no longer subject to appropriation by any railroad or other person or corporation to which a land grant has been made, but whether they are still so far the property of the United States that the government may protect itself against an unlawful use of them. Indeed, this court has settled by repeated decisions that the claim of a homestead or preëmption entry made at any time before filing a map of definite location of a railway prevents the lands covered by such claim from passing to such railway under its land grant, even though such entry be subsequently abandoned. *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357; *Whitney* v. *Taylor*, 158 U. S. 85; *Sioux City &c. Land Co.* v. *Griffey*, 143 U. S. 32. The same principle applies where lands have been reserved for any purpose whatever. *Wilcox* v. *Jackson*, 13 Pet. 498; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Newhall*

v. *Sanger*, 92 U. S. 761; *Kansas Pacific Railroad* v. *Atchison &c. Railroad*, 112 U. S. 414.

While these cases indicate that lands once appropriated to a certain purpose thereby cease to be available for another purpose, there is nothing in them to show that the United States loses its title to such lands by the first appropriation, or that they cease to be the property of the government. Upon the contrary, it was said by this court, as early as 1839, in *Wilcox* v. *Jackson*, 13 Pet. 498, 516, that "with the exception of a few cases, nothing but the patent passes a perfect and consummate title." So, in *Frisbie* v. *Whitney*, 9 Wall. 187, 193, "There is nothing in the essential nature of these acts" (entering upon lands for the purpose of preëmption) "to confer a vested right, or, indeed, any kind of claim to land, and it is necessary to resort to the preëmption law to make out any shadow of such right." In this case, the following extract from an opinion of Attorney General Bates was quoted with approval: "A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of preëmption. But this is only a privilege conferred on the settler to purchase lands in preference to others. . . . His settlement protects him from intrusion or purchase by others, but confers no right against the government." A number of authorities were cited to the same effect. It was held that it was within the power of Congress to withdraw land which had been preëmpted from entry or sale, though this might defeat the imperfect right of the settler. In the *Yosemite Valley Case*, 15 Wall. 77, the construction given to the preëmption law in *Frisbie* v. *Whitney* was approved, the court observing, p. 88: "It is the only construction which preserves a wise control in the government over the public lands and prevents a general spoliation of them under the pretence of intended preëmption and settlement. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the government, a convenient protection for any

trespass and waste in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises."

The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. By the homestead act, Rev. Stat. § 2289, certain classes of persons therein specified are entitled to enter a quarter section of land subject to preemption at a certain price, upon making an affidavit of facts, (§ 2290,) before the register or receiver, including in such affidavit a statement that "his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person." By the act of March 3, 1891, c. 561, § 5, 26 Stat. 1095, 1098, this affidavit is now required to state that the settler "will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as the agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon." By § 2291, no patent shall issue until the expiration of five years from the date of the entry, the settler being required to prove by two credible witnesses that he has resided upon or cultivated the land for such term of five years immediately succeeding the time of filing the affidavit, and that no part of such land has been alienated, except for certain public purposes. By § 2297, if, before the expiration of the five years, the settler changes his residence or abandons the land for more than six months at any time, the lands so entered shall revert to the government; and by § 2301, the settler may, at any time before the expiration of the five years, obtain a patent for the lands, by paying the minimum price therefor, and making proof of settlement and cultivation, as provided by law, granting preemption rights.

From this résumé of the homestead act, it is evident, first, that the land entered continues to be the property of the United States for five years following the entry, and until a patent is issued; second, that such property is subject to divestiture, upon proof of the continued residence of the settler upon the land for five years; third, that meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act. The object of this legislation is to preserve the right of the actual settler, but not to open the door to manifest abuses of such right. Obviously the privilege of residing on the land for five years would be ineffectual if he had not also the right to build himself a house, outbuildings, and fences, and to clear the land for cultivation, and to that extent the act limits and modifies the act of 1831, now embraced in Rev. Stat. § 2461. It is equally clear that he is bound to act in good faith to the government, and that he has no right to pervert the law to dishonest purposes, or to make use of the land for profit or speculation. The law contemplates the possibility of his abandoning it, but he may not in the meantime ruin its value to others, who may wish to purchase or enter it.

With respect to the standing timber, his privileges are analogous to those of a tenant for life or years. In this connection, it is said by Washburn in his work upon Real Property, (1st ed.) vol. 1, p. 108: "In the United States, whether cutting of any kind of trees in any particular case is waste, seems to depend upon the question whether the act is such as a prudent farmer would do with his own land, having regard to the land as an inheritance, and whether doing it would diminish the value of the land as an estate."

"Questions of this kind have frequently arisen in those States where the lands are new and covered with forests, and where they cannot be cultivated until cleared of the timber. In such case, it seems to be lawful for the tenant to clear the land if it would be in conformity with good husbandry to do so, the question depending upon the custom of farmers, the situation of the country, and the value of the timber. . . .

Wood cut by a tenant in clearing the land belongs to him, and he may sell it, though he cannot cut the wood for purposes of sale; it is waste if he does."

By analogy we think the settler upon a homestead may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and, perhaps, as indicated in the charge of the court below, to exchange such timber for lumber to be devoted to the same purposes; but not to sell the same for money, except so far as the timber may have been cut for the purpose of cultivation. While, as was claimed in this case, such money might be used to build, enlarge, or finish a house, the toleration of such practice would open the door to manifest abuses, and be made an excuse for stripping the land of all its valuable timber. One man might be content with a house worth $100, while another might, under the guise of using the proceeds of the timber for improvements, erect a house worth several thousands. A reasonable construction of the statute — a construction consonant both with the protection of the property of the government in the land and of the rights of the settler — we think restricts him to the use of the timber actually cut, or to the lumber exchanged for such timber and used for his improvements, and to such as is necessarily cut in clearing the land for cultivation.

While this question never seems to have arisen in this court before, in *United States* v. *Cook*, 19 Wall. 591 — a suit in trover for the value of timber cut from an Indian reservation — it was held that while the right of use and occupancy by the Indians was unlimited, their right to cut and sell timber, except for actual use upon the premises, was restricted to such as was cut for the purpose of clearing the land for agricultural purposes; that while they were at liberty to sell the timber so cut for the purpose of cultivation, they could not cut it for the purpose of sale alone. In other words, if the cutting of the timber was the principal, and not the incident, then the cutting would be unlawful, and the timber when cut became the absolute property of the United States. Their position was said to be analogous to that of a tenant for life, the

government holding the title, with the rights of a remainderman.

In the courts of original jurisdiction, it has been uniformly held that a similar rule applied to homestead entries. *United States* v. *McEntee*, 23 Internal Revenue Record, 368; *United States* v. *Nelson*, 5 Sawyer, 68; *The Timber Cases*, 11 Fed. Rep. 81; *United States* v. *Smith*, 11 Fed. Rep. 487, 493; *United States* v. *Stores*, 14 Fed. Rep. 824; *United States* v. *Yoder*, 18 Fed. Rep. 372; *United States* v. *Williams*, 18 Fed. Rep. 475; *United States* v. *Lane*, 19 Fed. Rep. 910; *United States* v. *Freyberg*, 32 Fed. Rep. 195; *United States* v. *Murphy*, 32 Fed. Rep. 376. This general consensus of opinion is entitled to great weight as authority.

While we hold in this case that, as between the United States and the settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, we do not wish to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed the property of the settler, and, therefore, subject to taxation. *Carroll* v. *Safford*, 3 How. 441; *Witherspoon* v. *Duncan*, 4 Wall. 210; *Railway Co.* v. *Prescott*, 16 Wall. 603; *Railway Co.* v. *MacShane*, 22 Wall. 444; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496.

As the land in question continued to be "the land of the United States," within the meaning of section 2461,

The first question must be answered in the negative, and the second in the affirmative.

PATTON *v.* UNITED STATES.

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

No. 36. Argued October 16, 1895. — Decided November 11, 1895.

The plaintiffs in error imported into the port of New York in November, 1888, a quantity of wool which had been scoured; which was then put upon a comb from which it came in long lengths known as slivers or slubbing; which was then put through a process called gilling, which formed the slivers into a less number of slivers of greater thickness; and which was then taken into the drawing room and finished, from whence it came out in the form of round balls called tops. The collector first classed the goods as waste, and fixed the duty at ten cents a pound under the act of March 3, 1883, c. 121, 22 Stat. 488, which duty was paid; but subsequently the collector imposed on the whole importation, under the same act, a duty of ten cents a pound as wool of the first class, costing under thirty cents per pound in the unwashed condition; then trebled that duty, because imported scoured; and then doubled the result upon the ground that the tops had been changed in their character or condition for the purpose of evading the duty. The importer declined to pay the excess of duty so imposed, and the United States commenced this action to recover it. *Held*, That the duty of sixty cents a pound was properly imposed, and that there was no error in the rulings of the trial court which are set forth in the opinion of this court.

This was an action by the United States in the District Court against the importing firm of George W. Patton & Co. to recover certain duties claimed to be due on thirty-three bales of merchandise entered by the importers as "wool waste," and claimed by them to be dutiable at ten cents per pound under the following clause of schedule K of the tariff act of 1883: "Woollen rags, shoddy, mungo, waste, and flocks, ten cents per pound." At the time of the importation (November, 1888) the duties were accordingly assessed and paid at this rate.

The appraiser subsequently returned the goods as "scoured wool, broken tops, class 1, costing under thirty cents per pound in the unwashed condition, sixty cents per pound." The collector accordingly fixed the duty at sixty cents per

pound, under the following paragraphs of the act of March 3, 1883, c. 121, 22 Stat. 488, 508.

"All wools . . . 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 . . . wools," etc.

"The duty on wools of the first class which shall be imported washed shall be twice the amount of the duty to which they would be subjected if imported unwashed; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed."

"The duty upon wool . . . which shall be imported in any other than ordinary condition, as now and heretofore practised, or which shall be changed in its character or condition for the purpose of evading the duty . . . shall be twice the duty to which it would be otherwise subject."

The collector first imposed a duty of ten cents a pound upon this as wool of the first class, costing under thirty cents per pound in the unwashed condition, then trebled this duty, because they were imported scoured, and again doubled the result upon the ground that they had been changed in their character or condition for the purpose of evading the duty. This made the aggregate duty sixty cents per pound, which appears to have been greater than the whole value of the goods. To recover the difference paid upon the entry and the duty imposed by the collector, the United States brought this suit.

Upon trial before a jury, the court charged that the importation in question could not be considered as wool waste, as it did not consist of refuse or broken particles thrown off in the process of manufacture, and was made intentionally by tearing up what are called "wool tops," which consist of wool which has been subjected to several processes, and prepared for spinning; and that it could not be considered as a manufacture of wool; and hence the court left it to the jury to say whether the wool was imported scoured, and in a condition other than that in which such wool was customarily imported in March,

1883, and previously. The court expressed the opinion that the plaintiff was entitled to recover the amount of the duties assessed, but submitted the case to the jury upon the evidence.

The jury found a general verdict for the plaintiff in the sum of $10,887.26, and further found, in answer to a special question submitted to them by agreement, "that the tops which were broken into fragments constituting this importation were so broken for the purpose of changing the condition of the wool from tops into the fragments resembling waste, for the purpose of evading the duty to which the wool in the form of tops would be subjected on importation into this country, or evading duty to which the importers believed the tops would be liable."

Judgment having been entered upon this verdict, defendant sued out a writ of error from the Circuit Court of the United States, which affirmed the judgment of the court below. Defendants thereupon sued out a writ of error from this court.

Mr. Frank P. Prichard, (with whom was *Mr. John G. Johnson* on the brief,) for plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

1. The first assignment of error is that which is taken to the instruction to the jury that the importation in question, though called wool waste, seems to be so called only because of its resemblance to what was formerly known by this designation; that it does not consist of refuse or broken particles thrown off in the process of manufacture, but is made intentionally, by tearing up what are called "wool tops," which consist of wool which has been put through several processes and prepared for spinning, and that the term "waste" did not embrace this commodity.

The correctness of this instruction turns upon the meaning

of the words "woollen waste," as used in the act of 1883. As bearing upon this, we are at liberty to consider its ordinary definition, which will be controlling, except so far as it may be varied by a commercial designation obtaining at that time. *Saltonstall* v. *Wiebusch*, 156 U. S. 601. *Waste* is defined by Webster as "that which is of no value; worthless remnants; refuse. Specifically: remnants of cops, or other refuse resulting from the working of cotton, wool, hemp, and the like, used for wiping machinery; absorbing oil in the axle boxes of railroad cars, etc." In this connection, and in the same clause of the statute, other words are included, undoubtedly referring to articles of the same or of a similar nature. These are "*rags; shoddy*," defined as "a fibrous material, obtained by 'devilling' or tearing into fibres, refuse woollen goods, old stockings, rags, druggets, etc.;" "*mungo*," which properly signifies the disintegrated rags of woollen cloth, as distinguished from those of worsted, which form shoddy; and "*flocks*," defined as "woollen or cotton refuse, old rags, etc., reduced to a degree of fineness by machinery, and used for stuffing upholstered furniture;" and also as "very fine sifted woollen refuse, especially that from shearing the nap of cloths, used as a coating for wall paper to give it a velvety or cloth-like appearance." The prominent characteristic running through all these definitions is that of refuse, or material that is not susceptible of being used for the ordinary purposes of manufacture. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable and used for purposes for which merchantable material of the same class is unsuitable.

The importation in question consisted of wool which had been scoured, then carded and prepared; then put upon a comb, from which it comes in long lengths, known as slivers or slubbing. It is then put through a process called gilling, which forms the slivers into a less number of slivers of greater thickness. These slivers are then taken into the drawing room and finished, from whence they come out in the form of round balls, called "tops." These tops become new articles of merchandise, which are sold to the spinners, who spin them into worsted yarn.

In the process of making the tops, short ends of wool are produced, which are called, and sold in the trade as "Botany laps" or "Botany waste," the two terms being synonymous in the English market. After the top is produced, it sometimes happens that it is shorter in staple than was anticipated, or not of the proper color, or that it has to be recarded to get out the burrs, or for some other reason it becomes unmerchantable. In such cases, it has always been the practice in England to break up the tops as unfit for ordinary use, and in that condition they are sold for the same purpose as wool waste, and are known and sold commercially as Botany laps or Botany waste. It was not claimed, however, that they formed a recognized article of commerce in this country, or to any great extent in England. At and prior to 1883, there was no quotable market price for waste, for the reason that the manufacture was not large, though it was bought and sold to a certain extent on its merits upon the market.

In 1887 or 1888, owing to the depression of the wool trade in England, and the demand for waste in this country, the price of tops became so low and the price of waste so high, that the deliberate breaking up of tops began for the purpose of exporting them to America as waste, though there is no evidence of any importation of this character prior to 1887. The discovery that the tops thus broken up might be entered at the American custom-houses as "waste" produced such a sudden demand for exportation that, while the amount declared at the American consulate at Bradford, the centre of this trade, for the last two months of 1887, and the first two months of 1888, was only 190,088 pounds, for the corresponding months of 1888 and 1889 it rose to 1,803,558 pounds.

It appeared from the evidence that the waste, whether intentionally or unintentionally produced, was an article having different qualities from the merchantable wool, and was used as an adulterant. It is, however, used like other scoured wool, being mixed with it in the carding machine, and is worth only ten or fifteen cents less per pound than

scoured wool of the same character; and hence, in view of the difference in tariff rates, is an article of much more value than scoured wool for the purposes of importation. While these broken tops became a large import under the designation of waste, they never seem to have been prepared in this country for the purposes of sale, the tops being much more valuable in their unbroken condition; while in England, in 1888, the broken tops were more valuable than the unbroken ones. The testimony upon both sides indicates that this artificial kind of waste is, for obvious reasons, more uniform and clean, and, therefore, more valuable than genuine waste. It was not disputed that the importations in question consisted of tops deliberately broken up for the purposes of sale. The main question is whether the action of the collector was correct in refusing to allow them to be entered under the denomination of "waste."

If the ordinary definition of "waste," as refuse matter thrown off in the process of manufacture, is to control, it is quite clear that the importations in question are not susceptible of this meaning. The common definition of "waste" lends no support to the theory of the defendants.

With regard to its commercial designation there was undoubtedly some testimony tending to show that, in England, merchantable tops broken up for the purpose of exportation had acquired the commercial designation of waste, or more properly, "broken top waste;" that the importations in question were ordered by the defendants under the latter designation, and that such waste was preferred to the ordinary waste or refuse, because the latter had too much slubbing. This designation, however, was confined to such waste as had been purchased since 1887, and threw no light upon the commercial designation of the article in question at or prior to March, 1883. There is little or nothing to indicate that the practice of breaking up merchantable tops for export prevailed in England prior to 1887, when the attention of wool dealers there seems to have been called to the profits that could be made by exporting broken tops to America. There were, however, several witnesses produced by the defence, who were

residents of the United States, and who swore that the article in question had been known in this country as top waste since 1866, and that there was no difference in the commercial designation of the article, whether it was intentionally or unintentionally produced.

This must, however, be taken in connection with the undisputed testimony that merchantable tops had never been broken up in England to form waste prior to 1887 or 1888, when the attention of dealers was first directed to the profits which could be made by importing them into this country under that denomination. The witnesses upon cross-examination admitted that they had never known of merchantable tops being broken up and imported here as waste prior to 1887, and their testimony, so far as it bears upon preceding years, indicates that the top waste referred to was that produced by the breaking up of discolored or otherwise unmerchantable tops, the product of which was known commercially and properly as waste or top waste. In short, the testimony upon this subject falls far short of establishing a commercial designation applicable to these articles with the certainty, uniformity, and generality required by the decisions of this court. *Maddock* v. *Magone*, 152 U. S. 368, 371; *Berbecker* v. *Robertson*, 152 U. S. 373, 377; *Sonn* v. *Magone*, 159 U. S. 417. In default of such evidence, the term will be presumed to have been used in the tariff act in its ordinary sense of refuse. *Swan* v. *Arthur*, 103 U. S. 597; *Schmieder* v. *Barney*, 113 U. S. 645. Taking the testimony all together, we think there was no such evidence of a commercial designation of the articles in question as made it incumbent upon the court to submit the question to the jury.

But had the evidence upon this point been much stronger than it was, it is difficult to see how it could avail the defendant in view of the clause that "the duty upon wool . . . which shall be imported in any other than ordinary condition, as now or heretofore practised, or which shall be changed in its character or condition for the purpose of evading the duty . . . shall pay twice the duty to which it would otherwise be subject." Although it was submitted as a separate question

to the jury, the testimony was practically undisputed, that the articles in question were merchantable tops broken up for the purpose of changing their character or condition from that of tops to that of waste, and that it was done for the purpose of evading the duty to which the wool in the form of tops would be subject on importation, or, at least, to which the importer believed it would be liable. If such change were made, and made for this purpose, it would make no difference whether the article thus produced was known commercially as waste or not. Assuming that the product would be waste, it would be waste produced by a process which Congress had refused to recognize, and the fact that the classification of the article was thereby changed would not relieve it from the double duty which Congress had imposed upon wool whose character or condition had been changed.

In this connection, we are referred by counsel for defendants to two cases which are supposed to justify the inference that imported merchandise may be treated in such manner as to change its classification, even though such change were made for the purpose of securing its importation at a lower rate of duty. In the first of these cases, *Merritt* v. *Walsh*, 104 U. S. 694, certain sugars were given an artificial color in the process of manufacture. The sole test of their dutiable quality was their actual color, as graded by the Dutch standard. It had been decided that this meant the color of the sugar obtained by the ordinary process of manufacture, and that any means used to degrade the color after such process was a fraud upon the revenue. As no proof was offered to show that they were artificially colored after the manufacture was completed, the court instructed the jury to find a verdict for the plaintiffs. The real question was whether (supposing that sugars were not artificially colored for the purpose of avoiding duties after being manufactured) their dutiable quality was to be decided by their actual color or by their saccharine strength. It was decided that as the Dutch standard was a color standard only, even if the sugars had been manufactured in dark colors on purpose to evade our duties, the entry at a reduced value was nevertheless lawful, and that the remedy lay with Congress alone.

In the second case, *Seeberger* v. *Farwell*, 139 U. S. 608, 611, this court held that certain manufactures of wool, into which a few threads of cotton had been introduced for the purpose of securing the classification of the goods at a lower rate of duty, were properly subject to classification at that rate, although the quantity of cotton was so small as not to materially change the character of the goods as merchandise, the court observing that "Congress having made special provision for a lower rate of duty upon goods when composed in part of wool, without naming how much of other material should enter into their composition in order to secure such lower rate of duty, the court was of opinion that manufacturers and importers had a right to adjust themselves to the foregoing clause of the tariff, and to manufacture the goods with only a small percentage of cotton, for the purpose of making them dutiable at the lower rate." In those cases, however, there was no such provision applicable to sugars or to woollen cloths as exists in this case, providing that where wool unmanufactured shall be changed in its character or condition for the purpose of evading duty a double duty shall be imposed. The object of this legislation seems to have been to make that unlawful with respect to raw wools which had been held to be legitimate with respect to other articles.

2. We are also of opinion that the importations in question cannot be considered as manufactures of wool. Assuming that the tops, before being broken up, represented a stage in the process of converting the wool into cloth, which would entitle them to be considered as manufactures; if the tops be reconverted into wool, so that the process has to be gone through with again, the wool loses its character as a manufacture and resumes its character as wool, even though it acquires the new commercial designation of waste. Waste in its ordinary sense being merely refuse thrown off in the process of converting raw wool into a manufacture of wool, cannot be considered a manufacture simply because it acquires a new designation, and if it be artificially produced by the breaking up of the tops it is with even less reason entitled to be so considered. Unless natural waste can be treated as a manufacture, artificial waste should not.

The clause in the tariff act covering these manufactures imposed both a specific and an *ad valorem* duty upon "woollen cloths, woollen shawls, and all manufactures of wool of every description." Applying the rule *noscitur a sociis*, it can hardly be supposed that wool, used for the purpose of waste and as an adulterant in the manufacture of cloths, was to be included in the same designation as woollen cloths and shawls, which evidently refer to articles made of wool and having a separate designation of their own. But however this may be, the article in question does not fall within the definition of manufactures as laid down by this court in numerous cases. Thus, in *United States* v. *Potts*, 5 Cranch, 284, round copper bottoms turned up at the edge, not imported for use in the form in which they were imported, but designed to be worked up into vessels, were held not to be manufactured copper within the intention of the legislature. So, in *Hartranft* v. *Wiegmann*, 121 U. S. 609, shells cleaned by acid, and then ground on an emery wheel, and some of them afterwards etched by acid, and intended to be sold for ornaments, as shells, were held to be "shells" and not "manufactures of shell." The question is fully discussed in *Lawrence* v. *Allen*, 7 How. 785, in which, however, it was held that india rubber shoes made in Brazil, by simply allowing the sap of the india rubber trees to harden upon a form, were manufactured articles because they were capable of use in that shape as shoes. Indeed, this was the form in which such shoes were at first made. Finally, in *Seeberger* v. *Castro*, 153 U. S. 32, tobacco scrap consisting of clippings from the ends of cigars and pieces broken from tobacco, of which cigars are made in the process of such manufacture, not being fit for use in the condition in which they are imported, were held to be subject to duty as unmanufactured tobacco. This scrap is in the nature of waste, and the case is directly in point.

3. The remaining assignment is as to the charge of the court that, if this wool was imported scoured, and in condition other than that in which such wool was customarily imported in March, 1883, and previously, it fell within the provision of wool imported scoured. There is abundance of testimony to

the effect that the article imported was not known commercially as "scoured wool;" but in the view taken by the court below, which we think was correct, this was immaterial. The act does not impose a duty upon scoured wool as such by its commercial designation, but provides that "the duty on wools . . . which shall be imported washed, shall be twice the amount of duty to which they would be subject if imported unwashed; and the duty on wools of all classes which shall be imported scoured, shall be three times the duty to which they would be subjected if imported unwashed." In short, the act refers not to the commercial designation but to the fact whether the wool has been actually scoured or washed, or is imported unwashed. If the wools have in fact undergone the process of scouring, they are properly classified as imported scoured, although they may not be known commercially as scoured wools.

There was no error in the rulings of the court below, of which the defendants were entitled to complain, and the judgment of the court below is, therefore,

Affirmed.

THIEDE *v.* UTAH TERRITORY.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 633. Submitted October 21, 1895. — Decided November 11, 1895.

It is not error in Utah to proceed to trial of a person accused of murder before the filing of the transcript of the preliminary examination had under the Compiled Laws of Utah, § 4883.

The provision in Rev. Stat. § 1033, that the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial does not control the practice and procedure of the local courts of Utah.

In Utah a juror in a capital case who states on his *voir dire* that he had read an account of the homicide in the newspaper and formed some impression touching it, but that he could lay that aside and try the case fairly and impartially on the evidence, is not subject to challenge for cause.

A juror is not subject to challenge for cause in a criminal proceeding

against a saloon keeper for homicide, who states on his *voir dire*, that he has a prejudice against the business of saloon keeping, but none against the defendant, whom he does not know.

When the relations between a defendant, charged with murdering his wife and the wife are to be settled, not by direct and positive but by circumstantial evidence, any circumstance which tends to throw light thereon may be fairly admitted in evidence.

The order in which testimony shall be admitted is largely within the discretion of the trial court.

When the court rules correctly that certain matters are not proper subjects of cross-examination, and notifies the questioning party that he can recall the witness and examine him fully in reference to those matters, and he fails to recall him or introduce testimony thereon, he has no grounds of complaint.

The credibility of a female witness cannot be impeached by asking her whether she has not had some difficulty with her husband.

When the defendant in a criminal case consents that a member of the jury shall act as interpreter for a witness speaking a foreign language, none of his rights are prejudiced by the juryman's so doing.

An exception in bulk to a refusal to charge several propositions, separately numbered but offered in bulk, cannot be maintained if any one proposition be unsound.

Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act.

Exceptions to the ruling of the court in a jury trial, tendered twelve days after the verdict was rendered, are too late.

THE case is stated in the opinion.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On November 5, 1894, in the District Court of Salt Lake County, Utah Territory, Charles Thiede, the plaintiff in error, was found guilty of the crime of murder, and sentenced to be hanged. On March 16, 1895, this judgment was affirmed by the Supreme Court of the Territory, whereupon he sued out this writ of error.

The record of the proceedings in the trial court is volumi-

nous, consisting of over four hundred printed pages, and we have not been assisted in our examination by either brief or argument on the part of counsel for plaintiff in error. We have, however, carefully examined the record, with the several assignments of error, and now state our conclusions thereon.

The first alleged error is in overruling the defendant's objection to going to trial on October 10, 1894, on the ground that the evidence taken at the preliminary hearing had not been transcribed, certified, and filed with the clerk of the District Court, as provided by law. The homicide was charged to have been committed on April 30, 1894. The indictment was returned on September 24. On September 28 the defendant was arraigned and pleaded "not guilty." On October 2 the trial was fixed by order of the court for October 10, and on that day when the case was called for trial the objection heretofore referred to was made and overruled. It was admitted that a preliminary examination had been had, that the testimony before the justice of the peace had been taken down in shorthand by one Fred. McGurrin, under direction of the justice; that about ten days before the trial said McGurrin was asked by the prosecuting attorney to transcribe the same, and that he declined to do so. McGurrin stated in open court that he had in a prior case transcribed the evidence and been refused payment therefor both by the county and the Territory, and upon such refusal had brought suit against both, and in such suits it had been adjudged that he had no cause of action against either, and that the only reason he failed to transcribe the testimony was that he would not be paid for the same.

By section 4883, Compiled Laws of Utah, 1888, in cases of homicide the testimony taken upon the preliminary examination is required to be reduced to writing as a deposition by the magistrate, or under his direction. If taken down in shorthand it must be transcribed into longhand by the reporter, within ten days after the close of the examination, and by him certified and filed with the clerk of the District Court. The fees for this are to be paid out of the county treasury. The defendant did not ask for a continuance, but simply objected to going to trial because this transcript of the testimony had

not been transcribed, certified, and filed. As the time within which this was by the statute required to be done had already passed, the objection, if sustained, would either have been fatal to the entire proceeding, and prevented any trial under that indictment, or at least would have caused a delay of the trial until such time as, by suitable proceedings, the filing of the transcript of the testimony could have been completed, and many things might interfere to postpone or prevent the obtaining of such transcript.

Before a ruling is made which necessarily works out such a result it should appear either that the statute gives an absolute right to the defendant to insist upon this preliminary filing, or else that the want of it would cause material injury to his defence. Neither can be affirmed. A preliminary examination is not indispensable to the finding of an indictment or a trial thereon; and if the examination itself is not indispensable it would seem to follow that no step taken in the course or as a part of it can be. Further, the statute does not provide that this transcript shall be filed at any time before the finding of the indictment or before the trial, but only within ten days after the examination. There is no prohibition against finding an indictment or bringing on of the trial at any time after the commission of the offence. The statute nowhere expressly places the filing of this transcript as something necessarily happening intermediate the examination and the trial, nor does it make the latter depend upon such filing or even upon a preliminary examination.

Further, supposing the transcript is filed, of what avail is it to the defendant? Simply this, that, as such a transcript is by the statute made *prima facie* a correct statement of the testimony and proceedings at the preliminary examination, if the defendant wishes to impeach any witness by proof of contradictory testimony at such examination, it is convenient to have on file that which is *prima facie* such testimony. But if the defendant can secure the same evidence without the transcript, the lack of it is no material injury; and that he could do so in this case appears from the fact that the stenographer was present in the court room, and his attendance could

have been secured by a subpœna, and he compelled under oath to develop from his notes any testimony taken on the preliminary examination. We conclude, therefore, that the law does not forbid a trial before the filing of this transcript, nor was, in this case, the failure so to file an error working substantial injury to the rights of the defendant.

The second matter presented is, that the court permitted certain witnesses to testify in the case over the objection of the defendant, when their names were not endorsed on the indictment nor included in a list furnished the defendant by the prosecuting attorney; and defendant had no knowledge that they would be called to testify until the trial had begun.

It appears that on October 2, when the case was set for trial, the defendant's counsel, in open court, requested the district attorney to furnish them before the trial began with the names of all witnesses to be called by the prosecution on the trial, stating that they did not claim it as a matter of right but of favor, and thought it was only fair to the defendant that he should be so advised. Thereupon the district attorney stated that he was unaware of any witnesses other than those whose names were on the back of the indictment, excepting four whom he then named, but promised that if he ascertained there were any others he would give information in regard to them as soon as received; on the 8th of October he furnished the defendant with a list of other witnesses; on the 11th, the day after the trial commenced, he notified the defendant of still another witness, who was in fact not called until the 15th, and four days before the defence rested.

By § 1033 Rev. Stat., the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial. *Logan* v. *United States*, 144 U. S. 263, 304. But this section applies to the Circuit and District Courts of the United States, and does not control the practice and procedure of the courts of Utah, which are regulated by the statutes of that Territory. This question was fully considered in *Hornbuckle* v. *Toombs*, 18 Wall. 648, and it was held, overruling prior decisions, that the pleadings and procedure of

the territorial courts, as well as their respective jurisdictions, were intended by Congress to be left to the legislative action of the territorial assemblies and to the regulations which might be adopted by the courts themselves. See also *Clinton* v. *Englebrecht*, 13 Wall. 434, in which it was held that the selection of jurors in territorial courts was to be made in conformity to the territorial statutes; *Good* v. *Martin*, 95 U. S. 90, in which a like ruling was made as to the competency of witnesses; *Reynolds* v. *United States*, 98 U. S. 145, where the same rule was applied to the impanelling of grand jurors and the number of jurors; also *Miles* v. *United States*, 103 U. S. 304, a case coming from the Territory of Utah, in which the same doctrine was announced with regard to the mode of challenging petit jurors. *Page* v. *Burnstine*, 102 U. S. 664, 668.

Referring, therefore, to the territorial statutes, there is none which directs that a list of the witnesses be furnished to the defendant. Section 4925, Comp. Laws Utah, requires that the names of witnesses examined before the grand jury be endorsed on the indictment before it is presented. There is no pretence that this direction was not complied with. In the absence of some statutory provision there is no irregularity in calling a witness whose name does not appear on the back of the indictment or has not been furnished to the defendant before the trial. The action of counsel for defendant in asking that as a favor the names be furnished them indicates their understanding of the extent of defendant's right, and, so far as appears, the district attorney fully complied with this request and furnished the names as fast as he was advised that they would be called. There is no suggestion that the defendant was surprised by the calling of any witness or the testimony that he gave. This allegation of error, therefore, is without foundation.

The third assignment is that the court erred in overruling defendant's challenges for cause directed against four jurors on the ground that on the *voir dire* they showed themselves incompetent to serve. These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspaper, and that some impression had been formed in

their minds from such reading, but each stated that he could lay aside any such impression and could try the case fairly and impartially upon the evidence presented. Section 5024, Compiled Laws of Utah, reads that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon public rumor, statements in public journals, or common notoriety: *Provided*, It appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him."

The testimony of these jurors clearly placed them within the terms of this statute, and there was no error in overruling the challenges. *Reynolds* v. *United States*, 98 U. S. 145; *Hopt* v. *Utah*, 120 U. S. 430; *Spies* v. *Illinois*, 123 U. S. 131; *Connors* v. *United States*, 158 U. S. 408.

The defendant was a saloon keeper, and one of the jurors also said that he had a prejudice against that business; that he did not know the defendant and had no prejudice against him individually, but simply against the business of saloon keeping; that such prejudice would not influence him in any way in passing upon the guilt or innocence of the defendant, but that his occupation, like that of any other witness, might affect the credit he would give to his testimony. But the charge against the defendant, the matter to be tried, had no reference to the occupation in which he was engaged, and, therefore, a prejudice against such occupation is entirely immaterial. In *Spies* v. *Illinois*, 123 U. S. 131, a juror testified to a decided prejudice against socialists and communists, as the defendants were said to be, but as the charge to be tried was murder, and there was no prejudice against the defendants as individuals, he was accepted and sworn as a juror. In the case at bar the juror was, however, excused by the defendant before all his peremptory challenges were exhausted. *Hopt* v. *Utah*, 120 U. S. 430; *Hayes* v. *Missouri*, 120 U. S. 68, 71.

A fourth assignment is that the court erred in admitting irrelevant, incompetent, and immaterial testimony. In order to appreciate this assignment of error it becomes necessary to

state briefly the circumstances of the homicide. The defendant owned a brewery, and adjoining it kept a saloon; he had for some time prior to the homicide been sleeping in the saloon, while his wife and their child — a girl of about nine years of age — slept at the dwelling-house a short distance away. Somewhere about one o'clock in the morning of Tuesday, May 1, 1894, the defendant awakened one Jacob Lauenberger, and informed him that he had found his wife lying dead, with her throat cut. Upon examination it appeared that the head had been almost severed from the body by a wound made with some sharp instrument, probably not a pocket-knife or a razor, but some large knife or similar instrument. The deceased was lying within three to five feet of the southeast corner of the saloon. About thirty feet further east was a pool of blood, with evidences of a struggle, and from that point to where the body lay there were marks of blood. The defendant was in or near the saloon during the night until he went with the witness Lauenberger for a physician, and the saloon was lighted during the whole of the night. There was blood upon his hands and upon his clothing. When he awakened Lauenberger, and thereafter when going for a physician, and after his return, he manifested grief at the loss of his wife. There was evidence of ill treatment by the defendant of his wife for a number of years, though this was denied by him, and his denial sustained by other testimony. On the Sunday evening preceding the murder the defendant and his wife had quarrelled. The witness Lauenberger called them into his house, and, according to his testimony and that of his wife, the defendant while there slapped his wife in the face, and ordered her to go home, and she refused to go, saying that if she went home the defendant would kill her that night. The last time the deceased was seen by any witness other than the defendant was about ten o'clock Monday evening, when she was sitting outside the defendant's saloon. The night was dark.

Now the most of the testimony objected to was introduced for the purpose of showing ill treatment by defendant of deceased, and a state of bitter feeling between them. This, of course, bears on the question of motive, and tends to rebut the

presumed improbability of a husband murdering his wife. The witnesses testified to hearing the deceased scream at several times; to seeing her with black eyes and a bruised face; to her eyes looking red; to her crying on several occasions, and appearing alarmed and scared, and to bruises and discolorations of her body. The objection was that these witnesses did not connect the defendant with these appearances, or testify that he was the cause of them. It is true these matters do not constitute direct evidence of ill treatment or a long-continued quarrel, but they are circumstances which, taken in connection with the testimony of what was seen and heard passing between the defendant and his wife, were fairly to be considered by the jury in determining the truth in respect thereto. Whether the relations between the defendant and his wife were friendly or the reverse, was to be settled, not by direct or positive but by circumstantial evidence, and any circumstance which tended to throw light thereon might fairly be admitted in evidence before the jury. *Alexander* v. *United States*, 138 U. S. 353; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Moore* v. *United States*, 150 U. S. 57. In the second of these cases, page 164, this court observed: "As has been frequently said, great latitude is allowed in the reception of circumstantial evidence, the aid of which is constantly required, and, therefore, where direct evidence of the fact is wanting, the more the jury can see of the surrounding facts and circumstances the more correct their judgment is likely to be."

Another witness, after stating that he knew the defendant prior to the homicide, was permitted to testify that he was "a strong, powerful man." While this was not very material, as the defendant was in the presence of the jury, yet, in view of the medical testimony that the wound must have been caused by a powerful blow, we cannot say that it was either incompetent or immaterial, or that the court erred in admitting it.

There was testimony that after the defendant had returned with Lauenberger and the physician to his saloon a stranger came in and bought some whiskey. This was before daylight on the morning of Tuesday. The physician testified that he

noticed this stranger carefully, and saw him the next day, and that there were no blood stains on him or his clothing. The latter testimony was objected to, yet, as there was evidence tending to show that there must have been something of a struggle between the deceased and her murderer, with the probability that in such struggle blood would have gotten on to the person and the clothing of the latter, we cannot say that the testimony was absolutely immaterial; at any rate, we cannot see how it in any manner tended to prejudice the defendant.

We may remark in regard to other alleged errors in the introduction of testimony, that the order in which testimony shall be admitted is largely within the discretion of the trial court; that when the court rules correctly that certain matters are not proper subjects of cross-examination, and at the same time notifies the defendant that he can recall the witness and examine him fully in reference to those matters, and the defendant fails to recall the witness or introduce his testimony thereon, it is difficult to see any ground of complaint; and further, that the credibility of a witness cannot be impeached by asking her whether she has not had some difficulty with her husband.

Another assignment of error is that one of the jurors was permitted to act as interpreter. The record discloses that when Lauenberger was called as a witness one Fritz Lomax was sworn as interpreter. After the examination had proceeded a little while defendant's counsel suggested that the interpreter was not correctly translating the answers of the witness; that the defendant had so informed him, which statement was corroborated by one of the jurors. This juror was asked if he fully understood the peculiar dialect of the German language which the witness spoke, and replied that he did, whereupon, with the consent of defendant, he was sworn to act as an interpreter, and the subsequent examination of the witness was carried on through him. We cannot see that in this any substantial right of the defendant was prejudiced. The juror certainly heard all that the witness stated, and was, therefore, fully prepared to act with the

other jurors in considering his testimony, and as his interpretation of the witness's testimony was with the consent of the defendant, the latter cannot now question its propriety.

The remaining assignments of error relate to the matter of instructions. It appears that at the close of the testimony the defendant presented a body of instructions in twenty-two paragraphs, and asked the court to give them to the jury. They were marked "refused as a whole except as given," and the only exception to such refusal was in this language, "the defendant excepts to the refusal of the court to give the instructions requested by the defendant, being numbered 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, and 21." Such an exception is insufficient to compel an examination of each separate instruction. It is enough that any one of the series is erroneous. In *Beaver* v. *Taylor*, 93 U. S. 46, 54, this precise question was presented, and the court said: "The entire series of propositions was presented as one request; and, if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained." See also *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 295; *Block* v. *Darling*, 140 U. S. 234; *Bogk* v. *Gassert*, 149 U. S. 17, 26; *Holder* v. *United States*, 150 U. S. 91; *Hickory* v. *United States*, 151 U. S. 303, 316; *Allis* v. *United States*, 155 U. S. 117; *Newport News &c. Valley Co.* v. *Pace*, 158 U. S. 36.

An examination of the twenty-two instructions shows that they are mainly directed to the matters of reasonable doubt, presumption of innocence, circumstantial testimony, and confessions, in respect to which the court, while not using the language of counsel, substantially expressed the same propositions in its charge. Of course, it was under no obligation to use the precise language adopted by counsel, and if it fully covered the ground indicated by the requests it is sufficient. One of the requests, to wit, No. 21, reads as follows:

"The jury are instructed that marital discord and quarrels are relevant to prove motive in cases of marital homicide, but, as instances of such quarrels are very numerous, generally expending their force in words, such proof is entitled to little weight, unless connected in some way with the fatal wound."

This, if true under any circumstances, was obviously improper as applied to the facts of this case, for, as there was no evidence of what took place between the deceased and her murderer at the night of the homicide, it might carry the impression to the jury that they were to ignore all the testimony of marital discord and quarrels because there was no express connection shown between such quarrels and the homicide.

It also appeared that defendant's counsel, at the close of the charge, excepted as follows:

"Further, the defendant excepts to the giving of the instructions to the jury on the definition of the word 'malice' and application to this case, as being misleading, confusing, and not correctly stating the law as applicable to this case and tending to influence the jury to find a verdict not justified by the evidence in this case.

"The defendant excepts to the giving of the instruction of the court to the jury on the question of murder in the second degree, as not being justified by the evidence and tending to mislead and confuse the jury and cause them to render a verdict not sustained by the evidence in this case.

"The defendant excepts to the instruction of the court to the jury in defining deliberation, that the same does not properly and legally define the meaning of the words used in the indictment in this case.

"The defendant excepts to the instruction of the court to the jury in the definition and meaning of premeditation, as misleading and not correct as charged in the indictment in this case."

It may well be doubted whether these exceptions are sufficiently specific to call the attention of the court to the precise matters complained of. *Beaver* v. *Taylor*, 93 U. S. 46, 55, in which this court observes: "It is not the duty of a judge at the Circuit Court, or of an appellate court, to analyze and compare the requests and the charge, to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there

consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so." *Allis* v. *United States*, 155 U. S. 117; *Newport News &c. Valley Co.* v. *Pace*, 158 U. S. 36. But if they are, we find nothing in the charge of the court in respect to those matters which can be deemed erroneous. This was the definition of malice: "The term 'malice' denotes a wicked intention of the mind; an act done with a depraved mind attendant with circumstances which indicate a wilful disregard of the rights or safety of others indicates malice. Malice aforethought is such wicked intention of the mind previously entertained." Evidently, there is nothing in this of which the defendant can complain. 1 Bishop's New Criminal Law, § 429. Following this definition of malice the court in its charge referred to the divisions of express and implied malice, and discussed them at some length, but we find nothing in such discussion which is not supported by accepted definitions, or which in any manner would tend to the prejudice of defendant's rights.

With reference to the giving of an instruction on the question of murder in the second degree, the accuracy of the instruction is not questioned, and that it was proper to give one has been already determined by this court. In *Hopt* v. *Utah*, 110 U. S. 574, 582, it was said: "It was competent for the judge, under the statutes of Utah, to state to the jury 'all matters of law necessary for their information,' and, consequently, to inform them what those statutes defined as murder in the first degree and murder in the second degree. Laws of Utah, 1878, p. 120; Code of Crim. Pro. secs. 283, 284."

As to the other matters, we do not find in the charge any separate definition of the terms "deliberation" or "premeditation." Probably counsel referred to the statement that such deliberation and premeditation need not exist for any fixed period of time; that it is enough that they were formed before the act. This is the accepted law. 2 Bishop's New Crim. Law, § 728.

Again, the verdict was returned on October 21. On November 2 counsel for defendant came into court, and sought to save other exceptions to the charge. The court noted those

exceptions but declined to make any ruling on them. Obviously, they were too late. *Mich. Ins. Bank* v. *Eldred*, 143 U. S. 293, 298.

These are all the errors assigned. We find nothing in the record of which the defendant has any just complaint, and, therefore, the judgment is

Affirmed.

WHEELER *v.* UNITED STATES.

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

No. 571. Submitted October 24, 1895. — Decided November 11, 1895.

An indictment for murder in the Eastern District of Texas which alleges that the accused and the deceased were not Indians nor citizens of the Indian Territory is sufficient, without the further allegation that they were not citizens of any Indian tribe or nation.

The overruling a motion for a new trial is not assignable as error.

A boy five years of age is not, as matter of law, absolutely disqualified as a witness; and in this case the disclosures on the *voir dire* were sufficient to authorize his admission to testify.

THE case is stated in the opinion.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error submitted on his brief.

MR. JUSTICE BREWER delivered the opinion of the court.

On January 2, 1895, George L. Wheeler was by the Circuit Court of the United States for the Eastern District of Texas adjudged guilty of the crime of murder and sentenced to be hanged. Whereupon he sued out this writ of error. Three errors are alleged: First, that the indictment is fatally defective in failing to allege that the defendant and the deceased were not citizens of any Indian tribe or nation. It charges

that they were not Indians nor citizens of the Indian Territory. The precise question was presented in *Westmoreland* v. *United States*, 155 U. S. 545, and under the authority of that case this indictment must be held sufficient.

Another contention is that the court erred in overruling the motion for a new trial, but such action, as has been repeatedly held, is not assignable as error. *Moore* v. *United States*, 150 U. S. 57; *Holder* v. *United States*, 150 U. S. 91; *Blitz* v. *United States*, 153 U. S. 308.

The remaining objection is to the action of the court in permitting the son of the deceased to testify. The homicide took place on June 12, 1894, and this boy was five years old on the 5th of July following. The case was tried on December 21, at which time he was nearly five and a half years of age. The boy, in reply to questions put to him on his *voir dire*, said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied that they would put him in jail. He also said that his mother had told him that morning to "tell no lie," and in response to a question as to what the clerk said to him, when he held up his hand, he answered, "don't you tell no story." Other questions were asked as to his residence, his relationship to the deceased, and as to whether he had ever been to school, to which latter inquiry he responded in the negative. As the testimony is not all preserved in the record we have before us no inquiry as to the sufficiency of the testimony to uphold the verdict, and are limited to the question of the competency of this witness.

That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests prima-

rily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities. In *Brasier's case*, (1 Leach, Cr. L. 199,) it is stated that the question was submitted to the twelve judges, and that they were unanimously of the opinion "that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court." See, also, 1 Greenleaf's Evidence, § 367; 1 Wharton's Evidence, §§ 398, 399, and 400; 1 Best on Evidence, §§ 155, 156; *State* v. *Juneau*, 88 Wisconsin, 180; *Ridenhour* v. *Kansas City Cable Company*, 102 Missouri, 270; *McGuff* v. *State*, 88 Alabama, 147; *State* v. *Levy*, 23 Minnesota, 104; *Davidson* v. *State*, 39 Texas, 129; *Commonwealth* v. *Mullins*, 2 Allen, 295; *Peterson* v. *State*, 47 Georgia, 524; *State* v. *Edwards*, 79 N. C. 648; *State* v. *Jackson*, 9 Oregon, 457; *Blackwell* v. *State*, 11 Indiana, 196.

These principles and authorities are decisive in this case. So far as can be judged from the not very extended examination which is found in the record, the boy was intelligent, understood the difference between truth and falsehood, and the consequences of telling the latter, and also what was required by the oath which he had taken. At any rate, the contrary does not appear. Of course, care must be taken by the trial judge, especially where, as in this case, the question

is one of life or death. On the other hand, to exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice.

We think that under the circumstances of this case the disclosures on the *voir dire* were sufficient to authorize the decision that the witness was competent, and, therefore, there was no error in admitting his testimony. These being the only questions in the record, the judgment must be

Affirmed.

WINONA AND ST. PETER LAND COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 31. Argued October 16, 1895. — Decided November 11, 1895.

The provisions in the statutes of Minnesota exempting from taxation the lands granted by the State to the Winona & St. Peter Railroad Company to aid in the construction of its railroad, until the land should be sold and conveyed by the company, ceased to be operative when the full equitable title was transferred by the company, and the railroad company could not, thereafter, by neglecting to convey the legal title, indefinitely postpone the exemption. *State* v. *Winona & St. Peter Railroad Co.*, 21 Minnesota, 472, followed.

Statutes exempting property from taxation are to be strictly construed.

Chapter 5 of the Laws of Minnesota of 1881, providing generally for the assessment and taxation of any real or personal property which had been omitted from the tax roll of any preceding year or years, does not, when applied to the land granted by that State to the Winona & St. Peter Railroad Company, deprive the owners of that land of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States.

A legislature can provide for collecting back taxes on real property without making a like provision respecting back taxes on personal property.

On March 3, 1857, Congress passed an act, 11 Stat. 195, c. 99, granting lands to the Territory, now State, of Minnesota, to aid in the building of railroads. On May 22, 1857, the

territorial legislature granted a portion of these lands, including those in controversy, to the Transit Railroad Company. Laws of Minnesota, 1857, special session, p. 17. The fourth section of this act provided that "the lands so granted shall be and are exempted from all taxation until the same shall have been sold and conveyed by said company." The Transit Company failed to comply with the conditions of this act, and, thereafter, by an act passed March 10, 1862, all its rights, benefits, property, and franchises, including the exemption of the lands from taxation, were transferred to the Winona and St. Peter Railroad Company. Laws of Minnesota, 1862, c. 19, p. 243. The latter company accepted the transfer and grant, and proceeded to build the railroad, and, as built, the lands were from time to time certified to the State, and by the State deeded to the company, some of the lands being thus conveyed in 1869 and others in 1870 and 1871.

On October 31, 1867, the railroad company entered into a contract with D. N. Barney and others. This contract recited the adjustment and settlement of an indebtedness of the company to Barney and his associates for money theretofore advanced, and provided for payment thereof in bonds and lands. No particular description was made in this contract of the lands to be thus conveyed, but only a general reference to the lands as those included in this congressional and state grant. The plaintiff in error, having succeeded to the rights of Barney and his associates, sought to obtain title to the lands, but the railroad company refused to convey, whereupon in 1879 suit was instituted, which terminated March 7, 1887, in a final decree of the Circuit Court of the United States directing a conveyance.

In 1881 (Laws 1881, c. 5, p. 24) the legislature of Minnesota passed an act providing generally for the assessment and taxation of any real or personal property which had been omitted from the tax roll of any preceding year or years. Under this statute, in 1886, the officers of Redwood County proceeded to assess and tax these lands for the taxes of past years. In the proceedings thus instituted the plaintiff in error appeared, and defended on the ground that the lands were,

by virtue of the fourth section of the act of May 22, 1857, exempt from taxation until after the decree of March 7, 1887, and also on the further ground that the act of 1881 was unconstitutional in failing to provide proper notice to the owners of the property sought to be assessed and taxed. The proceedings terminated adversely to the plaintiff in error, and it immediately sought a review thereof in the Supreme Court of the State. That court directed judgment to be entered against the land for the taxes for the six years immediately preceding the assessment, holding that all claims for prior years were barred by the statute of limitations. *Redwood County* v. *Winona & St. Peter Land Co.*, 40 Minnesota, 512. To reverse this judgment plaintiff in error sued out this writ of error.

Mr. James A. Tawney for plaintiff in error.

Mr. H. W. Childs, Attorney General of the State of Minnesota, for defendant in error. *Mr. George B. Edgerton* was on his brief.

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

Two questions are presented: First, has the State of Minnesota, in disregard of section 10 of article 1 of the Constitution of the United States, passed any law impairing the obligation of contracts; and, second, were the tax proceedings in violation of that clause of the Fourteenth Amendment, which prohibits a State from depriving any person of property without due process of law?

With respect to the first question, it may be noticed that since the grant in 1862 to the Winona and St. Peter Railroad Company the legislature of the State has passed no statute in terms referring to the lands, or attempting to repudiate or break the contract of exemption. The act of 1881 is one making general provision for putting upon the tax roll all lands that have escaped taxation in prior years. Of the valid-

ity of a statute of that character — that is, one providing generally for subjecting to taxation lands that have improperly escaped taxation in prior years — there can be no serious doubt; so that the real contention is that the taxing officers applied this valid statute to lands which ought not to have been subjected to its operation by reason of a prior contract between the State and its grantee. Does this bring the case within the constitutional inhibition against a State's passing a law impairing the obligation of a contract? *Railroad Company* v. *Rock*, 4 Wall. 177; *St. Paul &c. Railway* v. *Todd County*, 142 U. S. 282; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486; *Central Land Company* v. *Laidley*, 159 U. S. 103.

Assuming, but not deciding, that this law of 1881, enacted subsequently to the contract created by the acts of 1857 and 1862, as practically applied by the officers of the State to the taxation of these lands, presents the question of a violation of the constitutional inhibition — and the contention of plaintiff in error is that it does, and that the question was distinctly presented to the state court and by it decided — we are of opinion that the judgment of that court was correct, and that it must be affirmed. The contract of exemption was by the terms of the act to continue until the lands were "sold and conveyed." Plaintiff in error insists that these words extend the exemption until the legal title is conveyed, which was not done until the decree of 1887. The state court held that the exemption was continued only until the full equitable title was transferred, and that the railroad company could not thereafter, by neglecting to convey the legal title, postpone indefinitely the exemption. This question was first presented to that court in *State* v. *Winona & St. Peter Railroad Co.*, 21 Minnesota, 472, and the decision in the present case was simply an affirmance of the prior ruling. See also *Brown County* v. *Land Company*, 38 Minnesota, 397; *Brown County* v. *Land Company*, 39 Minnesota, 380.

It is familiar law that statutes exempting property from taxation are to be strictly construed. *Bank* v. *Tennessee*, 104 U. S. 493; *Railroad Company* v. *Dennis*, 116 U. S. 665;

Railroad Company v. *Thomas*, 132 U. S. 174; *Schurz* v. *Cook*, 148 U. S. 397.

Section 4 of the act of 1857, after providing that the lands should be exempted from taxation until "sold and conveyed," added that, in consideration of the grant of land and other franchises, the railroad company should pay into the treasury of the Territory or State three per cent upon all the gross earnings, and that this three per cent, when paid, should be in lieu of all taxes whatever. Construing the entire section, the Supreme Court of the State held that the manifest object was to apply the full value of the land to the construction of the road; that when that object was secured, the purpose of the exemption ceased; that it could not have been the contemplation of the legislature to have created an exemption dependent wholly upon the will of the grantee and entirely irrespective of the complete accomplishment of the object for which the lands were granted; that it was not to be expected that a sale could be made of the entire body of lands at once; that sales would progress slowly and from time to time as purchasers could be found, and that it would obviously detract from the value of the grant if, while holding these lands only for purposes of sale, the company was compelled to pay taxes thereon, but that when the company had received full payment for the lands, its interest in the matter ceased, and the purpose of the grant was accomplished. It could not be supposed that the legislature purposed to bestow an exemption upon purchasers from the railroad company. The company, and not its grantees, was the intended beneficiary. The matter of exemption was between it and the State. It was to pay three per cent of its gross earnings, and this in lieu of all other taxes, including those upon these lands. No such equivalent was suggested as between the purchasers and the State. No contract of any kind was expressed as between them. Reference was made in the opinion to *Carroll* v. *Safford*, 3 How. 441, and *Witherspoon* v. *Duncan*, 4 Wall. 210, in which this court held, as to lands purchased from the United States, that after the full equitable title had passed and the government simply held the naked legal title as trustee for the purchaser, they became subject to state taxation.

Opinion of the Court.

We concur in these views. A permanent exemption of land from taxation, or an exemption dependent upon the will of an individual, is something not to be adjudged unless the language creating such exemption clearly compels such construction; and when a statute creates an exemption with the evident design of aiding in accomplishing a particular result, the exemption should be expected to cease when that result has been accomplished, and the statute should be read in the light of such expectation. While it may be that the word "conveyed" generally implies the passing of the legal title, it is not inaptly or incorrectly used to describe a transfer of title, legal or equitable, and whether it is used with a narrow and technical meaning, or in a broad and general sense, is to be determined by the context, and the circumstances under which the entire instrument or document, in which it is found, was framed. "There can be no doubt whatever of the general proposition that, in the interpretation of any particular clause of a contract, the court is not only at liberty, but is required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." *Chicago, Rock Island &c Railway* v. *Denver & Rio Grande Railroad*, 143 U. S. 596, 609. Read in the light of these rules of construction the words "sold and conveyed," as found in the exempting section, are satisfied when the railroad company has received full payment for the lands, and executed an instrument by which all its equitable and substantial interest in them is transferred. It has then not contracted to sell, but has sold; it has not contracted to convey, but has conveyed. It has parted with all its interest, and is thereafter only a barren trustee of a naked legal title held for the benefit of the true owner.

It is now earnestly contended by plaintiff in error that the Barney contract did not operate to transfer the full equitable title. Two propositions are relied upon: First, it is said that the contract contained dependent covenants, and that the covenant to convey the lands depended upon the performance of certain conditions by the contractors; and, second,

that the lands were not particularly described. With reference to these contentions, it may be remarked that the only part of the record in the case of *Barney and others* v. *The Railroad Company*, which is before us, is the decree which recites no performance of conditions precedent, but simply adjudges a conveyance. Can we assume, therefore, that it was based upon the performance by the plaintiff of conditions precedent? Must it not rather be held that it adjudicated rights created solely by the original contract and enforced a conveyance stipulated in it? Turning to the contract itself, we find that it recites the advancement of large sums of money by Barney and associates theretofore made for the construction and equipment of 105 miles of railroad, a liquidation of the indebtedness thereby created, and part payment thereof, and then contains an agreement to issue certain bonds in further part payment, and for the residue of the said indebtedness promises to convey all the granted lands earned by the construction of the 105 miles of railroad. It is also true that there is no description of the lands by sections, towns, and ranges, and that the contract stipulates that the conveyance shall be when the railroad company shall obtain the title; but the description by reference to the acts of Congress and the territorial and state legislatures is sufficient, and the right to a conveyance is established by the contract, and is given as final payment of an indebtedness already existing. Subsequent to these stipulations there is a further promise that the contractors will fully pay and discharge certain floating debts of the company, amounting to the sum of $49,000, which is undoubtedly part of the consideration on the part of the contractors. But such promise seems to stand as an independent covenant, and it would be doing violence to the language to hold that performance of this promise was a condition precedent to the right to receive payment in bonds and lands. Not only that, the contractors in terms agreed to "receive and accept the property and things hereinbefore agreed to be transferred to them in full payment, satisfaction, and discharge of all indebtedness" of the railroad company to them. It is also true that the contract contemplated the possibility of an extension of the road,

and that such extension, if made by Barney and his associates, was to be paid for by an additional issue of bonds and the conveyance of the lands within the limits of the grant to be earned by such further construction. But there is nothing in the record to show that such construction was in fact undertaken by Barney and his associates, or that any of these lands passed by virtue thereof.

But a conclusive answer to the contention is this: The proceedings in the District Court were commenced to enforce the payment of taxes delinquent and unpaid on the first Monday of January, 1888, and the final decision of the Supreme Court limited the right to recover such delinquent taxes to the period of six years prior thereto. The decree in the Circuit Court of the United States was entered on March 7, 1887. The findings of fact show that the suit in which this decree was entered was commenced in 1879. The decree relates back to the time of the commencement of the suit, and adjudicates the rights of the parties as of that date. It was, therefore, an adjudication that in 1879 Barney and his associates held the full equitable title to these lands; but the lands were held subject to no taxes prior to those of 1880. It is, therefore, unnecessary to enter into any elaborate discussion of the terms and stipulations of the contract, or to seek to determine what are or are not dependent covenants. It is enough to rest upon the fact that by conclusive decree of a competent court it is established that the full equitable title had passed to the plaintiff in error prior to the time at which the lands were adjudged taxable. The case, therefore, in this direction is narrowed to the single question, as to the scope and meaning of the exempting statute of May 22, 1857; and for the reasons stated, we agree with the Supreme Court of the State in its construction thereof.

The other contention of plaintiff in error is that in these tax proceedings there was a lack of due process of law. That they were in substantial conformity with the provisions of the Minnesota statutes, and that there is nothing in those statutes in conflict with the state constitution, is settled for this court adversely to the plaintiff in error by the decision of the

Supreme Court of the State. *State Railroad Tax Cases*, 92 U. S. 575–618; *Palmer* v. *McMahon*, 133 U. S. 660; *Pittsburg, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421.

We pass, therefore, to consider the claim that the Minnesota statutes, so far as they attempt to provide for the subjection of property which has escaped taxation in prior years, to the taxes of those years violate that clause of the Fourteenth Amendment to the United States Constitution which forbids a State to deprive one of property without due process of law. What are the provisions of those statutes? The general tax law of the State is found in the statutes of 1878, commencing at page 2. Section 113 contemplated the collection of unpaid back taxes. This section was amended in 1881, (Laws of 1881, page 24,) so as to read as follows:

"If any real or personal property shall be omitted in the assessment of any year or years and the property shall thereby escape taxation, when such omission shall be discovered, the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against such property with seven (7) per cent interest thereon, from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax list for the current year."

This being an amendatory statute places the amended section as part of the general tax law, and it is to be construed accordingly. The section provides that if any property shall have been omitted from the assessment of any year it shall, upon discovery of that fact, be entered upon the assessment and tax books for that year, that all taxes for that year be charged thereon against it, with interest, and then extended against it on the tax list for the current year. In other words, for the purposes of collection, it stands on the tax list for the current year the same as any other property, and all taxes thereon are to be collected in the same manner. The amount of the tax for the omitted year is the same as that which was enforced against all other properties for that year, so that the only difference is in the mode of assessment and the charge of interest.

Opinion of the Court.

We must, therefore, inquire, in the first place, whether under the general tax law there is sufficient provision for notice to the owner of property before it is subjected to sale for non-payment of taxes; in the second place, whether the difference in the mode of assessment deprives the property owner of any constitutional right; and, in the third place, whether there is in section 113 any other matter which vitiates it.

With reference to the collection of taxes it may be remarked generally that the Minnesota statute authorizes such collection by suit in court. By section 70 the county auditor is required, between June 1 and 15, to file in the office of the clerk of the district court of the county a list of the delinquent taxes upon real estate, which shall contain a description of the land, the name of the owner if known, and if unknown so stated, and the amount of the delinquent tax for each year, which list shall be verified by his affidavit; and the filing of this list is to be considered as the filing of a complaint by the county against each piece or parcel of land therein described to enforce payment of the taxes and penalties appearing against it. Publication is then to be made of this list, together with a notice in the form prescribed by statute, for at least two weeks in some newspaper of general circulation in the county. (Secs. 71 and 72.) Upon the final publication of this notice the jurisdiction of the court over the property attaches. (Sec. 73.) Within twenty days after the last publication any person having an estate, right, title, or interest in or lien upon any parcel of land described in such list may file in the office of the clerk of the court an answer setting forth his defence or objection to the tax or penalty, which shall describe the piece or parcel of land and state the facts constituting his defence or objection to such tax or penalty, and thereupon the court is to hear and determine the questions raised by this complaint and answer, as it hears and determines any other action. (Sec. 75.) It is a full defence that the taxes have been paid or that the property is not subject to taxation. (Sec. 79.) The list is *prima facie* evidence of compliance with all provisions of law in relation to the assessment and levy of taxes. No omission of any of the things required

by law in relation to such assessment and levy "shall be a defence or objection to the taxes appearing upon any piece or parcel of land, unless it be also made to appear to the court that such omission has resulted to the prejudice of the party objecting, and that the taxes against such piece or parcel of land have been partially, unfairly, or unequally assessed; and in such case, but no other, the court may reduce the amount of taxes upon such piece or parcel, and give judgment accordingly." (Sec. 79.)

We think this opens to the property owner full opportunity for defence, and that he can raise every objection to which in law he is entitled. If he has paid his taxes, or if the land is not subject to taxation, the property is wholly discharged. If there has been any irregularity in the proceedings which worked to his predjudice he can show such irregularity, and, so far as it has injured him, secure a reduction in the amount. In reference to this matter we quote from the opinion of the Supreme Court of the State in this case, which shows fully the extent to which a party can, under the statutes of the State of Minnesota, make defences to these tax proceedings:

"Within twenty days after the last publication of the delinquent list any person may, by answer, interpose any defence or objection he may have to the tax. He may set up as a defence that the tax is void for want of authority to levy it, or that it was partially, unfairly, or unequally assessed. *Com'rs of St. Louis Co.* v. *Nettleton*, 22 Minn. 356. He may set up as a defence *pro tanto* that a part of a tax has not been remitted, as required by some statutes. *Com'rs of Houston Co.* v. *Jessup*, 22 Minn. 552. That the land is exempt, or that the tax has been paid. *County of Chisago* v. *St. Paul & Duluth Railroad*, 27 Minn. 109. That there was no authority to levy the tax, or that the special facts authorizing the insertion of taxes for past years in the list did not exist, or any omissions in the proceedings prior to filing the list, resulting to his prejudice. *County of Olmsted* v. *Barber*, 31 Minn. 256. The filing of the list is the institution of an action against each tract of land described in it, for the recovery of the taxes appearing in the list against such tract, and tenders

an issue on every fact necessary to the validity of such taxes. *Chauncey* v. *Wass*, 35 Minn. 1. The only limitation or restriction upon the defences or objections which may be interposed is that contained in section 79, to the effect that, if a party interposes as a defence an omission of any of the things provided by law in relation to the assessment or levy of a tax, or of anything required by any officer to be done prior to filing the list with the clerk, the burden is on him to show that such omission has resulted in prejudice to him, and that the taxes have been partially, unfairly, or unequally assessed. This relates not to want of authority to levy the tax, but to some omission to do or irregularity in doing the things required to be done in assessing or levying a tax otherwise valid. *Com'rs of St. Louis Co.* v. *Nettleton*, *supra*. And certainly, in justice or reason, a party cannot complain that, when he objects to a tax on the ground of some omission or irregularity in matters of form, he is required to show that he was prejudiced."

All the privileges which are secured to the property owner in respect to the taxes of the current year are also secured to him in reference to those imposed under amended section 113. He is, therefore, notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the Fourteenth Amendment to the Constitution, which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. *McMillen* v. *Anderson*, 95 U. S. 37; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Spencer* v. *Merchant*, 125 U. S. 345; *Palmer* v. *McMahon*, 133 U. S. 660; *Lent* v. *Tillson*, 140 U. S. 316; *Pittsburg, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421. That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the

court in which and the time at which the various steps in the collection proceedings shall be taken a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law. *State Railroad Tax Cases*, 92 U. S. 575, 609; *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Lent* v. *Tillson*, 140 U. S. 316, 328; *Pittsburg, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421. It cannot be doubted under these various authorities that in respect to the collection of these taxes ample provision is made for notice, and, therefore, that it cannot be adjudged that the owner is for want thereof deprived of his property without due process of law.

With respect to the next inquiry, it is true there is a difference in the mode of assessment. Section 113 authorizes the county auditor to make the assessment, while as to property generally the assessment is made by the county assessor. The latter also acts upon actual view, (sec. 33,) while there is in section 113 no such direction to the county auditor. The assessment made by the assessor comes before a town board of review, (sec. 39,) and subsequently before a county board of equalization. (Sec. 44.) Neither of these provisions is found in section 113. So that the difference between the two modes of assessment may be stated thus: in the one case there is an assessment by one officer, with a right to review his action; in the other, there is an assessment by a different officer, and no provision for a review except as the matter comes before the court in the proceedings for the collection of taxes. But there is nothing in this difference to affect the constitutional rights of a party. The legislature may authorize different modes of assessment for different properties, providing the rule of assessment is the same. *Kentucky Railroad Cases*, 115 U. S. 321, 337; *Pittsburg, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421.

One other suggestion is made by counsel for plaintiff in error. Section 113 contemplates the assessment and taxation of both real and personal property. It is claimed that the taxation of personal property is manifestly void because, even under the general tax law, there is no provision for notice to

the owner of the property before the charge is fixed upon him, and that it cannot be assumed that the legislature would attempt to provide for the taxing of real property which had escaped taxation in prior years without also providing for a like taxation of personal property, and hence that the whole section must fail. The Supreme Court of the State was of opinion that even if the tax on personal property was not collectible under the general provisions of the tax law for the reason claimed, yet there was at least a valid tax which, in the absence of any law providing another method, might be enforced by an ordinary personal action. It seems to us, also, that the assumption that it cannot be believed that the legislature would never seek to provide for the collection of back taxes on real property without at the same time including therein a like provision for collecting back taxes on personal property, cannot be sustained. The case is different from that of an ordinary tax law in which there may be some foundation for the claim that the legislature is expected to make no discrimination, and would not attempt to provide for the collection of taxes on one kind of property without also making provision for collection of taxes on all other property equally subject to taxation. For this statute rests on the assumption that, generally speaking, all property subject to taxation has been reached and aims only to provide for those accidents which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; and it may well be that the legislature in view of the probabilities of changes in the title or situs of personal property might deem it unwise to attempt to charge it with back taxes, while at the same time, by reason of the stationary character of real estate, it might elect to proceed against that. At any rate, if it did so it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the Supreme Court of the State.

These being the only matters presented, and in them appearing no error, the judgment of the Supreme Court of the State will be

Affirmed.

WINONA & ST. PETER LAND COMPANY *v.* MINNESOTA (No. 2).

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 38. Argued October 16, 1895. — Decided November 11, 1895.

The Federal question sought to be raised here not having been presented in the state court, the case is dismissed for want of jurisdiction.

THE case is stated in the opinion.

Mr. James A. Tawney for plaintiff in error.

Mr. H. W. Childs, Attorney General of the State of Minnesota, for defendant in error. *Mr. George B. Edgerton* was on his brief.

Mr. John Lind filed a brief for defendant in error on behalf of Brown County.

MR. JUSTICE BREWER delivered the opinion of the court.

This case is similar to the one between the same parties just decided, in that the questions presented to the state courts involved the taxability of lands included in the legislative grants of May 22, 1857, and March 10, 1862, the Barney contract of October 31, 1867, and the decree in the United States Circuit Court of March 7, 1887. The tax proceedings were under the law of 1881, but were had in the county of Brown instead of the county of Redwood. The case, however, differs from the preceding, in that the Federal questions sought to be raised in this court were not seasonably presented in the state courts. The alleged immunity from taxation and lack of due process of law were not "specially set up or claimed" prior to the decision in the Supreme Court. The failure so to do prevents this court, as has been frequently held, from acquiring jurisdiction. *Spies* v. *Illinois*, 123 U. S.

131, 181; *Brooks* v. *Missouri*, 124 U. S. 394; *Chappell* v. *Bradshaw*, 128 U. S. 132; *Brown* v. *Massachusetts*, 144 U. S. 573; *Schuyler National Bank* v. *Bollong*, 150 U. S. 85; *Powell* v. *Brunswick County*, 150 U. S. 433; *Miller* v. *Texas*, 153 U. S. 535; *Morrison* v. *Watson*, 154 U. S. 111; *Sayward* v. *Denny*, 158 U. S. 180.

The writ of error must, therefore, be dismissed for want of jurisdiction.

WEEKS *v.* BRIDGMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 44. Argued October 17, 1895. — Decided November 11, 1895.

In 1857 B., a mail contractor, applied to file a preëmption declaratory statement for public land under the act of March 3, 1855, c. 201, 10 Stat. 683. His application being rejected he appealed to the Commissioner of the General Land Office, by whom the decision below was sustained. He then appealed to the Secretary of the Interior, who in 1861 reversed the Land Commissioner's decision. Meanwhile, in 1860, Congress passed an act for his relief, (12 Stat. 843, c. 63,) and under that act he paid for the land, and in 1871 received a patent in which it was stated that the land had been certified to the State of Minnesota for railroad purposes by mistake. This certification was made in 1864. *Held*, as between the grantee of B. and the grantee of a railroad company to which the land had been conveyed by the State, that the title derived from B. must prevail.

This was an action brought by Charles A. Weeks against Coleman Bridgman in the District Court for the Seventh Judicial District of Minnesota under a statute of that State to determine adverse claims to vacant and unoccupied real estate. Judgment having been rendered for plaintiff, the cause was taken to the Supreme Court of Minnesota on appeal, the judgment reversed, and the cause remanded. 41 Minnesota, 352. The cause was again tried in the District Court by the court, a jury having been expressly waived, and judgment entered for defendant, which, on a second appeal, was affirmed.

46 Minn. 390. To this judgment the pending writ of error was allowed.

The facts were in substance as follows:

By act of Congress of March 3, 1857, c. 99, 11 Stat. 195, there was granted "to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch via Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the legislature of said Territory may determine; . . . every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said road and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of preëmption has attached to the same, then it shall be lawful for any agent, or agents, to be appointed by the governor of said Territory or future State to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preëmption have attached, as aforesaid; which lands (thus selected in lieu of those sold, and to which preëmption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid."

The Minnesota and Pacific Railroad Company was organized as a railroad corporation under and pursuant to an act of the legislature of the Territory, now State, of Minnesota, approved May 22, 1857. The St. Paul and Pacific Railroad Company was organized in conformity to an act of the legislature of the State, approved March 10, 1862, and, under and by virtue of that act, became the owner of all the lines of

Statement of the Case.

railroad formerly owned by the Minnesota and Pacific Railroad Company, and also of the lands granted to the Territory, now State, of Minnesota, to aid in the construction of the branch line of railroad from St. Anthony northward to St. Cloud, under the act of Congress of March 3, 1857. On February 6, 1864, the First Division of the St. Paul and Pacific Railroad was organized for railroad purposes, which organization was confirmed by act of the legislature of the State, approved February 6, 1866, and said First Division succeeded to all the rights, privileges, and lands possessed or granted to the Minnesota and Pacific Railroad Company or to the St. Paul and Pacific Railroad Company, as its successor, in any way pertaining to the branch line.

The line of the branch railroad was definitely fixed, and a map thereof filed with the Secretary of the Interior, December 30, 1857, and the land in controversy is part of an odd section within six miles of said branch line, being section 13, township 124 N., range 28 W. This section was certified to the State of Minnesota by the Secretary of the Interior, October 25, 1864, as a part of the land granted by the act of Congress of March 3, 1857. The branch line of railroad was constructed from St. Anthony to St. Cloud, opposite the land in controversy, during September, 1866, and plaintiff in error had acquired all the right and title to the land described in the complaint that was ever possessed by the Territory or State of Minnesota, or the First Division of the St. Paul and Pacific Railroad Company.

George F. Brott on September 9, 1855, entered into a contract with the United States to carry the mail from Minneapolis to supply the offices at St. Cloud, Monticello, and Dayton. This route was about sixty-five miles in length, and the contract said: "The route from Minneapolis by Dayton to Monticello and St. Cloud aforesaid, is to be deemed and considered a post road during the continuance of this contract."

By act of Congress of March 3, 1855, c. 201, 10 Stat. 683, 684, it was provided that: "Each contractor engaged, or to be engaged, in carrying mails through any of the Territories

west of the Mississippi, shall have the privilege of occupying stations at the rate of not more than one for every twenty miles of the route on which he carries a mail, and shall have a preëmptive right therein, when the same shall be brought into market, to the extent of six hundred and forty acres to be taken contiguously, and to include his improvement." As mail contractor, Brott, in 1855, selected for and built and established his mail station upon section 13, which station consisted of stable and building for the use of his teams and carriages, and maintained the same throughout the term of his mail contract. Brott's route terminated at St. Cloud, and no mail was carried west from there under the United States government until the latter part of the year 1856, or some time in 1857.

August 7, 1857, Brott made application to the United States land office at St. Cloud to file a preëmption declaratory statement for the southwest quarter of the northwest quarter of said section 13, township 124, range 28, which embraced the land in controversy, with other lands, claiming the right to preëmpt the same, as a mail contractor, under the act of March 3, 1855. This application was by the decision of the local land officers rejected, and from such decision Brott appealed to the Commissioner of the General Land Office, by whom the decision of the local land officers was sustained. Brott thereupon appealed to the Secretary of the Interior, who reversed the Commissioner's decision, on August 30, 1861, and held that Brott should be permitted to enter the tracts mentioned in his application upon the production of proof of the performance of his mail contract and of the occupation of the stations, and upon compliance with the laws and regulations in other respects applicable to the case. On May 26, 1860, Congress passed an act, entitled "An act for the relief of George F. Brott," providing, 12 Stat. 843, c. 63: "That George F. Brott be, and he is hereby, authorized to enter the following described lands, to wit: [omitting description which includes that in dispute] in the district of lands subject to sale at the land office at St. Cloud, Minnesota; said tracts containing five hundred and sixty-two and twenty hundredths

acres, upon the payment by the said Brott of the usual minimum of one dollar and twenty-five cents per acre therefor: *Provided*, That said entry shall in nowise interfere with or embrace any land to which there is a valid subsisting claim under the preëmption laws of the United States; and the Commissioner of the General Land Office is directed to issue a patent on said entry."

No further effort was made by Brott to enter the land simply as such mail contractor, but the entry of the same was thereafter made by him under and in pursuance of the act of Congress passed for his relief, he paying for the land the sum specified.

In July, 1871, a patent for the land issued from the United States to Brott in the usual form, except that it was stated therein that the land had been certified to the State of Minnesota for railroad purposes by mistake. The defendant at the time of the commencement of the action had and was seized of all the right and title to the lots in controversy that Brott ever had or possessed under his patent, and claimed his right to such title under and by virtue of mesne conveyances duly made, executed, and delivered by and through Brott and his grantees and duly recorded.

Mr. M. D. Grover for plaintiff in error.

No appearance for defendant in error.

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

The line of the road was definitely fixed December 30, 1857; the lands within the place limits then subject to the grant were thereby segregated from the public domain; and the grant took effect thereon. But under the granting act, lands to which preëmption rights had attached, when the line was definitely fixed, were as much excepted therefrom as if in a deed they had been excluded by the terms of the conveyance. And this was true in respect of applications for preëmption

rejected by the local land office and pending on appeal in the land department at the time of definite location, since the initiation of the inchoate right to the land would prevent the passage of title by the grant, and the determination of its final destination would rest with the government and the claimant. *Railway Company* v. *Dunmeyer*, 113 U. S. 629; *Railroad Company* v. *Whitney*, 132 U. S. 357; *Bardon* v. *Railroad Company*, 145 U. S. 535; *Ard* v. *Brandon*, 156 U. S. 537; *Whitney* v. *Taylor*, 158 U. S. 85. Brott selected certain lands, including this in dispute, for and built and established his mail stations thereon in 1855 and maintained the same during the term of his mail contract; and filed his application to enter these lands, as a mail contractor under the act of March 3, 1855, in the local land office August 11, 1857. The application was rejected by the local land officers, and Brott appealed to the Commissioner of the General Land Office, and from his decision to the Secretary of the Interior, who reversed the rulings of the land officers and of the Commissioner, and held Brott entitled to preëmpt the stations occupied. He was, indeed, required to produce proof of the performance of his mail contract and of the occupation of the lands as stations, and he actually entered them in pursuance of the act of Congress for his relief, but in *Ard* v. *Brandon*, *supra*, it was held that when a preëmptor has the right to make entry, and applies to the local land officers and they refuse to recognize his right, it will be deemed to date from the time of his application, and this notwithstanding he proceeds to obtain title in some other way. The conclusion follows that Brott's preëmption claim must be regarded as having attached prior to the definite location, December 30, 1857, and that the title did not pass under the Congressional grant to the State.

But it is contended that as on October 25, 1864, the Secretary of the Interior included section 13 in the lists of lands certified to the State of Minnesota under the act of August 3, 1854, (10 Stat. 346,) as a part of the lands granted by the act of March 3, 1857, that certification was an adjudication that the land in question had not been previously disposed of, and that no preëmption right had attached thereto, and passed the

legal title, whatever Brott's equitable rights might be; and that while the certification might be voidable, it was not absolutely void. The act of August 3, 1854, provided that where lands had been or should be thereafter granted to the several States or Territories, and the law did not convey the fee simple title of such lands or require patents to be issued therefor, the lists of such lands which had been, or might thereafter be certified, "shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby."

As we have seen, this particular land was not included in the grant, and the Secretary of the Interior had so decided on August 30, 1861, when he determined that the preëmption right had attached. And since it was not so included nor subject to disposition as part of the public domain, on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual. *Noble* v. *Railroad Co.*, 147 U. S. 165, 174.

The distinctions between void and voidable acts need not be discussed. It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are voidable which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bac. Abr. Void and Voidable; *Ewell* v. *Daggs*, 108 U. S. 143; *Ex parte Lange*, 18 Wall. 163; *State* v. *Richmond*, 6 Foster (N. H.) 232; *Anderson* v. *Roberts*, 18 Johns. 515; *Pearsoll* v. *Chapin*, 44 Penn. St. 9.

As against Brott the certification had no operative effect.

It is also objected that Brott was not a qualified claimant under the act of 1855, because that act only applied to a contractor engaged in carrying the mail through any of the Terri-

Counsel for Parties.

tories west of the Mississippi, and because it does not appear that his declaratory statement was ever accepted or recognized, or that he made proof of his occupation of the land as a mail station, but these and other like objections involve questions between Brott and the government, already determined in his favor, and which the railroad company and its grantees are not in a position to raise upon this record.

Judgment affirmed.

UNITED STATES *v.* AMERICAN BELL TELEPHONE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 745. Submitted October 28, 1895. — Decided November 11, 1895.

This court has appellate jurisdiction over a judgment rendered by a Circuit Court of Appeals of the United States in a suit brought by the United States in the Circuit Court of the Circuit, to cancel a patent for an invention.

Where the appellate jurisdiction of this court is described in a statute in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any subsequent statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it.

MOTION to dismiss for want of jurisdiction. The case is stated in the opinion.

Mr. James J. Storrow and *Mr. Frederick P. Fish* for the motion.

Mr. Attorney General, *Mr. Causten Browne*, and *Mr. Robert S. Taylor* opposing.

Opinion of the Court.

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

This is a suit by the United States to cancel a patent for an invention granted to the American Bell Telephone Company, as assignee of the inventor, Emile Berliner. On a hearing in the Circuit Court there was a finding and decree for the complainant. 65 Fed. Rep. 86. The cause having been taken to the Circuit Court of Appeals for the First Circuit, the decree of the Circuit Court was reversed, and it was ordered that the bill be dismissed. 68 Fed. Rep. 542. From this decree an appeal was taken by the United States to this court, which appellees now move to dismiss "for want of jurisdiction in this court to entertain it under the Circuit Court of Appeals act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828, for the reason that the case is a case arising under the patent laws."

The Supreme Court has appellate jurisdiction, under the Constitution, in all cases to which the judicial power extends, (other than those in respect of which it has original jurisdiction,) "with such exceptions and under such regulations as the Congress shall make." It was early held that in the passage of the judiciary act of 1789, Congress was executing the power of making exceptions to the exercise of appellate jurisdiction, and that the affirmative description of the cases to which the appellate power extended was to be understood as implying a negative on the exercise of such appellate power as was not comprehended within it, but that as this restriction rested on implication founded on the manifest intent of the legislature, it could be sustained only when that manifest intent appeared. *Durousseau* v. *United States*, 6 Cranch, 307.

Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words

import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. *Petri* v. *Commercial National Bank of Chicago*, 142 U. S. 644, 650; *Brewer's Lessee* v. *Blougher*, 14 Pet. 178; *Reiche* v. *Smythe*, 13 Wall. 162, 164; *Market Company* v. *Hoffman*, 101 U. S. 112.

We inquire then whether the appellate jurisdiction of this court over controversies to which the United States are parties has been circumscribed by Congress in respect to the right of appeal.

By section 629 of the Revised Statutes, original jurisdiction was conferred upon the Circuit Courts (with a limitation as to the value of the matter in dispute) of all suits in equity and all suits at common law where the United States are petitioners or plaintiffs; all suits at law or in equity, arising under any act providing for revenue from imports or tonnage; all causes arising under any law providing internal revenue; all causes arising under the postal laws; and all suits at law or in equity arising under the patent or copyright laws of the United States. By the fifth paragraph of section 711, the jurisdiction of the courts of the United States of all cases "arising under the patent right or copyright laws of the United States" was declared to be exclusive.

By the act of March 3, 1875, c. 137, 18 Stat. 470, it was provided: "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, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners;" and this was repeated in substance, the differences being immaterial here, in the acts of March 3, 1887, c. 373, 24 Stat. 552, and August 13, 1888, c. 866, 25 Stat. 433.

And this court had appellate jurisdiction over all final judgments and decrees of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions

where the matter in dispute exceeded the sum or value of five thousand dollars. Rev. Stat. §§ 690, 691, 692; 18 Stat. 315.

The primary object of the act of March 3, 1891, c. 517, as stated in *American Construction Company* v. *Jacksonville Railway Company*, 148 U. S. 372, 382, "well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the over burden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the Circuit Courts of Appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the Circuit and District Courts of the United States."

By section five of this act, appeals or writs of error may be taken from the Circuit Court directly to this court in six specified classes of cases: where the jurisdiction of the court below is in issue; in prize causes; in cases of convictions of capital or otherwise infamous crimes; in cases involving the construction or application of the Constitution of the United States; in cases in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question; in cases where the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. Cases in which the United States are plaintiffs or petitioners are not enumerated as falling within either of these classes, nor are cases involving merely the construction of a law of the United States, those ordinarily arising under the heads of jurisdiction in respect of subjects-matter treated of in the sixth section.

By the sixth section, it is provided that the Circuit Courts of Appeals shall have appellate jurisdiction "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The Courts of Appeals, therefore, have appellate jurisdiction of all cases in which

original jurisdiction is conferred on the Circuit Courts by reason of the United States being plaintiffs or petitioners. It is further provided by that section that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases." And the last paragraph of the section provides that "in all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." Judgments or decrees in cases in which the ground of jurisdiction of the Circuit Court is that the United States are plaintiffs or petitioners are not made final in terms, and such cases would fall within the last paragraph, unless restricted by the previous enumeration. And the contention is that the words "cases arising under the patent laws," must be held to operate as such restriction, and to render the judgments and decrees of the Circuit Courts of Appeals final, notwithstanding the existence of another distinct ground of jurisdiction in the Circuit Court, and that there would consequently be a right of appeal from a decree of a Circuit Court of Appeals dismissing a bill by the United States to cancel a patent for land, but none where the bill is one to repeal an invention patent.

In *United States* v. *Telephone Company*, 128 U. S. 315, 359, we said: "In the present case the United States are plaintiffs, and the bill asserts that the suit is one of a civil nature, and of equitable cognizance; and manifestly, if it presents a good cause of action, it arises under the laws and Constitution of the United States. It is, therefore, within the language both of the Constitution and of the statute conferring jurisdiction on the Circuit Courts." Two grounds to support the jurisdiction were thus indicated, but the question there was whether the judicial power of the United States under the Constitution extended to a suit by the United States to repeal a patent, and in that view

it was held that such a suit was a case arising under the laws of the United States, as had been previously adjudged many times by the court. In the language of appellee's counsel, "the judgments in the great contests reported in Cranch and Wheaton established that these words embraced, and therefore carried the judicial power to, every case wherein the existence or extent of a right purporting to be given by Federal authority and claimed by either party, became an essential ingredient."

Nevertheless, in respect of removals of suits from the state courts to the Circuit Courts under the acts of March 3, 1887, and August 13, 1888, we held, upon what was deemed the true construction of the statutes, that the right of removal was limited to cases in which it appeared from the plaintiff's statement of his own claim that his cause of action was one arising under the Constitution or laws of the United States. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Chappell* v. *Waterworth*, 155 U. S. 102.

In *Colorado Mining Company* v. *Turck*, 150 U. S. 138, it was ruled that when the original jurisdiction of a Circuit Court is invoked upon the sole ground that the determination of the question depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction was invoked; and that where the jurisdiction was invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals was final, although another ground for jurisdiction in the Circuit Court might be developed in the course of subsequent proceedings in the case. How the case might be if the plaintiff had invoked jurisdiction on two distinct grounds, one of them being independent of diverse citizenship, was not determined. Nor is it necessary to pass upon that question in this instance, for the motion may be disposed of upon the inquiry whether it was manifestly the intention of Congress to include such a case as that before us in the words "arising under the patent laws." Now, actions at law for infringement, and suits in equity for infringement, for interference and to obtain

patents, are suits which clearly arise under the patent laws, being brought for the purpose of vindicating rights created by those laws, and coming strictly within the avowed purpose of the act, to relieve this court of that burden of litigation which operated to impede the disposition of cases of peculiar gravity and general importance. We are of opinion that it is reasonable to assume that the attention of Congress was directed to this class of cases, and that the language was used as applicable only to them; and that there is nothing in the objects sought to be attained and the mischiefs sought to be remedied by the act which furnishes foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction of this court in a case such as this.

Moreover, in those cases, the subject-matter is everything in respect of jurisdiction, and the character of the parties nothing; while here, the character in which the plaintiffs sue and the nature of the case are inseparably blended.

In instituting this suit, the government appeared on behalf of the public, and, as it were, in the exercise of the beneficent function of superintending authority over the public interests, and the rule of construction in such cases is properly regarded as affected by considerations of public policy. It is upon the principle of public policy that the United States have been held not bound by statutes of limitation unless Congress has clearly manifested that they should be so bound. *United States* v. *Nashville &c. Railway*, 118 U. S. 120, 125; *Stanley* v. *Schwalby*, 147 U. S. 508; and the same rule is applicable to the exercise of the prerogative of *parens patriæ* inherent in the supreme power of every State, in respect of which it was observed by Mr. Justice Strong in *Savings Bank* v. *United States*, 19 Wall. 227, 237, that so much of the royal prerogative as belonged to the King in his position as universal trustee enters as much into the principles of our state as it does into the principles of the British government. Hence it was held in *United States* v. *Beebe*, 127 U. S. 338, that the United States are not bound by any statute of limitations, nor barred by laches of their officers, in a suit brought by them, as sovereign, to enforce a public right or to assert a public interest.

Syllabus.

In *United States* v. *Telephone Company*, *supra*, it was decided that where a patent for a grant of any kind issued by the United States has been obtained by fraud, by mistake or by accident, a suit by the United States against the patentee is the proper remedy for relief, and that in this country, where there is no kingly prerogative but where patents for land and inventions are issued by the authority of the government, and by officers appointed for that purpose who may have been imposed upon by fraud or deceit, or may have erred as to their power, or made mistakes in the instrument itself, the appropriate remedy is by proceedings by the United States against the patentee.

We cannot impute to Congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such; deeply concerning the public interests; and not falling within the reason of the limitations of the act.

Motion denied.

Mr. Justice Gray took no part in the consideration and disposition of this motion.

MAGONE *v.* WIEDERER.

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

No. 23. Argued January 25, 1895. — Decided November 18, 1895.

The plaintiff below imported into the port of New York in 1887 and 1888 a quantity of pieces of glass, cut in shapes to order and with bevelled edges, intended to be used in the manufacture of clocks. The collector classified them as "articles of glass, cut, engraved," etc., subject to a duty of 45 per cent *ad valorem*. The importer claimed that they were dutiable as "parts of clocks," and as such subject to a duty of 30 per cent *ad valorem;* paid the duty imposed under protest; and brought this action to recover the excess. The trial court instructed the jury

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that the burden was on the plaintiff to establish that the articles were parts of clocks; that in determining that question it would not be necessary for the jury to say that they were exclusively used for that purpose; that the fact that an article chiefly used for one purpose had been used by some for a purpose for which it was not originally intended would not change its tariff nomenclature; that if the jury should find that the articles were chiefly used as parts of clocks, that that would determine their tariff classification, but on the other hand, that they must be chiefly and principally used for that purpose; that if they are articles with no distinguishing characteristic, just as applicable for use in fancy boxes or in coach lamps as they are for clocks, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks; that they might be used for one purpose just as well as for another; and if the jury should find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles the verdict should be for the defendant. *Held*, that the instructions were manifestly correct, and that in giving the rule of chief use, the principles by which it was to be ascertained were fully stated exactly in accordance with the law announced by this court in *Magone* v. *Heller*, 150 U. S. 70.

This was an action brought in the Circuit Court of the United States for the Southern District of New York, by the defendants in error, who were partners in business under the name of P. Wiederer & Bros., against a former collector of the port of New York, to recover alleged overpayments exacted as duties upon certain importations made in 1887 and 1888. Due protests were made against the duties charged by the collector, and from his decision timely appeals were taken to the Secretary of the Treasury. The articles in question were imported from Bremen and Hamburg, and consisted of pieces of glass, square, oblong, or round, with ground or bevelled edges, the invoices describing them as "glass unsilbert," giving their respective dimensions. All the packages except four lots were also described in the invoices as "parts of watches." The collector assessed the glass as dutiable as "articles of glass, cut," under paragraph 135 of the tariff act of March 3, 1883, c. 121, § 6, 22 Stat. 488, 496, which imposed a duty of forty-five per centum *ad valorem* upon "articles of glass, cut, engraved, painted, colored, printed, stained, silvered, or gilt, not including plate glass silvered, or looking glass plates." The importer claimed that they were dutiable either

as "parts of watches," under paragraph 494 of said act, (p. 514,) which imposed a duty of twenty-five per centum *ad valorem* upon "watches, watch-cases, watch-movements, parts of watches, and watch materials, not specially enumerated or provided for in this act;" or as "parts of clocks," under paragraph 414, (p. 511,) which laid a duty of thirty per centum *ad valorem* upon "clocks and parts of clocks." On the trial of the case, the claim that the glass was dutiable as "parts of watches" was abandoned by the importers, who insisted that they should have been assessed as "parts of clocks."

There was testimony tending to show that the glass had been ordered from a factory in Germany, some for the Ansonia Clock Company and some for the New Haven Clock Company; that the pieces had been cut and manufactured to sizes suitable for clocks; and that the edges had been ground and bevelled so as to cause the glass to be ready for fitting into the dials and frames of the clocks for which the glass had been in advance prepared — in other words, that the glass was a finished product, ready for use in clocks without any further labor or preparation whatever. There was also evidence tending to show that the particular importations in question were made in consequence of a regular course of business between the clock companies and the importer, by which the latter had regularly, during a considerable period of time, received from the clockmakers the description and measurements of the glass required for fitting into the clocks, and ordered them manufactured in accordance therewith. There was also evidence tending to show that the glass of which the pieces were made was French window glass of a good quality, and that pieces of glass like those in question were chiefly and generally used as parts of clocks. On behalf of the collector, there was evidence tending to show that pieces of glass like those imported were sometimes used by the manufacturers of hand mirrors, by carriage manufacturers, by photographers, by perfumers, by makers of lamps, and for other objects. The evidence tended to show not that the exact size of glass covered by the invoices were used for the purposes named, but that pieces of glass of the general form of

those imported were thus used when cut to the sizes required for other purposes. There was conflict in the testimony as to whether pieces made from window glass were ever used other than for clocks; some of the witnesses saying that the glass used for such other purposes was plate glass and not window glass, whilst others testified that both pieces made of plate and window glass were used for the other purposes above indicated. The court below, after instructing the jury that the burden was upon the plaintiff to establish by a preponderance of evidence that the articles were parts of clocks, laid down the following rule by which they were to determine whether the glass was to be so considered:

"In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. . . .' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristic, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

Opinion of the Court.

The defendant excepted to so much of the charge as stated that "the principal or chief use of the articles would determine their tariff classification." He, moreover, excepted to the refusal of the court to give five separate charges by him presented. The first, fourth, and fifth of these charges substantially asked that the jury be instructed to find in favor of the defendant, unless the proof showed that the pieces of glass in controversy were used absolutely and exclusively for clocks, and for no other purpose. The second and third requests asked for an instruction in favor of the defendant, unless the proof showed that the articles imported were used in trade exclusively as parts of clocks or parts of watches, or were used in trade and commerce solely as parts of clocks.

Verdict and judgment thereon for plaintiffs, to review which this writ of error was brought.

Mr. Assistant Attorney General Whitney for plaintiff in error.

Mr. Edward Hartley, (with whom was *Mr. Walter H. Coleman* on the brief,) for defendant in error.

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

The instructions which were refused asked the court to rule that exclusive use was the correct criterion to determine the classification. The error of this contention seems obvious from the most casual consideration. If exclusive use were made the test, then an exception would destroy the rule; for however general and universal the use of a particular article might be, if exceptionally used for another purpose, such use would destroy the effect of the general and common use, and make the exception the controlling factor. It is urged that if exclusive use is not made the criterion it will be impossible to assess duties, because of the difficulty of ascertaining the chief or general and common use; but it is manifest that this argument of inconvenience is a mistaken one, and that, on the contrary, it would be impossible to resort to use as a criterion

of classification if exclusive use must be ascertained in so doing, for that which is generally and commonly done may be known, but that which is so universally done as to be without any exception is difficult, if not impossible, of ascertainment.

The strength of this reasoning has caused counsel, in the discussion at bar, to admit that the correct standard is not exclusive use, which was presented in the first, fourth, and fifth request to charge, but that such test is to be found in the exclusive commercial use which was embraced in the second and third requests. The proposition involves a distinction without a difference. How the line can be drawn between exclusive use and exclusive commercial use, in trade or commerce, is impossible of statement. Indeed, this difficulty is likewise so apparent that in defending the proposition of exclusive commercial use it is defined in the argument to be "known in commerce," but known in commerce is a matter of commercial designation, not of commercial use. Thus it is impossible to state the proposition of exclusive use without being driven by the reason of things to abandon it and seek refuge in the theory of exclusive commercial use, or exclusively used in trade or commerce. It is equally impossible to state this last contention without resolving it into a question of commercial designation. The decisions of this court abundantly support the refusal to give the charges asked. *Hartranft* v. *Langfeld*, 125 U. S. 128; *Robertson* v. *Edelhoff*, 132 U. S. 614; *Cadwalader* v. *Wanamaker*, 149 U. S. 532; *Walker* v. *Seeberger*, 149 U. S. 541; *Hartranft* v. *Meyer*, 149 U. S. 544; *Magone* v. *Heller*, 150 U. S. 70; *Sonn* v. *Magone*, 159 U. S. 417. It is urged that *Worthington* v. *Robbins*, 139 U. S. 337, and *Magone* v. *Heller* (*ub. sup.*) are in conflict with the other cases above quoted, and therefore such other cases by implication are overruled. The contention is without foundation. It proceeds upon the hypothesis that this court overruled, in 139 U. S., *Hartranft* v. *Langfeld* and *Robertson* v. *Edelhoff*, when, in 149 U. S., in *Cadwalader* v. *Wanamaker*, *Walker* v. *Seeberger*, and in *Hartranft* v. *Meyer*, it affirmed those cases, and held itself bound by the doctrine of chief use which was there announced. So, also, it presupposes that this court, in *Magone*

v. *Heller*, in 150 U. S., reversed the doctrine established in a line of carefully considered cases without even making reference to them. It is apparent that the matters decided in *Worthington* v. *Robbins* and *Magone* v. *Heller* do not conflict with the adjudications of this court, as to the chief or predominant use, which began with the case of *Maillard* v. *Lawrence*, 16 How. 251, 261, and has found fuller expression in the line of cases above referred to.

Worthington v. *Robbins* involved the rate of duty on a certain class of enamel, which it was claimed by the importer was dutiable as watch materials. The court found that the enamel was a raw material, not necessarily material for a watch at all, and not susceptible of being used as such without undergoing a process of manufacture. It was upon this ground the case was decided. *Magone* v. *Heller* involved the duty on an article invoiced as "manure salts" which the collector claimed was dutiable as sulphate of potash at 20 per cent *ad valorem*, and which the importer asserted was free of duty as a substance "expressly used for manure." The proof showed that salts like those in question were used for making fertilizers, that they were sometimes sold to farmers for fertilizing purposes, and that they were also used for making alum, nitrate of potash, and bichromate of potash. In this state of proof the defendant, collector, requested, under the theory of exclusive use, a verdict in his favor, which the court refused, but on the request of the plaintiff instructed a verdict in his behalf. We held that the court rightly refused the instruction for the defendant, which was necessarily an adhesion to the settled doctrine that where use becomes the criterion, exclusive use was not the proper test to apply. We held also that there was error in instructing for the plaintiff, because the question of whether there was chief or predominant use of the imported article as a substance "expressly used for manure," should have been left to the jury, and the case was remanded for that reason. In reviewing the contention we said: "If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally or by way of experiment it is used for a different

purpose will not take it out of the exception. But if it is commonly, practically, and profitably used for a different purpose, it cannot be considered as used expressly for manure, even if in the majority of instances it is so used." It follows that whilst *Magone* v. *Heller* adhered to the settled rule of chief use, a guide was there announced by which to discover whether the facts established such chief use. Chief use in itself is a vague and uncertain term. *Magone* v. *Heller*, therefore, held that chief use was to be ascertained by that which was commonly, practically, and generally done, and was not to be overthrown by an occasional exception for practical or experimental purposes. Thus, we repeat, *Magone* v. *Heller*, whilst enforcing and applying the rule of chief use, furnished the instrument for determining and measuring its operation and giving certainty to its application. It is for this reason that in the recent case of *Sonn et al.* v. *Magone*, 159 U. S. 417, *Magone* v. *Heller* was cited as authority for and in elucidation of the correct test by which use as a measure of classification was to be controlled. The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*.

Affirmed.

DEJONGE *v.* MAGONE.

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

No. 56. Argued November 1, 1895. — Decided November 18, 1895.

Papers, coated, colored and embossed to imitate leather, and papers coated with flock, to imitate velvet, imported into the United States in 1888, were subject, under Schedule M of the tariff act of March 3, 1883, c. 121, to a duty of 25 per cent *ad valorem*, as "paper hangings . . . not specially enumerated or provided for in this act," and not to a duty of 15

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per cent *ad valorem*, as manufactures of paper, or of which paper is a component material, not specially enumerated or provided for in this act.

THE action below was brought to recover the amount of alleged excessive exactions imposed by the defendant, while collector of the port of New York, as duties upon two importations into the port of New York made by the plaintiffs in 1888, of two kinds of paper, the one coated, colored, and embossed to imitate leather; the other coated with flock to imitate velvet; which importations were classified by the collector as dutiable under Schedule M of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 510, which reads as follows:

"Paper hangings and paper for screens or fireboards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper not specially enumerated or provided for in this act: twenty-five per centum *ad valorem*."

The goods were described in the invoices as "manufactures of paper," and in their protest the importers claimed that they were dutiable at only fifteen per cent *ad valorem*, under a paragraph of the same schedule of the act referred to, which reads as follows:

"Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act: fifteen per centum *ad valorem*."

A member of the plaintiff firm testified, and the evidence generally tended to show, that the articles in question were embraced in a class of surface coated papers, known to commerce and trade at the time of the passage of the tariff act of 1883 as "fancy papers," and were specifically designated and known to the trade at that time, the imitation of leather paper as "embossed paper" or "morocco paper," and the other as "imitation of velvet paper."

The process by which fancy papers of the character referred to are produced, while requiring different machinery, the employment of workmen not accustomed to making ordinary paper, or the completed paper which is used in this manufacture, yet is substantially the same method as is used in the manufacture of wall paper. Indeed, the unquestioned proof

was, that paper as completed in paper mills, in order to make wall paper, is subjected to further treatment to fit it for the new use. As to the imitation of leather paper, there are no ingredients contained in it not found in ordinary paper, though the sizing and coloring are different.

In the production of these fancy papers, printing paper or sized paper, white and manilla papers as completed in the paper mills are used. In the case of imitation of velvet paper, the process consists in first putting a strong sizing on the paper, then sifting the different colored flocks in the wet sizing, and then drying the product; and, in the case of the paper coated, colored, and embossed to imitate leather, color is first laid upon the paper, it is then dried, sized, and finally passed through engraved steel rollers, which emboss its surface. It was in evidence that the embossed or morocco paper was used to cover books, for covering paper boxes, for album covers, fancy boxes, or sample cards, for pocket-books, for pamphlets, and for a great many other purposes to imitate leather; and the imitation of velvet paper was used for mats to contain photographs, to frame photographs, for fancy boxes to imitate velvet, and also for wall decoration. A witness for the defendant testified that imitation velvet or flock paper had been used to put upon walls for more than forty years, and that the product when intended for use as wall paper was put up in rolls. In the catalogue issued by plaintiffs to the trade, put in evidence, and in which, as testified to by one of the plaintiffs, the imitation of velvet paper was embraced under the designation of "Leather Papers," the following appears:

"Leather Papers.

"Our own manufacture.

"$20.00 per ream of 500 sheets, 20 x 25.

"$2.00 per roll of 25 inches by 25 yards.

"Prices subject to the fluctuations of the market.

"These goods come in nine colors, as follows: Russia red, Turkey red, leather color, light brown, dark brown, light blue, navy blue, dark green, and black, and can be had in plain or smooth, seal grain, alligator, bamboo, and other

patterns; are waterproof finished on the best 40-pound rope manilla stock."

At the close of the evidence each party moved for a peremptory direction to the jury, and exceptions were duly taken and noted to the overruling thereof.

The following requests to charge were submitted on behalf of the plaintiffs, and a separate exception taken to each refusal so to instruct the jury:

"5. If the articles in suit are made by the addition of foreign substances to paper not covered by the popular definition nor the dictionary definition of paper, they cannot be classified as paper for purposes of duty.

"6. Unless you find that trade and commerce in 1883 and theretofore in this country had affixed a different meaning to the word 'paper' from the ordinary meaning, the articles here in suit not being within the latter, are not to be assessed as paper."

"8. The general words of section 392 of the tariff must be construed as though they read 'and all other papers of that class (designated by the nine preceding words) not specially enumerated or provided for in this act,' and unless you find that the articles in suit belong to that class they cannot be considered as provided for in section 392, unless by the words 'paper hangings and paper for screens and fireboards.'"

The plaintiff also excepted to the following portion of the charge of the court:

"Was this article, in the trade and commerce of this country, when Congress legislated in 1883, a variety of paper? In other words, if the committee of Congress that framed this act and reported it to Congress had turned to the trade and commerce of this country of 1883 and had asked that trade for a comprehensive list of all kinds of paper known to them and dealt in commercially as such, would paper like this have been included in such list? If the commerce of the country had furnished to the committee of Congress, in answer to such a request, a list of all the kinds of paper known to that trade, and if such list enumerated articles like these, then they are covered by the phrase 'all other papers' in paragraph 392.

The collector was right, and the defendant is entitled to a verdict. If, on the other hand, an article such as this would not have been included in that list at that time, then the plaintiff, having established by the proof that they are manufactures of paper, is entitled to your verdict."

The full charge to the jury is contained in 41 Fed. Rep. 432.

Mr. Albert Comstock 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 paragraph of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 510, under which the classification complained of was made, is contained in the statement of facts. It is contended by counsel for plaintiffs in error that it should be construed so as to read as follows:

"Paper hangings and paper for screens or fireboards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper (*of the class of paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, and note*) not specially enumerated or provided for in this act: twenty-five per centum *ad valorem*."

This contention is based upon the claims that —

a. The products in question are *manufactures* of paper as contradistinguished from paper, because completed paper, as produced in paper mills, is but one of the tangible ingredients, the other products, sizing of a particular description, water-color paints, wood flock, and the like, being materials entirely foreign to the art of the paper maker, and that complete merchantable paper is employed simply as the material, and is subjected to elaborate mechanical processes involving the employment of machinery entirely unknown to the paper maker's art, and operated by workmen who are not paper makers; and,

b. That paper hangings and paper for screens and fireboards are a group of products manufactured from an inferior grade of paper stock, and standing equivocally between paper and manufactures of paper, and that as the other nine articles enumerated in the paragraph under which the classification of plaintiff's importations was made, viz., paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, and note paper, are of the writing and drawing class of papers, a high grade of paper stock, and solely the product of paper mills, nothing is paper within the meaning of the term, as it is employed in the expression, "and all other paper not specially enumerated or provided for in this act," which is not of the class of papers last enumerated.

But it is established by the evidence beyond dispute that at the time of the passage of the tariff act of 1883 "fancy papers" were largely dealt in in commerce and were well known in the commerce and trade of this country; that there were a great variety of fancy papers, and that such designation covered both the importations out of which this controversy arose. It is not reasonable to suppose that Congress assumed that the manipulation or treatment of particular paper in the completed condition in which produced at a paper mill, by mere surface coating, a process which did not change its form, but only increased the uses to which such paper might be put, had the result to cause the article to cease to be paper and to become a manufacture of paper, especially in view of the continued commercial designation of the article as a variety of paper and its sale and purchase in commerce as paper.

Congress must be presumed to have known that the paper employed in paper hangings and paper for screens or fireboards was printing paper, sized in the paper mill, and subjected to treatment elsewhere, by which the value of the article as paper was greatly enhanced, and the association of those products with the writing and drawing class of papers in the paragraph in question is convincing evidence that paper hangings and paper subjected to similar processes by which paper hangings were produced was regarded as paper

and not as manufactures of paper. Not alone to avoid doubt and confusion, would such products as paper hangings likely be provided for separately, rather than in association with writing and drawing papers, if deemed to be "manufactures" of paper, but as an article clearly a manufacture of paper, to wit, "paper envelopes," was assessed at a duty of twenty-five per cent *ad valorem*, opportunity existed to place paper hangings in the same paragraph, and such would likely have been done if paper hangings had been deemed "manufactures of" and not "paper."

Nor is it at all probable that Congress would specifically impose a duty of twenty-five per centum upon paper hangings, and intend that an importation of velvet paper of a similar class to wall paper and used for wall decorations should be assessed as a manufacture of paper at a rate of fifteen per centum *ad valorem*.

While, directly speaking, the products in question might be termed manufactures of the particular variety of paper stock employed as their basis, yet the resultant product of such manufacture was a higher and better grade of *paper*. There was no such change of form as in the case of paper screens, paper boxes, paper envelopes, and other like manufactures of paper. The case is analogous in its main features to *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615, where it was held that shells cleaned by acid, and then ground on an emery wheel, and afterwards etched by acid, and intended to be sold for ornaments, as shells, remained shells, and that they had not been manufactured into a new and different article, having a distinctive name, character, or use from that of a shell.

In the schedule of the tariff act of 1883 under consideration, Congress attempted a classification of paper generally. A duty of twenty per cent was laid upon "paper, sized or glued, suitable only for printing paper;" a duty of fifteen per cent was laid upon "printing paper, unsized, used for books and newspapers exclusively;" a duty of ten per cent was laid upon "sheathing paper;" and all other paper was embraced in the paragraph under which the paper in question was classified and made dutiable at twenty-five per centum *ad valorem*.

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As cheaper grades of paper than the writing and drawing paper enumerated in the paragraph last referred to were elsewhere referred to in the act, it is obvious that the expression "and all other paper not specifically enumerated or provided for in this act" meant precisely what was expressed, and embraced paper *of any grade*, not elsewhere enumerated in the act. "Other paper, not elsewhere provided for," would embrace "tissue" paper, *Lawrence* v. *Merritt*, 127 U. S. 113, and that term would also seem to include the various grades of brown and other wrapping paper, and the rope manilla paper out of which the "leather goods" of plaintiffs in error were produced, even though not of the high grade of paper known as writing and drawing papers.

It follows from what has been stated that the court rightly refused the charges requested by plaintiffs in error. It equally follows that if the word "paper" had a well-known signification in trade and commerce in 1883, which embraced these products, that meaning would control. *Cadwalader* v. *Zeh*, 151 U. S. 171, *and cases cited* p. 176. This principle clearly authorized the court to submit to the jury the question: "Was this article, in the trade and commerce of this country, when Congress legislated in 1883, a variety of paper?" and to instruct them, in the event they answered the question in the affirmative, to find in favor of the collector.

Affirmed.

COWLEY *v.* NORTHERN PACIFIC RAILROAD COMPANY.

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

No. 67. Argued and submitted October 22, 1895. — Decided November 18, 1895.

In a proceeding — commenced in a court of the State of Washington, under the statutes of that State, by filing a petition to set aside a judgment charged to have been obtained there through fraud and collusion between the plaintiff's attorney of record and the defendant's attorney of record,

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and against the plaintiff's instructions touching a pretended compromise — and removed on the defendant's motion to the Circuit Court of the United States for that Circuit, it is *Held*, that the cause, although in the nature of a bill in equity, remained, so far as the rights of the plaintiff were concerned, a special proceeding under the Territorial statute, and that the powers of the Federal court, in dealing with it, were gauged not merely by its general equity jurisdiction, but by the special authority given the State courts by statute.

Federal courts may enforce on their equity or admiralty side new rights or privileges conferred by State or Territorial statutes as they may enforce new rights of action, given by statute, upon their common law side.

The averment in such a petition that the case was a case of fraud within the provisions of the statute of the State was sufficient to give the Federal court jurisdiction to act under the statute, and such jurisdiction could not be defeated by proof that no fraud was actually committed; but the plaintiff would be entitled to recover if he were able to show that he never assented to the pretended compromise, or that he repudiated it, and revoked the authority of his attorneys.

The case having been removed to the Federal court upon the defendant's petition, it does not lie in its mouth to claim that that court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.

This was a proceeding originally instituted in the District Court of the fourth judicial district of Washington Territory, under a territorial statute, to set aside a certain judgment rendered in a case brought by the Railroad Company against the appellant, Cowley, in the same court.

The facts of the case were substantially as follows: In 1886, the Railroad Company began an action against the appellant to recover possession of 120 acres of land within the limits of Spokane Falls. In answer to the complaint in that action, Cowley set up a contract of purchase of the land between himself and the Railroad Company, alleging that he had complied or was ready to comply with the terms of his contract, had gone into possession of the land pursuant thereto, and had made valuable improvements thereon to the amount of $1500, and demanded a specific performance. This answer or counter claim was denied by the Railroad Company in its reply, and the case being thus at issue, was referred to a referee to take testimony. The case was set for hearing by the referee on May 10, 1888, and was afterwards adjourned to May 11.

Statement of the Case.

On the day originally set for the hearing, the land agent of the Railroad Company made an oral offer to appellant's attorneys, who were to receive one-quarter of the proceeds of the action, to compromise the suit by the payment to appellant of $8000 in cash, and the conveyance of seven and one-half acres of the land in question, the company to retain the remainder of the land. This offer the appellant's attorneys, Messrs. Ganahl & Hagan, advised him to accept. There was some dispute as to whether it was actually accepted or not, but the court found that it was. The allegation of the petition in this connection is "that after full and mature consideration of said proposition, said Cowley decided to reject the same, and so notified his attorneys, Messrs. Ganahl & Hagan, and being very anxious about having said cause prosecuted to a final and successful issue in the courts, and being desirous of having his case tried by attorneys having confidence in the merits thereof, he determined to associate other counsel with said Ganahl & Hagan in the defence of said cause, and so notified them, asking that such other counsel should take an equal share with said Ganahl & Hagan in the conduct and defence of said cause."

If the proposition was accepted, as claimed by the Railroad Company, and found by the court, there is no doubt that it was subsequently repudiated by Cowley, who informed his attorneys that he was dissatisfied with it, and desired to employ other counsel with them, to which they refused to consent, except upon payment of their fees. There is no doubt that appellant also telegraphed the general land agent of the Railroad Company that he must have additional time to consider the proposition of compromise, to which the land agent replied that there was nothing to consider, the settlement having been made and the papers and money sent. The president of the First National Bank of Spokane Falls, to whom the money and papers were sent by the Railroad Company on May 16, took them to the office of appellant's attorneys and informed them that, on the execution of a quitclaim deed by appellant and his wife, the money would be paid over. But it seems the appellant refused to execute the deed, and has

ever since refused, and the money has ever since been in the hands of the president of the bank, ready to be turned over.

On the following day, May 17, appellant wrote to the attorney of the Railroad Company, and to its general land agent, that the offer was not accepted; that Ganahl & Hagan were no longer his attorneys; and that all further communication should be made through his attorneys, Messrs. Blake & Ridpath. These letters were received about May 18, and were answered to the effect that until other attorneys were regularly substituted by an order of court, Messrs. Ganahl & Hagan would still be recognized by the company as appellant's attorneys. On the same day on which appellant wrote these letters, he also wrote Ganahl & Hagan stating that he discharged them as his attorneys and that he had employed other counsel, to which they made reply that they demanded $4000 for their fee, and would take nothing less, and that they had, on motion, set the case down to take testimony on Monday, May 21. On May 18, the referee set down the case to take testimony on May 21, and notified the attorneys for the respective parties. Appellant telegraphed the attorney of the Railroad Company that he could not go on upon that day, as he had employed new counsel, to which the attorney replied that he had made no arrangements for taking testimony, having supposed it would be unnecessary, and that at any rate he could not go on until the general land agent of the company was able to attend.

On May 21, which was the first day of the May term of the court, the attorney for the Railroad Company, and Ganahl & Hagan as attorneys for Cowley, entered into a stipulation to the effect that the case had been settled and compromised on the terms above mentioned, and that judgment should be entered for the plaintiff, the said Railroad Company, for the restitution of the premises demanded in the complaint; denying the relief prayed in defendant's answer, with costs against the plaintiff. Ganahl & Hagan also executed a receipt for the papers and money then in the First National Bank, though, in fact, they never received the money, which is still in the bank on deposit. Upon this stipulation and receipt, judgment

was accordingly entered that the plaintiff Railroad Company recover of the defendant the possession of the premises described in the complaint; that a writ of restitution issue; that the relief prayed in defendant's answer be denied; and that plaintiff pay the costs. Defendant did not know that the stipulation had been made, or the receipt given, or judgment entered, until it had been done, and upon hearing of it, he protested against it.

Thereafter, and without taking any further proceeding in the original suit, appellant instituted this proceeding to set aside the judgment in the former case, upon the ground of fraud and collusion between Ganahl & Hagan and the attorney for the Railroad Company, and as being entered without authority. The proceeding was begun in the District Court of the Territory, and was afterwards proceeded with in the Superior Court of Spokane County, in the State of Washington. It was then removed into the Circuit Court of the United States, which rendered a decree dismissing the bill, from which decree Cowley took this appeal. The opinion of the Circuit Court is reported in 46 Fed. Rep. 325.

Mr. R. B. Blake for appellant. *Mr. Lewis Abraham*, *Mr. George Turner*, *Mr. Frank Graves*, and *Mr. W. M. Ridpath* were with him on his brief.

Mr. A. H. Garland and *Mr. William J. Curtis* for appellee submitted on their brief.

Plaintiff shows no case for the interposition of a court of equity.

The principles governing courts of equity, where their aid is invoked to enjoin or set aside judgments at law, are well settled. In the leading case of *Marine Ins. Co. of Alexandria* v. *Hodgson*, 7 Cranch, 332, 336, Chief Justice Marshall stated the law in language which has often been quoted and relied upon, as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of

judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defence ought to have been sustained at law. In the case under consideration, the plaintiffs ask the aid of this court to relieve them from a judgment on account of a defence, which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants or by any pure and unmixed accident, from making at law." See also *Hendrickson* v. *Hinckley*, 17 How. 443; *Crim* v. *Handley*, 94 U. S. 652; *Brown* v. *County of Buena Vista*, 95 U. S. 157.

It follows from this that wherever the party seeking the aid of a court of equity could, by any means, have obtained in a court of law, and in the original action, the relief which he seeks, equity will not interfere, but will leave him in the position in which he has placed himself by his failure to avail himself of the means of relief which were open to him in the original action.

These rules apply not only to such grounds of complaint as may arise from the party's failure to make, or to obtain proper advantages of, defences or causes of action in the suit at law, but also to incidental matters relating to the conduct of the action which have affected the result. If relief might have been had in a court of law, in respect of any of these matters, it will be a fatal objection to the bill, and equity will no more give the plaintiff the relief which he might have obtained by motion in the original action than it will enable him to avail himself of defences or claims which he might there have set up. This rule was forcibly stated by Lord Chancellor Redesdale in *Bateman* v. *Willoe*, 1 Sch. & Lef. 201.

See also *Hendrickson* v. *Hinckley*, 17 How. 443; *Wilkinson* v. *Rewey*, 59 Wisconsin, 554; *Bibend* v. *Krentz*, 20 California, 110; *Embry* v. *Palmer*, 107 U. S. 3.

In *White* v. *Crow*, 110 U. S. 183, 188, where an appeal was filed to set aside a judgment to enjoin the execution of a deed by the sheriff upon a sale under a judgment which was alleged to be void, upon the ground that it was entered before the time to answer had expired, and upon consent of a person who acted as agent for the defendant, but who, it was asserted, was not authorized so to act, the court, by Mr. Justice Woods, said: "But if he was not such agent, the question arises whether the rendition of the judgment before the time for filing defendant's answer had expired renders the judgment void. We are of opinion that it does not; that its rendition was simply erroneous, and nothing more. The court having jurisdiction to render the judgment, and having rendered it, the law, when the judgment is collaterally attacked, will make all presumptions necessary to sustain it. *Grignon's Lessee* v. *Astor*, 2 How. 319. The defendant being in court, was bound to take notice of its proceedings, and might have corrected the error at any time during the term. It did not move to set the judgment aside. It filed no answer. The presumption, therefore, which the law makes is either that it consented to a submission of the case before the time for answer expired, or that it subsequently waived the error by not seeking to correct it."

If the rules laid down in the cases cited be applied to the case at bar, it will be seen that appellant shows no ground on which a court of equity can interfere.

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

The referee, to whom this case was referred by the district territorial court, found, as a matter of fact, that Cowley did not directly authorize Ganahl & Hagan to enter into the stipulation and to consent to judgment, but that the stipulation and judgment were only incidental to the contract of

settlement and substantially embodied in the same terms, and that by reason of such settlement, and the general powers of attorney therein, and the power of attorney executed and given to Hagan, and their general powers as attorneys in the case, they were authorized to act in the manner they did, notwithstanding their agency was revoked and notice given to the Railroad Company. He also found, as conclusions of law, that the plaintiff was not entitled to the relief asked, and that the order and decree in the original case should be declared to stand and remain in force.

On August 6, 1889, motion was made by Cowley to set aside this report, defendant making a counter motion to confirm it, except as to certain findings of fact. Washington was admitted as a State by proclamation made November 11, 1889. The case was transferred to the superior court of Spokane County upon the admission of the State, and on January 6, 1890, was removed, upon the petition of the Railroad Company, to the Circuit Court of the United States for the District of Washington, in which court it appears to have been docketed as a case in equity. The motion to set aside the report of the referee coming on to be heard before the Circuit Court, that court struck out the paragraph of the referee's finding above cited, and found that the agreement for a compromise was "only an understanding between the parties as to the terms upon which the contract would be concluded, and that there was not a contract actually made and concluded." It further found that this agreement, even if it were binding in law and equity upon Mr. Cowley, had never been executed or carried into effect; that it had never been performed on defendant's part so as to entitle it to any judgment in the district court in the original case; that the stipulation signed by Ganahl & Hagan, as attorneys for Cowley, was not only not authorized, but was made in defiance of his known wishes in the matter, and hence that the judgment upon such stipulation was improperly rendered, and was unjust.

It was found, however, that the proceeding was in equity, and that it was not according to equity practice to decree that a judgment be vacated or annulled, or to act directly upon the

case in which an unjust or void judgment has been rendered. That the plaintiff should have applied by petition or motion in the original case, and that, his remedy at law being adequate, the suit must be dismissed.

At the time this proceeding was instituted, the following provisions of the Territorial Code of Washington were in effect:

Section 436. "The district court in which a judgment has been rendered, or by which, or the judge of which, a final order has been made, shall have power after the term at which such judgment or order was made to vacate or modify such judgment or order.

"1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials.

"2. By a new trial granted in proceedings against defendant served by publication only as prescribed in section sixty-seven.

"3. For mistakes, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order.

"4. For fraud practised by the successful party in obtaining the judgment or order," etc.

Section 437 provides that "when the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than the second term after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action." This manifestly refers to applications under the first and second subdivisions of section 436.

Section 438 requires that "the proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion," etc. This evidently refers to the third subdivision of section 436.

Section 439 requires that "the proceedings to obtain the benefit of subdivisions four . . . shall be by petition, veri-

fied by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and the facts constituting a defence to the action, if the party applying was a defendant; and such proceedings must be commenced within one year after the judgment or order was made unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability."

The judgment in the original case was entered upon May 21, 1888, and the petition in this case was filed on June 26 of the same year. It does not appear, however, whether it was at the same or a subsequent term of the District Court.

Section 440 provides that "in such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, and the pleadings shall be governed by the principles and the issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in an original action by ordinary proceedings, except that the defendant shall introduce no new cause, and the cause of the petition shall alone be tried."

Other sections provide that the judgment shall not be vacated until it is found that there was a valid defence or a valid cause of action in the original suit, and that all liens and securities obtained under it shall be preserved to the modified judgment. That the court may first try and decide upon the grounds to vacate or modify the judgment before deciding upon the validity of the defence or cause of action. That an injunction may issue suspending proceedings and prescribing the form of judgment to be finally entered.

The petition was in the form of an independent complaint by Cowley against the Northern Pacific Railroad Company, setting forth certain facts which he alleged made it a fraud upon his rights for his attorneys to agree to the judgment which was entered up in the original case against himself, and praying that the decree in that case be set aside, that he be allowed to defend the action, and that he have judgment for costs. The complaint appears to have been drawn in sub-

stantial conformity with the Territorial statute, although it is not entitled in the original cause, but has an independent entitling of its own. The defendant appeared in answer to a summons issued under section 440, demurred to the complaint, and, upon the demurrer being overruled, filed an answer, to which plaintiff replied as in an original action. The difficulty in the case seems to have arisen from the fact that, after the removal of the case to the Circuit Court of the United States, it was treated as a suit in equity, subject to all the limitations attaching to the equitable jurisdiction of the Federal courts, instead of a special proceeding to obtain the benefit of the statute; the court holding that the assistance of equity could not be invoked so long as the remedy by motion existed. The court declined to consider it as a proceeding under the code, saying that the rights of the parties and the limitations of their rights, in such a statutory proceeding, were quite different from the rights and limitations and the rules which must govern the decision in a suit in equity, and that the effect of a decision or judgment was entirely different.

It would appear, however, in view of section 440 of the Territorial code, providing that the parties shall be brought into court in the same way, on the same notice as to time, mode of service, and mode of return, that the pleadings should be governed by the principles, and the issues made up in the form, and all the proceedings conducted as in an original action by ordinary proceedings, that there was no impropriety in filing this petition or complaint as an original proceeding, or conducting the case in the ordinary method.

In the case of *Gaines* v. *Fuentes*, 92 U. S. 10, which was an action to annul an alleged will, brought under the laws of Louisiana, in the District Court of the Parish of Orleans, and removed to the Circuit Court of the United States, it was held that the suit was in effect an action between parties; and that the Federal court had jurisdiction. It was said that if the suit could be maintained in a State court, it might also be maintained by original process in a Federal court, where the requisite diversity of citizenship existed.

In the subsequent case of *Barrow* v. *Hunton*, 99 U. S. 80, a

petition was filed in the same State court of Louisiana, praying for a decree of nullity of a judgment recovered against the petitioner, setting forth as his grounds for such relief that the judgment complained of was void, because it was founded on a default taken, and no lawful service of the petition and citation in the suit had ever been made upon the petitioner. This case was also removed to the Circuit Court, where plaintiff, by leave of the court, amended his petition to conform to the equity practice, converting it into a bill in equity containing substantially the same averments and praying the same relief. It was said by Mr. Justice Bradley, in delivering the opinion of the court, that the question presented was whether the proceeding was a separate suit, or a supplementary proceeding so connected with the original suit as to form an incident to it, and substantially a continuation of it. "If the proceeding is merely tantamount to the common-law process of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case." "On the other hand," said he, "if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines* v. *Fuentes* the case might be within the cognizance of the Federal courts." "In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts, and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or of the party's right to claim any benefit by reason thereof." As the judgment complained of was sought to be impeached simply because the defendant had never been lawfully summoned, and the decree was taken by default against him, it was held that the proceeding was one that affected the mere regularity of the judgment. "In the common-law practice it would have been a motion to set aside the judgment for irregularity, or a writ of error *coram vobis*." It

was further said that, although the fact that the action of nullity can only be brought in the court that rendered the judgment, as in the present case, was entitled to some weight in determining the question, the court was not disposed to allow this consideration to operate so far as to make it an invariable criterion of the want of jurisdiction in the courts of the United States. "If the State legislatures could, by investing certain courts with exclusive jurisdiction over certain subjects, deprive the Federal courts of all jurisdiction, they might seriously interfere with the right of a citizen to resort to those courts. The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materia*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it. The classification of the causes of nullity in the Louisiana Code into causes relative to form and those relative to the merits is nearly coincident with the classification above suggested, of cases which are and cases which are not cognizable in the courts of the United States. Causes of nullity relating to form would fall in that class of cases which could not be brought in these courts or be removed thereto. The present case is one of that character."

The distinction between the two cases above cited is, that in the latter case the judgment was impeached for a matter of form, and in the former case for the falsity and insufficiency of the testimony, upon which the will was admitted to probate — in other words, for a fraud connected with the probating of the will. The case under consideration, being for an alleged fraudulent practice on the part of the attorneys, falls obviously within the class of cases of which *Gaines* v. *Fuentes* rather than *Barrow* v. *Hunton* is an example. So far as the right of the court to deal with this petition is concerned, it makes no difference that the court found that there was no fraudulent conduct on the part of the attorneys, since the petition averred a case of fraud within the fourth subdivision of section 436. This was sufficient to give the court jurisdiction to act, and such jurisdiction would not be defeated by proof that no fraud was actually committed; and the plaintiff

would still be entitled to recover, if he were able to show that he never assented to the compromise, or repudiated it, and revoked the authority of his attorneys. In this particular, the case resembles one wherein the plaintiff claims an amount sufficient to give the Circuit Court jurisdiction, but fails to prove such amount. If the claim be made in good faith, the court does not lose jurisdiction, but may proceed and enter judgment for the amount actually due.

But while, after the removal of the case to the Circuit Court of the United States, it might properly be docketed and tried by the court as an equity suit, it still remained, so far as the rights of the plaintiff were concerned, a special proceeding under the Territorial statute; and the powers of the court in dealing with it were gauged, not merely by its general equity jurisdiction, but by the special authority vested in its own courts by the statutes of the Territory. Had the case never been removed to the Circuit Court, it would have proceeded in the State court as a special proceeding under the Territorial statute, and we are of opinion that, upon its removal to the Circuit Court, petitioner lost no right to which he would have been entitled had the case not been removed. Even if it were treated as in form a bill in equity, the right of the complainant would be gauged as well by the statute under which the bill was filed, as by the general rules of equity jurisprudence. If any action or proceeding in a State court were subject to be defeated or impaired by one of the parties exercising his statutory right to remove it to a Federal court, no one would be safe in instituting such a proceeding in any case wherein, by reason of diversity of citizenship or otherwise, it might be subject to removal. While the Federal court may be compelled to deal with the case according to the forms and modes of proceeding of a court of equity, it remains in substance a proceeding under the statute, with the original rights of the parties unchanged.

Although the statute of a State or Territory may not restrict or limit the equitable jurisdiction of the Federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal courts may

enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus in *Ex parte McNiel*, 13 Wall. 236, a statute of the State of New York giving to the pilot, who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the District Court. See also the cases of *Broderick's Will*, 21 Wall. 503, 520, and *Clark* v. *Smith*, 13 Pet. 195, 203. So, in *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the Circuit Court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in *Davis* v. *Gray*, 16 Wall. 203, 231, that "a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunals." Other cases to the same effect are *Holland* v. *Challen*, 110 U. S. 15; *Marshall* v. *Holmes*, 141 U. S. 589; *Johnson* v. *Waters*, 111 U. S. 640; *Arrowsmith* v. *Gleason*, 129 U. S. 86.

The case having been removed to the Circuit Court upon petition of defendant, it does not lie in its mouth to claim that such court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction.

As the merits of the case, though appearing upon the record, were not argued by counsel, the decree will be

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

Statement of the Case.

HILTON'S ADMINISTRATOR *v.* JONES.

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

No. 1. Submitted October 28, 1895. — Decided November 18, 1895.

L. filed his petition in a State court of Nebraska, setting forth that he was the owner, as trustee for two infants, of an undivided two-thirds interest in a tract of land in that State, and individually in his own right of the other undivided third; that the lands yielded no revenue and were encumbered with unpaid taxes, etc.; and praying for leave to sell or mortgage one-half of the lands, declaring his willingness to join in the deed or mortgage as to his individual interest. A supplementary petition accompanied this and was filed with it, certifying to the integrity of L., and praying that power might be given him to sell or mortgage the premises as asked. This petition was signed by several parties in interest, among whom was H. The court, in its decree, recited the title as stated in the petition, and authorized the sale as asked for. On a bill filed by H. to establish his title to one undivided third part of the lands, and prosecuted after his death by his administrator, *Held*, that the alleged title of H. was *res judicata;* that he was estopped from maintaining this suit; and that it was not open to him or his representative in this suit to question the authority of the attorney of H. in the proceedings in the state court.

This was a bill in equity, filed by George H. Hilton, appellant's intestate, to cancel certain deeds, and to establish the title of the complainant to an undivided one-third of about 1900 acres of land, the greater portion of which is situated in Lancaster County, Nebraska, and near to the city of Lincoln.

The litigation originally consisted of two suits, which were heard together in the lower court. The other suit, in which the two surviving sons of the appellant's intestate here were complainants, was appealed to this court, but was dismissed by reason of the appellants failing to print the record. In that suit the appellants claimed a beneficial interest in two-thirds of the lands. In this suit appellant claims an undivided one-third of the same lands.

The facts of the case are substantially as follows:

1. On October 26, 1861, complainant's intestate, George H.

Statement of the Case.

Hilton, being the owner of the lands described in the bill, conveyed the same for a nominal consideration to his brother "John Hilton, his heirs and assigns forever," in trust for the benefit of his sons George L., James F., and Joseph B. Hilton, "in equal portion, said trustee having authority to sell and convey all or any portion at any time or in any way at his discretion, for their benefit, the following-described real estate," etc., "to have and to hold the same to the only proper use of said John Hilton, in trust as aforesaid, his heirs and assigns forever." This trust was accepted.

2. On September 16, 1863, said John Hilton as trustee, by warranty deed, absolute in terms, and for the expressed consideration of $1000, conveyed all the said lands to Alice B. Hilton, now Alice B. Ducharme, a sister of the three *cestuis que trustent.* It appeared upon the face of the deed that Hilton conveyed as trustee for the three sons of complainant George H. Hilton.

3. On November 22, 1865, Alice B. Hilton, upon the eve of her marriage, conveyed the same premises to Augusta Hilton, her sister, a girl of 18 years, by an absolute deed without mentioning the trust.

4. On May 18, 1866, George H. Hilton, the original complainant, and his wife Honora, also executed to their daughter Augusta a deed of the same land with the following clause: "This deed is made to perfect the title in Augusta Hilton, as it appears that the deed made by above grantors dated 26 October, 1861, through which title to said lands vested in her, has not been recorded and has been mislaid or lost;" concluding with the following clause: "To have and to hold the same to the said Augusta Hilton, her heirs and assigns forever," with a short covenant of warranty and of seizin.

5. On August 25, 1871, George L. Hilton, having attained his majority, Augusta Hilton conveyed to him in fee an undivided one-third part of all said lands with the usual covenants of warranty. It seems, too, that on the same day Augusta Hilton also conveyed to her brother George the remaining undivided two-thirds of the property, in trust for his two brothers. This deed, however, does not appear in the

record of this case, and is immaterial so far as the undivided one-third in controversy is concerned.

6. On September 11, 1872, said George L. Hilton conveyed an undivided one-third of 180 acres of said lands in fee by deed to Smith B. Galey, for a consideration of $3500, and on September 16, 1872, by a second deed to Galey, for a consideration of $5000, his entire interest in all the lands.

7. On September 18, 1873, the said Galey, together with said George L. Hilton, conveyed to William C. Lincoln an undivided one-third of the same lands, with a covenant against their own acts. The other defendants took their titles from Lincoln.

There were allegations in the bill that these conveyances from George H. Hilton to Galey, and from Galey to Lincoln, were for an inadequate consideration, and were procured by fraud, and that Lincoln's title was defective, unauthorized, illegal, and void.

On December 13, 1873, a petition was filed in the District Court of the county of Lancaster by William C. Lincoln, as plaintiff, against James F. Hilton, Joseph B. Hilton, infants under the age of 21 years; *George H. Hilton*, the appellant's intestate; Alice B. Ducharme, Augusta Hilton, George L. Hilton, and Nora M. Lincoln, setting forth that the plaintiff held in trust for James F. and Joseph B. Hilton, the two infants, a two-thirds interest in the lands in question; that the lands were wild and uncultivated, yielding no revenue; that the infants had no other property; that the unpaid taxes amounted to over $1500; that, owing to the mismanagement of John Hilton, the financial embarrassment of George H. Hilton, and to several unlawful conveyances of such lands, they became the subject of long and expensive litigation, and the plaintiff was obliged to expend large sums of money in maintaining the rights of said infants; that although the various conveyances of the property terminating in the deed to himself, conveyed the legal title, it had been questioned whether it was not necessary to have a decree of the court, confirming the equitable title in the plaintiff, that he might be able to procure the full value of the lands in case the court should deem it best to dis-

Counsel for Appellant.

pose of the same. The plaintiff further alleged that *he was the owner in fee of the remaining one-third of the land* above described; that it would be necessary to sell or mortgage one-half of the lands to pay off the indebtedness and to provide a sufficient revenue for the support of the infants, and that he was willing to join in a deed or mortgage for the purpose of paying off the debts. He, therefore, asked for a decree authorizing him to sell or mortgage one-half of the lands, and to declare the equitable, as well as the legal, title to be in the plaintiff, as trustee for said infants.

To this petition was annexed as an exhibit a supplementary petition, signed by the appellant's intestate, *George H. Hilton*, his three sons and three daughters, certifying to the integrity, fidelity, and financial ability of the petitioner, William C. Lincoln, husband of one of the daughters, and praying the court to appoint him trustee for the two minor sons, under the original trust deed from George H. Hilton to his brother, John Hilton, with power to sell and mortgage the premises, etc. A summons was issued upon this complaint, which was served upon the defendants, with the exception of George H. Hilton, Alice B. Ducharme, and Augusta Hilton, and on January 21, 1874, the defendants *George H. Hilton*, Alice B. Ducharme, Augusta Hilton, and Nora M. Lincoln, by their attorney, Seth Robinson, entered a disclaimer of all right, title, or interest in the lands described in the petition. Upon the same day a decree was entered, reciting the appearance of the parties, the filing of the disclaimer, finding that the plaintiff held the legal title to an undivided two-thirds in trust for the infants, and that *he was the owner in fee of the other undivided one-third* of the same, and authorizing the sale of one-half of the property described.

This decree was never appealed from, and no attempt was ever made to impeach it.

Upon the hearing of the case upon pleadings and proofs, the bill was dismissed, and complainant appealed to this court.

Mr. S. S. Gregory, *Mr. William M. Booth*, and *Mr. James S. Harlan* for appellant.

Mr. N. S. Harwood, *Mr. John H. Ames*, and *Mr. Charles O. Whedon* for appellees.

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

This bill was brought by the original owner of the land, George H. Hilton, against John Hilton, his trustee; Alice B. Ducharme, the grantee of John Hilton; Augusta Hilton, grantee of her sister Alice; Smith B. Galey, grantee of George L. Hilton, one of the *cestui que trusts*, to whom his sister Augusta had conveyed the land upon his attaining his majority; William C. Lincoln, grantee of Galey, and certain other parties who derive their title either as grantees or mortgagees of the undivided one-third interest conveyed by George L. Hilton to Galey and Lincoln. The bill deals particularly with the third interest conveyed to John Hilton for the benefit of George L. Hilton, who died September 16, 1877. Complainant now claims his interest either by descent, or, if his intestate's son was only seized of a life estate, then as owner of the reversion.

We think it entirely clear that the proceeding taken by Lincoln to obtain a sale of one-half the property operates to estop the complainant from maintaining this suit. The petition in that case stated that Lincoln, the plaintiff, held two-thirds of the property in trust for James F. and Joseph B. Hilton, and the remaining one-third he claimed to own in fee. In accordance with these allegations the District Court found that he did hold the two-thirds in trust for the infants, and that he was the owner in fee of the other undivided one-third, and authorized him to sell one-half of the entire property. This decree contains every element of a *res judicata*. The plaintiff in that proceeding is one of the defendants in this. George H. Hilton, the original complainant in this proceeding, was one of the defendants in that. He certified to the ability and integrity of Lincoln, disclaimed all interest in the property, allowed the decree to be taken against him, and took no steps to have it set aside, appealed, or modified.

Opinion of the Court.

The principal criticism of it is that Robinson was not the authorized attorney of the defendant in that case, and that his disclaimer of any interest of the complainant in the lands described in the petition was, therefore, not binding upon him. There is no evidence of this, however, except the unsworn statement of the complainant in his amended bill, which is not even signed by him in person. Of course this cannot be considered as against the decree of the District Court, which must necessarily have found that Robinson was authorized to make the disclaimer. There was certainly evidence from which the court might reasonably have adjudged, as it did, that Lincoln was the owner of an undivided one-third of the property in question. Not only does a statute of the State declare that "the term 'heirs' or other technical words of inheritance shall not be necessary to create or convey an estate in fee simple," and that "every conveyance of real estate shall convey all the interest of the grantor therein, unless a contrary intent can be reasonably inferred from the terms used," but on May 18, 1866, George H. Hilton and his wife conveyed the lands in question to Augusta Hilton, who then held the title from her sister Alice, with the declaration that the deed was made to perfect the title in Augusta, "as it appears that the deed made to above grantors dated 26th October, 1861, through which the said land vested in her has not been recorded and has been mislaid or lost." Without expressing an opinion whether Lincoln did in fact hold the title to one-third, there was certainly evidence tending to show that the court might have made in perfect good faith the finding that it did.

In addition to this we have the opinion of the Supreme Court of Nebraska in a case brought by *Hilton* against one *Bachman*, (24 Nebraska, 490,) holding that complainant was bound by that judgment. In delivering the opinion the court observed: "All presumptions are in favor of the regularity of that proceeding. We must presume that the District Court which rendered the decree did so upon ample proofs of title, and that the decree being still in full force is binding, and settles the question of title."

The decree of the court below was clearly correct and is, therefore,

Affirmed.

CLUNE *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 517. Argued October 30, 1895. — Decided November 18, 1895.

It is doubtful whether the record and bill of exceptions present for review the matters complained of in the brief of counsel.

On the trial of parties charged with the criminal offence of conspiring to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if identified and brought home to them.

So, too, the acts and declarations of persons not parties to the record are in such case admissible against the defendants if it appears that they were made in carrying the conspiracy into effect, or attempting to carry it into effect.

Instructions of the court below, to become part of the record, must be incorporated in a bill of exceptions, and be authenticated by the signature of the trial judge.

It is within the power of Congress to provide, for persons convicted of conspiracy to do a criminal act, a punishment more severe than that provided for persons committing such act.

THE case is stated in the opinion.

Mr. Robert Christy for plaintiff in error. *Mr. Johnstone Jones*, *Mr. W. T. Williams*, and *Mr. George M. Holton* filed a brief for same.

Mr. Attorney General for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

On July 3, 1894, the plaintiffs in error, together with one A. T. Johnson, were indicted under section 5440, Rev. Stat., in the District Court for the Southern District of California, for a conspiracy to obstruct the passage of the United States

mails. On November 17 a jury was empanelled and a trial begun, which resulted, on November 21, in a verdict of guilty. Motions for a new trial and in arrest of judgment having been overruled, the defendants were, on December 6, each sentenced to pay a fine of one dollar and to be imprisoned in the county jail of Los Angeles County for the period of eighteen months. The defendant Johnson, at the time of sentence, withdrew his motions for a new trial and in arrest of judgment. The other defendants, the present plaintiffs in error, have brought the case to this court.

It is doubtful whether the record is in such condition as to present for review the matters complained of in the brief or argument of counsel. There is only one bill of exceptions, which was signed and filed on December 24, and is authenticated in these words: "The defendants claiming that they are entitled to a bill of exceptions to review the ruling upon their motion for a new trial and having presented the foregoing as such bill, the same is hereby allowed and settled as a correct statement of the proceedings had on the trial so far as it goes." It preserves no portion of the charge, does not purport to contain all the evidence, but does state that on the trial certain testimony was offered and admitted over the objections of defendants, and exceptions taken. If this bill of exceptions was prepared simply for the purposes of a review of the ruling on the motion for a new trial, as seems to be suggested by the words of the authentication, then we are confronted with the proposition so often announced that the action of the court in overruling a motion for a new trial is not assignable as error. *Moore* v. *United States*, 150 U. S. 57; *Holder* v. *United States*, 150 U. S. 91; *Blitz* v. *United States*, 153 U. S. 308; *Wheeler* v. *United States*, 159 U. S. 523. If no error can be affirmed in overruling a motion, it would seem unnecessary to examine the record of that which was presented on the hearing of such motion.

But passing that, and assuming that we are at liberty to examine, for any purpose, the bill of exceptions, the contentions of counsel in the brief are practically three in number: First, that there was on the trial error in the admission of

testimony; second, that the verdict was against the evidence; and, third, that the court erred in the instructions.

With reference to the first it may be remarked that the offence charged against the defendants took place during and was a part of the great strike, which was brought to the attention of this court in *In re Debs*, 158 U. S. 564. One series of objections under this head is to the introduction of telegrams, some signed by the defendants, some by Debs, and others by still other parties, all of which upon their face have more or less direct reference to the stopping of railroad trains. The following are samples of these telegrams:

"EXHIBIT No. 19.

"LOS ANGELES, CAL., —— 29, 1894.

"To Barrett, Bakersfield:

"Have stopped trains at Mojave, come to Los Angeles with engine and caboose.

PHILIP STANWOOD."

"EXHIBIT No. 20.

"L. A., 7 10, 1894.

"To L. B. Hays:

"No. nineteen and one freight train left here this morning —everybody on the train are 'scabs.' Hold them there. Sure to win. "W. H. CLUNE, *Sec'y*."

"EXHIBIT No. 21.

"JUNE 26, 1894.

"CHICAGO, ILLS., —— 26.

"W. H. Clune, 1844 Naud St., Los Angeles, Calif.:

"Boycott against Pullman cars in effect at noon to-day by order of convention. E. V. DEBS."

Although all the evidence does not appear to have been preserved in this bill of exceptions, enough is disclosed to show that the government was seeking to establish a conspiracy by circumstantial testimony, and telegrams of this character, if identified and brought home to the defendants, were obviously circumstances tending to show such conspiracy. It is familiar law that where a case rests upon that

character of evidence much discretion is left to the trial court, and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact. *Alexander* v. *United States*, 138 U. S. 353; *Holmes* v. *Goldsmith*, 147 U. S. 150; *Moore* v. *United States*, 150 U. S. 57; *Thiede* v. *Utah Territory*, 159 U. S. 510. There was no error in admitting these telegrams.

Another series of objections is to the admission of the declarations and acts of parties other than the defendants, to wit, Gallagher and Buchanan, on the ground that they were not parties to the record. The indictment charged the defendants with conspiring and combining together, and with other persons. Now, if Gallagher and Buchanan were conspirators with defendants, evidence of their acts and declarations in carrying or attempting to carry into effect the conspiracy was competent, and we must assume in the silence of the record that it was shown that they were engaged in the conspiracy, and that their acts and declarations were in execution thereof.

Again, it is insisted that the verdict was against the evidence. It is enough to say that such a contention cannot be sustained unless all the testimony, or all upon some essential fact, is presented.

Finally, there is a claim of error in the instructions, but the difficulty with this is that they are not legally before us. True, there appears in the transcript that which purports to be a copy of the charge, marked by the clerk as filed in his office among the papers in the case; but it is well settled that instructions do not in this way become part of the record. They must be incorporated in a bill of exceptions, and thus authenticated by the signature of the judge. This objection is essentially different from that of the lack or the sufficiency of exceptions. An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it. There are, for instance, in

some States statutes directing that all instructions must be reduced to writing, marked by the judge "refused" or "given," and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record. But in the absence of that or some other statutory provision a bill of exceptions has been recognized as the only appropriate method of bringing onto the record the instructions given or refused. *Struthers* v. *Drexel*, 122 U. S. 487, 491; Supreme Court Rules No. 4, 108 U. S. 574; *Insurance Company* v. *Radding*, 120 U. S. 183, 193; *McArthur* v. *Mitchell*, 7 Kansas, 173; *Moore* v. *Wade*, 8 Kansas, 380; *Kshinka* v. *Cawker*, 16 Kansas, 63; *Lockhart* v. *Brown*, 31 Ohio St. 431; *Pettett* v. *Van Fleet*, 31 Ohio St. 536.

Even if we were to ignore this lack of due authentication we should be met with the want of any proper exceptions. To the charge as apparently given on November 20, when the case was submitted to the jury, there is no pretence of any exception whatever. The journal entry of November 21 shows that the jury were brought into court and announced that they had not agreed upon a verdict. Then follows this statement: "Thereupon the court further instructs the jury by reading written instructions to them, all of which is excepted to by the defendants' attorneys," and this is the only exception having any reference to instructions to be found in the transcript. Exactly what was intended by it is not clear. If the objection was simply to the time and manner of giving instructions, the propriety of such action has been sustained in *Allis* v. *United States*, 155 U. S. 117, 123. If to what was contained in those instructions, then in addition to the fact that they have not been preserved in any bill of exceptions arises the further difficulty that no particular proposition is called to the attention of the court.

These are all the matters pointed out by counsel in the brief. At the argument in this court other counsel than those whose names are on the brief appeared, and in addition presented this further objection: By section 3995, Rev. Stat., the offence of obstructing the passage of the mails is made punishable by a fine of not more than $100. Under section

5440, Rev. Stat., a conspiracy to commit any offence against the United States is punishable by a fine of not less than $1000 nor more than $10,000, and by imprisonment for not more than two years. Upon this he contended that a conspiracy to commit an offence cannot be punished more severely than the offence itself, and also that when the principal offence is, in fact, committed, the mere conspiracy is merged in it. The language of the sections is plain and not open to doubt. A conspiracy to commit an offence is denounced as itself a separate offence, and the punishment therefor fixed by the statute, and we know of no lack of power in Congress to thus deal with a conspiracy. Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body. *Callan* v. *Wilson*, 127 U. S. 540, 555. The power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each. With regard to the suggestion that the conspiracy was merged in the completed act, it is enough that we cannot, upon the record, hold that the mails were obstructed. All the testimony not being preserved, it may be that the testimony satisfied the jury that there was, in fact, no obstruction of the mails, but only as charged a conspiracy to obstruct. If so, the suggestion of a merger falls to the ground.

These are the only matters called to our attention. In them we perceive no error, and the judgment is

Affirmed.

McDOWELL *v.* UNITED STATES.

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

No. 552. Submitted October 15, 1895. — Decided November 18, 1895.

There being a vacancy in the office of District Judge for the District of South Carolina from January 1, 1894, to February 12, 1894, and the term of that court for the Western District being fixed by law for the fifth day of February, 1894, one of the Circuit Judges of the circuit designated and appointed a Judge of one of the District Courts in North Carolina, within the same circuit, to hold and preside over that term. Court was so held and adjourned from day to day. February 12 a commissioned Judge appeared. Plaintiff in error was tried upon an indictment returned against him, found guilty and sentenced. *Held*,

(1) That it is within the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district;

(2) That whether existing statutes authorized the appointment of the North Carolina District Judge to act as District Judge in South Carolina is immaterial; as,

(3) He must be held to have been a judge *de facto*, if not *de jure*, and his actions, as such, so far as they affect third persons, are not open to question.

Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public.

THIS case comes to this court on questions certified by the Court of Appeals of the Fourth Circuit. The facts, as stated, are that a vacancy existed in the office of District Judge of the United States for the District of South Carolina, from January 1, 1894, to February 12, 1894. The regular terms of the District Court for the Western District were fixed by law to be held at Greenville on the first Mondays of February and August, act of April 26, 1890, c. 165, 26 Stat. 71, and the first Monday of February, 1894, fell on the fifth day of the month. On January 30, 1894, the following order, made by Hon. Charles H. Simonton, one of the Circuit Judges of the circuit, was duly filed in the clerk's office:

Statement of the Case.

"It appearing to me by the certificate of the clerk, under the seal of the court, this day filed, that there is such an accumulation of business and urgency for the transaction thereof in the District Court for the Western District of this State, and that the public interests require the designation and appointment of a District Judge within this circuit to hold the regular term of this court beginning on the first Monday of February, 1894, at Greenville, South Carolina:

"Now, therefore, in consideration of the premises and on motion of the United States attorney, I do hereby designate and appoint the Honorable Augustus S. Seymour, judge of the District Court of the United States for the Eastern District of North Carolina, the same being in the fourth circuit, to hold and preside over the said term of court, and to have and to exercise within the Western District of South Carolina the same powers that are vested in the Judge of the said district."

In pursuance of this order, Judge Seymour held and presided over the regular term of the District Court for that district, from February 5 to February 12, on which day Hon. William H. Brawley, appointed and duly commissioned as District Judge, qualified and entered upon the discharge of his official duties, and held and presided at the term from that day until the conclusion of the proceedings in this case. On February 16 an indictment was returned into the court against A. F. McDowell, the plaintiff in error. Upon this indictment McDowell was tried February 21 and 22, and a verdict of guilty returned. A motion for a new trial was overruled February 23. Thereupon and before sentence, McDowell made a motion in arrest of judgment, on the ground that the indictment had been found, and the subsequent proceedings had thereon, at what was an unlawful term of court, and that such indictment and subsequent proceedings were consequently void. This motion was overruled and sentence pronounced upon the verdict. The making of the motion in arrest and its disposition appear in the record in a bill of exceptions, which refers to the indictment as found by "the grand jury empanelled at the special February term of said

court, at Greenville, at the district aforesaid," and the statement of the matter upon which the motion in arrest was founded commences: "At the opening of the special February term, 1894, of said court, that being the term at which said indictment was found," but the record nowhere discloses the calling of any special term as such. Upon these facts the Court of Appeals certified these questions:

"1. Whether plaintiff in error was indicted, convicted, and sentenced at a lawful term of the District Court for the District of South Carolina and the Western District thereof, sitting at Greenville, as set forth in this certificate?

"2. Whether the question as to the validity of the indictment and proceedings against plaintiff in error was open to consideration on the motion in arrest of judgment?"

Mr. J. Altheus Johnson for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

The contentions of counsel for plaintiff in error are that the power of a Circuit Judge or Justice to call one District Judge from his own into another district does not extend to cases in which there is a vacancy in the office of judge of the latter district; that the order of the Circuit Judge designating and appointing Judge Seymour to hold the February term, was void; that the term lapsed; that no special term having been called, Judge Brawley was attempting to hold the District Court at a time unauthorized by law, and that, therefore, all proceedings before him were *coram non judice* and void.

This obviously presents a mere matter of statutory construction, for the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district cannot be doubted. It involves no trespass upon the executive power of appointment. There is no constitutional provision restricting the authority of a District Judge to any particular territorial limits. District Courts

are solely the creation of statute, and the place in which a judge thereof may exercise jurisdiction is subject absolutely to the control of Congress.

At first there was no authority for the temporary transfer of one judge to another district. The Judiciary Act of September 24, 1789, c. 20, § 6, 1 Stat. 73, 76, simply provided that a District Judge, if unable to attend at the day appointed for the holding of any term, might, by his written order, continue it to any designated time, and that in case of a vacancy all matters pending in the court should be continued as of course until the first regular term after the filling of the vacancy.

Since then there has been repeated legislation, each successive statute seemingly intended to make larger provision for the regular and continued transaction of the business of the District Court. Thus, in 1850, 9 Stat. 442, Rev. Stat. § 591, an act was passed providing that when any District Judge was prevented by any disability from holding any term, and that fact was made to appear by the certificate of the clerk under the seal of the court to the Circuit Judge, such judge might, if in his judgment the public interests so required, designate and appoint the judge of any other district in the circuit to hold such term and to discharge all the judicial duties of the judge so disabled during such disability. This, it will be noticed, applied only in case of disability on the part of the regular District Judge. Two years thereafter, in an act 10 Stat. 5, carried into the Revised Statutes as § 592, like authority was given to call in the judge of some other district when, as shown by the certificate of the clerk, from the accumulation or urgency of business in any District Court, the public interests so required. This statute contemplated the doubling of the judicial force, and authorized both judges, the regular and the appointed judge, to act separately in the discharge of all duties. Finally, in 1871, an act was passed, 16 Stat. 494; Rev. Stat. § 596, which reads as follows:

"It shall be the duty of every Circuit Judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section 591, the District Judge of any judicial district within his circuit

to hold a District or Circuit Court in the place or in aid of any other District Judge within the same circuit; and it shall be the duty of the District Judge, so designated and appointed, to hold the District or Circuit [Court] as aforesaid, without any other compensation than his regular salary as established by law, except in the case provided in the next section."

This gives full power to the Circuit Judge to act without reference to any certificate from the clerk, whenever in his judgment the public interests require. It is contended that the words "in the place or in aid of" limit the power of designation and appointment to those cases in which there is an existing District Judge. This construction, it is claimed, finds support in section 602, Rev. Stat., which in substance reënacts the latter part of section 6 of the judiciary act of 1789, to the effect that in case of a vacancy in the office of District Judge all matters pending before the court shall be continued, of course, until the next stated term after the appointment and qualification of his successor. While "in aid of" naturally imply some existing judge to be aided, the words "in the place of" do not necessarily carry the same implication. *Commonwealth* v. *King*, 8 Gray, 501. They may, without doing violence to language, be construed to mean that the designated judge is to take temporarily the place which is or has been filled by a regular judge.

Section 602 throws little light on the question. It does not purport to abolish the term. The existence of a term does not depend on the fact that any business is transacted thereat, nor does any general order of continuance of itself close the term. A simple illustration will demonstrate this. Suppose at the commencement of any regular term of this court a general order should be entered continuing all matters to the succeeding term, no one would contend that such an order of itself adjourned the term, or prevented the court from adjourning from day to day until such time as it saw fit to order a final adjournment. The officers attending after the continuance of the cases and until the final order of adjournment would unquestionably receive their per diems for attendance upon a term of the court. The declaration that the process, etc.,

shall be "continued, of course," means simply continued without any special order, and was obviously designed to prevent that failure of right which in many cases might otherwise result from the absence of a judge. It is familiar that process is often made returnable at a term, and notices are given of applications for orders at a term. In these and similar cases rights are created which may depend for their continued existence upon some action of the court at the term. Clearly, the statute does not destroy or even temporarily suspend the jurisdiction of the regular judge when appointed over matters pending in his court.

But whatever doubts may exist whether the order of designation by the Circuit Judge was within his power, there is another consideration which is decisive of this case. Judge Seymour must be held to have been a judge *de facto*, if not a judge *de jure*, and his actions as such, so far as they affect third persons, are not open to question. *Ball* v. *United States*, 140 U. S. 118, 129; *Norton* v. *Shelby County*, 118 U. S. 425; *Hunter's Adm'r* v. *Ferguson's Adm'r*, 13 Kansas, 462. The time and place of a regular term of the District Court were fixed by law at Greenville, on the first Monday of February. Judge Seymour was a judge of the United States District Court, having all the powers attached to such office. He appeared at the time and place fixed by law for the regular term, and actually held that term. The Circuit Judge had, generally speaking, the power of designating the judge of some other district to do the work of the District Judge in this district. The order of designation was regular in form, and there was nothing on its face to suggest that there was any vacancy in the office of District Judge for the District of South Carolina. Any defect in the order, if defect there was, is shown only by matters *dehors* the record. While this may not be conclusive, it strongly sustains the contention of the government that Judge Seymour was, while holding that term, at least a judge *de facto*. Whatever doubt there may be as to the power of designation attaching in this particular emergency, the fact is that Judge Seymour was acting by virtue of an appointment, regular on its face, and the rule is

well settled that where there is an office to be filled and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto* and binding upon the public. Of course, if he was judge *de facto* his orders for the continuance of the term from day to day until February 12, when the regular judge took his place upon the bench, were orders which cannot be questioned, and the term was kept alive by such orders until Judge Brawley arrived. The record shows that the indictment was not found until after the latter was on the bench. Whether the grand jury was in fact empanelled or not before Judge Brawley took his seat, does not appear from the record. While Rev. Stat., § 817, provides that ordinarily jurors shall for this district be drawn at a preceding term, yet such provision does not conflict with the power granted in section 810 to all Circuit and District Courts, as follows: "And either of the said courts may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so." Under this provision the judge may at any term, regular or special, and at any time in the term, summon a grand jury.

Indeed, we may assume that all the proceedings in respect to this case were held before the regular judge of that court, and that the only orders which Judge Seymour made bearing upon this case were the daily orders of continuance of the court and the keeping alive of the term from February 5 to February 12, and these were orders made by a *de facto* judge of that court, and are, as we have stated, not open to challenge. The fact that in the recital of the proceedings the term is spoken of as a special term is immaterial in the face of the statement that the regular term was opened on February 5 and continued from day to day, until after the proceedings complained of had taken place. It follows from these considerations that the first question certified to this court must be answered in the affirmative. In view of this answer it is unnecessary to consider the second question.

The case will, therefore, be sent back to the Court of Appeals with an answer to the first question in the affirmative.

BALTIMORE & OHIO RAILROAD COMPANY *v.* GRIFFITH.

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

No. 53. Argued October 18, 1895. — Decided November 18, 1895.

When the judgment actually rendered in the court below was for an amount giving this court jurisdiction, which amount was reached by adding to a verdict for $5000, interest from the time of the verdict to the time of the entry of the judgment in a district where the local state law does not permit that to be done, and the plaintiff below, although excepting to the allowance of interest, and to the refusal of the court below to permit a remittitur, brings no writ of error to correct the alleged error, this court cannot dismiss a writ of error brought by the defendant to review other rulings in the case.

In an action against a railway company to recover damages for injuries caused by one of its trains striking a wagon in which the plaintiff and another woman were seated as it was crossing the track on a public highway at grade, the negligence of the defendant having been established, there was further evidence tending to show that the women were driving slowly and with a safe horse; that the train was several minutes behind time; that as they approached the low place at which a train could be seen if one were there, they stopped to look and listen, but neither saw nor heard anything; that after stopping they started driving slowly up the hill to a point at the top between forty and fifty yards from the track, where the slope commenced, and there they stopped again and listened, but heard nothing; they then drove slowly down the hill, both listening all the time, without talking, and heard nothing; and that just as they got to a cut and the horse had his feet on the nearest rail, the train came around a curve and the collision occurred. *Held*, that the question whether there was contributory negligence on the part of the plaintiff was properly submitted to the jury for determination.

This was an action brought by Emma Griffith in the Court of Common Pleas of Licking County, Ohio, against the Baltimore and Ohio Railroad Company, to recover for injuries received on August 1, 1888, by the collision of a train of that company with the vehicle in which plaintiff was then being conveyed. The cause was removed on the petition of the company into the Circuit Court of the United States for the Southern District of Ohio, where it was tried, and resulted in

Argument for Plaintiff in Error.

a verdict in favor of the plaintiff for five thousand dollars. A motion for a new trial was made and overruled and judgment entered on the verdict, with interest added, to review which this writ of error was sued out. The charge to the jury by Sage, J., and his opinion on the motion for new trial are reported, 44 Fed. Rep. 574, 582.

The following errors assigned were relied on in the brief for plaintiff in error: "Sixth. The said court erred in refusing to give the ninth charge asked by the plaintiff in error. Seventh. The court erred in refusing to give the tenth charge asked by the plaintiff in error. Tenth. The court erred in overruling the motion of the plaintiff in error for a new trial. Eleventh. Upon the whole record, judgment should have been rendered in said cause in favor of the plaintiff in error and against the defendant in error, instead of the judgment which was rendered."

The instructions thus referred to were as follows: "9. The testimony in this case shows that the plaintiff was guilty of negligence contributing to her injury. Such being the fact she is not entitled to recover and your verdict must be for the defendant.

"10. It was the duty of the plaintiff to stop before driving on this railroad track and allow the train to pass before she attempted to cross, and if she failed so to do and was thereby injured she cannot recover in this case."

Mr. John K. Cowen, (with whom was *Mr. Hugh L. Bond, Jr.*, on the brief,) for plaintiff in error, contended that, on the undisputed evidence in the case, the defendant in error was guilty of contributory negligence in law, citing: *Horn* v. *Baltimore & Ohio Railroad*, 6 U. S. App. 381; *Cleveland, Columbus &c. Railroad* v. *Elliott*, 28 Ohio St. 340; *Pennsylvania Company* v. *Rathgeb*, 32 Ohio St. 66; *Baltimore & Ohio Railroad* v. *Whitacre*, 35 Ohio St. 627; *Improvement Co.* v. *Munson*, 14 Wall. 442; *Pleasants* v. *Fant*, 22 Wall. 116; *Schofield* v. *Ch. Mil. & St. Paul Railway*, 114 U. S. 615; *Artz* v. *Chicago, Rock Island &c. Railroad*, 34 Iowa, 153; *Pennsylvania Railroad* v. *Beale*, 73 Penn. St. 504; *Rhoades* v. *Chicago & Grand Trunk Railway*, 58 Michigan, 263;

Schœfert v. *Chicago Milwaukee &c. Railway*, 62 Iowa, 624; *Turner* v. *Hannibal & St. Joseph Railroad*, 74 Missouri, 602; *Gorton* v. *Erie Railway*, 45 N. Y. 660; *Delaware & Lackawanna Railroad* v. *Toffey*, 38 N. J. L. 525.

Mr. Samuel M. Hunter for defendant in error.

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

The verdict was returned June 11, and the motion for a new trial was overruled and judgment entered on the verdict, December 12, 1890. The Circuit Court gave interest on the verdict and rendered judgment for $5154.17 and costs. Plaintiff's counsel excepted to the allowance of interest and also to the refusal of the court to permit a remittitur. Conceding that it is ordinarily within the discretion of the court below to permit or to deny a remittitur, *Pacific Company* v. *O'Connor*, 128 U. S. 394, and cases cited, it is argued here that interest was not allowable on verdicts under the local law; that in view of section 966 of the Revised Statutes, the judgment was improperly increased by the inclusion thereof, *Mass. Benefit Association* v. *Miles*, 137 U. S. 689; and that therefore the writ of error should be dismissed for want of jurisdiction. But if the Circuit Court committed error in this regard, plaintiff below brought no writ of error to correct it, and the question is not open to examination on this record. As the judgment actually rendered was for an amount which gives us jurisdiction, we cannot dismiss the writ on the ground that it should have been for less.

The contention of plaintiff in error is that on the undisputed evidence in the case defendant in error was guilty of contributory negligence in law, and that the court erred in refusing to direct a verdict accordingly.

This renders it necessary to make a brief reference to the evidence.

The plaintiff was riding with her mother in a phaeton buggy from their home in the country to Newark, Ohio, the

mother driving. About four miles south from Newark it was necessary to cross the track of the railroad at a place called Locust Grove crossing, and it was there that the injury was inflicted. The railroad ran nearly north and south in a cut through a small hill, and the highway crossed it at right angles, approaching the crossing through the same hill. The track from the south came to the crossing on a curve of four degrees through the cut, which was from twelve to eighteen feet deep, and the slope of the cut was about forty-five degrees. The bottom of the railroad cut was fifteen feet wide, and the highway as it came down to the track was about sixteen feet wide, though there was some conflict of evidence in regard to it. The train was coming from the south and the buggy was coming from the west. The field on the west of the track and on the south of the highway for a considerable number of feet and up to the crossing was covered with growing corn over ten feet high, so that by reason of the cut and the corn there was no view of the track by a person coming from the west on the highway until he got down into the railway cut. A stream called Hog Run flowed westerly under the track at the bridge of the railroad, 2430 feet south of the crossing, and, after making a curve northerly, passed under a county bridge on the highway in question. The highway from the county bridge ran easterly until about three hundred feet from the crossing, and thence due east to the crossing and after leaving that bridge went by a low place from which the train could be seen coming from the south, until it ran into the cut which commenced about six hundred feet south of the crossing and on a curve to it. The highway proceeding towards the crossing passed up the hill into the cut, and then there was no view of the railroad whatever to the south on account of the highway being cut down and the growing corn on that side. The highway was graded down, leaving a bank on both sides, the descent being gradual, and the highway cut deepening until it reached the place where it crossed at the railroad level at the bottom of the cut. Just as the horse and buggy reached the west rail, a passenger train, going at the rate of forty to forty-five miles an hour, and giving, as alleged, no

signals of its approach to the crossing, struck the horse in the neck, wrecked the buggy, knocked the plaintiff about forty feet, and inflicted permanent injuries, the mother just before the stroke doing all she could to pull the horse to the left, across the highway, to get it out of the way.

It seems to be conceded, and properly, that the jury were justified in finding that the railroad company was guilty of negligence. The case stated in the complaint was on the common law liability of defendant for failure to give signals, but the statutes of Ohio may be referred to as showing what constituted negligence in that regard. And they provided:

"Sec. 3336. Every company shall have attached to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle; and the engineer or person in charge of an engine in motion, and approaching a turnpike, highway, or town crossing, upon the same level therewith, and in like manner when the road crosses any other travelled place, by bridge or otherwise, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from the place of such crossing; and ring such bell continuously until the engine passes such road crossing; but the provisions of this section shall not interfere with the proper observance of any ordinance passed by any city or village council regulating the management of railroad locomotives and steam whistles thereon, within the limits of such city or village.

"Sec. 3337. Every engineer or person in charge of any such engine who fails to comply with the provisions of the preceding section shall be personally liable to a penalty of not less than fifty nor more than one hundred dollars, to be recovered by civil action, at the suit of the State, in the court of common pleas of any county wherein any such crossing is; and the company in whose employ such engineer or person in charge of an engine is, as well as the person himself, shall be liable in damages to any person or company injured in person or property by such neglect or act of such engineer or person." 1 Rev. Stat. Ohio, 960.

There was evidence that no bell was rung, and that the

engine whistled, if at all, at the railroad bridge, almost half a mile from the crossing.

The jury were warranted in finding that no sufficient warning was given of the approach of the train, which was running at the speed of fifty-eight to sixty-six feet a second, and that the collision was caused by the negligence of those in charge of the train. *Cleveland, Columbus &c. Railroad* v. *Crawford*, 24 Ohio St. 631.

It was held in *Cleveland, Columbus, Cincinnati & Indianapolis Railroad* v. *Elliott*, 28 Ohio St. 340, that the omission to ring the bell or sound the whistle at public crossings is not of itself sufficient ground to authorize a recovery, if the injured party might, notwithstanding such omission, by the exercise of ordinary care, have avoided the accident. And in *Pennsylvania Company* v. *Rathgeb*, 32 Ohio St. 66, that if all the material facts touching alleged negligence of the plaintiff be undisputed, or be found by the jury, and admit of no rational inference but that of negligence, in such case the question of contributory negligence becomes a matter of law merely, and the court should so charge the jury. But these were cases in which the court was of opinion that the omission to give the ordinary signals by bell or whistle, as in itself it did not absolve the plaintiff from the necessity of exercising ordinary care, did not furnish sufficient ground for recovery, because by due diligence in the use of ordinary precautions by the person injured, the consequence of the defendant's negligence might have been avoided.

In *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, 164, which was a case of collision between a train of passenger cars of the plaintiff in error and the wagon of the defendant in error, Mr. Justice Bradley, speaking for the court, stated the duties and obligations resting upon travellers and railroad companies thus:

"If a railroad crosses a common road on the same level, those travelling on either have a legal right to pass over the point of crossing, and to require due care on the part of those travelling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsist-

ing between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of the whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, such, — namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. . . .

"For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative

duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. . . .

"The mistake of the defendant's counsel consists in seeking to impose on the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity so long as their tracks cross the highways of the country upon the same level. The people have the same right to travel on the ordinary highways as the railroad companies have to run trains on the railroads." And see *Delaware, Lackawanna &c. Railroad* v. *Converse*, 139 U. S. 469, 472.

Tested by these principles, we think the Circuit Court did not err in leaving the case to the jury.

There was evidence tending to show that these women were driving slowly and with a safe horse; that the train was several minutes behind time; that as they approached the low place at which a train could be seen if one were there, they stopped to look and listen, but neither saw nor heard anything; that after stopping they started driving slowly up the hill to a point at the top between forty and fifty yards from the track, where the slope commenced, and there they stopped again and listened, but heard nothing; they then drove slowly down the hill, both listening all the time, without talking, and heard nothing; and that just as they got to the cut and the horse had his feet on the nearest rail, the train came around the curve and the collision occurred.

Since the absence of any fault on the part of a plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves and to keep out of difficulty may properly be taken into consideration, *Railroad Company* v.

Syllabus.

Gladmon, 15 Wall. 401, it is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by Mr. Justice Lamar in *Grand Trunk Railway* v. *Ives*, 144 U. S. 408, 417: "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

Judgment affirmed.

FOLSOM *v.* NINETY SIX.

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

No. 354. Submitted December 3, 1894. — Decided November 18, 1895.

When a township has been created by law as a territorial division of a State, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, it is within the

Statement of the Case.

power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit.

Notwithstanding the decision of the Supreme Court of South Carolina in *Floyd* v. *Perrin*, 30 So. Car. 1, the statute of South Carolina of December 24, 1885, which authorized townships (already defined by names and boundaries) to subscribe for stock in a railroad company, and county officials to issue bonds accordingly in their behalf, and to assess and levy taxes upon the property in the township for the payment thereof, and declared the townships to be bodies politic and corporate for the purposes of this act, with the necessary powers to carry out its provisions, and with rights and liabilities in respect to any causes of action growing out of its provisions, must be held by the courts of the United States, as to bonds issued and purchased in good faith before that decision, to be consistent with art. 9, sect. 8, of the constitution of South Carolina, authorizing the corporate authorities of townships to be vested with power to assess and collect taxes "for corporate purposes."

This was an action, brought in the Circuit Court of the United States for the District of South Carolina, by George W. Folsom, against Township Ninety Six in the county of Abbeville and State of South Carolina, to recover the sum of $5100, the amount of coupons attached to bonds issued in behalf of that township in aid of the construction of a railroad; and to compel the levy of a tax upon the property in the township to pay these coupons. The complaint contained the following allegations:

That the plaintiff was a citizen of the State of Tennessee; that the defendant was a corporation, duly chartered under and by virtue of an act of the general assembly of South Carolina of December 23, 1882, chartering the railroad company by the name of the Greenville and Port Royal Railroad Company, and of an act of December 24, 1885, amending its charter, and changing its name to the Atlantic, Greenville and Western Railroad Company; and that the defendant was a citizen and resident of the State of South Carolina.

"That the said acts authorized and empowered the counties and townships, interested in the construction of said railroad, to subscribe to the capital stock thereof, and to issue bonds in aid thereof; and declared the boards of county commissioners of the several counties to be the corporate agents of the town-

ships within their limits of said counties, respectively; and authorized and empowered said boards, respectively, to execute and issue bonds of said townships in aid of said railroad; as will more fully appear by reference to said acts, which are by their terms declared to be public acts."

That Township Ninety Six lay in Abbeville County, in the State of South Carolina, along the line of said railroad; that, in pursuance of said acts, an election was duly held in the said township, and resulted in favor of a subscription to said railroad company to the amount of $20,800; and that, in pursuance of said acts, the board of county commissioners of Abbeville County, on March 25, 1886, duly executed and issued bonds of the township, numbered on their face, and aggregating $20,800, as authorized by those acts, with interest coupons attached at the yearly rate of seven per cent; the bonds and coupons payable at the First National Bank of Charleston, S. C.; and the bonds containing a recital that the township by virtue of those acts had subscribed for $20,800 of the common stock of the railroad company.

That the plaintiff, in 1886, relying upon the recitals contained in the bonds, and upon their being legal and valid obligations of the township, became the purchaser of certain of the bonds, with the coupons attached, and was now the legal owner and holder thereof.

"That at the time of the issue of said bonds, and of the purchase thereof by the plaintiff, the said bonds and coupons, and other bonds and coupons issued as obligations of other townships under said acts and similar acts enacted in 1872 and 1875, when the bonds were also issued, were regarded and treated as valid securities by the corporate authorities of said township, by the public, the legal profession, and by the legislative, executive and judicial departments of the State of South Carolina; and that they circulated freely in the market, and large sums of money were invested in them by citizens of South Carolina, as well as other States, believing them to be valid and valuable securities."

That by an act of the general assembly of South Carolina of December 19, 1887, the validity of the bonds issued under

the former acts was distinctly recognized, and provision was made for their payment in the same manner as provided for coupons by the act of 1885.

That the plaintiff was now the owner and holder of unpaid coupons to the amount of $5100 upon his bonds; and that the defendant had failed and refused to assess and collect taxes, or to place money in the First National Bank of Charleston, for the payment of these coupons.

The defendant demurred to the complaint. The Circuit Court held the questions raised to be controlled by the case of *Floyd* v. *Perrin*, 30 So. Car. 1, which the Circuit Court was bound to follow; and therefore sustained the demurrer, and dismissed the complaint. 59 Fed. Rep. 67.

The plaintiff took the case by writ of error to the Circuit Court of Appeals for the Fourth Circuit, which, desiring the instructions of this court upon certain questions or propositions of law, certified them to this court as follows:

"First. Whether, upon the averments of the complaint, the Circuit Court was bound, in passing upon this case, by the decision of the Supreme Court of South Carolina in *Floyd* v. *Perrin*, 30 S. C. 1?

"Second. Whether, if the bonds and coupons in question were issued, put in circulation, and came to the hands of plaintiff in error, in due course of trade, for valuable consideration and without notice, there having been at the time no decision of the Supreme Court of South Carolina adverse to these bonds, or identical bonds issued under similar statutes, the plaintiff in error was entitled to recover on the coupons mentioned in said complaint?

"Third. Whether the acts of December 23, 1882, and of December 24, 1885, were constitutional, and the township bonds issued thereunder, if in compliance with the acts, or in the hands of *bona fide* holders for value, constituted valid indebtedness of the township issuing the same?

"Fourth. Whether the act of December 19, 1887, had the effect to validate the bonds and coupons in question, and make them binding upon the township of Ninety Six?"

Argument for Defendant in Error.

Mr. John K. Shields, (with whom were *Mr. James T. Shields*, *Mr. H. J. Haynesworth*, and *Mr. L. W. Parker*,) submitted on his brief for plaintiff in error.

Mr. W. C. Miller submitted on his brief for defendant in error.

I. The bonds sued on in this case were declared, in *Floyd* v. *Perrin*, 30 So. Car. 1, to be void. The train of reasoning by which the court reached its conclusion in that case may be briefly stated thus:

Section 8, Article IX, of the constitution of the State provides: "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes," etc.

Is Ninety Six township a corporation, and if so, are the corporate purposes of Ninety Six township of such a nature as will enable said township under the constitutional limitation, to assess and collect taxes in aid of a railroad?

At the time of the passage of the act creating the Greenville and Port Royal Railroad Company, and attempting to authorize the township subscriptions to its bonds, the township of Ninety Six did not exist in South Carolina as a corporate organization.

"It will be conceded," the court said, "that at the time of the passage of the act chartering the Greenville and Port Royal Railroad Company, Ninety Six township was not a corporate body. . . . It is true that under the act of the legislature passed in 1868, the counties of the State were divided into townships, which were declared to be corporate bodies, with corporate purposes, and to be organized with various officials, moderators, town clerks, selectmen, constables, etc., and with all the machinery of a regular corporation; but this act was repealed in 1870 by an 'Act to repeal an act entitled "an act to organize townships and to define their powers and privileges,"' excepting however that portion of said act fixing the number, names and boundaries of the respective townships in the respective counties, which were left as territorial divisions but with no corporate powers, privileges or purposes."

Argument for Defendant in Error.

Exception has been taken to the ruling of the Circuit Judge upon the ground "that the case of *Floyd* v. *Perrin* was not controlling because it is not a well settled decision of the said court, but is in effect overruled by the later cases of *State* v. *Whitesides*, 30 So. Car. 579, and *State* v. *Neely*, 30 So. Car. 587."

Floyd v. *Perrin* is on the contrary followed and reaffirmed by the cases above mentioned as well as by others.

And in these cases the court held the act of 1888 to be constitutional, but not, however, as an act validating the act of 1885. On the contrary, it was held that the act of 1888 had no such effect and was not so intended. The court founded the constitutionality of the act upon the ground that while, under the constitutional limitations, the legislature could not authorize the levy of a tax by a township to meet a railroad subscription, which is not a *corporate* purpose so far as such township is concerned, the building of a railroad, which is regarded as an improved highway, is a public purpose from the standpoint of the State; and that for such purpose the legislature may not authorize the levy of a tax *by*, but directly impose a tax *upon*, the townships created under the act of 1885. And thus these cases also reaffirm the doctrine of *Floyd* v. *Perrin*.

The question raised in these cases involves the meaning of "township," as used in the constitution of South Carolina, the corporate purpose of the township under that constitution, and the constitutional restrictions upon the power of the legislature of South Carolina to vest in such township the right of taxation.

The decisions of the state Supreme Court are not based upon general principles of law governing all commercial paper and applicable alike to all the States.

Admitting the existence in South Carolina of "townships" similarly constituted to municipal or political bodies of like name in other States, the power of subscription and taxation by such bodies might be determinable under the general law of the subject. But as will hereinafter appear, the pivotal inquiry is whether Ninety Six exists as a township within the

meaning of the state constitution. It is conceded to be a corporation, but is it a constitutional township? That question can be determined only by a construction of the constitution and statutes of South Carolina, and is therefore peculiar to that State. It exclusively relates "to the internal constitution of the body politic of the State of South Carolina."

It is submitted that these cases, giving a construction by the highest court of the State to its constitution, should be followed by this court. *Claiborne County* v. *Brooks*, 111 U. S. 400; *Norton* v. *Shelby County*, 118 U. S. 425; *Gormley* v. *Clark*, 134 U. S. 338; *Stutsman County* v. *Wallace*, 142 U. S. 293.

Insisting that there has been a recognition of township bonds as valid securities by the legislature, through the several acts permitting the issuing of such bonds in aid of railroads, and by the courts through the cases above cited, appellant claims to have brought his case within the exception stated in the case of *Pine Grove Township* v. *Talcott*, 19 Wall. 666, to the rule that the Federal courts upon a question of this character will follow the decisions of the state tribunals.

But the paramount controlling reason which induced the court to disregard the state decisions has already been assigned. It lay, not in the fact that the bonds had been recognized by the different departments of government, but that "the question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself."

If, therefore, appellee is right in the postulate that the question at bar is one involving the constitution of South Carolina and relating to the internal policy of *that* State, this case, as stated in the complaint, is still within the rule established in *Claiborne County* v. *Brooks*, unaffected by the decision of *Pine Grove Township* v. *Talcott*.

It is also averred in the complaint that the plaintiff, for full value and without notice of any defect or irregularity therein, purchased his bonds in reliance upon their recitals, etc.

The doctrine of estoppel is not applicable here. The inva-

lidity of the bonds does not arise from any failure in the performance of conditions precedent, and it is not disputed that all such conditions were performed. The malady lies deeper than that, and is to be found in the organic existence of the township itself. That is to say, the unconstitutionality of the bonds has not been adjudged upon any question of fact, about which the plaintiff may have been ignorant, but it rests upon a matter of law which is presumed to have been known to the plaintiff and all others, namely, upon the legal question whether or not a subscription to aid in building a railroad was a corporate purpose so far as the township of Ninety Six was concerned.

This distinction has been clearly defined by this court. *Coloma* v. *Eaves*, 92 U. S. 484; *Dixon County* v. *Field*, 111 U. S. 83; *Lake County* v. *Graham*, 130 U. S. 674.

II. It has been earnestly contended by the appellant in the argument before the lower court that his bonds were purchased before the decision in *Floyd* v. *Perrin*, and that that decision will not control this court. In no case has this fact alone determined Federal courts in following or disregarding the decisions of state courts. Whenever the decisions of this court have been so affected, it has been because of other considerations which are absent in the case at bar, viz.: (1) That before the decision of the state court was announced the question had been submitted to the Federal tribunal, and was being considered on its merits; (2) That before the state court had spoken, this court had announced its own judgment; or (3) That prior to the purchase of the bonds, earlier decisions of the state court had upheld their validity. *Knox County* v. *Ninth National Bank*, 147 U. S. 91, citing *Cass County* v. *Johnston*, 95 U. S. 360; *Daviess County* v. *Huidekoper*, 98 U. S. 98; *Douglass* v. *Pike County*, 101 U. S. 677; *Carroll County* v. *Smith*, 111 U. S. 556.

III. It is submitted that the *corporation* known as the "Township of Ninety Six" is not a township within the meaning of the constitution of South Carolina, nor is it otherwise such a municipal or political division of the State as that under the constitution it may be vested with the power to tax.

Opinion of the Court.

IV. The act of December 19, 1887, does not cure the invalidity of appellant's bonds nor otherwise render them obligations of the township.

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

By the constitution of South Carolina of 1868, art. 9, sec. 8, "The corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes." 2 Charters and Constitutions, 1659.

The situation arising out of the subsequent acts of the legislature and decisions of the courts of the State, with regard to bonds like those now in question, will be best understood by stating these acts and decisions in chronological order.

By the act of September 26, 1868, entitled "An act to organize townships, and to define their powers and privileges," the inhabitants of every township were declared to be a body politic and corporate, with power to sue and be sued, to hold and convey real and personal estate, to make contracts, to hold meetings, to elect town officers, to vote money for schools, burial grounds, highways and bridges, and to lay taxes for the purpose of keeping highways and bridges in repair; the lines of the townships were to be perambulated, and the marks and bounds renewed, once in every seven years forever; and the act was to take effect, as to each township, on the completion of the duties assigned to county commissioners under §§ 11, 12, of another act of the same date, by which the county commissioners were directed to divide the counties into townships, to establish their boundaries, and to designate the name of each, and the time and place of holding its first meeting. 14 Statutes of South Carolina, pp. 128, 143–151.

By the act of January 19, 1870, the township act of 1868 was repealed, "except that portion of the same fixing the number, names and boundaries of the respective townships of the respective counties." 14 Statutes of South Carolina, p. 313.

The act of December 23, 1882, chartering the Greenville and Port Royal Railroad Company, as amended by the act of December 24, 1885, (both of which were declared to be public acts,) contained the following provisions:

"SECT. 6. That, in addition to the provisions contained in the preceding section for private subscription, it shall and may be lawful for any city, town, county or township, interested in the construction of said road, to subscribe to its capital stock such sum as a majority of their voters, voting at an election held for that purpose, may authorize the county commissioners or proper authorities of such city, town, county or township, to subscribe, which subscription shall be made in seven per cent coupon bonds, payable in such instalments as the county commissioners or proper authorities of such city, town, county or township may determine, and to be received by said company at par; said bonds to be made payable in sixteen, twenty, twenty-four and twenty-eight years after the date thereof, and to be of the denomination of one hundred dollars, five hundred dollars and one thousand dollars: Provided that a sufficient sum realized from such bonds shall be retained to complete the grading through the county or township in which it is subscribed: Provided that no election shall be held in any of the towns, cities or townships in said counties unless one half of the owners of real estate situate and living in such town, city or township shall first petition for an election on the subject of subscribing to the capital stock, as hereinbefore provided; and no subscription shall be made by any of the towns, cities or townships until the conditions of this proviso shall have been complied with."

"SECT. 9. That, for the payment of the interest on such bonds as may be issued by said counties, cities, towns or townships, the county auditor, or other officer discharging such duties, or the city or town treasurer, as the case may be, shall be authorized and required to assess annually upon the property of said city, town, county or township such per centum as may be necessary to pay said interest of said sum of money subscribed, which shall be known and described in the tax book as said railroad tax, which shall be collected by the treas-

urer under the same regulations as are provided by law for the collection of taxes in any of the counties, cities, towns, or townships so subscribing, and which shall be paid over by the said treasurer to the holders of said bonds, as the interest shall come due, on presentation of the coupons, which said coupons shall be reported to the county commissioners by said treasurer, or the council of any city or town where there are coupons from the bonds of such city or town, and all such coupons shall be cancelled by the county treasurer as soon as they are paid by them.

"That, for the purposes of this act, all the counties and townships in said counties, along the line of said railroad, or which are interested in the construction as herein provided for, shall be, and they are hereby declared to be, bodies politic and corporate, and vested with the necessary powers to carry out the provisions of this act; and shall have all the rights, and be subject to all the liabilities, in respect to any rights or causes of action growing out of the provisions of this act.

"The county commissioners of the respective counties are declared to be the corporate agents of the counties or townships so incorporated and situate within the limits of said counties." 19 Statutes of South Carolina, pp. 239–241.

The power of the legislature, under the constitution of the State, to authorize townships to subscribe for stock, and to direct the issue of the bonds, in aid of the construction of railroads, appears to have been assumed, as undoubted, by the Supreme Court of the State, April 15, 1885, in *Chamblee* v. *Tribble*, 23 So. Car. 70; and July 14, 1886, in *Carolina Railway* v. *Tribble*, 25 So. Car. 260, 266.

By the act of December 19, 1887, the amending act of 1885 was further amended by adding a section providing "that, within ten years of the time when the bonds which may be subscribed to the capital stock of said corporation shall fall due, the money to pay the same shall be raised by taxation in the same manner, and paid out by the county treasurer, as provided for the payment of the annual interest on such bonds." 19 Statutes of South Carolina, p. 921. The principal, if not the only, object of this act would seem to have

been to extend to the principal sums of the bonds the provision of the earlier statute authorizing the assessment and collection of taxes "for the payment of the interest on said bonds."

On November 30, 1888, an action by taxpayers in township Ninety Six to recover back taxes paid by them, under protest, to meet the interest on bonds issued by the county commissioners in behalf of the township under the acts of 1882 and 1885, was sustained by the supreme Court of South Carolina, by concurring opinions of Chief Justice Simpson and Justice McIver, upon the ground that by the act of 1870, repealing the act of 1868, townships were left as mere territorial divisions, with no corporate powers, privileges or purposes; that, as no duty was imposed on them, or right given them, by the acts of 1882 and 1885, except to subscribe to stock in this particular railroad and to assess taxes to pay the subscription, they were without any corporate purpose; and therefore those acts, as applied to them, were in violation of the provision of the constitution. *Floyd* v. *Perrin*, 30 So. Car. 1; *Whitesides* v. *Neely*, 30 So. Car. 31.

Justice McGowan dissented, upon the grounds that the township "was certainly a corporation from the adoption of the constitution (1868) until 1870, when its corporate powers were withdrawn by the legislature, leaving the territorial division, with its lines, boundaries and name already fixed, like a lifeless body; ready, however, to have the new life of a corporation breathed into it;" that "no other power but the legislature could give it that new life;" that in 1885 the legislature passed the act chartering the railroad, in which it declared, for the purposes of this act, the counties and townships along the line of the road (of which this was one) to be corporations, with the necessary powers to carry out the provisions of the act, and with the rights and liabilities in respect to any causes of action growing out of its provisions; that "it may be thought by some to be rather a meagre corporation — scant in powers, authorities and officials as such; but it must not be overlooked that the legislature, which created it, had the undoubted right to give it such shape and form as it thought

proper — with a single power or a dozen;" and that the power to aid in building a railroad, when given by act of the legislature to a township corporation, whether a corporation already existing, or one created by the same act, was a corporate purpose, that is to say, a purpose benefiting the corporation. 30 So. Car. 24–30.

On December 14, 1888, petitions for rehearing of those cases were denied. 30 So. Car. 31, 33.

On December 22, 1888, an act, entitled "An act to provide for the payment of township bonds issued in aid of railroads in this State," was passed, to take immediate effect, beginning as follows: "Whereas certain townships in this State have, by their vote, expressed their willingness to subject themselves to taxation for the purpose of paying bonds issued by them in aid of certain railroads; and whereas, by reason of a defect in the acts authorizing the issue of said bonds, they have been declared invalid: Now, therefore, for the purpose of carrying into effect the expressed will of the people of said townships," it was enacted as follows:

SECT. 1. "The township bonds heretofore issued by county commissioners as the corporate agents of any township in this State, in aid of any railroad, by vote of the inhabitants of said township, are hereby declared to be debts of said township respectively having authorized the issue of the same. And the interest and principal thereof shall be paid, according to the terms of the said bonds or debt, by the assessment, levying and collection of an annual tax upon the taxable property in said townships, so far as may be necessary, in like manner and by the same county officials as the tax levied for county bonds in aid of railroads is assessed, levied and collected. Said tax to be known and styled in the tax books as the township railroad tax, and when collected shall be paid over by the treasurer of the county to the holders of said bonds as the interest thereon may become due and according to the terms thereof. All dividends received by or for said townships, on stock in railroad companies which have been aided by the said township bonds or debt, shall be applied by the county commissioners of the county in which said town-

ships are respectively situated, primarily towards the payment or retirement of said bonds or debt, and the surplus shall be expended in the improvement of the highways within the territorial limits of said township."

SECT. 2. "No tax shall be levied under the provisions of this act to pay the interest on any township bonds until the railroad in aid of which they were subscribed shall be completed through such township and accepted by the railroad commissioners." 20 Statutes of South Carolina, p. 12.

This statute is not mentioned in the questions certified, and, as it is not alleged or suggested that the railroad has been completed through this township, has no direct application to this case. We refer to it only as part of the history of legislation and decision in the State upon the subject.

On April 15, 1889, the Supreme Court of South Carolina held that, since, by its decision in *Floyd* v. *Perrin*, a township could not be authorized by the legislature to issue bonds in aid of the construction of a railroad, it followed that the act of 1888 could not be upheld as validating bonds issued by a township under the earlier acts, because the legislature could not ratify what it could not have authorized; but that the act of 1888 was an original exercise of the power of the legislature to authorize taxation for any public purpose, such as was the building of railroads in the State; and that the legislature, therefore, being satisfied of the consent of the township, had constitutionally fixed upon them the debt represented by the bonds previously issued without authority, and to be paid according to the provisions of the new act. *State* v. *Whitesides*, 30 So. Car. 579; *State* v. *Neely*, 30 So. Car. 587.

The first question certified to this court by the Circuit Court of Appeals is, "Whether, upon the averments of the complaint, the Circuit Court was bound, in passing upon this case, by the decision of the Supreme Court of South Carolina in *Floyd* v. *Perrin*, 30 So. Car. 1?"

The general principles which must govern the decision of this question have been often affirmed by this court, and were stated by Mr. Justice Bradley, in delivering judgment, after great consideration, in the leading case of *Burgess* v. *Seligman*, as follows:

Opinion of the Court.

"The Federal courts have an independent jurisdiction in the administration of state laws, coördinate with and not subordinate to that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two coördinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient, but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established, which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between

citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." 107 U. S. 20, 33, 34.

In the case at bar, the statutes of the State of South Carolina, under which the bonds were issued, were passed in 1882 and 1885. The bonds were issued in behalf of the township, and were purchased by the plaintiff, in 1886. It is alleged in the complaint, and admitted by the demurrer, that he purchased the bonds, relying upon their being legal and valid obligations of the township; and that, at the times of their issue and purchase, these bonds and like bonds of other townships were regarded and treated as valid securities by the corporate authorities of the township, by the public, by the legal profession, and by the legislative, executive and judicial departments of the State. And the decisions of the Supreme Court of the State, during the same period, appear to have assumed the validity of such bonds. *Chamblee* v. *Tribble*, and *Carolina Railway* v. *Tribble*, above cited.

The decision in *Floyd* v. *Perrin*, holding such bonds to be invalid, was by two judges only, against a strong dissent, and was not made until November 30, 1888, and a rehearing was denied December 14, 1888. Eight days after, on December 22, 1888, the legislature passed an act, to take immediate effect, declaring the bonds previously issued, in behalf of any township, to be debts of the township, and providing for their payment by taxation of the inhabitants. Five months later, on April 15, 1889, the Supreme Court of the State, in two laboured opinions, the one by Chief Justice Simpson and the other by Justice McIver, declared that, it having been decided in *Floyd* v. *Perrin* that the legislature could not authorize the township to levy a tax to pay the bonds, it could not ratify the proceedings of the township; but yet that the statute of 1888 was a constitutional exercise of the unlimited legislative power to authorize taxation for a public purpose, with the consent of the township. In each of the two cases, however, Justice Mc-

Gowan, who had dissented from the judgment in *Floyd* v. *Perrin*, delivered a concurring opinion in these words: "I concur. The meaning of the opinion of the court being that there is no necessity for the issue of any new bonds; but 'the debt' fixed upon the several townships by the act of 1888 shall be represented by the bonds heretofore issued, to be paid according to the provisions of the act; and I am authorized to say that such is the view of the other members of the court." *State* v. *Whitesides* and *State* v. *Neely*, above cited.

As the debt thus held to be imposed upon the township by the act of 1888 was the debt represented by the bonds issued under the act of 1885; as the tax for the payment of that debt under the new act was to be levied upon the property in the township by county officials in substantially the same manner as under the earlier statutes; and as the constitution of the State did not authorize the legislature, with or without the consent of the township, to vest its corporate authorities with power to assess and collect taxes for any but corporate purposes; it is not easy to understand how the later taxation could be held constitutional while the earlier was held unconstitutional; or how the result in *State* v. *Whitesides* and *State* v. *Neely* could be reached without practically overruling *Floyd* v. *Perrin*.

There not being shown to have been a single decision of the state court against the constitutionality of the act of 1885 before the plaintiff purchased his bonds, nor any settled course of decision upon the subject, even since his purchase, the question of the validity of these bonds must be determined by this court according to its own view of the law of South Carolina.

This question, which is presented in different forms by the second and third questions certified, lies in narrow compass. The constitution of South Carolina of 1868 authorized the legislature to vest the corporate authorities of townships or other municipal corporations with power to assess and collect taxes "for corporate purposes." By the act of 1870, townships were deprived of the corporate powers with which they had been vested by the legislature immediately after the adoption of the constitution, but were still defined by their names and

boundaries. By the act of 1882, as amended by the acts of 1885 and 1887, it was enacted that any city, town, county or township, interested in the construction of the railroad company named, might subscribe for stock and issue bonds in aid of the building of the railroad; and that, for the payment of the bonds and coupons, taxes might be assessed and levied upon the property of the township; and all the counties and townships along the line of the railroad, or interested in its construction, were declared to be bodies politic and corporate, for the purposes of this act, and to be invested with the necessary powers to carry out its provisions, and to have all the rights and be subject to all the liabilities, in respect to any rights or causes of action growing out of its provisions.

To aid in the building of a railroad is a public purpose, and, being for the general welfare of the ordinary municipal corporations, such as counties, cities and towns, through which the road is to pass, is a corporate purpose, within the meaning of a constitutional provision vesting in the legislature power to authorize municipal corporations to assess and collect taxes "for corporate purposes." *Livingston County* v. *Darlington*, 101 U. S. 407, 411, 413; *Harter* v. *Kernochan*, 103 U. S. 562, 571; *Anderson* v. *Santa Anna*, 116 U. S. 356, 363; *Bolles* v. *Brimfield*, 120 U. S. 759; *Johnson* v. *Stark County*, 24 Illinois, 75, 88; *Chicago &c. Railroad* v. *Smith*, 62 Illinois, 268, 276; *Nichol* v. *Nashville*, 9 Humph. 252, 268; *Brown* v. *Hertford Commissioners*, 100 No. Car. 92.

This is well settled, as to counties, under the constitution of South Carolina. It was assumed by the Supreme Court of the State in *State* v. *Chester & Lenoir Railroad*, 13 So. Car. 290, 317, and in *Connor* v. *Green Pond &c. Railway*, 23 So. Car. 427, 436; and it was admitted by all the judges in *Floyd* v. *Perrin*. 30 So. Car. 1, 13, 19, 27. See also *State* v. *Whitesides*, 30 So. Car. 579, 584, and *State* v. *Neely*, 30 So. Car. 587, 604. It has also been affirmed, as to towns, by the Circuit Court of the United States for the District of South Carolina, and by the Circuit Court of Appeals for the Fourth Circuit. *Darlington* v. *Atlantic Trust Co.*, 63 Fed. Rep. 76, and 68 Fed. Rep. 849.

Opinion of the Court.

In *Floyd* v. *Perrin*, it was also admitted that townships, having been declared by the legislature in the act of 1885, in express words, to be bodies politic and corporate, must be held to be corporations. 30 So. Car. 12, 16, 25. But the ground on which the majority of the court in that case held that act to be unconstitutional was that the townships, having, under the existing statutes, no other corporate duty or right, except to subscribe to the railroad and to assess taxes to pay the subscription, were without any corporate purpose whatever, and therefore to authorize them to assess taxes to pay the subscription was in violation of the constitution.

We are unable to concur in that view, and are much better satisfied with the reasoning of the dissenting opinion. When a township has been created by law, as a territorial division of the State, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, we are of opinion that it is within the power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such and so many corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit; and that the act of 1885 was therefore a constitutional and valid act, as far as regards all the kinds of municipal corporations named therein — cities, towns, counties and townships.

In *Weightman* v. *Clark*, 103 U. S. 256, the statute held to be unconstitutional purported to confer the power to issue bonds in aid of the construction of a railroad upon school districts, established and existing for educational purposes only. In *Lewis* v. *Pima County*, 155 U. S. 54, a territorial statute, purporting to confer upon a county the power to issue similar bonds, was held unconstitutional, because the fundamental law limited obligations of any municipal corporation to such as should be "necessary for the administration of its internal affairs."

The result is, that the first question certified must be answered in the negative, and the second and third questions in the affirmative, and the fourth question becomes immaterial.

Ordered accordingly.

RUTLAND RAILROAD COMPANY *v.* CENTRAL VERMONT RAILROAD COMPANY.

SAME *v.* SAME.

ERROR TO THE COURT OF CHANCERY OF FRANKLIN COUNTY IN THE STATE OF VERMONT.

Nos. 51, 472. Argued April 19, 22, 1895. — Decided November 19, 1895.

When the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error, without considering the Federal question.

A statute of a State imposed a tax upon the gross earnings of railroad companies, and provided that the tax upon a leased railroad should be paid by the lessee, and deducted from the rent. A lessee paid the tax upon the railroad of its lessor, and deducted it from the rent, and was sued in equity by the lessor for the rent, without deduction for the tax. The highest court of the State gave judgment for the lessee; and held that the statute, so far as it imposed a tax upon gross earnings derived from interstate commerce, was contrary to the Constitution of the United States; but that the provision for the payment of the tax by the lessee, and its deduction from the rent, was constitutional; and further held, independently of the question of constitutionality, that, as between the lessor and the lessee, it was the duty of the lessor to pay the tax; that the lessee having been compelled by law to make the payment to discharge an obligation of the lessor, the law implied a promise to repay; that the lessor having made no suggestion that the statute was unconstitutional, and no offer to indemnify the lessee, the lessee could not, in prudence, do otherwise than pay the tax, and was under no duty to incur the expense, delay and perils of litigation to test the constitutionality of the statute; and that the lessor, in a court of equity, could not have relief for what, as between the parties, itself should have done, and what, by its own laches it had suffered to be done, professedly in its behalf, by the lessee. *Held*, that this court had no jurisdiction to review the judgment.

THESE were two writs of error to review decrees of the Court of Chancery for the county of Franklin and State of

Statement of the Case.

Vermont, denying, in accordance with mandates of the Supreme Court of the State, the right of the Rutland Railroad Company, which had leased its railroad to the Central Vermont Railroad Company, to recover the amount of taxes assessed upon the gross earnings of that railroad under the laws of the State, and paid by the Central Vermont Railroad Company, and by it deducted from the rent due to the Rutland Railroad Company under the lease. The case appeared by the record to be as follows:

On December 30, 1870, the Rutland Railroad Company leased its road, including a branch known as the Addison Railroad, for twenty years, to the receivers of the Vermont Central and Vermont and Canada Railroad Companies at a fixed rent, payable semi-annually. On June 21, 1873, the Central Vermont Railroad Company became the receiver of the Vermont Central and the Vermont and Canada Railroad Companies, and took possession of the Rutland Railroad under the lease. Disputes arose between the parties, and on February 23, 1876, they made an agreement in writing, modifying the lease, and by which the rent was made payable monthly, and was to be a certain proportion of the gross earnings, which the lessee guaranteed should be not less than $250,000 a year. Neither of the contracts contained any provision for the payment of taxes.

Under the statutes of Vermont of 1874 and 1876, railroads were taxed by the mile in the towns through which they passed; and the Supreme Court of Vermont, at January term, 1878, in Rutland County, in a case between these parties, not reported, but stated in the opinion of the court below in this case, held that the lessor, and not the lessee, was bound to pay such taxes. See 63 Vermont, 12, 25, 26.

On November 28, 1882, the legislature of Vermont passed a statute, entitled "An act to provide a revenue for the payment of state expenses," which repealed all former statutes taxing the property of railroad companies, and required them to pay to the State a tax of a certain proportion of their gross earnings, and provided that the lessee of a railroad should pay this tax, and might deduct the amount from any payments

due to the lessor. The material provisions of this statute are copied in the margin.[1]

As required by this statute, blank returns of statements of gross earnings were sent in August, 1883, by the commissioner of state taxes to the Central Vermont Railroad Company; and that company filled out the returns, and paid the taxes on such earnings under protest.

A large part of the gross earnings so returned and taxed accrued from the transportation of persons and property between other States and countries through Vermont, and between Vermont and other States and countries.

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[1] SECT. 8. A corporation, company, person or persons, failing to pay the amount of any annual or semi-annual tax within the time required by this act, shall forfeit to the State the sum of one hundred dollars for each day's neglect to pay the same after the expiration of the time limited by law.

SECT. 11. Every corporation, person or persons, owning or operating a railroad in this State, whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the State on the entire gross earnings of such railroad, if such railroad is situated wholly within the State. If such railroad is situated partly within and partly without the State, the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this State bears to the mileage of all the trains run on the entire main line of the road.

SECT. 12. The tax upon such earnings shall be rated according to the earnings per mile of road in this State, and is hereby assessed, at the rate of two per cent on the first two thousand dollars a mile, or total earnings if less than that sum; at the rate of three per cent on the first thousand or part thereof above two thousand dollars a mile; at the rate of four per cent on the first thousand or part thereof above three thousand dollars a mile; and when the earnings exceed four thousand dollars a mile, at the rate of five per cent on all earnings above that sum.

SECT. 13. Such tax shall be payable one half semi-annually in the months of February and August, and shall be based upon the gross earnings during the six months terminating with the last day of December or June next preceding.

SECT. 14. When a railroad is operated in this State by a corporation, person or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad, or holder of such contract, as the case may be; and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person, persons or corporation granting such contract, as the case may be, on account of such lease or contract; unless in the provisions of such lease or contract it is stipulated otherwise.

Statement of the Case.

The Central Vermont Railroad Company paid the rents, when due according to the agreement, until July 31, 1883; but afterwards delayed such payments, and deducted therefrom the sums paid for taxes on gross earnings.

On September 19, 1883, the treasurer of the Rutland Company, by direction of its officers, wrote a letter to the treasurer of the Central Vermont Railroad Company, claiming that the tax was invalid against the Rutland Company, and demanding payment of the rent in full, without deduction on account of the tax. The president of the Rutland Company afterwards, in conversation with the president of the Central Vermont Company, without intending to limit, or being understood to limit, the grounds of objection of the Rutland Company to the payment of the taxes, stated that it had no gross earnings, and therefore could not be liable for the taxes. No other reason for the denial of its liability for the taxes under the statute of 1882 was ever given to the Central Vermont Company.

By an order of court of January 19, 1884, the Central Vermont Railroad Company was discharged of the receivership, and ordered to transfer and make over all the property in its hands, including the lease of the Rutland Railroad, to the Consolidated Railroad Company of Vermont. On June 30, 1884, the transfer was made accordingly; and on the same day, the latter company leased all the railroads to the Central Vermont Railroad Company, which afterwards continued in possession and operation thereof.

On November 9, 1886, the Rutland Company filed in the Court of Chancery a petition, praying that the Central Vermont Company and the Consolidated Railroad Company of Vermont be ordered to pay the rent due in full, with interest, and without deduction for taxes. The two defendant companies filed an answer denying their liability. The case was referred to a master, upon whose report, embodying the facts above stated, the Court of Chancery, on January 1, 1889, dismissed the petition.

The petitioner appealed to the Supreme Court of Vermont, which, at October term, 1890, delivered an opinion, copied in

the record, and reported 63 Vermont, 1, allowing the claim for interest on rents, reversing the decree, and remanding the case to the Court of Chancery, with the following mandate:

"In the matter of the petition of the Rutland Railroad Company, it is considered, adjudged and decreed as follows:

"The act of the legislature of Vermont, entitled 'An act to provide a revenue for the payment of state expenses,' approved November 28, 1882, so far as it imposes a tax upon the gross earnings of railroads derived from interstate transportation of persons or property, is unconstitutional and void, as being in conflict with that clause of the Federal Constitution which confers upon Congress the exclusive power to regulate commerce among the States.

"That section 14 of said act, providing that taxes assessed under said act upon the earnings of railroads operated by lessees thereof shall be paid by such lessees, and charged against and deducted from the rents due to the lessor of such railroads, is constitutional and valid.

"That all taxes paid to the State by the respondent, in accordance with the provisions of said act of 1882, notwithstanding its invalidity, as above held, were, as against the petitioner, valid payments, and so, *pro tanto*, payments in extinguishment of rents due the petitioner.

"That the petitioner is entitled to recover interest upon the deferred payments of monthly rent, mentioned in the master's report, from the last day of the month on which it is held such monthly instalments of rent respectively fell due under the lease and the modification thereof mentioned in said report.

"The decree of the Court of Chancery is reversed, and the cause remanded."

In August, 1891, the Court of Chancery entered a decree, purporting to pursue the mandate; and allowed an appeal taken to the Supreme Court of the State by the respondents, claiming that the decree did not conform to the mandate. The petitioner, on September 8, 1891, sued out a writ of error from this court to review that decree.

At October term, 1892, the Supreme Court of Vermont

Argument for Plaintiff in Error.

affirmed that decree, and remanded the cause. 65 Vermont, 360. The Court of Chancery, in August, 1894, entered a final decree accordingly. The petitioner, on October 9, 1894, sued out a writ of error from this court to review this decree.

The defendants in error moved to dismiss both writs of error for want of jurisdiction; the first, because the decree which it sought to review was not a final one; and both, because no Federal question was involved.

Mr. George F. Edmunds and *Mr. C. F. Prouty* for plaintiff in error. On the question of jurisdiction, on which the case turned in this court, they said:

If the decision of the Vermont court, that the act, although invalid as a regulation of commerce, would nevertheless protect the defendant, was erroneous, this court has jurisdiction to review that judgment.

The Federal Constitution declares that no State shall pass a law which regulates commerce between the States, or which impairs the obligation of a contract. The defendant has promised to pay the plaintiff a sum of money. It concedes that it has not paid according to its contract. As an excuse for not paying it sets up the statute of the State of Vermont. It makes no other excuse. The only question before the Vermont court is whether that statute protects the defendant. The plaintiff says it does not because it is repugnant to the Constitution of the United States, and upon that question comes to this court. The power to declare that act unconstitutional carries with it, by necessary implication, the power to further declare that, *as an act*, it is not binding upon the plaintiff; and unless that be so, the right of appeal in this case is a senseless formality.

The practical question is, can the plaintiff be divested of its property by virtue of this statute? That question this court has the power to answer, and to make its answer effectual. If the state court can hold that this statute is unconstitutional and nevertheless binding as a statute, and if the

citizen is thereby cut off from all redress in this court, the Federal Constitution becomes a nullity.

If the Vermont court could say that this law was to be treated as valid, because so declared by judicial interpretation, it might also say that it was presumed to be valid until declared invalid by some court of competent jurisdiction, and that, therefore, whatever was done under an unconstitutional act was to be regarded as rightfully done until this court had pronounced it unconstitutional. Would not such a decision present a case for the interposition of this court? If not, what protection has the citizen?

The remedy is an essential part of the obligation. It has been repeatedly held that the legislature cannot take away nor materially change the remedy existing when a contract is entered into without impairing its obligation. When this contract was made the plaintiff could enforce the payment of its stipulated rent. Under the decision of the Vermont court that right is absolutely taken away. That decision must be reviewable here. *Gunn* v. *Barry*, 15 Wall. 610; *White* v. *Hart*, 13 Wall. 646; *Hoffman* v. *Quincy*, 4 Wall. 535; *Edwards* v. *Kearzey*, 96 U. S. 595; *Louisiana* v. *Pilsbury*, 105 U. S. 278.

The authorities all hold that when the validity of a statute under the Federal Constitution is drawn in issue, this court has the fullest power to review every incidental matter which enters into the determination of the question. Does the judgment of the state court infringe the right of the citizen, so far as that right is guaranteed under the Constitution of the United States? The state court cannot escape this power of review by resting its judgment upon some principle of general law, *provided that judgment gives effect to the statute drawn in question*. *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Delmas* v. *Insurance Co.*, 14 Wall. 661; *University* v. *People*, 99 U. S. 309; *Given* v. *Wright*, 117 U. S. 648.

Given v. *Wright* presented the exact question under discussion. Certain lands in New Jersey had by legislative enactment been set apart to the Indians of that State. The act

provided that they should be free from taxation. This was in 1778. In 1801, at the request of the Indians, an act was passed providing that these lands should be sold, and the proceeds invested for the benefit of the Indians, which was done. Nothing was said in this act about the exemption from taxation, and the New Jersey court held that the lands were exempt in the hands of the new purchasers. In 1804, after the rendition of this judgment, the legislature repealed the exempting clause of the original act, and the state court then held that the lands were then subject to taxation. This decision was reversed upon appeal to the United States Supreme Court, *New Jersey* v. *Wilson*, 7 Cranch, 164, where it was held that the act of 1804 violated the obligation of the contract.

Notwithstanding this decision the lands were regularly assessed and the taxes paid down to 1876, when proceedings were begun in the state court to prevent the collection of these taxes. The state court sustained the assessment, holding that the uninterrupted payment of these taxes for more than sixty years raised a conclusive presumption that the exemption had been surrendered. To review this judgment a writ of error was prosecuted in this court.

The plaintiffs insisted that the state statute impaired the obligation of the contract. The state court said this was true, but that nevertheless the plaintiffs were not entitled to the benefit of the exemption clause by reason of the application of certain general principles of law. This court held that a Federal question was involved and that the Federal court should consider whether the state court had correctly applied those principles which deprived the plaintiffs of the exemption which they claimed.

Mr. Justice Bradley said: "The question, then, will be whether the long acquiescence of the land owners under the imposition of taxes raises a presumption that the exemption which once existed has been surrendered. This question by itself would be a mere question of state municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged that the obliga-

tion of a contract has been impaired by a state law, as in this case, by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

The case at bar should be carefully distinguished from those in which the state court puts its decision upon an independent ground. By independent ground is meant some ground apart from the statute, upon which the case may have been decided without any reference to the statute. If the judgment of the state court necessarily *gives effect* to the statute, a Federal question is presented. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574, 579; *Dale Tile Mfg. Co.* v. *Hyatt*, 125 U. S. 46, 51.

Mr. Edward J. Phelps for defendant in error. *Mr. B. F. Fifield* was with him on the brief.

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

It was hardly denied at the bar, that the first writ of error was prematurely sued out, before a final decree had been entered. But it is unnecessary to dwell upon that, because in other respects the questions arising upon the two writs of error are identical.

The decree below, as appears by the mandate of the Supreme Court of Vermont, and still more clearly by its opinion, made part of the record, and reported in 63 Vermont, 1, did not proceed exclusively on the decision of a Federal question, but also upon grounds of general law.

The conclusion of that court, following the decision of this court in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, that the statute of Vermont of 1882, so far as it sought to tax the earnings derived from interstate commerce, was unconstitutional, was in favor of the Rutland Railroad

Company, and therefore cannot be questioned on a writ of error sued out by that company.

The court did declare that the provision of the statute, which requires the lessee to pay the tax and deduct the amount from the rent, does not impair the obligation of a contract, because both railroad companies, as well as the rent due from the one to the other, were proper subjects for taxation under the laws of Vermont, and the method to be adopted for the collection of the tax was purely a question of legislative discretion.

But the decision of this part of the case (the only part decided against the plaintiff in error) was not put upon that consideration alone. On the contrary, the court went on to say: "But it by no means follows, because the defendant has paid to the State taxes, under a law afterwards held to be void, by withholding the amount thereof from the rent, that the Rutland Company can now claim the balance of the rent for this reason." And this proposition was rested on several distinct grounds.

The first of these grounds, as summed up by the state court, was as follows: "Down to May 27, 1887, the date on which the decision in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, was promulgated, the doctrine of the cases decided by the Supreme Court upheld the constitutionality of the taxation in question. *The State Tax on Railway Gross Receipts*, 15 Wall. 284; *The Delaware Railroad Tax*, 18 Wall. 206." "The Supreme Court of the United States is the supreme arbiter when a Federal question is involved. Down to 1887 that court had ruled the Federal question now under consideration in a way that upheld the legislation in question. Its decisions then promulgated were the supreme law of the land, absolutely binding upon both parties to this cause. Hence all payments of taxes, made under our law, which down to that time must be treated as valid for present purposes, were made in strict conformity to law. The subsequent change in the decisions of the United States Supreme Court is only operative prospectively, and all acts done in obedience to the former decisions are valid and cannot be disturbed."

But the conclusion that "the defendants are not liable to pay as rent the amount paid by them as taxes upon the earnings of the Rutland Road," was also put upon other grounds, namely, that the taxes upon the earnings of the Rutland Railroad were taxes, which, as between the Rutland Company and the Central Vermont Company, it was the duty of the Rutland Company to pay; that, the lease being silent, the duty to pay, under the common law, rested upon the lessor; that this question had been decided in the former suit between the parties; that by the statute of 1882 the thing taxed was the property of the Rutland Company, and the Central Vermont Company was but the collector of the tax; that the Central Vermont Company having been compelled by law to make the payments to discharge an obligation of another, the law implied a promise to repay, and the Central Vermont Company would have an action to recover the amount from the Rutland Company, and a court of equity would avoid circuity of action; that the Rutland Company, in its treasurer's letter of September 19, 1883, had simply objected that the tax was invalid, and had made no suggestion that the statute was unconstitutional, and no offer to indemnify the Central Vermont Company, and the latter could not, in prudence, do otherwise than pay the taxes, and was under no duty to incur the expense and assume the perils of delay and of litigation, to test the constitutionality of the statute; and that the Rutland Company, in a court of equity, could not have relief for what, as between the parties, itself should have done, and what, by its own laches, it had suffered to be done, professedly in its behalf, by the Central Vermont Company.

These grounds involved no Federal question, and were broad enough to support the judgment, without regard to the question whether the provision of the statute, under which the Central Vermont Company paid the taxes and deducted them from the rent, was or was not constitutional.

Such being the case, the conclusion is inevitable, that this court has no jurisdiction to review the decision of the state court.

It is well settled, by a long series of decisions of this court,

that where the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question. *Murdock* v. *Memphis*, 20 Wall. 590; *Jenkins* v. *Loewenthal*, 110 U. S. 222; *Beaupré* v. *Noyes*, 138 U. S. 397; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; *Hammond* v. *Johnston*, 142 U. S. 73; *Tyler* v. *Cass County*, 142 U. S. 288; *Delaware Co.* v. *Reybold*, 142 U. S. 636; *Eustis* v. *Bolles*, 150 U. S. 361; in the last two of which many other cases to the same effect are cited.

In *Williams* v. *Weaver*, the Court of Appeals of New York held that assessors of taxes were not personally liable in damages to the owner of national bank shares alleged to have been taxed in violation of a statute of the United States. 75 N. Y. 30. A writ of error to review the judgment was dismissed by this court, because, as was said by Mr. Justice Miller in delivering the opinion, "If the defendants, in assessing property for taxation, incur no personal liability for any error they may commit, the fact that the error committed is a misconstruction of an act of Congress can make no difference." 100 U. S. 547.

In *Young* v. *Steamship Co.*, 105 U. S. 41, it was held, in an opinion delivered by Mr. Justice Field, that the question whether fees exacted in violation of a statute of the United States, and paid without objection, could be recovered back, was not a Federal question, the decision of which by the highest court of a State could be reviewed by this court on writ of error.

In *Tyler* v. *Cass County*, above cited, an action was brought against a county to recover back money paid at a sale for taxes of lands alleged to be subject to a lien of the United States, and therefore exempt from taxation. The Supreme Court of North Dakota — while holding that, in view of the decision of this court in *Northern Pacific Railroad* v. *Traill County*, 115 U. S. 600, the lands were not taxable, and nothing passed by the sale — gave judgment for the defendant.

1 No. Dak. 369. In support of a writ of error sued out by the plaintiff from this court, it was argued that the assessor had no jurisdiction to decide whether the lands in question were or were not taxable; and that the state court, in holding that the act of the assessor, in assessing the lands against private parties in possession, though they in fact belonged to the United States, would not be without jurisdiction, decided against the immunity from the jurisdiction of the assessor. But this court dismissed the writ of error, and, speaking by the Chief Justice, said: "The question arising for determination in the state court was whether the money which had been paid by the purchaser of the lands at the tax sale could be recovered back, either at common law, or under the Dakota statute in that behalf. The ground upon which the tax title was held to have failed was that the United States had a lien upon the lands, and that, therefore, they could not, under the laws of the United States, be sold for taxes; but that fact did not impress with a Federal character the inquiry as to the right of recovery." 142 U. S. 290.

That case cannot be distinguished in principle from the case at bar. In this case, as in that, it was argued that the state court, while it declared the statute to be unconstitutional, yet by its decision gave effect to the unconstitutional statute. But in each case the decision of the Federal question was not an essential element in determining whether the plaintiff was entitled to recover against the defendant.

Writs of error dismissed for want of jurisdiction.

STEWART v. McHARRY.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 366. Submitted October 22, 1895. — Decided November 18, 1895.

In March, 1876, S. went into actual possession and occupation of a tract of public land in California, which was then reserved from settlement on account of unsettled Spanish and Mexican land grants, and which continued so reserved until April, 1883. On the 2d of October, 1882, the wife of S., being then the owner of an adjoining tract, on which she and S. resided, conveyed that tract to her husband. On the 10th of December, 1883, S. appeared in person at the United States land office in San Francisco, and represented that he was a naturalized citizen of the United States, the head of a family, that he was 56 years of age, and that since October 2, 1882, he had been the owner of and in actual and peaceable possession of the tract conveyed to him by his wife, and he applied to enter, as an adjoining farm homestead, under Rev. Stat. §§ 2289 and 2290, the tract so taken possession of by him in March, 1876. After payment of the fees and commissions required by law, he was permitted to enter that tract as an adjoining farm homestead. On the 13th of December, 1883, M. filed a preëmptive declaratory statement in the same land office, which statement included the tract so occupied and entered by S., and alleged a settlement thereon by himself on the 19th of January, 1876. Thereupon a contest took place between S. and M., first before the register and receiver of the local land office; then, on appeal, before the Commissioner of the General Land Office; and, finally, on appeal, before the Secretary of the Interior. In these proceedings it appeared that S. had not resided continuously on the original farm, but had leased it to a tenant for a number of years, including the period of his adjoining farm entry; and S., in reply, claimed that he did not reside there because of danger of violence and injury at the hands of M. The Secretary of the Interior, while intimating that the proof failed to show the required residence on the part of S., decided that the excuse set up by him for non-residence was not sustained by the evidence. *Held*, that the ownership and title shown by S. were sufficient to entitle him to an additional farm homestead; but that the question of his residence on the land conveyed to him by his wife was one of fact, which the courts had no jurisdiction to reëxamine, in the absence of a clear showing that the decision was procured by fraud or imposition.

THE case is stated in the opinion.

Mr. E. W. McGraw and *Mr. T. Wagner* for plaintiff in error.

Mr. Charles E. Wilson and *Mr. W. S. Wells* for defendant in error.

Mr. Justice Field delivered the opinion of the court.

This case comes before us on error to the Supreme Court of California. The action was ejectment, commenced in July, 1891, to recover possession of certain parcels of land situated in the county of Contra Costa, in that State.

The plaintiff in the court below, defendant in error here, alleges in his complaint that on the 26th of February of that year he was the owner in fee and entitled to the possession of certain parcels of land, described as lots Nos. 2 and 3 of section No. 22, and lot No. 1, and the northeast quarter of the northeast quarter of section No. 27, in township No. 2 north, of range No. 3 west, Mount Diablo base and meridian, according to the official survey of the government of the United States.

That while he was such owner, and thus seized and entitled to the possession of the premises, the defendant, on the day mentioned, without right or title, entered upon the premises and ejected him therefrom, and ever since has withheld, and still unlawfully withholds, the possession thereof, to the damage of plaintiff of $1000.

That the value of the rents, issues, and profits of the premises from the entry stated and while the plaintiff has been excluded therefrom is $50.

The plaintiff, therefore, prays judgment against the defendant for the possession of the premises and the recovery of the sum of $1000 for withholding the same, and the sum of $50 for the value of its rents and profits, and for such other and further relief as to the court may seem meet and proper.

The defendant in his amended answer denies generally and specifically each of its allegations, except that he is and has been in the possession of the premises, which he admits, and

claims that he is the owner thereof and entitled to their possession. And he denies that the plaintiff, by reason of the defendant's possession, has been damaged in the sum of $1000, or in any other sum.

And in his answer, treated as a cross-complaint, the defendant makes certain allegations as to the acquisition and possession of other property, upon which he asserts a right to enter the tract in controversy as an adjoining farm homestead; averring that on the 2d day of October, 1882, he became the owner and went into the actual possession of a tract of land situate in the county of Contra Costa, being a portion of the land which was awarded to one James McClellan, under partition of a certain rancho entitled Pinole Rancho in which he was interested, as it was surveyed and patented by the United States, and which portion Getta Stewart, his wife, acquired from him.

That the portion thus acquired, a tract of land containing about sixty (60) acres, was, on October 2, 1882, conveyed to the cross-complainant by deed executed and acknowledged by her. And he alleges that in the month of March, 1876, he went into actual possession of certain public lands of the United States situate in the county of Contra Costa, embracing a portion of the property for which this action is brought, containing, according to the public surveys, seventy (70) acres and twenty-five (.25) hundredths of an acre, and that he has from that date remained in the actual possession thereof, and used and cultivated the same, and that the public lands adjoin the land conveyed to him by Getta Stewart, and were reserved from settlement under the United States laws, on account of unsettled Spanish and Mexican land grants, until the 16th of April, 1883, when the boundaries of the Rancho El Sobrante, of which they were a part, were finally settled.

That on the 10th day of December, 1883, the survey of the public lands was approved by the United States surveyor general of California, and the map of the township was filed in the United States land office of California.

That the cross-complainant, in the month of March, 1876, and on the 16th day of April, 1883, and since those periods,

and on the 10th day of December, 1883, and thereafter, resided upon the land acquired by him from Getta Stewart.

That on the 10th of December, 1883, and since the month of March, 1876, he was the head of a family, and was then of the age of forty-nine years, and was, at the dates mentioned, a naturalized citizen of the United States; and was on the 2d day of October, 1882, and thereafter, on the 10th day of December, 1883, and since, the owner of and in the actual and peaceable possession of the land conveyed to him by Getta Stewart.

That on December 10, 1883, he appeared in person at the United States land office at San Francisco, State of California, and applied to the register to enter as an adjoining farm homestead under the provisions of sections 2289 and 2290 of the Revised Statutes of the United States, the public land above referred to as in his possession. The sections of the Revised Statutes referred to are as follows:

"SEC. 2289. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preëmption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

"SEC. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the

head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

That in compliance with these sections of the Revised Statutes, and on December 10, 1883, the cross-complainant made affidavit before the register of the United States land office at San Francisco, California, that he was then the head of a family, and of the age of fifty-six years, and a naturalized citizen of the United States, and that the application was for his exclusive use and benefit; that the entry of the land was made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use and benefit of any other person, and that the land was not mineral land, and that he was the owner of adjoining land upon which he was then residing, and the amount of land applied for would not, with the land already owned by him, exceed in the aggregate one hundred and sixty acres.

That he paid the fees and commissions required by law and demanded by the land officers, and thereupon was permitted to enter the land as an adjoining farm homestead, and that the receiver of the land office gave to him a receipt therefor.

He further alleges that on the 13th of December, 1883, the plaintiff in the action, McHarry, filed a preëmption declaratory statement in the United States land office at San Francisco, alleging settlement on the 19th of January, 1876, upon a tract of land described substantially as the premises for which recovery is sought in the present action, and gave notice that he claimed a preëmption right to the land.

That the land described in the preëmption declaratory statement of the plaintiff included the land in the actual possession

of, and entered by, the cross-complainant as an adjoining farm homestead. That plaintiff did not then, nor has he ever since, had possession of the land included in the cross-complainant's homestead entry, or any part thereof.

He further alleges that a hearing of their respective claims was had before the register and receiver of the United States land office at San Francisco, and that he, the cross-complainant, and the plaintiff produced witnesses in support of their respective claims to the land, whose testimony was taken and reduced to writing in the land office.

That at such hearing the fact was proved that the cross-complainant had been in the actual, peaceable, and continuous possession of the land included in his homestead entry since the month of March, 1876; that Getta Stewart, his wife, was in the actual possession of the land conveyed to him, by her deed, and had been in such actual possession since the year 1871 to the date of the conveyance, and that with the deed she delivered possession thereof to him, and that he then took possession thereof and continued in actual possession thereof with his family, consisting of his wife, said Getta Stewart, and her children by her former marriage, on the 10th day of December, 1883; and that the facts thus proved were not disputed, and that no evidence whatever to put the facts so proved in issue was ever brought before said land officers at the hearing.

That at the hearing of the contest before the register and receiver the fact was proven that the plaintiff and members of his family threatened the life of the cross-complainant and attacked him at various times since he took possession of the lands, shot at him at the house in which he and his family resided, and thus put him in reasonable fear of his life and of personal violence of himself and family, and thereby compelled him to remove to the town of Martinez, and that thereafter he employed tenants who held actual possession of the land for him, and that the tenants were assaulted by the plaintiff in a similar manner, and that upon two occasions the plaintiff and members of his family were arrested for such assaults. That the register and receiver refused to find facts from such testimony, and decided that it was unnecessary to consider the same.

That the plaintiff claimed to have made a settlement upon adjoining subdivisions of land, and by reason of such settlement included the land in the possession of, and contained in the homestead entry of the cross-complainant, in his preëmption claim, and the register and receiver found such facts to be true, but nevertheless decided that the land included in the cross-complainant's homestead entry was not a valid adverse claim to the plaintiff's preëmption claim, for the reason that the cross-complainant did not acquire any right or title by the deed from his wife to the land adjoining the land embraced in his homestead entry, in which ruling they erred.

And the cross-complainant further avers that on March 7, 1885, the land officers made a decision in the matter of the conflicting claims of the cross-complainant and plaintiff to the land, in favor of the plaintiff.

That on the 10th day of March, 1885, being within the time required by, and in accordance with, the rules and regulations of the General Land Office, the cross-complainant filed his appeal from the decision of the register and receiver to the Commissioner of the General Land Office.

That thereupon the Commissioner of the General Land Office considered the same and reviewed the evidence and the decision of the register and receiver, and on the 1st day of September, 1886, rendered a decision reversing that of the register and receiver, and awarding to the cross-complainant the land claimed by him and included in his homestead entry.

That thereupon the plaintiff McHarry, on the 6th day of November, 1886, appealed from the decision of the Commissioner of the General Land Office in the contest to the Secretary of the Interior.

That on the 16th day of September, 1889, the Secretary of the Interior reversed the decision of the Commissioner of the General Land Office, awarding the public land claimed by the cross-complainant to the plaintiff. One ground of the decision of the Secretary, awarding the public land to the plaintiff, is thus stated in his opinion:

"The statute requires *residence* on the original farm. The proof shows that Stewart and his family, while making a show

of residence on the tract claimed as an original farm, had in fact leased said farm to a tenant for a number of years, covering the period of his adjoining farm entry, and that they in fact resided several miles from said farm in the town of Martinez, where Stewart had an established permanent business and a residence connected with his place of business. The excuse set up by Stewart for such non-residence, namely, that it was because of danger of violence and injury at the hands of the McHarrys, is not sustained by the evidence. Mrs. Stewart testifies that she went to the farm and remained there for short periods, whenever she felt inclined, and seems never to have been molested, and no attempt by the McHarrys to prevent Stewart or his family from residing on the original farm at any time is shown."

The plaintiff demurred to the cross-complaint, the demurrer was sustained, and judgment was rendered thereon, and on the answer, in favor of plaintiff, and defendant appealed to the Supreme Court of the State by which the judgment was affirmed. 35 Pac. Rep. 141.

The Supreme Court held that Stewart's ownership and title were sufficient to entitle him to an additional farm homestead, and that the land department erred as matter of law in its conclusion in regard thereto, but that in respect of Stewart's residence on the land conveyed to him by his wife, that was a question of fact, and the court had no jurisdiction to re-examine the conclusions of the land department thereon in the absence of a clear showing that the decision was procured by fraud or imposition, which did not appear in the case. With these views we concur.

Judgment affirmed.

MILLS *v.* GREEN.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 732. Submitted October 28, 1895. — Decided November 25, 1895.

When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal.

When, pending an appeal from a decree dismissing a bill in equity to secure a right to vote at the election of delegates to a constitutional convention, the election is held and the convention assembles, on the days appointed by the statute calling the convention, the appeal must be dismissed, without considering the merits of the bill.

This court, on appeal from the Circuit Court of the United States, takes judicial notice of the days of public general elections of members of the legislature, or of the constitutional convention of a State, as well as of the times of the commencement of its sitting, and of the dates when its acts take effect.

MOTION to dismiss. The case is stated in the opinion.

Mr. William A. Barber, Attorney General of the State of South Carolina, *Mr. Edward McCrady*, and *Mr. George S. Mower* for the motion.

Mr. Henry N. Obear opposing.

MR. JUSTICE GRAY delivered the opinion of the court.

This was a bill in equity, filed April 19, 1895, in the Circuit Court of the United States for the District of South Carolina, by Lawrence P. Mills, alleging himself to be a citizen of the State of South Carolina and of the United States, and a resident of a certain precinct in the county of Richland, and qualified to vote at all Federal and state elections in the precinct, and suing in behalf of himself and all other citizens

of the county in like circumstances, for an injunction against W. Briggs Green, the supervisor of registration of the county.

The bill alleged that by a statute of South Carolina of December 24, 1894, a convention was called to revise the constitution of the State, the delegates to be elected on the third Tuesday of August, 1895, and the convention to assemble on the second Tuesday of September, 1895; that the same and other statutes of South Carolina contained regulations as to the registration of voters, and as to certificates of registration, which were in violation of the constitution of South Carolina, and of the Constitution of the United States, in various particulars pointed out, as abridging, impeding and destroying the suffrage of citizens of the State and of the United States; that the defendant was exercising the duties prescribed by those statutes, and intended to continue to do so, and specifically intended to furnish and deliver, to the boards of managers appointed to hold the election of delegates to the constitutional convention, the registration books of the several precincts, to be used by the managers at that election; that the plaintiff had failed to register as a voter, because, notwithstanding repeated efforts to become registered, he found himself unable to comply with the unreasonable and burdensome regulations prescribed by the unconstitutional registration laws; that he was desirous of voting for delegates to the constitutional convention at the election prescribed by the statute of 1894 for that purpose; that the registration books in the defendant's hands did not and would not contain the plaintiff's name; that he, and others under like circumstances, would not be permitted by the managers to vote at that election, unless their names were found upon the books, and unless they could produce registration certificates; and that, if the defendant were permitted to continue the illegal, partial and void registration, and were allowed to turn over the books to the managers, the plaintiff would be deprived of his right to vote at that election, and grievous and irreparable wrong would be done to him, and to other citizens under like circumstances.

The prayer of the bill was for "a writ of injunction, re-

straining and enjoining the said defendant, individually and as supervisor of registration, from the performance of any of the acts hereinbefore complained of," and for further relief.

On the filing of the bill, the Circuit Court granted a temporary injunction, as prayed for, and ordered notice to the defendant to show cause on May 2, 1895, why it should not be continued in force; and on that day, after a hearing, ordered it to be continued until the final determination of the case, or until the further order of the court. 67 Fed. Rep. 818.

The defendant appealed to the Circuit Court of Appeals, which, on June 11, 1895, reversed the orders of the Circuit Court, dissolved the injunction, and remanded the case to that court with directions to dismiss the bill. 25 U. S. App. 383. The plaintiff, on September 4, 1895, appealed to this court; and the appeal was entered in this court on September 19, 1895.

The defendant moved to dismiss the appeal, assigning, as one ground of his motion, "that there is now no actual controversy involving real and substantial rights between the parties to the record, and no subject-matter upon which the judgment of this court can operate."

We are of opinion that the appeal must be dismissed upon this ground, without considering any other question appearing on the record or discussed by counsel.

The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord* v. *Veazie*, 8 How. 251; *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308.

If a defendant, indeed, after notice of the filing of a bill in equity for an injunction to restrain the building of a house, or of a railroad, or of any other structure, persists in completing the building, the court nevertheless is not deprived of the authority, whenever in its opinion justice requires it, to deal with the rights of the parties as they stood at the commencement of the suit, and to compel the defendant to undo what he has wrongfully done since that time, or to answer in damages. *Tucker* v. *Howard*, 128 Mass. 361, 363, and cases cited; *Attorney General* v. *Great Northern Railway*, 4 De G. & Sm. 75, 94; *Terhune* v. *Midland Railroad*, 9 Stew. (36 N. J. Eq.) 318, and 11 Stew. (38 N. J. Eq.) 423; *Platteville* v. *Galena & Southern Wisconsin Railway*, 43 Wisconsin, 493.

But if the intervening event is owing either to the plaintiff's own act or to a power beyond the control of either party, the court will stay its hand.

For example, appeals have been dismissed by this court when the plaintiff had executed a release of his right to appeal; *Elwell* v. *Fosdick*, 134 U. S. 500; or when the rights of both parties had come under the control of the same persons; *Lord* v. *Veazie*, 8 How. 251; *Cleveland* v. *Chamberlain*, 1 Black, 419; *Wood Paper Co.* v. *Heft*, 8 Wall. 333; *East Tennessee Railroad* v. *Southern Telegraph Co.*, 125 U. S. 695; *South Spring Co.* v. *Amador Co.*, 145 U. S. 300; or when the matter had been compromised and settled between the parties; *Dakota County* v. *Glidden*, 113 U. S. 222; or when, pending a suit concerning the validity of the assessment of a tax, the tax was paid; *San Mateo County* v. *Southern Pacific Railroad*, 116 U. S. 138; *Little* v. *Bowers*, 134 U. S. 547; *Singer Co.* v. *Wright*, 141 U. S. 696; or the amount of the tax was tendered, and deposited in a bank, which by statute had the same effect as actual payment and receipt of the money; *California* v. *San Pablo & Tulare Railroad*, 149 U. S. 308.

Where appeals were taken from a decree of foreclosure and sale, and also from decrees made in execution of that decree, and the principal decree was reversed, it was held that the later appeals having been annulled by operation of law, their subject-matter was withdrawn, and they must be dismissed

for lack of anything on which they could operate. *Chicago & Vincennes Railroad* v. *Fosdick*, 106 U. S. 47, 84.

Where, pending an appeal from a decree dismissing a bill to restrain a sale of property of the plaintiff under assessments for street improvements, and to cancel tax lien certificates, the assessments and certificates were quashed and annulled by a judgment in another suit, the appeal was dismissed, without costs to either party. *Washington Market Co.* v. *District of Columbia*, 137 U. S. 62.

Where, pending a writ of error in an action which did not survive by law, the plaintiff died, the writ of error was abated. *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673.

In the great case of *The State of Pennsylvania* v. *The Wheeling and Belmont Bridge Company*, which was a bill in equity filed in this court, under its original jurisdiction, for an injunction against the construction and maintenance of a bridge across the Ohio River to the obstruction of the free navigation of the river, this court entertained jurisdiction, and on May 27, 1852, decreed that the bridge was an obstruction and a nuisance, and should be either abated or elevated so as not to interfere with the free navigation of the river, and awarded costs against the defendant; but suspended the enforcement of the decree for a limited time, to allow the defendant to carry out a scheme by which the obstruction to navigation might be removed. 13 How. 518, 626, 627. By the act of Congress of August 31, 1852, c. 111, § 7, the defendant was authorized to have and maintain the bridge at its then site and elevation; and the officers and crews of all vessels and boats navigating the river were required to regulate the use of their vessels and boats, and of any pipes or chimneys belonging thereto, so as not to interfere with the elevation and construction of the bridge. 10 Stat. 112. The bridge having been blown down by a violent storm in the summer of 1854, and the defendant preparing to rebuild it according to the original plan, the plaintiff, on June 26, 1854, obtained from Mr. Justice Grier in vacation an injunction, which was served upon the defendant, notwithstanding which it proceeded with the erection of the bridge, and completed it in November,

1854. At December term, 1854, of this court, the defendant moved to dissolve that injunction; and the plaintiff filed motions for a sequestration against the defendant, and for an attachment for contempt against its officers, for disobeying the former decree of this court and the injunction of Mr. Justice Grier, and for an execution for the costs awarded by the former decree of this court. This court held that the act of 1852 was a constitutional exercise of the power of Congress to regulate interstate commerce, and that since that act the portion of its former decree which directed the alteration or abatement of the bridge could not be carried into execution; and therefore denied the plaintiff's motions for sequestration and attachment, dissolved the injunction, and only granted to the plaintiff execution for the costs decreed by this court before the passage of the act of Congress. 18 How. 421, 431, 436, 459, 460.

In a suit by a county to restrain a railroad corporation from building a railroad along a public highway, the Supreme Court of Iowa held that an order refusing an injunction, though erroneous when made, should not be reversed, when the legislature, pending the appeal, had authorized the act complained of. *Linn County* v. *Hewitt*, 55 Iowa, 505.

Still more analogous to the present case is one brought before the Court of Appeals of New York, and stated in its opinion as follows: "This action was commenced to restrain certain persons from proceeding to incorporate the village of North Tarrytown under the general act of the legislature authorizing the incorporation of villages. The persons made defendants are those who signed the notice required, and the officers of the town who would be inspectors of the election. A temporary injunction was obtained, which was dissolved, and the election was held, and a majority of votes determined in favor of the incorporation, and the proceedings for such incorporation have been perfected, village officers chosen, and the corporation is in operation. By a supplemental complaint these facts were set up, and judgment demanded that all these acts be declared null and void. The grounds of the action are that the statute was not complied with, and that

the statute itself is unconstitutional. We do not deem it necessary to determine whether the action is maintainable as originally commenced. As it appeared upon the trial, and is presented to us upon appeal, no effectual judgment can be rendered in it. The acts sought to be restrained have been consummated, and from a project to incorporate a village, the village has become incorporated. The defendants are not necessary or proper parties to the action upon the facts disclosed at the trial. The village itself, or the trustees who are now exercising the franchise, are the necessary parties to the action, and an injunction restraining the defendants would have no practical effect upon the corporation. We do not deem it proper, therefore, to express an opinion upon the points presented, involving the validity of the statute or the regularity of the proceedings under it, for the reason that a decision could not be made effectual by a judgment." *People* v. *Clark*, 70 N. Y. 518.

In the case at bar, the whole object of the bill was to secure a right to vote at the election, to be held, as the bill alleged, on the third Tuesday of August, 1895, of delegates to the constitutional convention of South Carolina. Before this appeal was taken by the plaintiff from the decree of the Circuit Court of Appeals dismissing his bill, that date had passed; and, before the entry of the appeal in this court, the convention had assembled, pursuant to the statute of South Carolina of 1894, by which the convention had been called. 21 Statutes of South Carolina, pp. 802, 803. The election of the delegates and the assembling of the convention are public matters, to be taken notice of by the court, without formal plea or proof. The lower courts of the United States, and this court, on appeal from their decisions, take judicial notice of the constitution and public laws of each State of the Union. *Owings* v. *Hull*, 9 Pet. 607, 625; *Lamar* v. *Micou*, 112 U. S. 452, 474, and 114 U. S. 218, 223; *Hanley* v. *Donoghue*, 116 U. S. 1, 6; *Fourth National Bank* v. *Francklyn*, 120 U. S. 747, 751; *Gormley* v. *Bunyan*, 138 U. S. 623; *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 678. Taking judicial notice of the constitution and laws of the State, this court must take judicial

notice of the days of public general elections of members of the legislature, or of a convention to revise the fundamental law of the State, as well as of the times of the commencement of the sitting of those bodies, and of the dates when their acts take effect. 1 Greenl. Ev. § 6; *Brown* v. *Piper*, 91 U. S. 37, 42; *Gardner* v. *Collector*, 6 Wall. 499; *Hoyt* v. *Russell*, 117 U. S. 401; *Jones* v. *United States*, 137 U. S. 202, 216.

It is obvious, therefore, that, even if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted.

Appeal dismissed, without costs to either party.

GILLIS *v.* STINCHFIELD.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 661. Submitted November 11, 1895. — Decided November 25, 1895.

The decision by the highest court of a State that the grantor of a portion of the ground of a mining claim is estopped, on general principles of law and by the statutes of the State, from claiming priority of title to a space of vein-intersection within the granted premises, by reason of his locating the portion retained by himself before a location of the granted portion by his grantee, presents no Federal question.

This was an action brought by Stinchfield against Gillis and others in the Superior Court of Tuolumne County, California, to recover the value of certain gold alleged to have been taken by defendants from the mining claim of plaintiff. Gillis, for many years, had held and asserted ownership of a mining claim known as the Carrington, and had sold and conveyed by deed of grant, bargain and sale a portion of the ground to Stinchfield. Immediately after executing the deed to Stinchfield, Gillis located that portion of the claim which he retained, and denominated his location the Carrington, and afterwards Stinchfield located the ground he had purchased and denominated it the Pine Tree claim. Thereafter Gillis,

or those under him, entered upon the ground he had sold to Stinchfield at the intersection of two veins, one of which had its apex in the portion of the original claim which Gillis had retained, and the other had its apex in the ground sold to Stinchfield, and dug out and appropriated a large amount of gold, the space of vein-intersection from which the gold was taken being entirely in Stinchfield's ground.

The trial court gave judgment for Stinchfield, and Gillis appealed to the Supreme Court of California, by which the judgment of the lower court was affirmed. 40 Pac. Rep. 98. The Supreme Court was of opinion that Gillis was estopped, under the law of California, by his deed to Stinchfield, from claiming priority of title to the space of vein-intersection by reason of the location which he had made after the execution of the deed, but before the location by Stinchfield of the ground conveyed to him. The same conclusion had been reached and announced on a former appeal. 96 Cal. 33.

A writ of error from this court having been allowed, a motion to dismiss was submitted.

Mr. M. A. Wheaton, *Mr. T. M. Kalloch*, and *Mr. F. J. Kierce* for the motion.

Mr. J. C. Campbell, *Mr. F. W. Street*, and *Mr. J. F. Rooney* opposing.

The Chief Justice: Neither in the pleadings nor in the proceedings during the trial, nor in the specifications of error below, was any Federal question specifically raised, nor was any right, title, privilege, or immunity of a Federal nature set up or claimed. *Sayward* v. *Denny*, 158 U. S. 180. It is, however, contended that the record shows that a Federal question arose in the case, as considered by both the Superior and the Supreme Courts, and was decided adversely to plaintiffs in error, namely, that Gillis had the right to follow what was known as the Rice vein, which had its apex on the Carrington mine, upon its dip, beneath the surface of the Pine Tree mine, and to appropriate to his own use the gold found

in that vein at the point of its intersection with the so-called West vein, which had its apex on the Pine Tree mine, because the Carrington mine was the older or prior location; and that this could only be determined by an application of sections 2322 and 2336 of the Revised Statutes. But the decision of the Supreme Court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad enough to maintain the judgment. The writ of error must, therefore, be dismissed. *Eustis* v. *Bolles*, 150 U. S. 361; *Rutland Railroad Co.* v. *Central Vermont Railroad Co.*, 159 U. S. 630.

Writ of error dismissed.

LAMBERT *v.* BARRETT.

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

No. 771. Submitted November 11, 1895. — Decided November 18, 1895.

The several questions raised by the counsel for the petitioner are matters for the determination of the courts of the State, and their determination there adversely to the petitioner involves no denial of due process of law, or the infraction of any provision of the Constitution of the United States.

The administration of justice ought not to be interfered with on mere pretexts.

This is an appeal from a final order of the Circuit Court of the United States for the District of New Jersey, denying the petition of Theodore Lambert for a writ of *habeas corpus*. It appeared from the petition that Lambert was convicted by the verdict of a jury, June 15, 1894, of the murder of William Kairer, in the court of oyer and terminer and general jail delivery of Camden County, New Jersey, and sentenced, October 13, to be hanged on December 13, 1894; that on the

fourth of December the governor of New Jersey granted a reprieve, suspending the execution of the sentence until January 3, 1895, and on December 22, 1894, issued a death warrant for the execution of Lambert on said third of January; that on December 29, 1894, application was made to one of the judges of the Circuit Court of the United States for the Third Circuit for a writ of *habeas corpus*, which was denied, and on January 2 an appeal was taken to this court; that on the same day a citation was issued to Barrett, sheriff of the county of Camden, in whose custody petitioner was, together with an order by one of the justices of this court, staying the execution of Lambert "until the further order of this court." It also appeared that the appeal was heard in this court March 25, 1895, and the appeal thereafter dismissed for want of jurisdiction, and a mandate to that effect was duly issued, but that it was not filed nor any entry of final judgment made in the Circuit Court. Petitioner further averred that on May 28, 1895, the governor issued another death warrant to the sheriff of Camden County, directing the execution of the death sentence on the 27th of June following; that on June 5, 1895, a petition was presented to the Supreme Court of New Jersey for a writ of *habeas corpus* to inquire into the cause of the detention of Lambert, and that the same was granted and made returnable on June 10, and after hearing argument the court held that Lambert was lawfully in custody; that subsequently application was made to the Chancellor of the State for a writ of error to remove the last mentioned judgment to the Court of Errors and Appeals, which was refused.

Petitioner charged that under section 766 of the Revised Statutes any proceedings to carry out the judgment against him by or under the authority of the State of New Jersey before final judgment was entered in the Circuit Court were null and void, and that as such judgment had not been entered, the sheriff restrained him of his liberty for the purpose of carrying the death warrant into execution in violation of that statute of the United States; that the governor had no prerogative, right, or authority under or by virtue of the laws of New Jersey to grant the reprieve or issue the death war-

rant; and that the second death warrant was in the nature of a new sentence, which could not be had without the presence of petitioner, and placed petitioner twice in jeopardy of his life; all of which was in violation of the Constitution and laws of the United States.

Mr. John L. Semple for appellant.

Mr. Wilson H. Jenkins for appellee.

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

By section 766 of the Revised Statutes, where an appeal from the final decision of a Circuit Court of the United States, denying the writ of *habeas corpus* to a person alleging restraint of his liberty by state authority in violation of the Constitution or laws of the United States, is "in process of being heard and determined," any proceeding against such person in respect of the matter under consideration is to be deemed null and void. As no order staying proceedings under state authority is made a condition to such stay, the bare pendency of the appeal has that effect, and in consequence many applications for *habeas corpus* have been made to the Circuit Courts, and, on denial, many appeals taken to this court on inadequate and insufficient grounds. It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts.

When in the instance of the first application for *habeas corpus* made by this petitioner, the appeal to this court was dismissed, the supersedeas fell with the disposition of the case; and when final judgment was entered here, and especially after the mandate had issued, the authorities of the State had power to proceed, although the mandate may have been, as is said, delivered to them instead of to the Circuit Court. *In re Jugiro*, 140 U. S. 291, 295, 296.

The constitution of New Jersey provides that the governor

may grant reprieves "to extend until the expiration of a time not exceeding ninety days after conviction;" and by section 123 of the Criminal Procedure Act of that State, it is provided that when a reprieve is granted to any convict sentenced to the punishment of death and he is not pardoned, it shall be the duty of the governor to issue his warrant to the sheriff of the proper county for the execution of the sentence at such time as is therein appointed and expressed. It is contended that if there is no reprieve there can be no warrant; that there was no authority to issue either, except within ninety days after conviction; and that appellant must be brought before the trial court and a new date be fixed for the execution. But these are matters for the determination of the state courts, and they appear to have been passed upon adversely to the petitioner. That result involves no denial of due process of law, or the infraction of any provision of the Constitution of the United States. *Lambert* v. *Barrett*, 157 U. S. 697; *Holden* v. *Minnesota*, 137 U. S. 483; *Schwab* v. *Berggren*, 143 U. S. 442; *McElvaine* v. *Brush*, 142 U. S. 155, 159; *In re Cross*, 146 U. S. 271, 278.

Order affirmed.

GOODE *v.* UNITED STATES.

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

No. 616. Argued November 1, 1895. — Decided November 25, 1895.

When a verdict is general upon all the counts in an indictment, sufficient in form, it must stand if any one of the counts was sustained by competent testimony.

In an indictment under Rev. Stat. § 5467, against a letter carrier charged with secreting, embezzling or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defence.

A letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute, and for the purposes of Rev. Stat. §§ 5467 and 5469 a letter which bears the outward semblance of a genuine communication, and comes into the possession of the employé in the

Statement of the Case.

regular course of his official business, is a writing or document within the meaning of the statute.

Where a general verdict of guilty is rendered, an objection taken to evidence admissible under one, or a part of the counts, is untenable.

The term "branch post office," as employed in those sections, includes every place within such office where letters are kept in the regular course of business, for reception, stamping, assorting or delivery.

It being shown, in this case, that the branch post office in which the offence was alleged to have been committed, was known as the Roxbury station of the Boston post office, that it had been used as such for years, and that it was a post office *de facto*, it was unnecessary to show that it had been regularly established as such by law.

GEORGE GOODE, a letter-carrier, was indicted and convicted in the District Court for the District of Massachusetts for embezzlement and theft from the mail. The indictment contained seven counts, the first three of which charged a violation of Rev. Stat., § 5467, and the last four a violation of § 5469. (The substance of these sections is printed in the margin.) The case was submitted to the jury under certain instructions, hereafter to be considered, who returned a verdict of guilty upon the whole indictment.

The facts of the case were substantially as follows:

Goode, the plaintiff in error, was a letter carrier employed in the branch post office at Roxbury, which had formerly been an independent post office, but is now known as the Roxbury station of the Boston post office. Complaints having been

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[1] SEC. 5467. Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter . . . intrusted to him, or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail-messenger, route-agent, letter carrier, or other person employed in any department of the postal service, or forwarded through or delivered from any post office or branch post office established by authority of the Post-master-General, and which shall contain any . . . postage stamp . . . or other pecuniary obligation or security of the government, . . . any such person who shall steal or take any of the things aforesaid out of any letter, . . . which shall have come in his possession, either in the regular course of his official duties or in any other manner whatever, and provided the same shall not have been delivered to the party to whom it is directed, shall be punishable by imprisonment at hard labor for not less than one year nor more than five years.

made of thefts from the mails at this office, Thomas J. Boynton, a post-office inspector, prepared two decoy letters, one of which was addressed to Whitcomb, Keys & Co., a firm of merchant tailors on Washington Street, in the Roxbury district, and was subsequently delivered to them in the regular course of business, and one addressed to John Muldoon, Esq., 153 Ziegler street, Boston, Mass., and postmarked West Cheshire, Conn.

Boynton, in fact, took an envelope containing that postmark, filled in the date, which was missing on the postmark, with type which he had in his office for that purpose, and cancelled the stamp with a canceller, such as was used ordinarily in the smaller post offices. He enclosed in the letter two one dollar silver certificates and five two cent postage stamps, marked the postage stamps by means of pin holes, and gave the letter to one McGrath, who was assistant superintendent of the mailing division of the main post office in Boston, but who was stationed temporarily, by direction of the postmaster, at the Roxbury office.

McGrath, when the letter carriers were out, called as witness the superintendent and person having charge of the branch post office, and in his presence put the letter into defendant Goode's box. This was not the ordinary method of depositing the mail. Indeed, he passed by the places on the outside as well as the inside of the post office, where letters are usually mailed, and went into the back room, where the letters after

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SEC. 5469. Any person who shall steal the mail or steal or take from or out of any mail or post office, branch post office, or other authorized depository for mail matter, any letter or packet; any person who shall take the mail, or any letter or packet therefrom, or from any post office, branch post office, or other authorized depository for mail matter, with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter, or package which shall contain any . . . postage stamp . . . or other pecuniary obligation or security of the government; . . . any person who shall, by fraud or deception, obtain from any person having custody thereof, any such mail, letter, or packet containing any such article of value shall, although not employed by the postal service, be punishable by imprisonment at hard labor for not less than one year and not more than five years.

passing through the mails are sorted. Goode returned from his route, took up all the letters in his box, and went to his desk, which was situated in the same room. His own route terminated at No. 51 Ziegler Street, and it was his duty to put this Ziegler Street letter into the box of the carrier whose route included the higher numbers of Ziegler Street, or to put it into what was known as the "list box." This list box was kept for the reception of any letter known as a "beat" or a "nixie," that is, a letter addressed to a person not to be found in the district. On Goode's return from his route, the letter not being found in either of these boxes or elsewhere, he was searched and the five marked postage stamps were found upon his person. It was shown that, while absent on his route, he had the opportunity of disposing of the letter and the silver certificates therein contained. There were a large number of other letters in the box in which this Muldoon letter was put by McGrath. McGrath knew at the time that there was no such place as 153 Ziegler Street, and that there was no such person as John Muldoon. He put the letter in the box for the purpose of being able to identify its contents in case Goode embezzled them.

Goode was sentenced upon conviction to imprisonment at hard labor for three years, and thereupon sued out this writ of error.

Mr. Elbridge R. Anderson, (with whom was *Mr. Charles W. Bartlett* on the brief,) for plaintiff in error.

This case is one of great importance both to the government and to the defendant.

The question has not been before this court before, and it is one upon which there have been various rulings by the Circuit and District Courts of the United States, and which should be considered fully upon its merits for the future guidance of the various courts in which cases of this character are being continually tried.

The Muldoon letter was not a letter. There can be no letter — that is, message or communication — to that which is not

in existence. *United States* v. *Denicke*, 35 Fed. Rep. 407; *Regina* v. *Gardner*, 1 Car. & K. 628.

It never became a letter or mail matter, under the statute, because it never got into the mail in any of the ways provided by the post office authorities. *United States* v. *Rapp*, 30 Fed. Rep. 818; *United States* v. *Denicke*, *ub. sup.*; *Regina* v. *Rathbone*, 1 Car. & M. 220.

It was never deposited in the Roxbury post office nor in the mail for the Roxbury district deposited in the branch post office of the United States. It never went into the office so as to get into the custody of the postmaster. The mere fact that it was carried into the post office building and put into a sorting case and in a sorter's box is not enough. It must get into the mail through the usual channels and by proper means. Had it been thrown on the floor it could not be said that it had been deposited in the mail, and the contention is that what was done amounted to no more. *Regina* v. *Rathbone*, *ub. sup.*; *United States* v. *Rapp*, *ub. sup.* A letter, to be "deposited," must be confided to the care of the postal department for transmission. *Walster* v. *United States*, 42 Fed. Rep. 891. A letter addressed to a person not in existence and to a place that does not exist, and one that does not get into the mail in the usual course, is not intended to be conveyed by mail nor carried by a letter carrier, under §§ 5467 and 5469 of the Revised Statutes. *United States* v. *Matthews*, 35 Fed. Rep. 890; *United States* v. *Denicke*, *ub. sup.*; *United States* v. *Rapp*, *ub. sup.*

United States v. *Foye*, 1 Curtis, 364; *United States* v. *Wright*, 38 Fed. Rep. 106; *United States* v. *Dorsey*, 40 Fed. Rep. 752; *United States* v. *Bethen*, 44 Fed. Rep. 802; and *United States* v. *Cottingham*, 2 Blatchford, 470, supposed to hold a contrary doctrine, will be found, on examination, not to do so.

There is another principle which the plaintiff in error invokes in his behalf, which is, that wherever error is apparent on the record it is open to revision whether it be made to appear by a bill of exceptions or in any other manner. *Suydam* v. *Williamson et al.*, 20 How. 427. Where error is apparent on a record, no exception need be shown, and it

need not have been presented by a bill of exceptions. *Moline Plow Co.* v. *Webb*, 141 United States, 616; *Clinton* v. *Missouri Pacific Railway*, 122 U. S. 469; *Potomac Railroad Company* v. *Trustees of Presbyterian Church*, 91 U. S. 127. Anything appearing upon the record which would have been fatal on a motion in arrest of judgment is equally as fatal upon a writ of error, although objection was not taken below. *Slacum* v. *Pomery*, 6 Cranch, 221.

Mr. Assistant Attorney General Whitney for defendants in error.

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

To make a case under Rev. Stat., § 5467, it is necessary for the government to prove —

(1.) That the person charged was employed in the postal service.

(2.) That the letter that he is charged with secreting, embezzling, or destroying was entrusted to him or came into his possession, and was intended to be conveyed by mail, carried, or delivered by carrier, messenger, route agent, or other person employed in the postal service, or forwarded through or delivered from any post office or branch office, etc.

(3.) That it contained one of the articles of value described in the statute, one of which is postage stamps.

(4.) Or that the person so employed stole one of such articles out of any such letter, etc., provided the same had not been delivered to the party to whom it was directed.

Upon the other hand, § 5469 applies to every person, irrespective of his employment in the post office, and to establish a case under this section it is only necessary to prove —

(1.) That the defendant stole the mail or that he took from out of the mail or post office or other authorized depository a letter or packet, or took such mail or letter or packet therefrom, or from any post office, etc., or otherwise authorized depository, with or without the consent of the person having the custody thereof.

(2.) That he opened, embezzled, or destroyed any such mail, letter, or packet containing an article of value.

(3.) Or, by fraud or deception, obtained from any person having custody thereof any such mail, letter, or packet, containing such article of value.

As the verdict was general upon all the counts, which are conceded to be sufficient in form, if any one of the counts was sustained by competent testimony, the verdict must stand. *Claassen* v. *United States*, 142 U. S. 140; *Evans* v. *United States*, 153 U. S. 584.

1. The main contention of the defendant is that the Muldoon letter was not a letter in point of fact, inasmuch as it was not only a decoy, that is, not written in good faith as a message or communication to the person addressed, but was wholly fictitious; that there was no such person as John Muldoon, no such place as 153 Ziegler Street, and the letter could not possibly have been delivered.

That the fact that the letter was a decoy is no defence is too well settled by the modern authorities to be now open to contention. *King* v. *Egginton*, 2 Bos. & Pull. 508; *United States* v. *Foye*, 1 Curtis, 364; *United States* v. *Cottingham*, 2 Blatchford, 470; *Bates* v. *United States*, 10 Fed. Rep. 92, 97; *United States* v. *Whittier*, 5 Dillon, 35, 39; *United States* v. *Moore*, 19 Fed. Rep. 39; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Matthews*, 35 Fed. Rep. 890, 896; *United States* v. *Dorsey*, 40 Fed. Rep. 752. Indeed, this court held at the last term, in *Grimm* v. *United States*, 156 U. S. 604, that the fact that certain prohibited pictures and prints were drawn out of the defendant, by a decoy letter written by a government detective, was no defence to an indictment for mailing such prohibited publications.

The question whether a letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute, is more serious, and there are certainly authorities which lend support to the theory of the defendant in that regard. Thus in *Regina* v. *Rathbone*, 1 Car. & M. 220, a detective mailed a decoy letter, containing a marked sovereign, to a fictitious address in London, and placed it in a heap of

letters which the prisoner was about to sort, and which he had to deliver that day. The letter was not delivered, and, in the course of the same day, the prisoner was arrested and searched, and the marked sovereign found in his pocket. It was held that this was not a "post letter," or a letter put into the post; but as there was a separate count for the larceny of the sovereign, he was held to have been properly convicted of that. A similar ruling was made in *Regina* v. *Gardner*, 1 Car. & K. 628, wherein the prisoner was held to have been properly convicted of the larceny of certain marked money contained in a letter which was addressed to a fictitious person, the court adhering to its previous ruling that it was not the stealing of a post letter.

The authority of these cases, however, was seriously shaken by that of *Regina* v. *Young*, 1 Den. Cr. Cas. 194. In that case the letter contained a half sovereign, and was addressed to a fictitious person. The prisoner, instead of transmitting the letter to the general post office, abstracted it from the receiving box, opened it, took out the half sovereign, and kept both the letter and the money. It was held to be a post letter, having all the ingredients under the statute, and "whether it can be delivered or no seems beside the question." On the Gardner case being cited, Pollock, Chief Baron, said he had seen reason to think his dictum in that case was incorrect, and the judges were unanimously of the opinion that the conviction was right.

The question has been generally ruled in the same way in this country. *United States* v. *Foye*, 1 Curtis, 364; *United States* v. *Wight*, 38 Fed. Rep. 106; *United States* v. *Dorsey*, 40 Fed. Rep. 752; *United States* v. *Bethen*, 44 Fed. Rep. 802.

If the word "letter" were given the technical construction of a written message or communication from one person to another, it would strike at the whole system of decoy or test letters, none of which contain *bona fide* communications. This would render it practically impossible to detect thefts and embezzlements by employés, since, in a large majority of cases, the letters and their envelopes are thrown away or

destroyed for the very purpose of preventing their being identified in case the employé is arrested; and the contents of the letter, which it is ordinarily impossible to identify, only are abstracted. If, however, the contents can be identified, as they always are in test letters, by a private mark put upon them, the discovery of such contents upon the person of the employé affords almost conclusive evidence of the theft of the letter in which they are enclosed.

It makes no difference with respect to the duty of the carrier, whether the letter be genuine or a decoy, with a fictitious address. Coming into his possession as such carrier, it is his duty to treat it for what it appears to be on its face — a genuine communication; to make an effort to deliver it, or, if the address be not upon his route, to hand it to the proper carrier, or put it into the list box. Certainly he has no more right to appropriate it to himself than he would have if it were a genuine letter. For the purposes of these sections a letter is a writing or document, which bears the outward semblance of a genuine communication, and comes into the possession of the employé in the regular course of his official business. His duties in respect to it are not relaxed by the fact or by his knowledge that it is not what it purports to be — in other words, it is not for him to judge of its genuineness.

2. The question whether this letter "was intended to be conveyed by mail, or carried or delivered by any mail carrier, mail messenger, route agent, letter carrier, or other person," etc., does not properly arise at this stage of the case, since, under § 5469, it is only necessary to show that the article embezzled or taken was a letter or packet properly deposited, etc., the subsequent limitation of the prior section with respect to the intention of the party mailing the letter being omitted here. Whether the court erred in refusing the defendant's request in that particular, therefore, becomes immaterial, in view of the last four counts, which are drawn under § 5469, and contain no allegation that the letter in question was intended to be conveyed by mail or carrier. Indeed, it is somewhat doubtful whether it could be material at all in view of

§ 5468, declaring that the fact that any letter, etc., has been deposited in any post office or branch post office, or in charge of any agent of the postal service, shall be evidence that the same was "intended to be conveyed by mail" within the meaning of § 5467. Had defendant been convicted under the first three counts and acquitted under the last four, of course the objection might be material; but where a general verdict of guilty is rendered, an objection taken to evidence admissible under one or a part of the counts is untenable.

3. Was there competent evidence to show that the letter was deposited in any mail or post office, branch post office, or other authorized depository for mail matter, within the meaning of § 5469? If, to meet the requirements of this section, it were necessary to show that the letter was deposited in one of the ordinary boxes accessible to the public and used for the reception of letters regularly mailed, the evidence is obviously insufficient, since it is shown that McGrath, in mailing this letter, passed by the place where letters were usually mailed, entered the back room of the office, where letters were sorted, and put this letter into Goode's box. This was clearly sufficient to charge Goode with the duty of delivering or attempting to deliver, the letter, and it makes no difference that, before it was put into this box, it did not go through the usual channel or reach it in the ordinary way. The term "branch post office," within the meaning of the act, includes every place within such office where letters are kept in the regular course of business, for reception, stamping, assorting, or delivery. Of course, a letter thrown upon the floor, or laid upon a desk appropriated to other and different purposes, could not be said to have been deposited in the post office; but if it be put in any place where letters are usually kept or deposited for any purpose, we think it is within the act.

4. While there was no direct evidence that this branch post office was established by authority of the Postmaster General, there was evidence that it was known as the Roxbury station of the Boston post office, had been used as such for years, and that it was a post office *de facto*. For the purposes of this case, it was quite unnecessary to show that it had been regu-

larly established as such by law. *Ingraham* v. *United States*, 155 U. S. 434; *Wright* v. *United States*, 158 U. S. 232.

The judgment of the court below is, therefore,

Affirmed.

MOORE *v.* MISSOURI.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 493. Argued and submitted October 30, 1895. — Decided November 25, 1895.

The provision in § 3959 of the Revised Statutes of Missouri that prisoners convicted two or more times of committing offences punishable by imprisonment in the penitentiary shall be punished with increased severity for the later offences, does not in any way conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States.

A State may provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law, and that a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.

Whether an indictment in a state court is sufficient in its description of the degree of the offence charged is a matter for the state court to determine, and its decision in that respect presents no Federal question.

No question which could be regarded as a Federal question having been raised at his trial, the prisoner was not subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges, instead of by three.

Frank Moore was indicted in the St. Louis Criminal Court for burglary in the first degree and larceny in a dwelling-house, on May 26, 1893. The indictment also charged that defendant "on the eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-seven, at the city of St. Louis aforesaid, in the St. Louis Criminal Court, was duly convicted on his own confession of the offence of grand larceny, and in accordance with said conviction was duly sentenced by said court to an imprisonment in the penitentiary for the term of three years, and was duly imprisoned

in said penitentiary in accordance with said sentence, and that after his discharge from the penitentiary upon compliance with the sentence, he committed the said offences of burglary and larceny." Being duly arraigned, he pleaded not guilty, but subsequently withdrew his plea, and filed a motion to quash the indictment for duplicity, and "because section 3959, under which the said indictment purports to charge the defendant with a former conviction, is unconstitutional and illegal and void and in conflict with the Constitution of the United States and the State of Missouri." The motion being overruled, he was again arraigned, pleaded not guilty, and was put upon his trial, which resulted in a verdict of guilty of burglary in the second degree, his punishment being fixed by the jury at imprisonment in the penitentiary for life. A motion for a new trial was made for the following cause among others, "because the court erred in overruling defendant's motion to quash the indictment for the reason that it violated both the state and Federal Constitutions;" and, that motion being overruled, Moore filed a motion in arrest of judgment upon various grounds, and among them, that burglary in the second degree was not included in the offence of burglary in the first degree, but was a separate and distinct offence; that the statute upon which the indictment was founded was "unconstitutional and void, in that it violates the Fourteenth Amendment of the Federal Constitution, and violates the 'bill of rights' in the constitution of Missouri in prescribing a second punishment for the same offence, and different punishment for different persons for committing the same offence;" that the indictment in charging the former conviction attacked defendant's character when not in issue; and that the indictment failed to inform the defendant of the accusation against him. The motion in arrest was overruled and Moore sentenced to the penitentiary for life in accordance with the verdict, whereupon he appealed to the Supreme Court of Missouri, Division No. 2, by which the judgment was affirmed. 121 Missouri 514. Moore afterwards moved for a rehearing upon the ground, among others, that he "was acquitted by the jury of all and every charge against him in the

indictment, and yet stands sentenced for an offence not named in the indictment, nor included in any offence described therein, and thus is deprived of his constitutional right of being prosecuted under an indictment informing him of the nature and cause of the accusation against him;" and also moved that the motion and cause be transferred to the court in banc. These motions were denied, and, thereafter, Moore moved the Supreme Court sitting in banc to set aside the judgment of Division No. 2, and to order that division to transfer the cause to the court in banc for the reason that the cause involved a Federal question, or questions, raised by his motions to quash the indictment, for new trial, and in arrest of judgment. The Supreme Court in banc denied this motion, and also a second motion to the same effect. A writ of error from this court was subsequently allowed.

Mr. Charles T. Noland for plaintiff in error.

Mr. R. F. Walker, Attorney General of Missouri, *Mr. C. O. Bishop*, and *Mr. Morton Jourdan*, for defendant in error, submitted on their briefs.

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

Admitting that the first ten articles of amendment to the Constitution of the United States were adopted as limitations on Federal power, it is argued for plaintiff in error that the fundamental rights secured thereby are protected by the fourteenth article of amendment from invasion by the States, in the prohibition of the abridgment of the privileges and immunities of citizens of the United States; of the deprivation of life, liberty, or property without due process of law; and of the denial of the equal protection of the laws; and it is contended that section 3959 of the Revised Statutes of Missouri of 1889 is in violation of that amendment, in that persons are thereby subjected to be twice put in jeopardy for the same offence, and to cruel and unusual punishment; and deprived of

the equal protection of the laws. That section, which is also to be found in the Revised Statutes of Missouri of 1879 and the General Statutes of Missouri of 1865, is as follows:

"SEC. 3959. *Second offence, how punished.* — If any person convicted of any offence punishable by imprisonment in the penitentiary, or of petit larceny, or of any attempt to commit an offence, which, if perpetrated, would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offence be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which, under the provisions of this law, might extend to imprisonment in the penitentiary for life, then such person shall be punished by imprisonment for life; second, if such subsequent offence be such that upon a first conviction the offender would be punishable by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offence; third, if such subsequent conviction be for petit larceny, or for an attempt to commit an offence which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offence shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Similar provisions have been contained in state statutes for many years, and they have been uniformly sustained by the courts. In the opinion of the Supreme Court of Missouri it is said: "The increased severity of the punishment for the subsequent offence is not a punishment for the same offence for the second time, but a severer punishment for the subsequent offence, the law which imposes the increased punishment being presumed to be known by all persons, and to deter those so inclined from the further commission of crime; and we are unable to see how the statute which imposes such increased punishment violates the provisions of our constitu-

tion hereinbefore quoted. . . . The fact that the indictment charged a former conviction of another and entirely different offence, is not in fact charging him with an offence with respect of the former offence in the case in hand. The averments as to the former offence go as to the punishment only." And *People* v. *Stanley*, 47 California, 113; *Rand* v. *Commonwealth*, 9 Gratt. 738; *Ross's case*, 2 Pick. 165; *Plumbly* v. *Commonwealth*, 2 Met. (Mass.) 413; *Ingalls* v. *State*, 48 Wisconsin, 647; *Maguire* v. *State*, 47 Maryland, 485; *State* v. *Austin*, 113 Missouri, 538; and *Reg.* v. *Clark*, 6 Cox Cr. Cases, 210, are cited. And see *People* v. *Butler*, 3 Cowen, 347; *Johnson* v. *State*, 55 N. Y. 512; *Kelly* v. *People*, 115 Illinois, 583; *Blackburn* v. *State*, 50 Ohio St. 428; *Sturtevant* v. *Commonwealth*, 158 Mass. 598.

The reason for holding that the accused is not again punished for the first offence is given in *Ross's case* by Chief Justice Parker, that "the punishment is for the last offence committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself;" in *Plumbly* v. *Commonwealth*, by Chief Justice Shaw, that the statute "imposes a higher punishment for the same offence upon one who proves, by a second or third conviction, that the former punishment has been inefficacious in doing the work of reform for which it was designed;" in *People* v. *Stanley*, that "the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offence;" and in *Kelly* v. *People*, "that it is just that an old offender should be punished more severely for a second offence — that repetition of the offence aggravates guilt." It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice put in jeopardy for the same offence, or that the increase of his punishment by reason of the commission of the first offence was not cruel and unusual. *In re Kemmler*, 136 U. S. 436. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other

person in like case with him, and convicted as he had been, would be subjected to the like punishment.

The Fourteenth Amendment means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." *Missouri* v. *Lewis*, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offences; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State. *In re Converse*, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law, and that a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Pace* v. *Alabama*, 106 U. S. 583; *Leeper* v. *Texas*, 139 U. S. 462.

2. It is further urged, by plaintiff in error, that the crimes of burglary in the first degree and burglary in the second degree were so distinct and separate that plaintiff in error was not sufficiently informed of the nature and cause of the accusation against him by the indictment for burglary in the first degree, and was in fact convicted under what was, in effect, no indictment at all, and, therefore, denied due process of law. It is true that in order to a conviction for a minor offence it must be an ingredient of the major and substantially included in the offence charged in the indictment, but it is clearly a matter for the state courts to determine whether in a given case an indictment is sufficient in that regard. *Caldwell* v. *Texas*, 137 U. S. 692.

Under the statutes of Missouri burglary in the first degree is defined to be "breaking into and entering the dwelling-house of another, in which there shall be at the time some

human being, with intent to commit some felony or any larceny therein," in the several modes pointed out; and burglary in the second degree consists in breaking into a dwelling-house with intent to commit a felony or any larceny, "but under such circumstances as shall not constitute the offence of burglary in the first degree," or entrance into a dwelling-house in such manner as not to constitute burglary as hereinbefore specified, "with intent to commit a felony or any larceny," or the commission by a person being in, of felony or larceny, and the breaking of any door or otherwise, to get out, or the breaking of an inner door with intent to commit felony or larceny, when entrance is made through an open outer door or window, or where a person is lawfully in the house, etc.

The St. Louis Criminal Court and the Supreme Court of the State appear to have had no difficulty in concluding upon the evidence that it was for the jury to say whether plaintiff in error had committed the crime of burglary in the second degree, and that he could be lawfully convicted therefor under an indictment for the greater offence. It may be admitted that these courts did not suppose that they were passing on any Federal question in this regard, for no such question was specifically and seasonably raised; but if it had been we do not think that plaintiff in error was denied due process of law in the view which was taken of his case.

3. Finally, it is said that plaintiff in error was denied due process of law because his case was not heard by the court in banc, consisting of seven judges, but was left on the disposition of it by Division No. 2, consisting of three judges. In an amendment to the constitution of Missouri, adopted in 1890, the Supreme Court was divided into two divisions, Division No. 1 consisting of four judges and Division No. 2 of the remaining three, the latter division having exclusive cognizance of all criminal cases. It was also provided that when a Federal question was involved the cause, on the application of the losing party, should be transferred to the full bench for its decision. *Duncan* v. *Missouri*, 152 U. S. 377.

In *Bennett* v. *Missouri Pacific Railway*, 105 Missouri, 642, it was held that the court would not take jurisdiction on the

ground that a Federal question was involved, unless that question was raised in and submitted to the trial court, and such court had the opportunity to pass upon it; and that while it could not be laid down by rule how every such question must be raised in the trial court, it should, at least, be fairly and directly presented by some of the methods recognized by the practice and procedure of the court. In this instance, the Supreme Court in banc refused to direct the case to be transferred, and we cannot say that it was not justified in that refusal. The interjection into the motions to quash and for a new trial, of the assertion that section 3959 was in conflict with the Constitution of the United States, and also in the motion in arrest, was perhaps regarded as not sufficiently definite to invoke a distinct ruling on the points afterwards suggested, and, moreover, the full court may have been of the opinion that there was no sufficient ground for the contention that a violation of the Federal Constitution had occurred to require it to hear argument upon that subject. At all events, as we find that there was no ground for questioning the judgment of the Supreme Court because of such violation in the legislation on which that judgment was based or in the conduct of the trial, we cannot hold that the plaintiff in error was subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges instead of three.

Judgment affirmed.

BUCKLIN *v.* UNITED STATES (No. 1).

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

No. 246. Submitted October 21, 1895. — Decided November 18, 1895.

The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except on writ of error; and the review is confined to questions of law, properly presented.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Thomas T. Taylor for appellant.

Mr. Assistant Attorney General Dickinson for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

The appellant Bucklin was convicted of the crime of perjury under section 5392 of the Revised Statutes, and sentenced to imprisonment at hard labor in the penitentiary for the term of one and one-half years, and also to pay a fine of one hundred dollars. He seeks a review of that judgment by the present appeal.

The appeal must be dismissed. By section five of the act of March 3, 1891, c. 517, 26 Stat. 826, "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts" of the United States directly to this court, in certain enumerated cases, civil and criminal, among others, "in cases of conviction of a capital or otherwise infamous crime." There was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error. The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error. Our review of the judgment, when brought here in that form, is confined to questions of law, properly presented by a bill of exceptions, or arising upon the record.

Appeal dismissed.

BUCKLIN *v.* UNITED STATES (No. 2).

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

No. 572. Submitted October 21, 1895. — Decided November 18, 1895.

The consolidation of several indictments against different persons growing out of the same transaction, and the trial of all at the same time and by the same jury, if not excepted to at the time, cannot be objected to after verdict.

The indictment in this case, in every substantial particular, states an offence against the laws of the United States.

A refusal to grant a new trial cannot be reviewed on writ of error.

An instruction, on the trial of several defendants indicted separately for offences growing out of the same transaction, that, while they might find a verdict of guilty as to all the defendants, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others, contains prejudicial error which may be taken advantage of by a defendant who is found guilty and convicted.

THE case is stated in the opinion.

Mr. Thomas T. Taylor for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is the same case as the one just disposed of. The accused being in doubt whether the judgment against him could be reviewed here on appeal, brought this writ of error.

The plaintiff in error was indicted in the District Court of the United States for the District of Kansas under section 5392 of the Revised Statutes of the United States, providing that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states

or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

By the third section of the act of June 14, 1878, c. 190, 20 Stat. 113, entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,'" (18 Stat. 21, c. 55,) it was provided, in reference to the affidavit required to be filed by any person applying for the benefits of that act, "that if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead-settler, or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases."

This act, and all laws supplementary thereto or amendatory thereof, were repealed by the act of March 3, 1891, entitled "An act to repeal timber-culture laws and for other purposes." But the repealing act declared that it should not affect any valid rights theretofore accrued or accruing under said laws, but all *bona fide* claims lawfully initiated before its passage might be protected on due compliance with law, in the same manner, on the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if the repealing statute had not been enacted. 26 Stat. 1095, c. 561.

The indictment charged, in substance, that the accused, for the purpose of contesting a named timber-culture claim that had been made and entered in the proper land office at Wichita, Kansas, presented himself before H. P. Wolcott, the

duly appointed, qualified, and acting register of the United States land office at Larned, in the second division of the District of Kansas, and authorized by law to administer oaths in contests relating to timber-culture entries; that the accused, after being sworn by the said register to testify the truth, the whole truth, and nothing but the truth touching his right to enter such contest, did knowingly, wilfully, feloniously, and falsely testify to certain facts (fully set out in the indictment) material to the proceeding of contest; that his testimony was embodied in a deposition, subscribed and sworn to by him before said register, and was by him stated to be true when he did not believe it to be true, and that in so doing he wilfully and corruptly committed perjury, etc.

At the time of the trial there were pending in the court below two other separate indictments, one against Thomas Bucklin and one against George Elder, each of whom was indicted for perjury growing out of the same transaction as that set out in the indictment against Daniel A. Bucklin.

By order of the court the three cases were consolidated and tried at the same time and by the same jury.

Upon the conclusion of the evidence, and after receiving the instructions of the court, and hearing the argument of counsel, the jury retired, and, having deliberated three days, without making a verdict, came into court, in a body, and through their foreman propounded to the court this question: "Can we find a verdict as to some of the defendants and disagree as to the others?" The court answered, "You can find a verdict of guilty as to all, a verdict of not guilty as to all, or you can find some guilty and some not guilty, but you cannot find a verdict as to some and disagree as to others." To this action of the court the accused excepted.

The jury again retired, and returned a verdict of guilty as to Daniel A. Bucklin, and not guilty as to each of the other defendants.

Motions for new trial and in arrest of judgment having been successively made and overruled, the defendant was sentenced to hard labor in the penitentiary for the term of one year and six months and to pay a fine of one hundred dollars.

Opinion of the Court.

1. It is assigned for error that the court below consolidated the three indictments, and permitted them to be tried together. As the charges against the defendants, respectively, grew out of the same transaction, both the court and the defendants may have deemed it convenient to have all the cases tried at the same time and by the same jury. It is consistent with the record that the plaintiff in error preferred that the jury which tried the other defendants should try him. But as it does not appear that the plaintiff in error objected at the time to being tried by the same jury with the other parties indicted, nor that he excepted to the order of consolidation, we need not consider whether that order, if objected to seasonably, could have been properly made. He cannot now complain of the action of the court. *Logan* v. *United States*, 144 U. S. 263, 296.

2. One of the grounds for arrest of judgment was that the indictment does not state an offence under the laws of the United States. This point does not seem to be pressed in the brief of counsel. It is without merit. The indictment conforms, in every substantial particular, to section 5396 of the Revised Statutes, providing that "in every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

3. It is assigned for error that the court overruled the defendants' motion for a new trial. A refusal to grant a new trial cannot be reviewed upon writ of error. *Blitz* v. *United States*, 153 U. S. 308, 312; *Wheeler* v. *United States*, 159 U. S. 523.

4. But there was error prejudicial to the accused in the

instruction to the jury that while they might find a verdict of guilty as to all three defendants on trial, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others.

The learned Assistant Attorney General refers to section 1036 of the Revised Statutes, providing that "on an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury." He properly insists that that section is not, in terms, applicable to separate indictments, tried together. But he frankly states that the instruction is so clearly erroneous as to suggest the possibility of a mistake in the bill of exceptions.

Upon a careful examination of the record we find nothing that justifies the assumption that a mistake occurred in the preparation of the bill of exceptions.

Taking the record as disclosing all that occurred at the time the jury came into court for additional instructions, there was error in the ruling that the jury could not find a verdict as to some of the defendants and disagree as to others. The jurors had been deliberating for three days without returning a verdict as to either of the defendants, when they were instructed that their duty was either to find each defendant not guilty, or each guilty, or some guilty and the others not guilty. If some of the jurors wavered in their minds as to the guilt of all the defendants — and the delay in returning the verdict justifies the belief that such was the fact — it may be that the instruction of which complaint is made worked injury to the plaintiff in error. We cannot say that it did not. To say that the court would not receive from the jury a report of a disagreement as to one defendant was, in effect, to announce that the jurors would be held together until the court should deem it to be its duty to discharge them finally, and would not be discharged unless or until they returned a verdict of guilty or not guilty. This tended to coerce the jury into making a verdict. The accused was entitled, of right, to go

before a new jury, if the one that tried him was unable to agree that he was guilty of the offence charged.

As it was competent for the jury to return a verdict of guilty or of not guilty as to the defendants Thomas Bucklin and George Elder, and to report a disagreement as to Daniel A. Bucklin, the instruction complained of must be held to have been erroneous; and as this error may have injuriously affected the rights of the accused, the judgment is reversed, with directions to grant him a new trial.

Reversed.

THE BAYONNE.

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

No. 215. Submitted November 18, 1895. — Decided December 2, 1895.

The District Court of the United States for the Southern District of New York has monthly terms. The decree in this case was entered December 21, and an appeal allowed December 31, 1892. On the 17th of the following January, during a new term of the court, the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. *Held*, that if that assignment could be treated as a certificate, it came too late, and, as there was nothing in the record prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record *nunc pro tunc*.

The filing of an assignment of errors in a Circuit Court, by order of that court and the taking a general appeal and its allowance by that court, is not a compliance with the statutory provision in the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, and is not equivalent to the certificate required by that act.

In so deciding the court must not be understood as intimating any opinion upon the question whether jurisdictional questions existed, within the meaning of § 5 of the act of March 3, 1891.

In re Lehigh Mining & Manufacturing Co., 156 U. S. 322, and *Shields* v. *Coleman*, 157 U. S. 168, distinguished from this case.

THIS was a libel filed by the United States in the District

Court for the Southern District of New York to recover a penalty from the steamship Bayonne, under the act of Congress approved June 29, 1888, entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and prevent such offences." 25 Stat. 209, c. 496. The first section of that act provides:

"That the placing, discharging, or depositing, by any process or in any manner, of refuse, dirt, ashes, cinders, mud, sand, dredgings, sludge, acid, or any other matter of any kind, other than that flowing from streets, sewers, and passing therefrom in a liquid state, in the tidal waters of the harbor of New York, or its adjacent or tributary waters, or in those of Long Island Sound, within the limits which shall be prescribed by the supervisor of the harbor, is hereby strictly forbidden, and every such act is made a misdemeanor, and every person engaged in or who shall aid, abet, authorize, or instigate a violation of this section, shall, upon conviction, be punishable by fine or imprisonment, or both, such fine to be not less than two hundred and fifty dollars, nor more than two thousand five hundred dollars, and the imprisonment to be not less than thirty days, nor more than one year, either or both united, as the judge before whom conviction is obtained shall decide, one-half of said fine to be paid to the person or persons giving information which shall lead to conviction of this misdemeanor."

The act further provides for the punishment of every master, engineer, or person or persons acting in such capacity, respectively, on board of any boat or vessel, who shall knowingly engage in towing any scow, boat, or vessel loaded with prohibited matter to an unauthorized place of deposit; requires masters of scows and boats carrying such matter to apply to the supervisor of the harbor for a permit defining the precise limits within which their contents might be discharged, and provides for a remedy in admiralty by the concluding paragraph of section four, which reads as follows: "Any boat or vessel used or employed in violating any provision of this act, shall be liable to the pecuniary penalties

Statement of the Case.

imposed thereby, and may be proceeded against summarily by way of libel in any District Court of the United States having jurisdiction thereof."

The supervisor of the harbor, assuming to act under and by virtue of the statute, directed that the prohibited matter must not be deposited "except to the south and east of a certain white spar buoy, known as the 'Mud buoy,' which buoy is three miles south of Coney Island and located as follows: Stone Beacon light bearing west $\frac{3}{4}$ south, distant $4\frac{1}{2}$ miles; West Brighton observatory bearing northwest by south $\frac{1}{2}$ north, distant $3\frac{1}{2}$ miles; Sandy Hook lighthouse bearing southwest, distant 6 miles; Scotland lightship bearing south $\frac{1}{2}$ west, distant $6\frac{1}{4}$ miles; Sandy Hook light bearing south southwest, distant $7\frac{3}{4}$ miles."

Certain ashes were dumped from the deck of the Bayonne into tidal waters, not to the south and east of the Mud buoy, but to the southward and westward thereof, at or near the mouth of Gedney's channel, at a point more than three miles from Sandy Hook and more than three miles from Coney Island and the shore of Long Island. These ashes were dumped by the direction of the mate for the relief of the ship in the usual course of her navigation, the vessel being at the time about twenty minutes beyond Sandy Hook, contrary to the orders of the master, which were that ashes should not be put overboard until the ship was an hour at sea after the pilot left her, and this constituted the alleged use and employment of the vessel in violation of the act of Congress.

It was adjudged by the District Court that by force of the statute and of the definition of the limits by the supervisor where the deposit of ashes must take place, the steamship became liable to a penalty of $250, for which sum, with costs, a final decree was entered in favor of the United States, December 21, 1892. On the 31st of December the claimant filed the following prayer for appeal:

"The above-named claimant, John Edward Payne, considering himself aggrieved by the final decree entered in this cause on the 21st day of December, 1892, hereby appeals

from said decree to the United States Supreme Court upon the ground that this court was without jurisdiction to make the said decree; and thereupon he prays that his said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made may be sent up, duly authenticated, to the United States Supreme Court."

This was endorsed by the District Judge "appeal allowed."

On January 17, 1893, the following assignment of errors was filed as of December 31, 1892, by direction of the District Judge that the same should be filed *nunc pro tunc:*

"The learned court below erred in taking jurisdiction of the cause and entering a decree against the steamship Bayonne in the following particulars:

"First. Because the act in question creates no lien enforceable *in rem* except as against a boat or vessel used or employed in violating some provision of the act, whereas the Bayonne was not used or employed in violating any provision of the act.

"Second. Because the act does not create a lien enforceable against the Bayonne *in rem* to recover the penalties to which the person or persons who committed the offence complained of may have been subject under section one of the act.

"Third. Because if the act does create a liability on the part of the Bayonne for the pecuniary penalty to which the person or persons who committed the offence may be subject under section one of the act, such penalty is not recoverable against the Bayonne *in rem* without a previous imposition of the fine upon the offender or offenders.

"Fourth. Because the limits within which the deposit of refuse matter was intended to be prohibited have never been drawn by the supervisor of the harbor in accordance with the requirements and specifications of the act or in accordance with law, and therefore the deposit of ashes at the place they were deposited by a person or persons from the deck of the Bayonne did not constitute an offence for which the Bayonne can be held responsible under the provisions of the act."

Statement of the Case.

The appeal was duly prosecuted and the record filed in this court February 20, 1893.

A motion to dismiss having been made, appellant served notice of a motion "to remand this cause to the District Court for the purpose of having annexed to the record a certificate distinctly certifying to this court the jurisdictional questions involved in this appeal, or in the alternative for a writ of *certiorari* to have such certificate annexed to the transcript of record." Annexed to this motion was a certificate by the district judge, filed November 8, 1895, which, after stating the case, continued as follows:

"I further certify that the questions of jurisdiction involved in the said appeal of the claimant are:

"1. Whether the said steamship Bayonne, by reason of ashes being dumped from her deck by the order of her mate, contrary to the directions of the captain, was 'used or employed in violating any provision of this act,' within the meaning of the fourth section of said statute, so as to create a lien against the vessel enforceable by proceedings *in rem* to recover the penalty therein and thereby provided.

"2. The first section of the statute provides as follows [Here followed section already quoted].

"A further question of jurisdiction involved in the claimant's appeal is, whether the supervisor of the harbor, by simply prescribing that all refuse, dirt, ashes and other prohibited matter must be deposited to the eastward and southward of the said Mud buoy, has prescribed the limits within which the deposit of ashes and other prohibited matter is strictly forbidden as required by the above first section of the act, and, if so, whether the limits so prescribed are within the 'tidal waters of the harbor of New York, or its adjacent or tributary waters,' so as to make the deposit of the said ashes from the deck of said steamer, under the circumstances stated, and at the place specified, a violation of the statute, subjecting the steamer to the penalty therein provided."

This certificate was directed by the District Judge, November 8, 1895, to be filed *nunc pro tunc* as of January 17, 1893.

The motion to dismiss and the cross-motion to remand for certificate or for *certiorari* were submitted on briefs.

Mr. Solicitor General Conrad for the motion to dismiss.

Mr. J. Parker Kirlin opposing.

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

No question as to the constitutionality of the act of Congress arises on this appeal, but it is contended that the jurisdiction of the District Court was in issue, and that therefore the appeal was properly taken directly to this court. But the judiciary act of March 3, 1891, provides that in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certified to this court for decision, the inquiry being limited to the question thus certified. *United States* v. *Jahn*, 155 U. S. 109, 113.

In *Maynard* v. *Hecht*, 151 U. S. 324, we held that a certificate from the court below of the question of jurisdiction to be decided was an absolute prerequisite to the exercise of jurisdiction here, and indicated by reference to the settled rules in relation to certificates of division of opinion in what manner we thought the certificate should be framed.

In *Colvin* v. *Jacksonville*, 158 U. S. 456, it was decided that such certificate must be granted during the term at which the judgment or decree is entered.

The District Court of the United States for the Southern District of New York has monthly terms. Rev. Stat. 572. The decree here was entered December 21, and the appeal allowed December 31, 1892. On the seventeenth of the following January, during a new term of the court, the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. If that assignment could be treated as a certificate, it came too late, and, as there is nothing in the record prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that

term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record *nunc pro tunc*. *Hickman* v. *Fort Scott*, 141 U. S. 415, 418; *Michigan Insurance Bank* v. *Eldred*, 143 U. S. 293, 299. We do not, however, regard the assignment of errors, and the action of the court in directing it to be filed, as a compliance with the statutory provision and equivalent to the certificate required.

The certificate of November 8, 1895, which gives a statement of the case and certifies certain specific questions as questions of jurisdiction, was also wholly unavailing at that date.

Nor do we think that the allowance of the appeal can be treated as a certificate. The prayer for appeal did, indeed, state that claimant appealed "upon the ground that this court was without jurisdiction to make the said decree," but it specified no question of jurisdiction, and asked "that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up," as if the appeal were on the whole case. The entry of the district judge thereon was "appeal allowed." This was wholly insufficient to subserve any other than the ostensible purpose.

In the case of *The Lehigh Mining and Manufacturing Company*, 156 U. S. 322, the defendant in an action of ejectment filed two pleas to the jurisdiction of the court, which pleas were sustained, and judgment thereupon entered as follows: "And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit." A bill of exceptions was taken, in which it was declared that the court "held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court, the plaintiff did then and there except." The plaintiff then prayed for a writ of error from this court, which was allowed by an order under the hand of the judge, and entered of record, reciting the final judgment entered, "dismissing the

said case because the said court, in its opinion, did not have jurisdiction thereof," and the plaintiff prayed for a writ of error "upon the said question of jurisdiction," and averring "that said writ of error be allowed and awarded as prayed for." Under these circumstances it was thought that the question was sufficiently certified.

In *Shields* v. *Coleman*, 157 U. S. 168, a receiver appointed by a state court intervened in a suit in the Circuit Court of the United States for the recovery of possession of railroad property from the receiver of the Circuit Court, and, his application having been denied, he prayed an appeal to this court from the decree and interlocutory orders by which the Circuit Court assumed and asserted jurisdiction over the property. The Circuit Court allowed the appeal by an order stating "this appeal is granted solely upon the question of jurisdiction," and reserving to the court the right, which it subsequently exercised, of determining what portion of the proceedings should be incorporated into the record for the purpose of presenting that question. We entertained jurisdiction in that case also. But we are of opinion that this case cannot be brought within either of those last cited.

The conclusion is that this appeal must be dismissed for want of jurisdiction, because of the lack of the proper certificate, a defect which cannot now be supplied. We have assumed that jurisdictional questions existed, within the meaning of section 5 of the act of March 3, 1891, though not properly raised, but we do not wish to be understood as intimating any opinion on that subject.

Appeal dismissed.

ANSBRO v. UNITED STATES.

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

No. 588. Argued November 19, 1895. — Decided December 2, 1895.

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826.

If the jurisdiction of a Circuit Court is questioned in order that this court take jurisdiction it is necessary that there should be a certificate of such question to this court.

THE case is stated in the opinion.

Mr. Albert A. Wray for plaintiff in error. *Mr. James Emerson Carpenter* and *Mr. John F. Foley* were with him on the brief.

Mr. Assistant Attorney General Whitney for defendant in error.

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

John Ansbro was indicted for the crime of dumping injurious deposits within the harbor and adjacent waters of New York city, in violation of the act of Congress of June 29, 1888, (25 Stat. 209, c. 496,) was tried before Judge Benedict and a jury in the Circuit Court of the United States for the Southern District of New York, convicted, and sentenced December 20, 1894, to six months' imprisonment. There were six counts in the indictment against him, three of which were waived by the district attorney; he was acquitted upon two and convicted upon the second count alone. The act in question is entitled "An act to prevent obstructive and injurious deposits within the harbor and adjacent waters of New York city, by dumping or otherwise, and to punish and pre-

vent such offences," and has just been referred to in the case of *The Bayonne*, *ante*, 687.

By its first section the discharge or deposit of refuse, dirt, ashes, mud, and other specified matter, in the harbor of New York city or adjacent waters within the limits prescribed by the supervisor of the harbor, is forbidden; every such act made a misdemeanor; and every person engaged in or who shall aid, abet, authorize, or instigate a violation of the section, subjected to a punishment therein prescribed. Section two provides that every master and engineer on board of any boat or vessel who shall knowingly engage in towing any scow, boat, or vessel loaded with such prohibited matter to any point or place of deposit or discharge in the waters of the harbor of New York or in its adjacent or tributary waters. or in those of Long Island Sound, or to any point or place elsewhere than within the limits defined by the supervisor of the harbor, shall be deemed guilty of a violation of the act, and punished as provided. Section three, under which Ansbro was convicted, is as follows:

"That in all cases of receiving on board of any scows or boats such forbidden matter or substance as herein described, it shall be the duty of the owner or master, or person acting in such capacity, on board of such scows or boats, before proceeding to take or tow the same to the place of deposit, to apply for and obtain from the supervisor of the harbor appointed hereunder a permit defining the precise limits within which the discharge of such scows or boats may be made; and any deviation from such dumping or discharging place specified in such permit shall be a misdemeanor within the meaning of this act; and the master and engineer, or person or persons acting in such capacity, on board of any towboat towing such scows or boats, shall be equally guilty of such offence with the master or person acting in the capacity of the master of the scow, and be liable to equal punishment."

The punishment prescribed by sections one and two of the act consists of fines of not less than $250 or more than $500, or imprisonment not less than thirty days or more than one year, or both.

Opinion of the Court.

Ansbro sued out a writ of error from this court, and we are met on the threshold of the case with the question whether we can take jurisdiction. Under section five of the judiciary act of March 3, 1891, appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts directly to this court in any case in which the jurisdiction of the court is in issue and the question of jurisdiction is certified from the court below for decision; in cases of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the Constitution of the United States; and in any case in which the constitutionality of any law of the United States is drawn in question.

The offence for which Ansbro was indicted is not punishable by imprisonment for a term of over one year or at hard labor; and persons convicted thereof cannot be sentenced to imprisonment in a penitentiary. Rev. Stat. §§ 5541, 5542. Ansbro was not convicted, therefore, of an infamous crime.

If the jurisdiction of the Circuit Court was in issue, no certificate of such question of jurisdiction to this court for decision appears in the record, and without such certificate the case is not properly here on that ground.

The jurisdiction of this court must be maintained then, if at all, on the ground that this is a case "that involves the construction or application of the Constitution of the United States," or "in which the constitutionality of any law of the United States is drawn in question." But we cannot find that any constitutional question was raised at the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

A case may be said to involve the construction or application of the Constitution of the United States when a title, right,

privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. *Borgmeyer* v. *Idler*, 159 U. S. 408; *Carey* v. *Railway Company*, 150 U. S. 170; *In re Lennon*, 150 U. S. 395; *Northern Pacific Railroad Company* v. *Amato*, 144 U. S. 465, 472; *Sayward* v. *Denny*, 158 U. S. 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.

Writ of error dismissed.

LITTLE ROCK AND MEMPHIS RAILROAD COMPANY *v.* EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY.

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

Argued and submitted November 14, 1895. — Decided December 2, 1895.

No appeal could be taken to this court from a decree in a Circuit Court made on the 1st of October, 1891, in a case like this case.

THE case is stated in the opinion.

Mr. U. M. Rose and *Mr. G. B. Rose*, for appellant, submitted on their brief.

Mr. John F. Dillon, (with whom was *Mr. Winslow S. Pierce* and *Mr. Rush Taggart* on the brief,) for St. Louis, Iron Mountain and Southern Railway Company, appellee.

Opinion of the Court.

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

This was a bill in equity filed by the Little Rock and Memphis Railroad Company against the East Tennessee, Virginia and Georgia Railroad Company and the St. Louis, Iron Mountain and Southern Railroad Company in the Circuit Court of the United States for the Western District of Tennessee, April 13, 1889, praying for a mandatory injunction against the defendants, requiring them to afford complainant "the same equal facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable." Defendants filed their joint and several demurrers July 17, 1889, and on the first of October, 1891, the cause having theretofore been submitted to the court, a final decree was entered dismissing the bill of complaint for want of equity, from which decree complainant prayed an appeal to this court, which was allowed and duly perfected.

By the fifth section of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, appeals or writs of error can be taken directly to this court in six classes of cases there enumerated, and the case before us falls within none of them. Jurisdiction as existing before the passage of the act was preserved by a joint resolution of March 3, 1891, 26 Stat. 1115, as to pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. In this case the decree was not rendered until the first day of October of that year. It follows that the appeal must be dismissed. *National Exchange Bank* v. *Peters*, 144 U. S. 570.

By the sixteenth section of the interstate commerce act, (24 Stat. c. 104, 379; 25 Stat. c. 382, 855,) it was provided that where the commission had made any lawful order or requirement, and a party refused to obey or perform it, it should be lawful for the commission, or any person or company interested therein, to apply to the Circuit Court sitting in equity for the enforcement of such order; and it was further provided, in respect of the action of the Circuit Court, that "whenever the subject in dispute shall be of the value of two

thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal." In *Interstate Commerce Commission* v. *Railroad Company*, 149 U. S. 264, where an appeal was taken directly to this court after July 1, 1891, from an order in a proceeding under that act, we held that it would not lie. Certainly there can be no different result in this case.

Appeal dismissed.

APPENDIX.

I.

In Memoriam.

HOWELL EDMONDS JACKSON, LL.D.

SUPREME COURT OF THE UNITED STATES.

Monday, November 25, 1895.

Present: The Chief Justice,
Mr. Justice Field,
Mr. Justice Harlan,
Mr. Justice Gray,
Mr. Justice Brown,
Mr. Justice Shiras, and
Mr. Justice White.

Mr. Attorney General addressed the court as follows:

It is with more than a sense of official propriety that I comply with the request of the bar by presenting to the court their resolutions relating to the late Justice Jackson. We of his home circuit knew him best. There were his birthplace and his home. There his first regular judicial work was done, by which he made the reputation that led to the call from across the party wall to a seat beside Your Honors.

The active bar always feel some misgivings when a man in public life, even though he has won distinction there, is called to the bench, especially when he has reached middle age. But they soon found that Howell Edmonds Jackson was not so much a senator who had been appointed judge as a judge who had served for a time as senator. His mind, naturally broad and strong, symmetrically

developed, controlled by steady purpose, and directed by industry which seemed almost weariless, would have enabled him to fill with credit any place which requires such qualities. He had so filled the high positions to which the resolutions refer, but he was peculiarly fitted for the duties of a judge. He had in high degree patience to hear and consider, and firmness to decide. He had an even temper, judgment unprejudiced toward men or things, and a logical turn of mind which naturally shed irrelevance and sophistry and inclined to accuracy of fact and correctness of conclusion. He loved justice in the concrete as well as in the abstract and felt the pleasure a strong judge always takes in applying the principles of law to the redress of wrongs; but he knew and loved the system of judicial science too well to wrench or impair it, and unsettle the rights of the great body of the people, in seeking to avoid those occasional hardships against which human law, being necessarily general, cannot provide. So his decisions were of the kind which build and perfect our jurisprudence, and not a series of mere arbitrary judgments. There are few among them which the legal mind hesitates to adopt among the precedents which keep the law in healthful life and growth.

He was never chargeable with the blunders of a careless man or the vacillations of a weak one, but won respect even when he failed to convince, because he reached his conclusions by the broad highways and not by indirection or evasion.

Some have excelled him in extent of learning and others in mere force of intellect, but few have equalled him in the comprehensive perception and abiding sagacity which result from a harmony of powers. His vigorous practical understanding was not to be bewildered by details, confused by doubtful or conflicting precedents, nor misled by refinements of reasoning. His decisions always bore the stamp of his own mind and character.

Absorbed as he was in the exacting duties of the circuit, his health was shaken before he realized it, but he never lost patience or resolution. The vigor he showed as a member of this court in the number and promptness of his opinions, as well as by their lucid thoroughness, was in spite of the dragging of disease. And one of the most striking instances of the calm heroism of peace was the resumption of his place when the public interest required it in the income tax case. However opinion, legal and lay, was and may remain divided on the questions involved in that case,

there is, and will be, no divided judgment about the high qualities shown by the opinion of Mr. Justice Jackson, which all feared would be, and which was, his last. Though the effort required undoubtedly hastened the end, no true friend or patriot can feel regret, because it has put on imperishable record an example of devotion to public duty whose worth cannot be too highly esteemed.

The feeling of personal bereavement which prevails to a very unusual extent among those who knew Justice Jackson seems to me the highest tribute to his memory. There is no warmth in mere mental power or acquirement, nor in the most careful correctness. These may kindle admiration or envy, but not the affection which is the best tribute of man to man. I do not mean the mere result of pleasant ways, but the sturdy liking implied in the line —

"He makes no friends who never made a foe."

He had a kind and considerate nature, but it did not blind him to his duty, nor swerve him from it; and he was free from that morbid excess of virtue which makes some good men unjust to their friends.

Reputation and honors did not affect his quiet simplicity, nor add to the unobtrusive dignity which needed no assertion.

The entire life of Justice Jackson illustrates the efficiency of steadfast devotion to duties which come without self-seeking and are met with diligence, earnestness, and sincerity of mind and purpose. His seven years as Circuit Judge gave him time to accomplish a most honorable career. Few positions put capacity and character to so severe a test as the office of judge of a court of first resort and general jurisdiction. This applies with great fitness to the sixth circuit, whose four States, reaching from Lake Superior to the Appalachian Range, like a cross-section of the great Republic, present almost every variety of population, business, and laws. Such a judge must admit and exclude evidence, sift, discern, and analyze facts, and apply legal principles generally, all without the advantage of associates, sometimes with slight aid from counsel, and often with little opportunity for study and reflection. Many of his judgments are final, and few are open to complete review; but every act and utterance undergo the impartial and unerring scrutiny of the bar and the people.

The powers of this highest of all tribunals are too great to be

committed to one man alone. Their exercise is placed beyond the reach and above the need of review by the association of minds which stimulate, aid, and correct each other. Who may so fitly join in the deliberations of such a court as those who have stood the highest tests which the profession affords?

Justice Jackson's career as a member of this court was cut short by his untimely death; but he served long enough to confirm the fitness of his selection and sharpen still further our sense of loss. Whoever shall be called to take that vacant place will find it none the easier to fill because it was last held by Justice Jackson.

The Resolutions are as follows:

The committee appointed at a meeting of the bar of the Supreme Court of the United States, held in the Supreme Court room at the city of Washington, October 14, 1895, in memory of Mr. Justice Jackson, to draft resolutions to be reported at an adjourned meeting, present for consideration the following:

On August 8, 1895, Mr. Justice Howell Edmonds Jackson departed this life at his home, near Nashville, Tennessee.

He was born at Paris, Tennessee, in 1832, obtained his academic education in his native State, graduated at the University of Virginia, and took the degree of bachelor of laws at the Cumberland University, in Tennessee.

He practised law at Jackson and Memphis before the civil war, and at once displayed those qualities which gave promise of the high rank which he subsequently attained in the profession.

He was an earnest believer in the doctrines of the Whig party, was devoted to the Union, and opposed secession. After his native State passed the ordinance of secession and was threatened with invasion, he, like so many others who would have sacrificed their lives, if by this they could have removed the cause of strife and assured a happy union, adhered, with all of the ardor of his nature, to the side his people had chosen in the conflict. The war suspended the activities of civil life, and holding an office under the Confederate Government, which, while one of great trust, left him much leisure, he devoted himself throughout the war to the most laborious and systematic study of the law, thus acquiring an accuracy and breadth of legal knowledge which made him so fully equipped for all of the responsible duties which came to him.

After the close of the civil war he practised law in Jackson and

Memphis, and achieved a reputation second to none of his competitors. His practice was varied, embracing office work of the most delicate and responsible character, and litigation in all of the state and Federal courts, and while his services were justly prized as a counsellor and as a chancery and supreme court lawyer, he was no less successful in the severest jury contests, where he achieved great triumphs, not by the graces of oratory, which he never cultivated, nor the meretriciousness of cunning advocacy, which he scorned, but by candor and earnestness, which won the confidence of the jury, and clear, forcible, and logical arguments, which convinced them.

On account of his reputation as a man and lawyer, he was called to a seat upon the court of referees of Tennessee, which was a provisional supreme court created to assist the regular court to dispose of the vast accumulation of cases occasioned by the civil war. He served on this court with great credit until its term expired.

Though never having taken any active part in politics, he consented, on account of his great interest in the question of the settlement of the state debt of Tennessee, to become a candidate on the state credit ticket for the state senate.

Following the custom established by immemorial usage in Tennessee, he met his opponent in joint debate and made the canvass with so much ability and persuasiveness as to win his election in a heated contest, in which he advocated high taxes, the most unwelcome cause that could be championed.

This, though not suspected by him, was the initial point of his national career. A deadlock in the selection of a United States Senator, for which position he was not a candidate, was suddenly solved by his political opponents, who, moved by an estimate of his character like that which, on a later occasion, caused the President to nominate him to the Supreme Bench, came to his support as soon as his friends put his name before the legislature; and, coöperating with a majority of his own party, elected him on the first ballot. The offices of United States Senator, Circuit Judge, and Justice of the Supreme Court all came to him in unbroken succession and without expectation or effort on his part.

His career in these honorable and responsible positions is too well known to need recapitulation.

His performance of the labors of his office, even when the hand of death rested heavily upon him, will always remain a pathetic

and inspiring picture in the memory of those who saw his heroic efforts.

He was profoundly religious, and an elder in the Presbyterian Church.

His manner was reserved, and yet no one found him difficult of approach. He was frank and courageous in expressing his opinions of men and measures, yet free from bitterness and personal invective. He was serious in affairs, but in the company of friends was always jovial, enlivening conversation with sprightly humor and pointed anecdote. He felt and maintained the dignity of his office and yet with those amenities which in a judge invest the intercourse between bench and bar with an atmosphere which is as wholesome as it is gracious.

He displayed exact learning, laborious investigation, unfaltering courage, absolute impartiality, and broad patriotism; therefore, be it

Resolved, That the members of the bar of the Supreme Court of the United States, profoundly impressed with the great loss sustained by the profession and the nation in the untimely death of Mr. Justice Jackson, desire to record their esteem for the qualities which distinguished his short career on the Supreme Bench, and which gave such perfect assurance that he was a worthy successor of those distinguished judges who have administered, with such fidelity and ability, the greatest trust ever confided by a nation.

Resolved, That we deeply sympathize with the bereaved family of Mr. Justice Jackson and that a copy of these resolutions be presented to them by the secretary of this meeting.

Resolved, That the Attorney General be requested to present these resolutions to the Supreme Court in session and request that they be recorded.

The Chief Justice responded:

Mr. Justice Jackson took his seat as a member of this court on the 4th of March, 1893, serving for the remainder of the current term, which closed on the 15th of May; sat through the next term, the month of March excepted; and heard argument in a few cases at October term, 1894.

Perhaps no greater eulogium can be passed on him than to say that, brief as was the period during which he was permitted to be with us, he impressed himself upon his colleagues and the country

as possessed of the highest attributes of the judicial officer, and left enduring evidence of judicial eminence on the records of the court.

There was no eccentricity in his success. He came here with a mind disciplined by years of experience in business and political activities, in an extensive professional practice and in the discharge of judicial duties and stored with knowledge of affairs as well as of books, knowledge qualifying him to deal with questions promptly and with practical wisdom, rather than knowledge of things "remote from use, obscure and subtle."

Patience in hearing; assiduity in examination; quickness in grasp; clearness in thought; facility, simplicity, and directness in expression; all these he had, and they enabled him to find the clew in records however lost in wandering mazes and make it plain for guidance to correct results.

He profoundly realized that the administration of justice is the great end of human society, and that upon the conscientious labors of those to whom that administration is committed the protection of life and liberty and property depends, and so the endeavor to do justice ran like a golden thread through all his work. Added and superior to all other grounds of praise, it could well be said of him, as an eminent English judge said of himself, that there was one merit to which he could boldly lay claim — the determination to do what was right, whenever that could be discovered.

Of the cordial relations between Mr. Justice Jackson and his brethren, which his engaging qualities of mind and heart rendered of the closest, I do not care to speak. We part with him with a keen sense of personal bereavement as he takes his place in the goodly company of those who have gone before, though still remaining with us one in the blood of common traditions and common labors.

There is little in the performance of judicial duty to attract popular attention or to win popular applause, but the influence of faithful service such as his — of labors so abundant — of a life shortened by effort in the public interest, "cut, like the diamond, with its own dust" — can scarcely be overestimated, and sooner or later will receive its meed of recognition.

The pathetic incident at the close of Mr. Justice Jackson's career, referred to by the Attorney General, was thoroughly

characteristic. Devotion to duty had marked his course throughout, and he found in its inspiration the strength to overcome the weakness of the outward man, as, weary and languid, he appeared in his seat for the last time in obedience to the demand of public exigency. The response to the roll call under such circumstances gives complete assurance — though, indeed, it was not needed — that when, a few weeks later, he came to the passage of the river, Good Conscience, to whom in his lifetime he had spoken to meet him there, lent him his hand and so helped him over.

The resolutions and the remarks by which they have been accompanied will be entered on our records, and the court will now adjourn to Monday next.

II.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

It is ordered that the following additional rule of practice be, and the same is hereby, adopted:

39.

MANDATES.

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

November 25, 1895.

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ASSIGNMENT OF ERROR.

See JURISDICTION, A, 24.

BOUNDARY LINE.

The court appoints commissioners to run the disputed boundary line in accordance with its decision, announced May 19, 1890, 136 U. S. 479. *Indiana* v. *Kentucky*, 275.

CASES AFFIRMED.

Emert v. *Missouri*, 156 U. S. 296. *Rash* v. *Farley*, 263.

See JURISDICTION, A, 3, 5;
TAXATION, 1.

CASES DISTINGUISHED.

See JURISDICTION, A, 23.

COMMON CARRIER.

See RAILROAD.

CONSTITUTIONAL LAW.

1. A license to pursue any business or occupation, from the governing authority of any municipality or State, can only be invoked for the protection of one in the pursuit of such business or occupation so long as the same continues unaffected by existing or new conditions, which it is within the constitutional power of the legislature to enact. *Gray* v. *Connecticut*, 74.
2. The provisions in the statutes of Connecticut that a person selling or offering for sale, or owning or keeping with intent to sell or exchange, spirituous liquors, without having a license therefor, and that the granting of such license to a druggist shall be discretionary with the county commissioners, are not in conflict with any of the provisions contained in the Fourteenth Amendment to the Constitution of the United States. *Ib.*
3. When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not de-

prive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment to the Constitution of the United States. *Central Land Co.* v. *Laidley*, 103.

4. The act of the legislature of Massachusetts of June 1, 1867, c. 308, to enable the city of Boston to abate a nuisance, and for the preservation of the public health in said city, and which provided for the taking of certain private lands therein, and for their improvement, filling up, and complete draining, so as to abate an existing nuisance and preserve the health of the city, and which further provided for the payment of the cost of the lots so taken through judicial proceedings, was within the constitutional power of the legislature of that State, and the fee in said lands, when acquired by the city, passed to it under the act, and the previous owners ceased to have any interest in them, but were only entitled to reasonable compensation, to be ascertained in the manner provided by the act. *Sweet* v. *Rechel*, 380.
5. It is within the power of Congress to provide, for persons convicted of conspiracy to do a criminal act, a punishment more severe than that provided for persons committing such act. *Clune* v. *United States*, 590.
6. The provision in § 3959 of the Revised Statutes of Missouri that prisoners convicted two or more times of committing offences punishable by imprisonment in the penitentiary, shall be punished with increased severity for the later offences, does not in any way conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States. *Moore* v. *Missouri*, 673.
7. A State may provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence against the law, and that a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Ib.*
8. No question which could be regarded as a Federal question having been raised at his trial, the prisoner was not subjected to an unconstitutional ruling in not being allowed to have his case heard at large by seven judges, instead of by three. *Ib.*

See TAXATION, 3;
TOWNSHIP, 2.

CONTRACT.

The parties to these suits having had extensive dealings founded upon mutual agreements and arrangements respecting the manufacture of and licenses to manufacture patented articles, and having had serious misunderstandings touching their accounts, came to an agreement whereby the Thorn Company, in consideration of the sum of $10,000 paid to it by the Washburn and Moen Company, released and discharged the latter from all claims and demands of every kind and nature whatsoever, which it had or could have against that company for and on account of any moneys, properties, or valuable things

which the Washburn Company had received from any persons in settlement for damages or profits accruing to it, on account of infringements committed upon any letters patent, and also on account of any moneys which it had received by way of bonuses or premiums paid to it by parties receiving licenses from it; and discharged and released the Washburn Company from any obligation to account to the Thorn Company for any sums which it might thereafter receive in settlement of claims for damages for infringements prior to the date of that agreement, or for moneys which it should thereafter receive for bonuses or premiums for licenses. The parties worked under this agreement for several years, the Washburn Company paying and the Thorn Company receiving, without objection, from time to time considerable sums as royalties, etc., due thereunder, the Washburn Company settling with parties from whom the royalties were due, sometimes receiving cash in full, sometimes notes, and sometimes compromising on receipt of a lesser sum. After the lapse of about eight years the Thorn Company filed its bill in equity to set aside the agreement and the settlements made under it, claiming that it was entitled to a much larger sum than it had received; and the Washburn Company in its answer denied this claim and filed a cross-bill claiming to recover from the Thorn Company large sums which it had been obliged to yield to licensees in compromising settlements with them. *Held*, (1) That the agreement released the Washburn Company from claims for damages due at its date, but received subsequent thereto, and from claims for royalties due on its own products, or products of its licensees sold prior to its date; (2) that under the circumstances disclosed it was not open to the Thorn Company to claim that $10,000 was not a sufficient consideration for such release; (3) that the Thorn Company, by receiving, for so long a period, royalties as accruing and receipting for them as collected without challenging the accounts rendered, and by its delay in setting up claims for moneys received by the Washburn Company before the date of the agreement, and its delay in contesting settlements and compromises made by that company, must be deemed to have acquiesced in the construction put upon the contract by the Washburn Company, and to have assented to its settlements with licensees; and that the evidence showed no want of diligence or good faith by the latter company in this respect; (4) that the Washburn Company was not entitled to recover the sums claimed in its cross-bill. *Thorn Wire Hedge Co.* v. *Washburn & Moen Manufacturing Co.*, 423.

CONTRIBUTORY NEGLIGENCE.

See RAILROAD.

CORPORATION.

See JURISDICTION, B;
TOWNSHIP, 1, 2.

COURT AND JURY.

1. A request to instruct a verdict for the defendant should be disregarded when the evidence is conflicting. *White* v. *Van Horn*, 3.
2. A request to charge may be disregarded when the court has already fully instructed the jury on the point. *Ib.*
3. The court should refuse to charge upon a purely hypothetical statement of facts, calculated to mislead the jury. *Ib.*
4. An objection to one of a number of charges is unavailable when the charge, taken as a whole, fairly states the question which the jury is to decide by preponderance of proof. *Ib.*

CRIMINAL LAW.

1. An instruction on the trial of a person indicted for murder, whereby the verdict of guilty of murder or manslaughter turns alone upon an inquiry as to the way in which the killing was done, is held to be reversible error. *Brown* v. *United States*, 100.
2. The court committed no error in charging that the fact that the man killed was a white man might be shown by the statement of the defendant taken in connection with other facts and circumstances. *Isaacs* v. *United States*, 487.
3. It is not error in Utah to proceed to trial of a person accused of murder before the filing of the transcript of the preliminary examination had under the Compiled Laws of Utah, § 4883. *Thiede* v. *Utah Territory*, 510.
4. The provision in Rev. Stat. § 1033, that the defendant in a capital case is entitled to have delivered to him at least two entire days before the trial a copy of the indictment and a list of the witnesses to be produced on the trial does not control the practice and procedure of the local courts of Utah. *Ib.*
5. In Utah a juror in a capital case who states on his *voir dire* that he had read an account of the homicide in the newspaper and formed some impression touching it, but that he could lay that aside and try the case fairly and impartially on the evidence, is not subject to challenge for cause. *Ib.*
6. A juror is not subject to challenge for cause in a criminal proceeding against a saloon keeper for homicide, who states on his *voir dire* that he has a prejudice against the business of saloon keeping, but none against the defendant, whom he does not know. *Ib.*
7. When the relations between a defendant, charged with murdering his wife and the wife are to be settled, not by direct and positive but by circumstantial evidence, any circumstance which tends to throw light thereon may be fairly admitted in evidence. *Ib.*
8. Deliberation and premeditation to commit crime need not exist in the criminal's mind for any fixed period before the commission of the act. *Ib.*

9. An indictment for murder in the Eastern District of Texas which alleges that the accused and the deceased were not Indians nor citizens of the Indian Territory is sufficient, without the further allegation that they were not citizens of any Indian tribe or nation. *Wheeler* v. *United States*, 523.
10. When a verdict is general upon all the counts in an indictment, sufficient in form, it must stand if any one of the counts was sustained by competent testimony. *Goode* v. *United States*, 663.
11. In an indictment under Rev. Stat. § 5467, against a letter carrier charged with secreting, embezzling, or destroying a letter containing postage stamps, the fact that the letter was a decoy is no defence. *Ib.*
12. A letter addressed to a fictitious person, known to be such, is a letter within the meaning of the statute, and for the purposes of Rev. Stat. §§ 5467 and 5469 a letter which bears the outward semblance of a genuine communication, and comes into the possession of the employé in the regular course of his official business, is a writing or document within the meaning of the statute. *Ib.*
13. Where a general verdict of guilty is rendered, an objection taken to evidence admissible under one, or a part, of the counts, is untenable. *Ib.*
14. The term "branch post office," as employed in those sections, includes every place within such office where letters are kept in the regular course of business, for reception, stamping, assorting, or delivery. *Ib.*
15. It being shown, in this case, that the branch post office in which the offence was alleged to have been committed was known as the Roxbury station of the Boston post office, that it had been used as such for years, and that it was a post office *de facto*, it was unnecessary to show that it had been regularly established as such by law. *Ib.*
16. The consolidation of several indictments against different persons growing out of the same transaction, and the trial of all at the same time and by the same jury, if not excepted to at the time, cannot be objected to after verdict. *Bucklin* v. *United States* (*No. 2*), 682.
17. The indictment in this case, in every substantial particular, states an offence against the laws of the United States. *Ib.*
18. An instruction, on the trial of several defendants indicted separately for offences growing out of the same transaction, that, while they might find a verdict of guilty as to all the defendants, or find some guilty and some not guilty, they could not find a verdict as to some and disagree as to others, contains prejudicial error which may be taken advantage of by a defendant who is found guilty and convicted. *Ib.*

See CONSTITUTIONAL LAW, 5 to 8; HABEAS CORPUS, 1; EVIDENCE, 4, 5, 6, 7; JURISDICTION, A, 18, 19; LOCAL LAW, 1.

CUSTOMS DUTIES.

1. Goods arriving at the port of New York August 7, 1894, entered at the custom house and duties paid August 8, 1894, and the entry liquidated as entered at the custom house August 28, 1894, on which day the tariff act of August, 1894, became a law without the signature of the President, were subject to duty under the act of October 1, 1890, and not to duty under the act of August 28, 1894. *United States* v. *Burr*, 78.
2. The provision in § 1 of the tariff act of 1894, which took effect August 28 of that year, that from and after the first day of August, 1894, there shall be levied, collected, and paid upon articles imported from foreign countries the rates of duty prescribed by that act, does not apply to transactions completed when the act became a law. *Ib.*
3. The third question from the Circuit Court of Appeals is too general and need not be answered. *Ib.*
4. Lentils and white medium beans in a dry state, both mature and ordinarily used for food, though sometimes sold for seed, imported into New York in the years 1887 and 1888, were properly classified by the collector as vegetables under paragraph 286 of Schedule G of the act of March 3, 1883, c. 121, and as such were subject to a duty of ten per cent *ad valorem*. *Sonn* v. *Magone*, 417.
5. *Maddock* v. *Magone*, 152 U. S. 368, affirmed to the point that "in construing a tariff act, when it is claimed that the commercial use of a word or phrase in it differs from the ordinary signification of such word or phrase, in order that the former prevail over the latter it must appear that the commercial designation is the result of established usage in commerce and trade, and that at the time of the passage of the act that usage was definite, uniform, and general, and not partial, local, or personal." *Ib.*
6. Whether the lentils and beans were properly classified by the collector was a matter for the court to decide. *Ib.*
7. The plaintiffs in error imported into the port of New York in November, 1888, a quantity of wool which had been scoured; which was then put upon a comb from which it came in long lengths known as slivers or slubbing; which was then put through a process called gilling, which formed the slivers into a less number of slivers of greater thickness; and which was then taken into the drawing room and finished, from whence it came out in the form of round balls called tops. The collector first classed the goods as waste, and fixed the duty at ten cents a pound under the act of March 3, 1883, c. 121, 22 Stat. 488, which duty was paid; but subsequently the collector imposed on the whole importation, under the same act, a duty of ten cents a pound as wool of the first class, costing under thirty cents per pound in the unwashed condition; then trebled that duty, because imported scoured; and then doubled the result upon the ground that the tops had been changed in their character or condition for the purpose of evading the

duty. The importer declined to pay the excess of duty so imposed, and the United States commenced this action to recover it. *Held*, That the duty of sixty cents a pound was properly imposed, and that there was no error in the rulings of the trial court which are set forth in the opinion of this court. *Patton* v. *United States*, 500.

8. The plaintiff below imported into the port of New York in 1887 and 1888 a quantity of pieces of glass, cut in shapes to order and with bevelled edges, intended to be used in the manufacture of clocks. The collector classified them as "articles of glass, cut, engraved," etc., subject to a duty of 45 per cent *ad valorem*. The importer claimed that they were dutiable as "parts of clocks," and as such subject to a duty of thirty per cent *ad valorem;* paid the duty imposed under protest; and brought this action to recover the excess. The trial court instructed the jury that the burden was on the plaintiff to establish that the articles were parts of clocks; that in determining that question it would not be necessary for the jury to say that they were exclusively used for that purpose; that the fact that an article chiefly used for one purpose had been used by some for a purpose for which it was not originally intended would not change its tariff nomenclature; and if the jury should find that the articles were chiefly used as parts of clocks, that that would determine their tariff classification, but on the other hand, that they must be chiefly and principally used for that purpose; that if they are articles with no distinguishing characteristic, just as applicable for use in fancy boxes or in coach lamps as they are for clocks, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks, that they might be used for one purpose just as well as for another; and if the jury should find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles the verdict should be for the defendant. *Held*, that the instructions were manifestly correct, and that in giving the rule of chief use, the principles by which it was to be ascertained were fully stated exactly in accordance with the law announced by this court in *Magone* v. *Heller*, 150 U. S. 70. *Magone* v. *Wiederer*, 555.

9. Papers, coated, colored and embossed to imitate leather, and papers coated with flock, to imitate velvet, imported into the United States in 1888, were subject, under Schedule M of the tariff act of March 3, 1883, c. 121, to a duty of 25 per cent *ad valorem*, as "paper hangings . . . not specially enumerated or provided for in this act," and not to a duty of 15 per cent *ad valorem*, as manufactures of paper, or of which paper is a component material, not specially enumerated or provided for in this act. *Dejonge* v. *Magone*, 562.

DEED.

See LOCAL LAW, 3.

DISTRICT JUDGE.

1. There being a vacancy in the office of District Judge for the District of South Carolina from January 1, 1894, to February 12, 1894, and the term of that court for the Western District being fixed by law for the fifth day of February, 1894, one of the Circuit Judges of the circuit designated and appointed a Judge of one of the District Courts in North Carolina, within the same circuit, to hold and preside over that term. Court was so held and adjourned from day to day. February 12 a commissioned Judge appeared. Plaintiff in error was tried upon an indictment returned against him, found guilty and sentenced. *Held*, (1) That it is within the power of Congress to provide that one District Judge may temporarily discharge the duties of that office in another district; (2) that whether existing statutes authorized the appointment of the North Carolina District Judge to act as District Judge in South Carolina is immaterial; as, (3) he must be held to have been a judge *de facto*, if not *de jure*, and his actions, as such, so far as they affect third persons, are not open to question. *McDowell* v. *United States*, 596.
2. Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer *de facto*, and are binding on the public. *Ib.*

EMINENT DOMAIN.

1. The authority of a legislature to enact provisions for taking private property for public use rests upon its right of eminent domain; and it is a condition precedent to its exercise that the statute conferring the power make reasonable provision for compensation to the owner of the land. *Sweet* v. *Rechel*, 380.
2. Unless the constitution of the State in which the lands are situated requires payment or tender of payment for land so taken for public use before the rights of the public therein can become complete, a statute which authorizes the taking of the property for public use and directs the ascertainment of the damages without improper delay and in a legal mode, and which gives the owner a right to judgment therefor, to be enforced by judicial process, is sufficient to transfer the title. *Ib.*

EQUITY.

1. When a decree in chancery awards to a party in the suit a portion of a special fund, forming one of the matters in dispute therein, and denies to him the right to a part of a general fund, forming another and distinct matter in dispute, his acceptance of the awarded share in the special fund does not operate as a waiver of his right of appeal from so much of the decree as denies to him a share in the general fund. *Gilfillan* v. *McKee*, 303.
2. Where a decree is several as to different defendants, and the interest

represented by each is separate and distinct from that of the others, any party may appeal separately, to protect his own interests. *Ib.*

3. Some years before the commencement of the civil war, Cochrane, who had already acted as agent of the Choctaws in prosecuting their claims against the United States, contracted with them to continue to prosecute all their unsettled claims, and they contracted to pay him for such services thirty per cent of all sums collected through his efforts, when they should be paid by the United States. Under this contract he had collected a large amount when the war broke out, and the Choctaws sided with the South. On the termination of the war Latrobe was employed by the Choctaws in supporting such claims, and did valuable service. In 1866 Cochrane, being about to die, and desiring to secure pay for the services he had rendered, made a verbal arrangement for assigning the contract to Black, and by will authorized his executor to sell, assign or compromise his claims. He also recognized by his will that Lea was entitled to an interest in the contract equal to his own. This interest afterwards became vested in Gilfillian and his associates. Cochrane's executor, McPherson, agreed with Black for the continued prosecution of the claims on the terms named in the original contract, to which the Choctaws assented. Black and his partner, Lamon, and Lamon individually, continued acting under this contract until 1870, when the Choctaws made a new contract with McKee and his partner to prosecute their claims; and (the partner soon dying) this contract was executed by McKee. Under it the prosecutor was to receive thirty per cent of the amounts awarded, and it was provided that he should adjust the claims of all parties who had previously prosecuted claims for the Choctaws and should pay to the widow of Cochrane five per cent of the thirty per cent. In 1881 the question of the liability of the United States on these claims was referred to the Court of Claims and a judgment was rendered in favor of the Choctaws, which was substantially affirmed by this court, 119 U. S. 1. Congress then made an appropriation of $2,858,798.62 for the payment of that judgment. Before this appropriation was made, and in view of it, the Choctaw council recognized the contract with McKee, and another with Luce, as valid, and appropriated thirty per cent of the amount to be received from Congress under the appropriation to their satisfaction. The council also by the same act appropriated $14,140 as a sum shown to be due to Cochrane for services performed by him in his lifetime. After the passage of the appropriation bill by Congress McKee drew from the Treasury twenty-five per cent of the whole judgment, and Luce five per cent, the two making the thirty per cent. Suits in equity were then commenced against McKee by Lamon, as surviving partner of Black & Lamon; by Gilfillan and others interested with him; by McPherson as executor of Cochrane; and by Mrs. Latrobe as executrix of her husband; setting up their various claims upon the fund. McKee filed a bill of interpleader in

the Lamon case, and subsequent proceedings were had in the several suits as set forth in detail in this and the following two cases. They resulted in decrees that one-half of the special fund should be paid to McPherson, as executor of Cochrane, and the other half to Gilfillan and his associates; and that the general fund should be distributed to Cochrane's widow, to Latrobe, and to Lamon, in specified proportions. Lamon was awarded $35,000 and interest for his services and disbursements, and the claims of Lamon and Black, as assignees of the Cochrane contract, and as surviving partners, were disallowed. McPherson, as executor, appealed from so much of the decree as denied him participation in the general fund; Gilfillan and others from the decree distributing the general fund, and from a decree dismissing their cross-bill; McKee from the decree giving a distributive share in the general fund to Latrobe; and Lamon and Black from the decree disallowing their claim. *Held*, (1) That McPherson had a right of appeal from the decree excluding him from participation in the distribution of the general fund, although he had accepted payment of his share of the special fund; (2) that the sum awarded to Mrs. Cochrane by the Choctaws was intended as a donation to her, and not as compensation to Cochrane, and that the judgment of the court below to that effect should be sustained; (3) further holdings were made in regard to the contentions in *McKee* v. *Lamon*, *ante*, 317, and *McKee* v. *Latrobe*, *ante*, 327, which will be found set forth in the headnotes to those cases respectively. *Ib.*

4. On the facts set forth in the headnote to *Gilfillan* v. *McKee*, it is in this suit, further *Held*, (1) That when the Choctaws transferred the work from Black & Lamon to McKee, there was no intention on the part of anybody to ignore what had already been done; (2) that Lamon, as representing the surviving partners of Black, Lamon & Company, was entitled to recover the reasonable value of their services from the date of the assignment by McPherson to the date of the McKee contract. *McKee* v. *Lamon*, 317.

5. On the facts set forth in the headnote to *Gilfillan* v. *McKee*, just decided, it is further held that Latrobe was entitled to receive from the general fund the value of his services, and that their value was $75,000. *McKee* v. *Latrobe*, 327.

6. In a proceeding — commenced in a court of the State of Washington, under the statutes of that State, by filing a petition to set aside a judgment charged to have been obtained there through fraud and collusion between the plaintiff's attorney of record and the defendant's attorney of record, and against the plaintiff's instructions touching a pretended compromise — and removed on the defendant's motion to the Circuit Court of the United States for that Circuit, it is *Held*, that the cause, although in the nature of a bill in equity, remained, so far as the rights of the plaintiff were concerned, a special proceeding under the territorial statute, and that the powers of the

Federal court, in dealing with it, were gauged not merely by its general equity jurisdiction, but by the special authority given the state courts by statute. *Cowley* v. *Northern Pacific Railroad Co.*, 569.

7. Federal courts may enforce on their equity or admiralty side new rights or privileges conferred by state or territorial statutes as they may enforce new rights of action, given by statute, upon their common law side. *Ib.*

8. The averment in such a petition that the case was a case of fraud within the provisions of the statute of the State was sufficient to give the Federal court jurisdiction to act under the statute, and such jurisdiction could not be defeated by proof that no fraud was actually committed; but the plaintiff would be entitled to recover if he were able to show that he never assented to the pretended compromise, or that he repudiated it, and revoked the authority of his attorneys. *Ib.*

See CONTRACT; MORTGAGE;
JURISDICTION, B; TRUST.

ESTOPPEL.

1. The facts set up by the defendant as an estoppel suggest the rule "*de minimis non curat lex.*" *Wisconsin Central Railroad Co.* v. *Forsythe*, 46.

2. L. filed his petition in a state court of Nebraska, setting forth that he was the owner, as trustee for two infants, of an undivided two-thirds interest in a tract of land in that State, and individually in his own right of the other undivided third; that the lands yielded no revenue and were encumbered with unpaid taxes, etc.; and praying for leave to sell or mortgage one-half of the lands, declaring his willingness to join in the deed or mortgage as to his individual interest. A supplementary petition accompanied this and was filed with it, certifying to the integrity of L., and praying that power might be given him to sell or mortgage the premises as asked. This petition was signed by several parties in interest, among whom was H. The court, in its decree, recited the title as stated in the petition, and authorized the sale as asked for. On a bill filed by H. to establish his title to one undivided third part of the lands, and prosecuted after his death by his administrator, *Held*, that the alleged title of H. was *res judicata;* that he was estopped from maintaining this suit; and that it was not open to him or his representative in this suit to question the authority of the attorney of H. in the proceedings in the state court. *Hilton's Administrator* v. *Jones*, 584.

EVIDENCE.

1. It is competent to explain by proof declarations of a privy in interest, admitted in evidence without objection, although they might have been found inadmissible, if objected to. *White* v. *Van Horn*, 3.

2. An objection going to the effect, and not to the admissibility of evidence, should be disregarded. *Ib.*
3. The credibility of a female witness cannot be impeached by asking her whether she has not had some difficulty with her husband. *Thiede* v. *Utah*, 510.
4. When the defendant in a criminal case consents that a member of the jury shall act as interpreter for a witness speaking a foreign language, none of his rights are prejudiced by the juryman's so doing. *Ib.*
5. A boy five years of age is not, as matter of law, absolutely disqualified as a witness, and in this case his disclosures on the *voir dire* were sufficient to authorize his admission to testify. *Wheeler* v. *United States*, 523.
6. On the trial of parties charged with the criminal offence of conspiring to stop the mails, contemporary telegrams from different parts of the country, announcing the stoppage of mail trains, are admissible in evidence against the defendants if identified and brought home to them. *Clune* v. *United States*, 590.
7. So, too, the acts and declarations of persons not parties to the record are in such case admissible against the defendants if it appears that they were made in carrying the conspiracy into effect, or attempting to carry it into effect. *Ib.*

See CRIMINAL LAW, 2, 7.

EXCEPTION.

1. An exception in bulk to a refusal to charge several propositions, separately numbered but offered in bulk, cannot be maintained if any one proposition be unsound. *Thiede* v. *Utah Territory*, 510.
2. Exceptions to the ruling of the court in a jury trial, tendered twelve days after the verdict was rendered, are too late. *Ib.*
3. It is doubtful whether the record and bill of exceptions present for review the matters complained of in the brief of counsel. *Clune* v. *United States*, 590.
4. Instructions of the court below, to become part of the record, must be incorporated in a bill of exceptions, and be authenticated by the signature of the trial judge. *Ib.*

FOREIGN JUDGMENT.

1. A citizen and resident of this country, who has his principal place of business here, but has an agent in a foreign country, and is accustomed to purchase and store large quantities of goods there, and, in a suit brought against him by a citizen and in a court of that country, appears and defends with the sole object of preventing his property within the jurisdiction, but not in the custody of that court, from being taken in satisfaction of any judgment that may be recovered against him there, cannot, in an action brought against him in this

country upon such a judgment, impeach it for want of jurisdiction of his person. *Hilton* v. *Guyot*, 113.

2. The admission, at the trial in a court of a foreign country, according to its law and practice, of testimony not under oath and without opportunity of cross-examination, and of documents with which the defendant had no connection and which by our law would not be admissible against him, is not of itself a sufficient ground for impeaching the judgment of that court in an action brought upon it in this country. *Ib.*

3. When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court; unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it is not entitled to full credit and effect. *Ib.*

4. A judgment for a sum of money, rendered by a court of a foreign country, having jurisdiction of the cause and of the parties, in a suit brought by one of its citizens against one of ours, is *prima facie* evidence only, and not conclusive of the merits of the claim, in an action brought here upon the judgment, if by the law of the foreign country, as in France, judgments of our own courts are not recognized as conclusive. *Ib.*

5. In an action upon a foreign judgment, an answer admitting that "certain attorneys entered, or undertook to enter, the appearance of the defendant" in the action in the foreign court; and alleging that the judgment was entered without his knowledge, in his absence, and without any hearing; but not alleging that the attorneys were not authorized to enter his appearance in that action, or that he appeared and answered under compulsion, or for any other purpose than to contest his personal liability, is insufficient to show that the foreign court had no jurisdiction of his person. *Ritchie* v. *McMullen*, 235.

6. Averments, in an answer to an action upon a foreign judgment, that it was "an irregular and void judgment," and "without any jurisdiction or authority on the part of the court to enter such a judgment upon the facts and upon the pleadings," are mere averments of legal conclusions, and are insufficient to impeach the judgment, without specifying the grounds upon which it is supposed to be irregular and void, or without jurisdiction or authority. *Ib.*

7. To warrant the impeaching of a foreign judgment, because procured by fraud, fraud must be distinctly alleged and charged. *Ib.*
8. A judgment rendered by a court having jurisdiction of the cause and of the parties, upon regular proceedings and due notice or appearance, and not procured by fraud, in a foreign country, by the law of which, as in England and in Canada, a judgment of one of our own courts, under like circumstances, is held conclusive of the merits, is conclusive, as between the parties, in an action brought upon it in this country, as to all matters pleaded and which might have been tried in the foreign court. *Ib.*

FORGERY.

See LOCAL LAW, 1.

HABEAS CORPUS.

1. The Supreme Court of the District of Columbia had jurisdiction and authority to determine the validity of the act of July 23, 1892, c. 236, which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offence, and this being so, this court cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*. *In re Belt*, 95.
2. The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors. *Ib.*
3. Ordinarily a writ of *habeas corpus* will not lie where there is a remedy by writ of error or appeal; but in rare and exceptional cases it may be issued although such remedy exists. *Ib.*

INDIAN.

See CRIMINAL LAW, 2, 9.

INDICTMENT.

See CRIMINAL LAW, 9, 11, 16, 17.

INSOLVENCY.

See JURISDICTION, B.

JUDGMENT.

See FOREIGN JUDGMENT.

JUDICIAL NOTICE.

See JURISDICTION, A, 14.

JUROR.

See CRIMINAL LAW, 5, 6;
EVIDENCE, 4.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1. The decision by a state court that the pleadings were sufficient to permit the examination and determination of the case presents no Federal question. *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 87.
2. This court has no jurisdiction of a writ of error to a state court, on the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract was made is admitted, and the only question is of its construction by that court. *Central Land Company* v. *Laidley*, 103.
3. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138, affirmed and applied to this case upon the points: (1) that when the jurisdiction of a Circuit Court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character of which the Circuit Court could properly take cognizance at the time its jurisdiction was invoked; and (2) that when the jurisdiction of a Circuit Court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case. *Borgmeyer* v. *Idler*, 408.
4. The mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under a treaty with a foreign Power, providing for the submission of claims against that Power to arbitration, does not in any way draw in question the validity or the construction of that treaty. *Ib.*
5. This case is dismissed for want of jurisdiction, on the authority of *San Francisco* v. *Itsell*, 133 U. S. 65; *Beatty* v. *Benton*, 135 U. S. 244; and *Eustis* v. *Bolles*, 150 U. S. 361; and cases cited. *California* v. *Holladay*, 415.
6. The Federal question sought to be raised here not having been presented in the state court, the case is dismissed for want of jurisdiction. *Winona & St. Peter Land Co.* v. *Minnesota* (*No. 2*), 540.
7. This court has appellate jurisdiction over a judgment rendered by a Circuit Court of Appeals of the United States in a suit brought by the United States in the Circuit Court of the circuit, to cancel a patent for an invention. *United States* v. *American Bell Telephone Co.*, 548.
8. Where the appellate jurisdiction of this court is described in a statute in general terms so as to comprehend the particular case, no presump-

tion can be indulged of an intention to oust or to restrict such jurisdiction; and any subsequent statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it. *Ib.*

9. When the judgment actually rendered in the court below was for an amount giving this court jurisdiction, which amount was reached by adding to a verdict for $5000, interest from the time of the verdict to the time of the entry of the judgment in a district where the local state law does not permit that to be done, and the plaintiff below, although excepting to the allowance of interest, and to the refusal of the court below to permit a remittitur, brings no writ of error to correct the alleged error, this court cannot dismiss a writ of error brought by the defendant to review other rulings in the case. *Baltimore & Ohio Railroad Co.* v. *Griffith*, 603.

10. When the highest court of a State, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error, without considering the Federal question. *Rutland Railroad Co.* v. *Central Vermont Railroad Co.*, 630.

11. A statute of a State imposed a tax upon the gross earnings of railroad companies, and provided that the tax upon a leased railroad should be paid by the lessee, and deducted from the rent. A lessee paid the tax upon the railroad of its lessor, and deducted it from the rent, and was sued in equity by the lessor for the rent, without deduction for the tax. The highest court of the State gave judgment for the lessee; and held that the statute, so far as it imposed a tax upon gross earnings derived from interstate commerce, was contrary to the Constitution of the United States; but that the provision for the payment of the tax by the lessee, and its deduction from the rent, was constitutional; and further held, independently of the question of constitutionality, that, as between the lessor and the lessee, it was the duty of the lessor to pay the tax; that the lessee having been compelled by law to make the payment to discharge an obligation of the lessor, the law implied a promise to repay; that the lessor having made no suggestion that the statute was unconstitutional, and no offer to indemnify the lessee, the lessee could not, in prudence, do otherwise than pay the tax, and was under no duty to incur the expense, delay and perils of litigation to test the constitutionality of the statute; and that the lessor, in a court of equity, could not have relief for what, as between the parties, itself should have done, and what, by its own laches, it had suffered to be done, professedly in its behalf, by the

lessee. *Held*, that this court has no jurisdiction to review the judgment. *Ib.*

12. When, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief, the court will not proceed to a formal judgment, but will dismiss the appeal. *Mills* v. *Green*, 651.

13. When, pending an appeal from a decree dismissing a bill in equity to secure a right to vote at the election of delegates to a constitutional convention, the election is held, and the convention assembles, on the days appointed by the statute calling the convention, the appeal must be dismissed, without considering the merits of the bill. *Ib.*

14. This court, on appeal from the Circuit Court of the United States, takes judicial notice of the days of public general elections of members of the legislature, or of the constitutional convention of a State, as well as of the times of the commencement of its sitting, and of the dates when its acts take effect. *Ib.*

15. The decision by the highest court of a State that the grantor of a portion of the ground of a mining claim is estopped, on general principles of law and by the statutes of the State, from claiming priority of title to a space of vein intersection within the granted premises, by reason of his locating the portion retained by himself before a location of the granted portion by his grantee, presents no Federal question. *Gillis* v. *Stinchfield*, 658.

16. The several questions raised by the counsel for the petitioner are matters for the determination of the courts of the State, and their determination there adversely to the petitioner involves no denial of due process of law, or the infraction of any provision of the Constitution of the United States. *Lambert* v. *Barrett*, 660.

17. The administration of justice ought not to be interfered with on mere pretexts. *Ib.*

18. Whether an indictment in a state court is sufficient in its description of the degree of the offence charged is a matter for the state court to determine, and its decision in that respect presents no Federal question. *Moore* v. *Missouri*, 673.

19. The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except on writ of error; and the review is confined to questions of law, properly presented. *Bucklin* v. *United States*, (*No. 1*), 680.

20. The District Court of the United States for the Southern District of New York has monthly terms. The decree in this case was entered December 21, and an appeal allowed December 31, 1892. On the 17th of the following January, during a new term of the court, the assignment of errors was directed to be filed *nunc pro tunc* as of December 31, 1892. *Held*, that if that assignment could be treated as a certifi-

cate, it came too late, and, as there was nothing in the record prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record, *nunc pro tunc*. *The Bayonne*, 687.

21. The filing of an assignment of errors in a Circuit Court, by order of that court and the taking a general appeal and its allowance by that court, is not a compliance with the statutory provision in the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, and is not equivalent to the certificate required by that act. *Ib.*

22. In so deciding the court must not be understood as intimating any opinion upon the question whether jurisdictional questions existed, within the meaning of § 5 of the act of March 3, 1891. *Ib.*

23. *In re Lehigh Mining & Manufacturing Co.*, 156 U. S. 322, and *Shields* v. *Coleman*, 157 U. S. 168, distinguished from this case. *Ib.*

24. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826. *Ansbro* v. *United States*, 695.

25. If the jurisdiction of a Circuit Court is questioned, in order that this court take jurisdiction it is necessary that there should be a certificate of such question to this court. *Ib.*

26. No appeal could be taken to this court from a decree in a Circuit Court made on the first of October, 1891 in a case like this. *Little Rock & Memphis Railroad* v. *East Tennessee, Virginia & Georgia Railroad*, 698.

See PUBLIC LAND, 26.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

A Circuit Court of the United States has "jurisdiction, in a general creditor's suit properly pending therein for the collection, administration, and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same cause by its receiver in accordance with its order, against debtors of such corporation, so far as in said suit, the receiver claims the right to recover from any one debtor a sum not exceeding $2000." *White* v. *Ewing*, 36.

See EQUITY, 6, 7, 8;
REMOVAL OF CAUSES.

LACHES.

The issues in this case were substantially decided in the suit between the same parties in the state courts of Illinois decided in the Circuit Court of Marion County August 9, 1883, and affirmed by the Supreme Court of the State, January 25, 1888; and, so far as the plaintiff sets up a

new claim here, it is, if not barred by the statute of limitations, too stale to receive favor from a court of equity. *Townsend* v. *St. Louis & Sandoval Coal and Mining Co.*, 21.

LICENSE.

See CONSTITUTIONAL LAW, 1, 2.

LOCAL LAW.

1. The law of Texas in regard to forgery considered. *White* v. *Van Horn*, 3.
2. When the defendant in an action of ejectment in Texas sets up that his title was founded on a warranty deed, and has the warrantor summoned in to defend, and the plaintiff recovers judgment, the defendant may have judgment against the warrantor for the amount of the purchase money, with interest from the day of the sale. *Ib.*
3. In Michigan a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the centre of the thread thereof. *Grand Rapids & Indiana Railroad Co.* v. *Butler*, 87.

South Carolina. *See* TOWNSHIP, 2.
Utah. *See* CRIMINAL LAW, 5.
Washington. *See* EQUITY, 4, 5, 6.

MEXICAN GRANT.

See PUBLIC LAND, 26.

MORTGAGE.

1. When a junior mortgagee is a party defendant to a foreclosure bill in which there is a prayer that he be decreed to redeem, and when the priority of the plaintiff's mortgage is found or conceded, and a sale is ordered in default of payment, declaring the right of the debtor to redeem to be forever barred, a similar order as to right of redemption by the junior mortgagee is not substantially, or even formally, necessary. *Simmons* v. *Burlington, Cedar Rapids, & Northern Railway*, 278.
2. In such case a junior mortgagee, who stands by while the sale is made and confirmed, must be deemed, in equity, to have waived his right to redeem. *Ib.*
3. A decree in such a suit that the sale is to be made subject to the rights of the junior mortgagee and of intervening creditors, and reserving to the court the right to make further orders and directions, and providing that no sale shall be binding until reported to the court for its approval, and a subsequent order that the property shall be sold subject to the future adjudication as to such rights, and the property conveyed subject thereto, while it warrants a contention that the court intended to make a future disposition of the claims of such parties, does not

authorize the junior mortgagee to wait for a period of seven years before attempting to enforce his alleged rights; and such delay deprives him of the right to ask the aid of a court of equity in enforcing them. *Ib.*

MOTION FOR NEW TRIAL.

1. The overruling of a motion for a new trial is not assignable as error. *Wheeler* v. *United States*, 523.
2. A refusal to grant a new trial cannot be reviewed on writ of error. *Bucklin* v. *United States* (*No. 2*), 682.

MUNICIPAL BOND.

See TOWNSHIP, 2.

OFFICER OF THE UNITED STATES.

See DISTRICT JUDGE, 2.

PATENT FOR INVENTION.

1. With the exception of the third claim, viz., for "the incandescing conductor for an electric lamp, formed of carbonized paper, substantially as described," the claims in the letters patent No. 317,076 issued May 12, 1885, to the Electro-Dynamic Light Company, assignee of Sawyer and Man, for an electric light, are too indefinite to be the subject of a valid monopoly. *The Incandescent Lamp Patent*, 465.
2. The court, on application to file a petition for rehearing, adheres to its opinion, reported in 158 U. S. 299, that letters patent No. 308,095, issued November 18, 1884, to Edward S. Richards for a grain transferring apparatus, are wholly void upon their face, for want of patentable novelty and invention. *Richards* v. *Chase Elevator Co.*, 477.
3. While the omission of an element in a combination may constitute invention if the result of the new combination be the same as before; yet, if the omission of an element is attended by a corresponding omission of the function performed by that element, there is no invention if the elements retained perform the same function as before. *Ib.*
4. When the result of a combination of old elements is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, there is nothing upon which a claim to invention can be based. *Ib.*

POST OFFICE.

See CRIMINAL LAW, 14, 15.

PRACTICE.

1. The action of the trial court upon an application for a continuance is purely a matter of discretion, not subject to review by this court, unless it clearly appears that the discretion has been abused. *Isaacs* v. *United States*, 487.

2. It is no ground for reversal that the court omitted to give instructions which were not requested by the defendant. *Ib.*
3. The order in which testimony shall be admitted is largely within the discretion of the trial court. *Thiede* v. *Utah Territory*, 510.
4. When the court rules correctly that certain matters are not proper subjects of cross-examination, and notifies the questioning party that he can recall the witness and examine him fully in reference to those matters, and he fails to recall him or introduce testimony thereon, he has no grounds of complaint. *Ib.*

See COURT AND JURY; EVIDENCE, 2;
CRIMINAL LAW, 13; EXCEPTION;
CUSTOMS DUTIES, 3; JURISDICTION, A, 24, 25, 26;
MOTION FOR NEW TRIAL.

PUBLIC LAND.

1. In this case the United States surveyors obviously surveyed the plaintiff's lot only to a bayou which they called the Indian River, leaving a tract between the bayou and that river unsurveyed; and the plaintiff has no right to challenge the correctness of their action, or to claim that the bayou was not the Indian River or a proper water line on which to bound the lots. *Horne* v. *Smith*, 40.
2. The land in controversy in this case is within the place limits of the road of the plaintiff in error, and was subject to the full control of Congress at the time of the grant made by § 3 of the act of May 5, 1854, c. 80, 13 Stat. 66, and it passed by operation of that grant, notwithstanding the fact that it was withdrawn by the Land Department in 1856 and 1859, in order to satisfy the grant made by the act of June 3, 1856, c. 43, 11 Stat. 20. *Wisconsin Central Railroad Co.* v. *Forsythe*, 46.
3. Every act of Congress making a grant of public land is to be treated both as a law and a grant, and the intent of Congress, when ascertained, is to control in the interpretation of the law. *Ib.*
4. When Congress makes a grant of a specific number of sections of public land in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land; and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that, if possible, the beneficiary shall receive those particular sections. *Ib.*
5. The courts are not concluded by a decision of the Land Department on a question of law. *Ib.*
6. By the order of the Commissioner of the General Land Office of June 12, 1856, the land in controversy in this case was withdrawn from preëmption or sale; and the validity of that order was not affected by the fact that the order covered more land than was included in the grant by Congress which caused its issue. *Spencer* v. *McDougal*, 62.

7. When the receipt given by a local land office to a preëmptionist, acknowledging the payment of the preëmption money, is sufficient on its face to transfer the full equitable title to him and does not disclose when his rights to the land were initiated, his vendees are not chargeable, as matter of law, with knowledge of the fact that the land at the time was not subject to preëmption or homestead. *Texas & Pacific Railway Co.* v. *Smith*, 66.

8. While the rule is that this court, upon a writ of error to the highest court of a State, in an action at law, cannot review its judgment upon a question of fact, it is unnecessary to consider the extent of the power of the court in that particular in chancery cases, as this court concurs with the result reached by the state court that when the survey was made of the land in controversy, there was no reservation made of the island, and no act on the part of the government showing any intention to reserve it. *Grand Rapids & Indiana Railroad Company* v. *Butler*, 87.

9. The court has no doubt, upon the evidence, that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey the tract in controversy as an island; that there is nothing to indicate mistake or fraud, and the government has taken no steps predicated on that theory; and that the judgment of the Supreme Court of the State of Michigan was right. *Ib.*

10. In an action in which the plaintiff claims title under the act of September 28, 1850, c. 84, 9 Stat. 519, granting to the several States the swamp and overflowed lands in each unfit for cultivation, and the defendant claims title under the act of May 15, 1856, c. 28, 11 Stat. 9, making a grant of lands to the State of Iowa to aid in the construction of railroads, parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers having authority in the premises, that the lands in controversy were, in fact, at the date of the act of 1850, swamp and overflowed ground. *McCormick* v. *Hayes*, 332.

11. The Sioux City & St. Paul Railroad Company having failed to complete the entire road from Sioux City to the Minnesota line, as contemplated by the act of Congress of May 12, 1864, c. 84, 13 Stat. 72, making a grant of public land in aid of its construction, and as required by the statutes of Iowa, has not only received as many acres of public land as it could rightfully claim under that act, but has also received 2004.89 acres in excess of what it could rightfully claim. *Sioux City & St. Paul Railroad Co.* v. *United States*, 349.

12. Grants of odd-numbered sections of public lands to aid in the construction of railways imply no guaranty that each section shall consist of 640 acres, nor any obligation on the part of the United States to give other public lands to supply deficiencies in reaching that amount. *Ib.*

13. Under the said act of 1864, the grant was made to the State as trustee,

and not to the railroad company, and the title under the patent, when issued, vested in the State as trustee. *Ib.*

14. When lands are granted by acts of Congress of the same date, or by the same act, to aid in the construction of two railroads that must necessarily intersect, or which are required to intersect, each grantee, when the maps of definite location are filed and accepted, takes, as of the date of the grant, an equal undivided moiety of the lands within the conflicting place limits, without regard to the time of the location of the respective lines. *Ib.*
15. Congress, in the grant made by the act of May 12, 1864, 13 Stat. 72, had in view two railroads, one extending from Sioux City to the Minnesota line, the other from South McGregor by a named route to a point of intersection with the Sioux City road; and the Chicago, Milwaukee & St. Paul Railway Company, as the successor in right of the McGregor Company, is in no position to question the decree just affirmed in *Sioux City & St. Paul Railroad Company* v. *United States*, establishing the title of the United States as against the Sioux City Company, and is estopped by the decree in *Sioux City & St. Paul Railroad* v. *Chicago, Milwaukee & St. Paul Railway*, 117 U. S. 406, from making any claim whatever to the lands in controversy in this suit. *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States*, 372.
16. Neither of the railroad companies named in said act of May 12, 1864, could get the benefit of the moiety of lands granted for the building of the other, in the overlapping limits of the two roads, by reason of the failure of the other to construct its road. *Ib.*
17. At the time when the United States instituted the suit against the plaintiff in error which has just been decided, the plaintiff in error had no interest whatever in the 26,017.33 acres of land certified back to the United States by the governor of Iowa, pursuant to a statute of that State, and all such land was then subject to entry under the preemption and homestead laws. *Sioux City & St. Paul Railroad Co.* v. *Countryman*, 377.
18. It is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. *United States* v. *Chaves*, 452.
19. The courts of the United States are bound to take judicial notice of the laws and regulations of Mexico prior to the cessions under the treaty of Guadalupe Hidalgo, and the treaty of December 30, 1853. *Ib.*
20. It is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and such rule will be applied as a *presumptio juris et de jure* whenever, by possibility, a right may be acquired in any manner known to the law, including occupations of claimants under alleged Mexican grants prior to the said treaties. *Ib.*
21. On the facts the court decides that the land in controversy in this case

was the property of the claimants before the treaties with Mexico, and consequently that its protection is guaranteed as well by those treaties as by the law of nations. *Ib.*

22. Land, duly and properly entered for a homestead, under the homestead laws of the United States, is not, from the time of entry, and pending proceedings before the land department, and until final disposition by that department, so appropriated for special purposes, and so segregated from the public domain as to be no longer lands of the United States within the purview and meaning of section 2461 of the Revised Statutes of the United States; but, on the contrary, it continues to be the property of the United States for five years following the entry, and until a patent is issued. *Shiver* v. *United States*, 491.

23. Where a citizen of the United States has made an entry upon the public lands of the United States under and in accordance with the homestead laws of the United States, which entry is in all respects regular, he may cut such timber as is necessary to clear the land for cultivation, or to build him a house, outbuildings, and fences, and perhaps may exchange such timber for lumber to be devoted to the same purposes; but he cannot sell the timber for money, except so far as it may have been cut for the purpose of cultivation; and in case he exceeds his rights in this respect, he may be held liable in a criminal prosecution under section 2461 or section 5388 of the Revised Statutes of the United States, or either of said sections, for cutting and removing, after such homestead entry, and while the same is in full force, the standing trees and timber found and being on the land so entered as a homestead. *Ib.*

24. In holding that, as between the United States and a homestead settler, the land is to be deemed the property of the former, at least so far as is necessary to protect it from waste, the court is not to be understood as expressing an opinion whether, as between the settler and the State, it may not be deemed to be the property of the settler, and therefore subject to taxation. *Ib.*

25. In 1857 B., a mail contractor, applied to file a preëmption declaratory statement for public land under the act of March 3, 1855, c. 201, 10 Stat. 683. His application being rejected he appealed to the Commissioner of the General Land Office, by whom the decision below was sustained. He then appealed to the Secretary of the Interior, who in 1861 reversed the Land Commissioner's decision. Meanwhile, in 1860, Congress passed an act for his relief, (12 Stat. 843, c. 63,) and under that act he paid for the land, and in 1871 received a patent in which it was stated that the land had been certified to the State of Minnesota for railroad purposes by mistake. This certification was made in 1864. *Held*, as between the grantee of B. and the grantee of a railroad company to which the land had been conveyed by the State, that the title derived from B. must prevail. *Weeks* v. *Bridgman*, 541.

26. In March, 1876, S. went into actual possession and occupation of a tract of public land in California, which was then reserved from settlement on account of unsettled Spanish and Mexican land grants, and which continued so reserved until April, 1883. On the 2d of October, 1882, the wife of S., being then the owner of an adjoining tract, on which she and S. resided, conveyed that tract to her husband. On the 10th of December, 1883, S. appeared in person at the United States land office in San Francisco and represented that he was a naturalized citizen of the United States, the head of a family, that he was 49 years of age, and that since October 2, 1882, he had been the owner of and in actual and peaceable possession of the tract conveyed to him by his wife, and he applied to enter, as an adjoining farm homestead, under Rev. Stat. §§ 2289 and 2290, the tract so taken possession of by him in March, 1876. After payment of the fees and commissions required by law, he was permitted to enter that tract as an adjoining farm homestead. On the 13th of December, 1883, M. filed a preëmptive declaratory statement in the same land office, which statement included the tract so occupied and entered by S., and alleged a settlement thereon by himself on the 19th of January, 1876. Thereupon a contest took place between S. and M., first before the register and receiver of the local land office; then, on appeal, before the Commissioner of the General Land Office; and, finally, on appeal, before the Secretary of the Interior. In these proceedings it appeared that S. had not resided continuously on the original farm, but had leased it to a tenant for a number of years, including the period of his adjoining farm entry; and S., in reply, claimed that he did not reside there because of danger of violence and injury at the hands of M. The Secretary of the Interior, while intimating that the proof failed to show the required residence on the part of S., decided that the excuse set up by him for non-residence was not sustained by the evidence. *Held*, that the ownership and title shown by S. were sufficient to entitle him to an additional farm homestead; but that the question of his residence on the land conveyed to him by his wife was one of fact, which the courts had no jurisdiction to reëxamine, in the absence of a clear showing that the decision was procured by fraud or imposition. *Stewart* v. *McHarry*, 643.

See TAXATION, 1, 3.

RAILROAD.

In an action against a railway company to recover damages for injuries caused by one of its trains striking a wagon in which the plaintiff and another woman were seated as it was crossing the track on a public highway at grade, the negligence of the defendant having been established, there was further evidence tending to show that the women were driving slowly and with a safe horse; that the train was several

minutes behind time; that as they approached the low place at which a train could be seen if one were there, they stopped to look and listen, but neither saw nor heard anything; that after stopping they started driving slowly up the hill to a point at the top between forty and fifty yards from the track, where the slope commenced, and there they stopped again and listened, but heard nothing; they then drove slowly down the hill, both listening all the time, without talking, and heard nothing; and that just as they got to a cut and the horse had his feet on the nearest rail, the train came around a curve and the collision occurred. *Held*, that the question whether there was contributory negligence on the part of the plaintiff was properly submitted to the jury for determination. *Baltimore & Ohio Railroad Co.* v. *Griffith*, 603.

See MORTGAGE;
PUBLIC LAND, 2, 10 to 17;
TOWNSHIP, 2.

REMOVAL OF CAUSES.

The case having been removed to the Federal court upon the defendant's petition, it does not lie in its mouth to claim that that court had no jurisdiction of the case, unless the court from which it was removed had no jurisdiction. *Cowley* v. *Northern Pacific Railroad Co.*, 569.

SPIRITUOUS LIQUORS.

See CONSTITUTIONAL LAW, 2.

STATUTE.

A. STATUTES OF THE UNITED STATES.

See CRIMINAL LAW, 4, 11, 12; HABEAS CORPUS, 1;
CUSTOMS DUTIES, 1, 2, 4, 7, 9; JURISDICTION, A, 21; 24;
EQUITY, 3; PUBLIC LAND, 2, 10, 11, 13, 15, 22, 23, 25.

B. STATUTES OF STATES AND TERRITORIES.

Connecticut. *See* CONSTITUTIONAL LAW, 2.
Massachusetts. *See* CONSTITUTIONAL LAW, 4.
Minnesota. *See* TAXATION, 1, 3,
Missouri. *See* CONSTITUTIONAL LAW, 6.
South Carolina. *See* TOWNSHIP, 2.
Utah. *See* CRIMINAL LAW, 3.
Vermont. *See* JURISDICTION, A, 11.
Washington. *See* EQUITY, 6.

TAXATION.

1. The provisions in the statutes of Minnesota exempting from taxation the lands granted by the State to the Winona & St. Peter Railroad

Company to aid in the construction of its railroad, until the land should be sold and conveyed by the company, ceased to be operative when the full equitable title was transferred by the company, and the railroad company could not, thereafter, by neglecting to convey the legal title, indefinitely postpone the exemption. *State* v. *Winona & St. Peter Railroad Co.*, 21 Minnesota, 472, followed. *Winona & St. Peter Land Co.* v. *Minnesota*, 526.

2. Statutes exempting property from taxation are to be strictly construed. *Ib.*
3. Chapter 5 of the laws of Minnesota of 1881, providing generally for the assessment and taxation of any real or personal property which had been omitted from the tax roll of any preceding year or years, does not, when applied to the land granted by that State to the Winona & St. Peter Railroad Company, deprive the owners of that land of their property without due process of law, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. *Ib.*
4. A legislature can provide for collecting back taxes on real property without making a like provision respecting back taxes on personal property. *Ib.*

See PUBLIC LAND, 24.

TOWNSHIP.

1. When a township has been created by law as a territorial division of a State, with no express grant of corporate powers, and with no definition or restriction of the purposes for which it is created, it is within the power of the legislature, at any time, to declare it to be a corporation, and to confer upon it such corporate powers, appropriate to be vested in a territorial corporation for the benefit of its inhabitants, as the legislature may think fit. *Folsom* v. *Ninety Six*, 611.
2. Notwithstanding the decision of the Supreme Court of South Carolina in *Floyd* v. *Perrin*, 30 So. Car. 1, the statute of South Carolina of December 24, 1885, which authorized townships (already defined by names and boundaries) to subscribe for stock in a railroad company, and county officials to issue bonds accordingly in their behalf, and to assess and levy taxes upon the property in the township for the payment thereof, and declared the townships to be bodies politic and corporate for the purposes of this act, with the necessary powers to carry out its provisions, and with rights and liabilities in respect to any causes of action growing out of its provisions, must be held by the courts of the United States, as to bonds issued and purchased in good faith before that decision, to be consistent with art. 9, sect. 8, of the constitution of South Carolina, authorizing the corporate authorities of townships to be vested with power to assess and collect taxes "for corporate purposes." *Ib.*

TRADE-MARK.

1. The fact that a trade-mark bears the name and portrait of the person in whose name it is registered does not render it unassignable to another. *Richmond Nervine Co.* v. *Richmond*, 293.
2. On the facts this court reverses the decree of the court below. *Ib.*

TRUST.

1. Where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which may be enforced by bill in equity, if not by action at law. *McKee* v. *Lamon*, 317.
2. The acceptance of money, with notice of its ultimate destination, is sufficient to create a duty on the part of the bailee to devote it to the purpose intended by the bailor. *Ib.*
3. In enforcing such a trust a court of equity may make such incidental orders as may be necessary for the proper distribution of the fund. *Ib.*