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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1895

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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.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.[1]

JUDSON HARMON, Attorney General.
HOLMES CONRAD, Solicitor General.
JAMES HALL McKENNEY, Clerk.
JOHN MONTGOMERY WRIGHT, Marshal.

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[1] Mr. Justice Peckham's commission is dated December 9, 1895. He took the oath of office in open court, January 6, 1896, and at once took his seat upon the bench.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1895.

UNITED STATES v. UNION PACIFIC RAILWAY COMPANY AND WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 334. Argued October 18, 19, 1894. — Decided November 18, 1895.

The objects which Congress sought to accomplish by the act of July 1, 1862, c. 120, 12 Stat. 489, granting a subsidy to aid in the construction of both a railroad and a telegraph line from the Missouri River to the Pacific Ocean, and by the act of July 2, 1864, c. 216, 13 Stat. 356, amendatory thereof, were the construction, the maintenance and the operation of both a railroad and a telegraph line between those two points; the governmental aid was extended for the purpose of accomplishing all these important results; and there is nothing in subsequent legislation to indicate a change of this purpose.

The provisions in those acts permitting the railroad company to arrange with certain telegraph companies for placing their lines upon and along the route of the railroad, and its branches, did not affect the authority of Congress, under its reserved power, to require the maintenance and operation by the railroad company itself, through its own officers and employés, of a telegraph line over and along its main line and branches.

Syllabus.

An arrangement between the railroad company and the telegraph company, such as was permitted by the 19th section of the act of July 1, 1862, and by the fourth section of the act of July 2, 1864, c. 220, known as the Idaho Act, could have no other effect than to relieve the railroad company from any present duty itself to construct a telegraph line to be used under the franchises granted and for the purposes indicated by Congress. No arrangement of the character indicated by Congress could have been made except in view of the possibility of the exercise by Congress of the power reserved to add to, or amend the act that permitted such arrangement.

It was not competent for Congress under its reserved power to add to, alter, or amend these acts to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given, nor, by any alteration or amendment of those acts, destroy rights actually vested, nor disturb transactions fully consummated. With the policy of such legislation the courts have nothing to do.

The provision in the act of August 7, 1888, c. 772, 25 Stat. 382, requiring all railroad and telegraph companies to which the United States have granted subsidies, to "forthwith and henceforward, by and through their own respective corporate officers and employés, maintain and operate, for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants," is a valid exercise of the power reserved by Congress.

Since the passage of the act of July 24, 1866, c. 230, the provisions of which were embodied in the Revised Statutes Title LXV, Telegraphs, no railroad company operating a post-road of the United States, over which interstate commerce is carried on, can bind itself, by agreement, to exclude from its roadway any telegraph company, incorporated under the laws of a State, that has accepted the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.

The agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company gave the telegraph company the absolute control of all telegraphic business on the routes of the railway company, and consequently tended to make the act of July 24, 1866, c. 230, 14 Stat. 221, ineffectual and was hostile to the object contemplated by Congress; and, being thus in its essential provisions invalid, it was not binding upon the railway company.

The agreements of September 1, 1869, and December 14, 1871, between the Union Pacific Railroad Company and the Atlantic and Pacific Telegraph Company were void.

The agreement of July 1, 1887, between the Union Pacific Railway Company and the Western Union Telegraph Company is illegal, not only to the extent it assumes to give to the telegraph company exclusive rights and advantages in respect of the use of the way of the railroad company for

telegraph purposes, but also because, in effect, it transfers to the telegraph company the telegraphic franchise granted it by the United States, which was not permitted by the acts of Congress defining the obligations of railroad companies that had accepted the bounty of the government.

While the United States might proceed by mandamus against the railway company to compel it to perform the duties imposed by its charter, it has the further right, in this suit, to ask the interposition of a court of equity to compel a cancellation of the agreements under which the telegraph company asserts rights inconsistent with the several acts of Congress, and the final decree in such a suit may require the railway company to obey the directions of Congress as given in those acts.

THIS suit was commenced by the United States in the Circuit Court for the District of Nebraska. A decree was there made giving the plaintiff the relief it asked for. 50 Fed. Rep. 28. An appeal was taken to the Circuit Court of Appeals for the Eighth Circuit, where the decree of the Circuit Court was reversed. 19 U. S. App. 531. From that decree the United States took this appeal. The case is stated in the opinion of the court.

Mr. Solicitor General Maxwell for appellant.

Mr. Rush Taggart for the Western Union Telegraph Company, appellee.

Mr. John F. Dillon, for the Union Pacific Railway Company, appellee. *Mr. John M. Thurston* and *Mr. Jeremiah M. Wilson* were on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought by the United States against the Union Pacific Railway Company and the Western Union Telegraph Company under the authority of the act of Congress of August 7, 1888, c. 772, 25 Stat. 382, supplementary to the act commonly known as the Pacific Railroad act of July 1, 1862, c. 120, 12 Stat. 489, and to the act of July 2, 1864, c. 216, 13 Stat. 356, and other acts amendatory of the act of 1862.

By the first section of the above act of 1888, it is provided that all railroad and telegraph companies to which the United States have granted any subsidy in lands or bonds or loan of

credit for the construction of either railroad or telegraph lines, and which, by the acts incorporating them, or by any amendatory or supplementary act, were required to construct, maintain, or operate telegraph lines, and all companies engaged in operating such railroad or telegraph lines "shall forthwith and henceforward, by and through their own respective corporate officers and employés, maintain, and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the acts making the grants as aforesaid."

The second section declares that any telegraph company, having accepted the provisions of Title LXV, Telegraphs, of the Revised Statutes, which should extend its line to any station or office of a telegraph line belonging to any one of the railroad or telegraph companies referred to in the first section, shall have the right and shall be allowed "to connect with the telegraph line of said railroad or telegraph company to which it is extended at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver, and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable."

If any railroad or telegraph company referred to in the first section, or any company operating such railroad or telegraph line, refuses or fails, in whole or in part, to maintain and operate a telegraph line as provided in the act of 1888 and the acts to which it is supplementary, "for the use of the Government or the public, for commercial and other purposes, without discrimination," or refuses or fails to make or continue such arrangements for the interchange of business with any connecting telegraph company, then, by the third section, application for

relief may be made to the Interstate Commerce Commission, whose duty it shall be to ascertain the facts, and prescribe such arrangement as will be proper in the particular case.

The fourth section is in these words: "In order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act, and to have the same possessed, used, and operated in conformity with the provisions of this act and of the several acts to which this act is supplementary, it is hereby made the duty of the Attorney General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this act, and under the acts hereinbefore mentioned, and under all acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation."

The fifth section subjects to fine and imprisonment any officer or agent of a company operating its railroads and telegraph lines who refuses or fails, in such operation and use, to afford and secure equal facilities to the government and the public, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or refuses to abide by or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission. The party aggrieved may also sue the company, whose officer or agent violates the provisions of the act, for any damages thereby sustained.

The sixth section makes it the duty of all railroads and telegraph companies to report to the Interstate Commerce Commission in relation to certain matters, and to file with that body copies of all contracts and agreements of every description between it and every other person or corporation in reference to the ownership, possession, maintenance, control, use, or operation of any telegraph lines or property over or upon its rights of way.

The defendant, the Union Pacific Railway Company, is a corporation formed by the consolidation (under the authority of the above acts of Congress of July 1, 1862, c. 120, 12 Stat. 489, and July 2, 1864, 13 Stat. c. 216, 356) of the following companies: The Union Pacific Railroad Company, incorporated by the act of July 1, 1862; the Kansas Pacific Railway Company, formerly known as the Union Pacific Railway Company, Eastern Division, which latter company succeeded to the rights and powers of the Leavenworth, Pawnee and Western Railroad Company, a Kansas corporation that accepted the aid provided by the act of July 1, 1862; and the Denver Pacific Railway and Telegraph Company, a corporation of Colorado.

The present suit proceeds on the ground that the Union Pacific Railway Company is conducting its business under certain contracts and agreements with the Western Union Telegraph Company that are not only repugnant to the provisions of the above act of 1888, but are inconsistent with the rights of the United States, and in violation of the obligations imposed upon the railway company by other acts of Congress. The relief asked was a decree annulling those contracts and agreements and compelling the railway company to maintain and operate telegraph lines on its roadways, as required by the act of 1888.

By the final decree of the Circuit Court it was adjudged, among other things, that the following agreements be annulled and held for naught:

An agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company;

Two agreements, one of September 1, 1869, and one of

December 14, 1871, between the Union Pacific Railroad Company and the Atlantic and Pacific Telegraph Company, the rights of the latter company having been acquired, as is claimed, by the Western Union Telegraph Company ; and,

An agreement of July 1, 1881, between the Union Pacific Railway Company and the Western Union Telegraph Company. 50 Fed. Rep. 28.

It will be well, at this point, to refer to the principal parts of the several agreements that were set aside and annulled by the final decree of the Circuit Court.

By the agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, the railway company agreed to pay to the telegraph company the cost of the telegraph poles that had been erected by the latter company along the railroad between Wyandotte and Fort Riley, except for such as have been already furnished and erected by said railway company, and also the cost of the wire and insulators for a telegraph line with one wire, between those points, except for such distance as the railroad company had already provided wires and insulators; to furnish and distribute along their road west of Fort Riley, as fast as the same was completed, suitable poles for a first-class telegraph line, and wires and insulators for a telegraph line with one wire; to supply and distribute suitable telegraph poles, as required from time to time ; to repair and renew the line as might be necessary; to transport, free of charge, for the telegraph company all persons engaged in and material required for the construction, reconstruction, working, repairing, and maintaining said telegraph line ; and to furnish a suitable telegraph office in the depot at Wyandotte, Kansas, free of charge, and pay one-half of the salary of the operator in such office, or so much thereof as was necessary to save the telegraph company from loss at that office — such operator to be fully qualified to do the business of the railway company, and to be appointed and his salary fixed by the parties to the contract.

The railway company further stipulated " not to transport any persons engaged in or property intended for the construction or repair of any other line of telegraph along their railway,

except at the usual and regular rates charged by said railway company for passengers and freight, nor give permission to nor make any agreement with any other telegraph company to construct or operate any telegraph line upon the lands or roadway of said railway company, without the consent in writing of the telegraph company. The above agreed to by said railway company so far as it has the right to do so."

The telegraph company agreed, upon its part, that it would erect poles, attach the insulators, and string the wire to be furnished or paid for by the railway company, as provided, as fast as each section of twenty miles of railroad was completed; that the first wire should belong to the railway company, and be for their use exclusively after the second wire was put up, "but no commercial or paid business shall be transmitted by the railway company from any station where the telegraph company shall have an office, without the consent of the latter;" that if the business of the railway company should, in its opinion, require more than one wire, they might appropriate another wire, upon paying to the telegraph company the cost of such wire on the poles, the telegraph company to attach such other wire for the use of the company; that the business of the railway company of every kind, and the family, private, and social messages of its executive officers, should be transmitted without charge between all telegraph stations on the line of said roadway, and between all such stations and St. Louis, and over all other lines in Missouri, Kansas, Colorado, and New Mexico, then owned or controlled, or which might thereafter be owned or controlled, by the telegraph company, provided, so far as said lines in Colorado and New Mexico were concerned, and the road or roads of the Union Pacific Railway Company, Eastern Division, were at the time in process of construction towards Santa Fé or Denver, or both, all such business should be transmitted free of charge over all other lines then or thereafter to be owned or controlled by the telegraph company within the United States, to an amount not exceeding four thousand dollars per annum, with a rebate of one-half of regular tariff charges for all in excess of that amount; that until a second wire was put up,

both parties could use the first wire, the business of the railway company having preference; and if either wire was interrupted or required by the United States, both parties might use the other one as far as practicable, but without delay or charge to the railway company; that the telegraph company should furnish all main batteries required for the efficient working of the telegraph line provided for, and keep the line in good working order, without expense to the railway company, except for the materials which the latter had agreed to supply.

Again: That "the railway company may establish, at their own expense, as many offices as they require, and at all places where the telegraph company has no separate office the employés of the railway company shall, so long as it may not interfere with the business of said railway company, receive, transmit, and deliver such commercial or paid business as may be offered at the tariff rates of the telegraph company, provided such paid business does not amount to enough to pay the expenses of a separate telegraph office, and shall account for and pay over to the latter, monthly, the amount thereof at such rates; and concerning such business, all rules, regulations, and orders of the telegraph company applicable thereto shall be observed; but said railway company shall not be amenable in any way to said telegraph company for the acts or operations of said agents, otherwise than to remedy the difficulty in future;" that each party, at its own expense, should have the right to add as many lines as its business required; that it would perform without charge for the railway company what should be decided by competent authority to be its telegraphic obligations to the Government of the United States; and that a telegraph line should be constructed on the road of the railway company from Leavenworth to Lawrence at such time, between May 31, 1867, and September 1, 1868, as that company might decide, and upon the same terms and conditions as that west of Fort Riley.

By the agreement of September 1, 1869, between the Atlantic and Pacific Telegraph Company and the Union Pacific Railroad Company, the railroad company, in consideration of thirty-three thousand shares of the stock of the telegraph

company, (for an increase of whose stock the agreement made provision,) demised and leased to that telegraph company "all its telegraph line, wires, poles, instruments, offices, and other property by it possessed appertaining to the business of telegraphing for the purpose of sending messages and doing a general telegraphic business," to have and to hold during the whole term of the charter of the telegraph company, and any renewals thereof, subject to the rights of the United States, as set forth in the charter of the railroad company, and on condition that the telegraph company should fully perform all duties that were or might be imposed upon the railroad company by its charter or by the laws of the United States.

It was further stipulated in that agreement that the telegraph company should proceed at once, as soon as arrangements were perfected for extending its line to San Francisco, to put two additional wires, fully equipped and furnished, on the poles demised along the whole length of its line; the railroad company to maintain and keep in repair such poles, wires, and equipments at its expense during the period of such demise, until from age or other cause they were required to be renewed, in which case the telegraph company should meet the cost of renewal; that the railroad company should at its own expense employ, during a period of twenty-five years, suitable persons to operate said telegraph at its own stations, other than at Omaha and such other stations as required, for the business of both parties, operators in addition to those needed by the railroad company; that the railroad company should have the right free of expense to the constant and perpetual use of two of the wires when required for its business, and the free use for its business of the whole line of telegraph, which should then or thereafter belong to or be controlled or operated by the telegraph company, to and from all parts of the United States, for all purposes connected with the management of the road or its business; that the telegraph company should have such preferential privileges and facilities for its business as are usually granted by railroad companies in contracts of connection with telegraph companies; and that the railroad company should "afford all other telegraph com-

panies only such facilities as by law they now are or may hereafter be required to afford as common carriers or otherwise, in which shall not be included the privilege of using hand cars or of stopping trains except at regular stations, or transporting the officers or servants of such companies, except on regular passenger trains at regular rates of fare, or of transporting material for such companies or persons (other than the parties of the first part) except on regular freight trains and at the usual rates of freight, unless the facilities aforesaid, or some of them, shall be required by law to be afforded such companies or persons."

These companies entered into a supplementary agreement on the 14th day of December, 1871, by which the original contract was modified in certain particulars, that need not be set out, and which provided that for all the purposes of both the original and supplementary contract the road of the railroad company "demised by said original contract shall be deemed and taken to terminate at the junction of the Union Pacific Railroad Company with the Central Pacific Railroad Company, as now established, which junction is at a point about five miles west of Ogden, and all the rights of the parties under said contract and supplement shall be made to conform to this modification."

The agreement between the Western Union Telegraph Company and the Union Pacific Railway Company of July 1, 1881, recites that the former corporation had acquired all the property, rights, and franchises of the Atlantic and Pacific Telegraph Company, and was in possession of and operating a separate line of poles and wires along the main line of the Union Pacific Railway Company between Omaha and Ogden; that the parties were then, and for some time past had been, operating lines of telegraph along various roads of the railway company, under sundry contracts, thirteen in number, including the above agreements of 1866, 1869, and 1871, and made between the railway company or companies formerly in possession of lines of railroad, then controlled by and forming part of that company, and the Western Union Telegraph Company, or other telegraph companies that had become

merged into the latter company; and that it was desirable to terminate existing disputes, and embody the agreement of the parties in one new contract, in lieu of said existing contract.

The expressed purpose of this agreement was to provide telegraph facilities for the parties, and to maintain and operate the lines of telegraph along all the railway company's roads in the most economical manner in the interest of both parties, as well as to fulfil the obligations of the railway company to the Government of the United States and the public, in respect to the telegraphic service required by the act of July 1, 1862, and its amendments.

Among other provisions of the above agreement are the following:

"Third. The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, upon, and under the line, lands, and bridges of the railway company and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, or either of them, or underground or other system of communication for commercial or public uses or business, with the right to put up from time to time, or cause to be put up or constructed under the provisions of this agreement, such additional wires on its own or the railway company's poles or such additional lines of poles and wires or either as well on its bridges as on its right of way, or to construct such underground lines as the telegraph company may deem expedient, doing as little damage and causing as little inconvenience to the railway company as is practicable, and the railway company will not transport men or material for the construction or operation of a line of poles and wire or wires or underground or other system of communication in competition with the lines of the telegraph company, party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at other than regular stations: *Provided always*, That in protecting and defending the exclusive rights

given by this contract, the telegraph company may use and proceed in the name of the railway company, but shall indemnify and save harmless the railway company from any and all damages, costs, charges, and legal expenses incurred therein or thereby.

"Fourth. It is mutually understood and agreed that all of the telegraph lines and wires covered by this contract, whether belonging to or used by the telegraph company or the railway company for the purpose of this contract, as herein provided, shall form part of the general system of the telegraph company. The railway company further agrees that its employés shall transmit over the lines owned, controlled, or operated by the parties hereto, all commercial telegraph business offered at the railway company's offices, and shall account to the telegraph company exclusively for all of such business and the receipts thereon, as provided herein. No employé of the railway company shall, while in its service, be employed by or have any connection with any other telegraph company than the telegraph company party hereto, and the telegraph company shall have the exclusive right to the occupancy of and connection with the railway company's depots or station houses for commercial or public telegraph purposes as against any other telegraph company: *Provided*, That if any person or party, or any officer of the Government, tender a message for transmission over the railway telegraph lines between Council Bluffs and Ogden at any railway telegraph station between those points and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same accordingly at rates to be fixed by the railway company to the point of destination if not beyond its own lines. If the destination of said message be beyond said railway company's lines, the telegraph company, when receiving the same at the point at which it leaves the said railway lines, may demand the prepayment of tolls for the service of forwarding the message on its own lines: *Provided, however*, That the local receipts of the railway company on such messages shall be divided between the parties hereto in the same manner and subject to

the same conditions as provided in the tenth clause of this agreement."

"Sixth. Each party hereto shall pay one-half of the entire cost of all poles, wires, insulators, tools, and other material used for the maintenance, repair, and renewal or reconstruction of existing lines and wires along all of the railway company's railroads, and for the construction, maintenance, repair, and renewal or reconstruction of such additional wires or lines of poles and wires as may be required for commercial or railroad telegraph purposes along said railroads, and along future branches or extensions thereof, and along new railroads constructed or acquired by the railway company, until the total number of wires shall amount to three for the exclusive use of each party hereto between Council Bluffs and Ogden, two for the exclusive use of each party hereto between Kansas City and Denver, and one for the exclusive use of each party hereto on all other portions of the railway company's railroads, branches, and extensions. Each party hereto shall pay the entire cost of the construction, maintenance, repair, and renewal or reconstruction of wires for its exclusive use in excess of the number hereinbefore mentioned. The material of the telegraph company for additional wires to be transported free of charge by the railway company over its own lines, as hereinafter provided. The telegraph company agrees to furnish at its own expense all blanks and stationery for commercial or other public telegraph business, and all instruments, main and local batteries, and battery material for the operation of its own and the railway company's wires and offices. . . .

"Seventh. . . . The telegraph company agrees to furnish, free of charge, for the railroad business of the railway company, a direct wire connecting the railway company's office in Omaha, Nebraska, with its office in Kansas City, Missouri, and with the railway company's offices at intermediate railroad stations of the railway company along the Missouri River, including Council Bluffs; and the telegraph company will receive, transmit, and deliver, free of charge, at and from its offices at said intermediate stations of the railway company, such messages on the railroad business of the railway company

as may be offered by its agents and officers for points on the railway company's roads, provided that the telegraph company may use said wire for the transaction of commercial or public telegraph business when not in use for railroad business.

"Eighth. All messages of the officers and agents of the railway company pertaining to its railroad business may be transmitted free of charge between all telegraph stations on the lines of its various railroads over wires set apart for railroad business. . . . It is understood and agreed that the free telegraphic service herein provided for is for the transmission of messages concerning the operation and business of the railway company's railroads, and shall not be extended to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the railway company, the tolls on which messages should properly be chargeable to such customers.

"Ninth. The railway company agrees to transport free of charge over its railroads, upon application of the superintendent or other officer of the telegraph company, all officers of the telegraph company when travelling on its business, and all employés of the telegraph company when travelling on the telegraph company's business connected with or pertaining to the lines or wires and offices along any of the railway company's railroads. And the railway company further agrees to transport and distribute free of charge along the line of any and all its railroads all poles and other materials for the construction, maintenance, operation, repair, or reconstruction of the lines and wires covered by this agreement, and of such additional wires or lines of poles and wires as may be erected under and in pursuance of the provisions of this agreement. Also all material and supplies for the establishment, maintenance, and operation of the offices along said railroads, it being understood that no charge shall be made for the transportation of poles or other materials over any of the railway company's railroads for use on any other of its railroads.

"Tenth. The telegraph company agrees to supply instruments and local batteries and blanks and stationery for commercial telegraph business, as hereinbefore provided at offices

established and maintained by the railway company. At all telegraph stations of the railway company its employés shall receive, transmit, and deliver such commercial or public messages as may be offered, and shall render to the telegraph company monthly statements of such business and full accounts of all receipts therefrom, and the railway company shall cause all of such receipts to be paid over to the telegraph company monthly.

"As compensation to the railway company for the services herein provided for, the telegraph company agrees to pay or return to the railway company monthly one-half of the cash receipts at telegraph stations maintained and operated by and at the expense of the railway company, tolls on ocean cable messages and tolls for lines of other companies excepted, all of which shall be retained by the telegraph company, it being understood that the railway company shall not be entitled to any portion of the tolls on ocean cable messages or tolls belonging to lines of other companies or to any portion of amounts checked against other offices. . . .

"The railway company agrees that its employés shall not compete with the telegraph company's offices in the transaction of commercial telegraph business at any point where the telegraph company may now or hereafter have an office separate from the railway company's office, by cutting rates or by active efforts to divert business from the telegraph company."

"Twelfth. It is further agreed that the management of the wires, the repairs of all the lines along the railway company's railroads, and the distribution of all materials for use on said lines, shall be under the supervision and control of a competent superintendent, who shall be appointed and paid jointly by the parties hereto, and whose salary shall be fixed by mutual agreement, and said superintendent shall be equally the servant of each of the parties hereto, and shall, as far as practicable, protect and harmonize the interest of both parties hereto in the transaction of the railroad and commercial telegraph business along the railway company's railroads. . . .

"Thirteenth. The railway company shall have the right to the free use of any telegraphic patent rights or new discoveries or inventions that the telegraph company now owns

and uses in its general telegraph business or which it may hereafter own and use as aforesaid, so far as the same may be necessary to properly carry on the business of railroad telegraphing on the line of said railroads as provided for herein.

"Fourteenth. The telegraph company hereby promises and agrees to assume and protect the railway company from the payment of all taxes levied and assessed upon the telegraph property belonging to either of the parties to this agreement.

"Fifteenth. The provisions of this agreement shall extend to all railroads and branches or extensions thereof now or hereafter owned or controlled by the railway company, provided, however, that in case the railway company shall hereafter acquire the ownership or control of any railroad, upon which the telegraph company may already have a line of telegraph in operation, the provisions of this contract shall not apply to such railroad and telegraph line without the mutual consent of the parties hereto at the time of such acquisition."

The contract of 1881 was, by its terms, to continue in force for twenty-five years, and existing contracts with other companies, and in respect to other roads, were to be deemed superseded, so long as the last contract was fully observed on the part of the railway company, but to be again in force, for the protection of the Western Union Telegraph Company, in case this contract should not be kept in good faith by the railway company for the full term of twenty-five years.

By the decree of the Circuit Court it was further adjudged that the Union Pacific Railway Company "at once put an end to all relations between it and the defendant, the Western Union Telegraph Company, not equally allowed to all other persons or corporations operating, owning, or using the telegraph as a means of communication, and also at once resume possession of its offices, poles, wires, instruments, and all its other property belonging or appertaining to the business of telegraphy along such of its main and branch lines as were aided by the Government under the act of July 1, 1862, and acts amendatory and supplemental thereto, and henceforth, by and through its own corporate officers and employés, maintain and operate, for railroad, governmental, commercial, and

other purposes, such telegraph lines and instruments, and in all ways exercise by itself alone all the telegraph franchises conferred upon it and obligations assumed by it under the several acts granting subsidies in land or bonds or loan of credit to it and to its constituent companies, or the acts amendatory of or supplemental thereto; and in all cases where the said defendant company has not now adequate facilities to enable it to thus conduct the telegraph business and afford equal facilities to all without discrimination in favor of or against any person, company, or corporation whatever, and to receive, deliver, and exchange business with connecting telegraph lines and all companies desiring to make such connections on equal terms and afford equal facilities to all, and without discrimination for or against any one of such connecting lines and upon just and equitable terms (all of which said defendant is required and directed to at once proceed to do), then said defendant shall at once construct and provide such facilities as are necessary to carry out the provisions of this decree and the several acts of Congress creating or aiding said defendant company or its constituent parts and all acts amendatory and supplemental thereto."

It was further adjudged that the Western Union Telegraph Company "at once vacate all the offices of said railway company without interference or damage to the same, and without removing, until the further order of this court, any property therefrom or from the line of said railway company which has heretofore been jointly used by the two companies, or the ownership of which is in dispute or is so connected with or mixed with the property of the railway company as to make it difficult of identification, or the removal of which will interrupt or interfere with the discharge of the duties of the defendant railway company, as herein set forth and enjoined;" this decree, however, not to be construed as preventing the railway company from leasing to the telegraph company "the right to occupy with its wires, instruments, batteries, and operators, upon reasonable and proper terms, any of its poles along the right of way and space in the depots or stations of the said the Union Pacific Railway Company not required by the railway company for the transaction of its business."

Sixty days after the entry of the decree were given to make such necessary arrangements, adjustments, and changes as might become necessary by reason of annulling the above agreements, and in order that the provisions of the decree might be carried into effect. And the right was reserved to the telegraph company to apply for and have stated an account between the defendants in respect of the value of the telegraph property along the line of the railway company, the cost of maintenance and profits of the telegraph lines, the amounts contributed thereto by the respective defendants or their assignors or predecessors in title, and all matters affecting the equities of the defendants — the United States to have the right to intervene on such accounting for the protection of its interests and those of the public. 50 Fed. Rep. 28.

Upon appeal by the defendants to the United States Circuit Court of Appeals the decree of the Circuit Court was reversed, and the cause remanded with directions to enter a modified decree adjudging, among other things, that the agreement of October 1, 1866, was a lawful and binding contract, and continued in force until it was superseded by the agreement of July 1, 1881; that the agreements of September 1, 1869, and December 14, 1871, were beyond the powers of the Union Pacific Railroad Company, and must be annulled; that the equities arising out of the two last-named agreements were adjusted and settled by the parties interested when they made the contract of July 1, 1881; and, that the last-named agreement was valid and binding in all respects, except that the third and fourth paragraphs were null and void to the extent, and only to the extent, that they secured or granted, or were intended to secure and grant, to the Western Union Telegraph Company any exclusive rights, privileges, or advantages whatsoever. 19 U. S. App. 531; *S. C.* 59 Fed. Rep. 813.

Before examining the provisions of the agreements that were annulled by the decree of the Circuit Court, it is necessary to ascertain the nature and extent of the obligations imposed upon the Union Pacific Railroad Company and the other constituent companies of the Union Pacific Railway

Company, in respect of the construction, maintenance, and operation of telegraph lines along the routes of their respective roads. If it be found that the Union Pacific Railway Company, in the exercise of the rights and powers of its constituent companies, was not, prior to the passage of the act of August 7, 1888, under any legal duty, in addition to the construction of a railroad on the routes prescribed, to maintain or operate telegraph lines on or along its roadways, the question will arise, whether it was competent for Congress to require that company, through its own officers and employés exclusively, to maintain or operate telegraph lines on or over its roadways, to be used for railroad, governmental, commercial, and other purposes, and itself alone exercise the telegraph franchises conferred by the acts of Congress.

The Union Pacific Railroad Company was created by the above act of Congress of July 1, 1862. 12 Stat. 489, c. 120. Its title indicated that the subsidy granted was to aid in the construction of both a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes.

Proceeding under that act, the company began in 1865, and in 1869 completed, the construction of a railroad from Omaha to Ogden, making connection at the latter place with the Central Pacific Railway, extending from Ogden to San Francisco. It also constructed, on the north side of its right of way, a telegraph line between Omaha and Ogden.

By the first section of the above act of July 1, 1862, the Union Pacific Railroad Company was authorized and empowered "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph" from a named point in the then Territory of Nebraska to the western boundary of Nevada Territory; by the second section, a right of way through the public lands was given "for the construction of said railroad and telegraph line;" by the third section, a grant of public lands was made "for the purpose of aiding in the construction of said railroad and telegraph line;" by the fourth section, patents for lands granted were to be issued

upon the certificate of commissioners appointed by the President, when it appeared that forty consecutive miles of the "railroad and telegraph line" had been completed and equipped in all respects as required, and were ready for the service contemplated by the act; by the fifth section, provision was made for issuing to the company bonds of the United States that should constitute a first mortgage on the whole line of "the railroad and telegraph, together with the rolling stock" — such bonds to be issued when the commissioners certified to the completion and equipment of forty consecutive miles of "railroad and telegraph," in accordance with the provisions of the act; by the sixth section, the grants of land were declared to be made "upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line," etc.; by the seventh section, the company was required, within one year after the passage of the act, to file its assent to its provisions, and complete said "railroad and telegraph" from the point of beginning as provided to the western boundary of Nevada Territory before the first day of July, 1874; and by the eighth section, "the line of said railroad and telegraph" was prescribed.

The ninth section authorized the Leavenworth, Pawnee and Western Railroad Company — which, prior to January 1, 1862, had located its line of road from Leavenworth to Fort Riley — to construct a railroad and telegraph line from the Missouri River, at the mouth of the Kansas River, on the south side thereof, so as to connect with the Pacific Railroad of Missouri at the aforesaid point, on the one hundredth meridian of longitude west of Greenwich, upon "the same terms and conditions in all respects" as were provided in the act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude named. The same section authorized the Central Pacific Railroad Company, a California corporation, to construct "a railroad and telegraph line" from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento River, to the eastern boundary of that State, "upon the same

terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California."

The tenth section authorized the Kansas and California companies, or either of them, after completing their roads, to unite upon equal terms with the first-named company in constructing so much of said "railroad and telegraph line and branch railroads and telegraph lines" in the act mentioned, through the Territories from the State of California to the Missouri River, as shall then remain to be constructed, on the same terms and conditions as provided in relation to the said Union Pacific Railroad Company. And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company, or either of them, on filing their assent to the act, were authorized to unite upon equal terms, with the said Kansas company, in constructing said railroad and telegraph, to said meridian of longitude, with the consent of the said State of Kansas; "and in case said first-named company shall complete its line to the eastern boundary of California before it is completed across said State by the Central Pacific Railroad Company of California, said first-named company is hereby authorized to continue in constructing the same through California, with the consent of said State, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

By the eleventh section it was provided, in respect of bonds

issued in aid of the construction of the most mountainous and difficult parts of the road, that "no more than fifty thousand of said bonds shall be issued under this act to aid in constructing the main line of said railroad and telegraph;" by the twelfth section, that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and Government are concerned, as one connected, continuous line;" and by the fourteenth section, that the Union Pacific Railroad Company should construct a single line of railroad and telegraph from the western boundary of Iowa, at a point to be designated by the President, so as to form a connection with that company's line on the said one hundredth meridian of longitude, upon the same terms and conditions prescribed "for the construction of said railroad and telegraph first mentioned;" and whenever a railroad was constructed through Minnesota or Iowa to Sioux City, then the above company should construct a railroad and telegraph line from Sioux City to connect with the Union Pacific Railroad.

The fifteenth section declared that any company then or thereafter incorporated should have the right to connect its road with the road and branches provided by the act, at such places and upon such terms as the President might prescribe. But by an act of Congress, passed June 20, 1874, 18 Stat. 111, c. 331, the following addition was made to this section of the act of July 1, 1862, 12 Stat. 489, 496, c. 120: "And any officer or agent of the companies authorized to construct the aforesaid roads, or of any company engaged in operating either of said roads, who shall refuse to operate and use the road or telegraph under his control, or which he is engaged in operating for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line, or shall refuse, in such operation and use, to afford and secure to each of said roads equal advantages and facilities as to rates, time, or transportation, without any discrimination of any kind in favor of, or adverse to, the road or business of any or either of said companies, shall be deemed guilty of a misdemeanor, and, upon conviction thereof,

shall be fined in any sum not exceeding one thousand dollars, and may be imprisoned not less than six months; . . . and it is hereby provided that for all the purposes of said act, and of the acts amendatory thereof, the railway of the Denver Pacific Railway and Telegraph Company shall be deemed and taken to be a part and extension of the road of the Kansas Pacific Railroad, to the point of junction thereof with the road of the Union Pacific Railroad Company at Cheyenne, as provided in the act of March third, eighteen hundred and sixty-nine."

The sixteenth section of the act of 1862 further provided that all of the railroad companies mentioned in the act, or any two or more of them, might form themselves into one consolidated company, the latter company to proceed thereafter "to construct said railroad and branches and telegraph line upon the terms and conditions provided in this act."

The seventeenth section provided that in case said company or companies failed to comply with the terms and conditions of the act "by not completing the said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies."

The eighteenth section provided that whenever it appeared that "the net earnings of the entire road and telegraph," including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to the United States, Congress could reduce the rates of fare thereon, if unreasonable in amount, and fix and establish the same by law. And "the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and

telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

The act of July 1, 1862, was amended, in various particulars, by the act of July 2, 1864, c. 216. 13 Stat. 356. By the tenth section of the latter act the former was so amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and other companies authorized to participate in the construction of the proposed lines of road, could "issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States," and "the lien of the United States shall be subordinate to that of the bonds of any or either of said companies, hereby authorized to be issued on their respective roads, property, and equipments," except as to those provisions of the act of 1862, relating to the transmission of despatches, and the transportation of mails, troops, munitions of war, supplies and public stores of the United States.

Section fifteen of the same act was in these words: "That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others, and it shall not be lawful for the proprietors of any line of telegraph, authorized by this act, or the act amended by this act, to refuse or fail to convey for all persons requiring the transmission of news and messages of like character, on pain of forfeiting to the person injured, for each offence, the sum of one hundred dollars, and such other damage as he may have suffered on account of said refusal or failure,

to be sued for and recovered in any court of the United States, or of any State or Territory of competent jurisdiction."

The sixteenth section provided that any two or more of the companies authorized to participate in the benefits of that act might at any time unite and consolidate upon such terms and conditions as were not incompatible with such act or the laws of the State or States in which the roads of such companies were, and such consolidated company should be entitled to receive from the Government all the grants, benefits, and immunities that the respective constituent companies were entitled to, subject to all the restrictions imposed upon them.

By the twenty-second section it was declared that "Congress may, at any time, alter, amend, or repeal this act."

In our judgment, it is not difficult to ascertain the intention of Congress in passing the acts of July 1, 1862, and the amendatory act of July 2, 1864, c. 216. The supreme object to be attained was the maintenance and operation of both a railroad and telegraph line from the Missouri River to the Pacific Ocean, and governmental aid was extended in order to accomplish a result so important to the whole country.

The authority given to the Union Pacific Railroad Company to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad *and telegraph* line on that route, § 1; the grant of public lands *for the purpose* of aiding in the construction of said railroad *and telegraph line*, § 3; the direction that patents for lands granted should be issued as each forty consecutive miles of such railroad *and telegraph line* appeared, upon the certificate of commissioners, appointed by the President, to have been completed and *equipped* in all respects as required, § 4; the making the bonds of the United States a first mortgage on the whole line of the railroad *and telegraph*, § 5; the explicit declaration that the grants of public lands were made *upon the condition*, among others, that *the company* should keep said railroad *and telegraph line* in repair and *use*, and at all times transmit despatches over said *telegraph line*, § 6; the requirement that the company should complete said railroad *and telegraph* on the route prescribed and within a named time, § 7; the reservation that Congress may at any

time, having due regard to the rights of the companies named, add to, alter, amend, or repeal the act in order that it may better accomplish the object of the government, namely, "to promote the public interest and welfare by the construction of" said railroad *and telegraph line*, and keep the same in working order, and to secure to the government at all times (but particularly in time of war) "the use and benefits of the same for postal, military, and other purposes," § 18; these and other provisions are wholly inconsistent with the idea that the Union Pacific Railroad Company could have fulfilled its obligations to the government by simply constructing a railroad, without making any provision whatever for the construction, maintenance, or operation of a telegraph line, thereby leaving all communication by telegraph, along its route, to the absolute control of private corporations deriving no corporate authority from the National Government, and whose operations would not ordinarily be subjected to national supervision.

The same observations are applicable to the Leavenworth, Pawnee and Great Western Railroad Company — afterwards, and successively, as has been stated, the Union Pacific Railway Company, Eastern Division, and the Kansas Pacific Railway Company. That corporation was authorized to construct not simply a railroad, but a railroad *and telegraph line*, between certain points, upon the same *terms and conditions* as were prescribed in the act for the construction of a railroad *and telegraph line* by the Union Pacific Railroad Company.

The purpose of Congress, as indicated in the act of 1862, to provide for the construction of telegraph lines by the companies named in it, in connection with their respective railroads, was unchanged at the time of the passage of the amendatory act of July 2, 1864, c. 216. The latter act, as we have seen, gave authority to the companies authorized to participate in the construction of the roads that were to connect the Missouri River with the Pacific Ocean to place a first mortgage on their respective railroads *and telegraph lines*, and made the mortgage held by the United States subordinate to it. § 10. It did more. It required those companies to operate and use their roads *and telegraph* for all purposes of communication,

travel, and transportation, so far as the public and government were concerned, "as one connected, continuous line," and without discrimination against either road — a requirement that would not have been made if Congress had not intended that each company receiving aid from the government should itself maintain and operate or control, or should provide for the maintenance, on its own route, and under its own control, of a telegraph line for the accommodation of both the government and the general public.

What we have said as to the objects that Congress intended to accomplish by aiding the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean is based upon sections one to eighteen, inclusive, of the act of July 1, 1862, and upon the provisions of the amendatory acts of July 2, 1864, c. 216, and June 20, 1874, 18 Stat. 111, c. 331. If we look alone to those sections and provisions, the conclusion must be that any company named in the act of 1862, and receiving the aid therein granted by the government, was required itself, and through its own officers and employés, to construct, maintain, and operate both a railroad and telegraph line, and could not assign or transfer to any other corporation its franchises in that regard.

But there is a section in the act of 1862 showing that, for the benefit of certain telegraph companies that had already expended large sums in the construction of telegraph lines, Congress was willing, in a named contingency, to relieve the railroad companies receiving governmental aid, from, at least, any present obligation to construct telegraph lines on their respective rights of way. That contingency is indicated in the nineteenth section of the act of 1862, which provides:

"That the several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said tele-

graph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein."

A similar provision relating to the Union Pacific Railroad Company and the United States Telegraph Company and its associates was embodied in the fourth section of the act of Congress, commonly known as the Idaho act, of July 2, 1864, c. 220, 13 Stat. 373, entitled "An act for increased facilities of telegraph communication between the Atlantic and Pacific States and the Territory of Idaho."

By the latter act the United States Telegraph Company and their associates were authorized to erect a line or lines of magnetic telegraph between the Missouri River and San Francisco on such routes as they might select, to connect with its lines then constructed and being constructed through the States of the Union. It was given the use of such unoccupied land of the United States as was necessary for right of way, and materials, and for the establishing of stations along said line for repairs, not exceeding at any station one quarter-section of land, and such stations not to exceed one in fifteen miles on the average of the whole line, unless said lands should be required by the government of the United States for railroad or other purposes. § 1. Under the direction of the President of the United States it was authorized to erect a telegraph line from Fort Hall to Portland, Oregon, and from Fort Hall to Bannock and Virginia City, in the Territory of Idaho, with the same privileges as to the right of way, and so forth, as provided in the first section; the United States to have priority in the use of said lines of telegraph to Oregon and Idaho. § 2. It was authorized to send and receive despatches, on payment of the regular charges for transmission, over any line then or thereafter to be constructed by the

authority or aid of Congress, to connect with any line or lines authorized or erected by the Russian or English governments, and all despatches received by its line or lines were to be transmitted in the order of their reception, and the answers delivered to the United States Telegraph Company for transmission over their lines to the office whence the original message was sent, whenever so directed by the sender thereof. § 3. By the fourth section it was provided: "The several railroad companies authorized by the act of Congress of July one, eighteen hundred and sixty-two, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri River and San Francisco may be made upon and along the line of said railroads and branches as fast as said roads and branches are built, and if said arrangements be entered into and the transfer of said telegraph line be made in accordance therewith to the line of said railroads and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfilment on the part of said railroad companies of the provision of the act in regard to the construction of a telegraph line; and, in case of disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the lines of railroad therein contemplated, without prejudice to the rights of said railroad companies."

Referring to the nineteenth section of the act of 1862, Mr. Justice Miller, in *Western Union Tel. Co.* v. *Union Pacific Railway*, 3 Fed. Rep. 721, 728, (1 McCrary, 581, 588,) said: "The three telegraph companies here spoken of, together constituted, at the time this statute was passed, a continuous line of telegraph from the Missouri River to San Francisco; and it was obvious that the building of another line parallel to that, and not far distant from it, would have a very injurious effect upon the value of the property of those telegraph companies; and it was to protect those companies and to prevent the injury which would follow from the construction of another line between the same points, over an uninhabited region of country, that Congress provided that, by an arrangement with the railroad company, if those companies should remove their

wires along the line of that road so they could be used both for railroad purposes and the use of the general public, then the obligation of the railroad company under the act of Congress to build another line should no longer exist."

In reference to the fourth section of the Idaho act, the same eminent Justice said: "It does not admit, in my opinion, of any reasonable doubt that if the United States Telegraph Company mentioned in that statute, or any company which had the same rights and authorities on that subject that that company had, entered into an agreement with the Pacific Railroad Company, or any of its branches built under the authority of the original act of 1862, which secures the proper construction and operation of a line of telegraph along its road for the benefit of the public, that it is absolved from the obligation imposed upon it by the act of 1862, to construct and operate such a telegraph line. It was manifestly the design of this act of 1864 to enable the United States Telegraph Company to become substituted, by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the track and right of way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line." Id. 727.

We concur in these observations as to the scope and effect of the nineteenth section of the act of 1862, and of the like section in the Idaho act of July 2, 1864, c. 220. But it must be observed that the transfer to the roadway of the Union Pacific Railroad of the lines of the telegraph companies, or either of them, named in the nineteenth section of the act of 1862, was not in pursuance of any "arrangement" made with those companies. On the contrary, as stated by counsel, the lines constructed by telegraph companies between Omaha and Ogden, and operated by the Western Union Telegraph Company prior to the actual completion of the railroad between those points, were transferred to the south side of the railroad as the work of railroad construction proceeded, without any arrangement whatever with the railroad company. This was done under that clause in the nineteenth section of the act of

1862, providing that "in case of disagreement said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein."

In reference to the telegraph line from Kansas City via Lawrence and Rossville to Denver, the claim is, that a part of it was constructed under some arrangement between the railroad company and Samuel Hallett, contractor; that the balance was constructed under the contract of October 1, 1866, between the Western Union Telegraph Company and the Kansas Pacific Railroad Company, the latter contracting by the name it then used of the Union Pacific Railway Company, Eastern Division; and that after that date and until 1880, the line of telegraph extending from Kansas City to Denver was operated under the contract of October 1, 1866. It is further claimed that the telegraph line so constructed was accepted by the Government as a substitute for the line which the charter of the railroad company required it to construct, maintain, and operate.

If it were true that the telegraph line on the Kansas Pacific branch was constructed on the roadway of the railroad company under such an "arrangement" with the railroad company as was contemplated or permitted by the fourth section of the Idaho act, and that the Government, by not declaring to the contrary, is to be deemed to have accepted the construction by the telegraph companies of a line on the south side of the right of way of the Union Pacific Railroad as equivalent to an "arrangement" allowed by the nineteenth section of the act of 1862, the question would remain whether such arrangements, even if legal in all respects when made, so tied the hands of the Government that it could not, at a subsequent date, in execution of the purposes of Congress, require the railroad company, by its own officers and employés exclusively, to maintain or operate telegraph lines for railroad, governmental, and commercial purposes, on and over its roads, for the construction of which the aid of the United States was accepted.

We have seen that the object of giving governmental aid to the corporations named in the act of 1862 was to promote the

public interest and welfare by the construction and operation of a railroad and telegraph line, to the use and benefit of which the Government should be entitled at all times, particularly in time of war, for postal, military, and other purposes; and that "the better to accomplish" that object Congress reserved the power, capable of being exercised at any time, of *adding to*, altering, amending, or repealing such act, having "due regard to the rights" of the companies named in it; and that by the act of 1864, c. 216, the several companies authorized to construct the roads named were required to operate and use their roads and telegraph for all purposes of communication, travel, and transportation as one connected, continuous line, affording equal advantages and facilities as to rates, time, and transportation, without discrimination against other companies, or against persons requiring the transmission of news and messages.

No express limitation is imposed upon the exercise of the power so reserved, except that the act of 1862 required that due regard be had to the rights of the railroad companies that accepted its provisions. But, looking at the entire act, it is clear that there was no purpose to interfere with the authority of Congress to enact such laws, by way of addition to or alteration of existing legislation, as were necessary or conducive to the attainment of the public objects sought to be attained. Indeed, the words in the act of 1862, "due regard for the rights of said companies named therein," suggest only such restrictions as the law, without such words, would imply.

It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consummated. We may here, not inappropriately, repeat what was said in the *Sinking Fund Cases*, 99 U. S. 700, 718, 719, 720, that "this power has a limit," and "cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." Again,

in the same case: "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

But it cannot be doubted that the act of 1888 is within the general scope, and consistent with the objects, of the previous statutes relating to railroad and telegraphic communication between the Missouri River and the Pacific Ocean. If Congress concluded — and we must assume, from the provisions of the act of 1862, that it did conclude — that the public interests and the general welfare would be promoted if the railroad company, accepting national aid, should exercise through its own officers and employés exclusively, the telegraphic franchises granted to it, it is difficult to perceive how legislation designed to enforce such a policy can be held to be wanting in due regard to the rights of such company.

It may be that Congress passed the act of 1888 because, in its judgment, the rights of the Government and of the public, in the matter of telegraphic communication, could be fully secured or effectively guarded only by means of telegraph lines maintained and operated by a corporation deriving its power from the General Government, and subject, in respect

of the general conduct of its affairs, to national supervision and control. If such considerations induced the passage of the act of 1888, can the validity of that legislation be made to turn upon the inquiry by the courts whether the policy inaugurated by Congress was best for the public interests? Can it be said that the act of 1888 is not germane or related to the objects for the attainment of which the aid of the Government was bestowed, as indicated in the act of 1862? These questions must be answered in the negative. We have nothing to do with the wisdom or policy of legislation. The discretion of Congress in such matters cannot be controlled by the judiciary, nor can the courts disregard an act of legislation merely upon the ground that the public interests would, in their judgment, have been best subserved by leaving telegraphic communications, along the route of railroads constructed with national aid, under the domination of private corporations organized under state authority. We can consider only the question of legislative power. If the power existed to enact the statute of 1888, the duty of the courts is to give full effect to the will of Congress. No other position can be taken without attributing to the judiciary an authority to revise the action of the legislative branch of the Government that it does not possess, and which the established principles of our Government forbid it to exercise.

The contention that the act of 1888 did not have due regard to the rights of the railroad company is based upon that provision in the act of 1862 (§ 19), and a similar provision in the act of 1864 (§ 4), which permitted the railroad company to make an "arrangement" with certain telegraph companies to place their lines upon and along the route of the railroad and branches — such transfer to be held and considered, for all the purposes of the act, a *fulfilment* on the part of said railroad companies of the provisions of the act "in regard to the *construction* of said lines of telegraph." But such an arrangement, accompanied by the transfer of telegraph lines constructed by telegraph companies to the roadway of the railroad company, had no other effect than to relieve the railroad company from any *present* duty itself to construct a telegraph

line to be used under the franchises granted and for the purposes indicated by Congress. It did not affect the authority of Congress, under its reserved power, to require the railroad company itself to maintain or operate in the future, by its officers and employés alone, telegraph lines on its main road and branches.

Indeed, no arrangement of the character specified could have been made, except in full view of the power reserved to add to, alter, or amend the act that permitted it. Although, as just stated, that power could not have been exercised, so as to divest either the railroad company or the telegraph company of property already acquired, or to disturb or annul any transaction fully consummated, while such arrangement was in force, it was competent for Congress to make such additions to, or such alterations or amendments of, previous statutes, as would secure the maintenance or operation by the railroad company, through its own officers and employés, of a telegraph line over and along its main line and branches.

It is of no consequence that such legislation may defeat the purpose contemplated by the parties to an arrangement of the character described; for they contracted, and could only have contracted, in view of the possible exercise by Congress of the power expressly reserved by it. If we should hold the addition made by the act of 1888 to the act of 1862, and the acts amendatory thereof, to be beyond the power of Congress, it would be difficult, if not impossible, to prescribe the lines within which the national legislature must keep, and beyond which it may not pass, when exerting its reserved power of adding to, altering, or amending statutes and charters of incorporation.

We have, therefore, considered the question before us just as if a contract or arrangement, between the railroad and a telegraph company, for the construction by the latter of a telegraph line on the route of the former, expressly recited the provision of the act of 1862, by which Congress reserved the power, to be exerted at any time, to add to, amend, or repeal the act which authorized such contract or arrangement.

In this view, it must be held that by its reservation of authority to add to, alter, amend, or repeal the acts in question,

whenever it chose so to do, Congress, subject to the limitation that rights actually vested or transactions fully consummated could not be disturbed, intended to keep within its control the entire subject of railroad and telegraphic communication between the Missouri River and the Pacific Ocean, through the agency of corporations created by it, or that had accepted the bounty of the Government. It was never intended that the railroad companies, accepting such bounty, should be able, by any contract or arrangement with telegraph companies, to discharge themselves, for all time and beyond the authority of Congress otherwise to provide, from the obligation to exercise, by their officers and agents exclusively, the telegraphic franchises received by them from the National Government.

These principles are fully supported by former decisions, in which this court has determined the scope and effect of constitutional or statutory provisions that reserved to the legislature granting charters of incorporation, or enacting statutes under which private rights might be acquired, the power to alter, amend, or repeal such charters or statutes. *Tomlinson* v. *Jessup*, 15 Wall. 454, 457, 458; *Miller* v. *State*, 15 Wall. 478; *Holyoke Company* v. *Lyman*, 15 Wall. 500; *Sinking Fund Cases*, 99 U. S. 700, 720, 721; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 21; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Water Works Co.* v. *Schottler*, 110 U. S. 347, 352; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 696; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 408; *Sioux City Street Railway* v. *Sioux City*, 138 U. S. 98, 108; *Louisville Water Co.* v. *Clark*, 143 U. S. 1, 12, 14; *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 270; *N. Y. & N. E. Railroad* v. *Bristol*, 151 U. S. 556, 567.

What has been said in reference to the effect of the reservation in the act of 1862 of the right of adding to, altering, amending, or repealing its provisions, is applicable to the fourth section of the Idaho act of July 2, 1864, which permitted the several railroad companies referred to in the act of 1862 to make an arrangement with the United States Telegraph Company, such as was permitted by the nineteenth section of the act of 1862 to be made with the telegraph companies therein

named. The fourth section of the Idaho act was, in legal effect, nothing more than an amendment or enlargement of the nineteenth section of the act of 1862, by adding the name of another telegraph company to those mentioned in the latter section.

It was suggested in argument that the objects of the act of 1862 could be fully accomplished by means of a telegraph company, incorporated by one of the States, and which, by placing its lines on the route of the railroad, could meet all the demands, as well of the railroad company, as of the Government and the general public. But this suggestion can have no weight in the present inquiry. For if, as intimated, the execution of the act of 1888 will result in no real good to the general public, and may even be injurious to the pecuniary interests which the Government has in the Union Pacific Railway and its branches, that is a question of public policy, with which the judiciary is not concerned, and the responsibility for which is with another branch of the Government.

We perceive no escape from the conclusion that it is entirely competent for Congress to add to, alter, or amend the acts of 1862 and 1864, so as to require the Union Pacific Railway Company, possessing the rights and powers of its constituent companies, to maintain and operate, by and through its own officers and employés, telegraph lines, for railroad, governmental, commercial, and other purposes, and to exercise itself and alone all the telegraphic franchises conferred upon it. It is enjoying the bounty of the Government subject to the condition, among others, that it will perform these duties whenever so required by Congress.

It becomes necessary now to determine in what respects the agreements of 1866, 1869, 1871, and 1881, if kept and performed by the defendants, are inconsistent with the rights of the United States, and whether, by their necessary operation, they will interfere with the performance by the Union Pacific Railway Company of the duty imposed upon it by the act of 1888.

Looking first at the agreement of October 1, 1866, between the Union Pacific Railway Company, Eastern Division, and the Western Union Telegraph Company, it will be seen that the Western Union Telegraph Company does not, in that agree-

ment, expressly undertake to meet the obligations imposed by the Pacific Railroad acts upon the railroad companies named in them, of constructing, maintaining, and operating both a railroad and telegraph line, on their respective routes, for the use equally of the Government and the public. It does undertake to perform, without charge to the railway company, what should be "decided by competent authority" to be the telegraphic obligations of the railroad company to the Government. § 10. Whom the parties regarded as competent to decide as to the nature and extent of such obligations, does not appear from the agreement. The effect of this stipulation, as between the railway company and the telegraph company, was to excuse the latter from performing any services for the Government, until competent authority decided that such service was due from the former.

But passing this point, as one not controlling in the case, it is evident that the effect, if not the object, of the agreement was to give the telegraph company the absolute control of all telegraphic business on the route of the Union Pacific Railway Company, Eastern Division.

The provision that the railway company should transport for the telegraph company, free of charge, all the persons engaged, and material required, in the construction, repairing, and maintaining the telegraph line for which the agreement provided, while exacting from other telegraph companies, for persons engaged and for property intended to be used, in building a telegraph line on the railway company's roadway, the usual rates for passengers and freight, §§ 4, 5; the stipulation that the railway company should not give permission to another telegraph company to construct or operate any telegraph line upon the lands or roadway of the railway company, without the consent in writing of the telegraph company, § 5; the provision that the railway company should not, without the consent of the telegraph company, transmit commercial or paid business from any station where the latter had an office; and the provision that the railway company should account for and pay over to the telegraph company, at the tariff rates established by the latter, all sums received by

the railway company for messages sent from points where the telegraph company had no separate office, if such sums were not sufficient to meet the expenses of a separate telegraph office, § 8 — these provisions, to say nothing of others, all plainly indicate that the object of the agreement was to grant to the Western Union Telegraph Company, as against all other telegraph companies, the exclusive right to control the railway company's roadway for telegraphic purposes, so far as that could be done without interfering with the ordinary operations of the railway company.

This agreement of October 1, 1866, enabling the Western Union Telegraph Company to exclude all other telegraph corporations from the roadway of the railway company, if not void as against public policy, independently of specific statutory provisions, was inconsistent with the act of Congress of July 24, 1866, 14 Stat. 221, c. 230, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes." The substantial provisions of this statute have been preserved in sections 5263 to 5268, inclusive, of the Revised Statutes.

By the act of June 8, 1872, 17 Stat. c. 335, pp. 308, 309, reproduced in section 3964 of the Revised Statutes, all the waters of the United States, during the time the mail is carried thereon, and all railroads or parts of railroads in operation, are post roads. And by the above statute of 1866 Congress declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any State of the Union should have the right to construct, maintain, and operate lines of telegraph through or over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had been or might thereafter be declared such by act of Congress, and over, under, or across the navigable streams of the United States; the lines of telegraph to be so constructed and maintained as not to obstruct the navigation of streams and waters, or interfere with the ordinary travel on military or post roads. "And any of said companies," the act declared, "shall have the right to take and use from such public lands the necessary

stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands, subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

The remaining sections of that act were as follows: "§ 2. That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster General. § 3. That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, The United States may at any time, after the expiration of five years from the date of the passage of this act, for postal, military, and other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected. § 4. That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the United States of the restrictions and obligations required by this act."

It is clear that the essential part of the agreement of 1866 is prohibited by this act of July 24, 1866. As that act gave every telegraph company, organized under state laws, and accepting its provisions, the right to erect its poles and wires upon the post roads of the United States, the agreement of the Union Pacific Railway Company, Eastern Division, that it would not permit, except with the consent of the Western Union Telegraph Company, other telegraph companies to use its roadway,

directly tended to make the act of July 24, 1866, ineffectual, and was, therefore, hostile to the object contemplated by Congress. *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 11. The railway company operating one of the post roads of the United States, over which interstate commerce was carried on, could not, at least after the passage of that act, grant to any one or more telegraph companies the exclusive right to use its roadway for telegraphic purposes.

But it is contended that the agreement of 1866 was authorized by the Idaho act of 1864.

That act, as we have said, authorized the several railroad companies, named in the act of July 1, 1862, to enter into an "arrangement" with the "United States Telegraph Company" for the transfer of its telegraph line to the roadways of the railroad company, and declared that such transfer, when made, should, for all the purposes of the act of 1862, "be held and considered a fulfilment, on the part of said railroad companies, of the provisions of this act in regard to the construction of a telegraph line."

We have already determined that the Idaho act did not affect the power that Congress reserved, of adding to, altering, amending, or repealing the original and amendatory acts. It is now to be examined as to its bearing upon the validity of the agreement of October 1, 1866.

If the Western Union Telegraph Company became the successor in right and power of the United States Telegraph Company, and entitled to make any arrangement with the railroad company that its predecessor could legally have made — and such is the claim of the Western Union Telegraph Company — the question, nevertheless, remains, whether the fourth section of the Idaho act authorized any "arrangement" to be made by the Union Pacific Railway Company, Eastern Division, with the United States Telegraph Company, in conflict with the previous act of July 24, 1866. This question is not, in our judgment, difficult of solution.

The purpose of the fourth section of the Idaho act is quite apparent. Its effect was, as we have heretofore said, to relieve each of the railroad companies named in the act of 1862 from

any *present* obligation to construct a telegraph line on its roadway, by means of an "arrangement" with the United States Telegraph Company for the construction of such a line. But no arrangement could be legally made under that act which tended, in any degree, to defeat the great objects of the act of 1862, and the act amendatory thereof, of July 2, 1864, c. 216. The act of 1862 did not authorize the railroad company to agree that it would not itself, at some future time, construct and operate a telegraph line for the use of the Government and the people. Nor did it, in terms or by implication, repeal or modify the clause in that act by which Congress expressly reserved the power to add to, alter, amend, or repeal, the latter act, having due regard to the rights of the railway companies named in it. Certainly, it could never be held that a due regard to the rights of either the railroad company or of any corporation claiming under it required that the Government, charged by the Constitution with the duty of regulating interstate commerce, should permit the railroad company receiving national aid to invest a corporation, not deriving its authority from the United States, with the exclusive right to enjoy its roadway — a national highway — for purposes of telegraphic communication between the States.

Even if the act of July 24, 1866, had never been passed, we ought not to construe the Idaho act as permitting the railway company to bind itself by agreement to give to one telegraph company a monopoly of the use of its roadway for telegraphic purposes. In none of the acts of Congress, having for their object the establishing of communication by railroad and telegraph between the Missouri River and the Pacific Ocean, is there to be found anything indicating a purpose to allow the post roads of the United States, particularly those aided by the Government, to fall, for all the purposes of telegraphic communication, under the exclusive control of one or more telegraph corporations. On the contrary, as early as the act of June 16, 1860, c. 137, "to facilitate communication between the Atlantic and Pacific States by electric telegraph," it was declared that nothing in that act contained should confer "any exclusive right to construct a telegraph to the Pacific,

or debar the Government of the United States from granting from time to time, similar franchises and privileges to other parties." 12 Stat. 41.

If, however, it be contended that this is not the correct interpretation of the Idaho act, upon what ground can it be claimed that any arrangement could be made under the Idaho act, after the passage of the act of July 24, 1866, that was inconsistent with the latter act? Can it be said that, after the passage of the act of 1866, and while it was in force, a railway company, operating a post road of the United States, could, by any form of agreement, exclude from its roadway a telegraph company which had accepted the provisions of that act? These questions can be answered only in one way, namely, that every railroad company operating a post road of the United States, over which commerce among the States is carried on, was inhibited, after the act of July 24, 1866, took effect, from making any agreement inconsistent with its provisions or that tended to defeat its operation. The object of that act was not only to promote and secure the interests of the Government, but to obtain, for the benefit of the people of the entire country, every advantage, in the matter of communication by telegraph, which might come from competition between corporations of different States. It was very far from the intention of Congress, by any legislation, to so exert its power as to enable one telegraph corporation, Federal or state, to acquire exclusive rights over any post road, especially one for the construction of which the aid of the United States had been given, and the use of which was, to some extent, under the control of the National Government.

We are, consequently, of opinion that the agreement of October 1, 1866, was, in its essential provisions, invalid and not binding upon the railway company.

In reference to the agreements of 1869 and 1871 between the Union Pacific Railroad Company and the Atlantic and Pacific Telegraph Company, but little need be said to show that they were void. By those agreements the former corporation demised and leased to the telegraph company, to whose rights, it may be assumed, the Western Union Telegraph Company suc-

ceeded, all the telegraph lines, wires, poles, instruments, offices, and other property appertaining to telegraph business, that were possessed by the railroad company. These agreements were annulled by the Circuit Court, and it was likewise so adjudged by the Circuit Court of Appeals. The same conclusion had been previously announced by Judge McCrary in *Atlantic and Pacific Telegraph Co.* v. *Union Pacific Railway Co.*, 1 McCrary, 541, 547. That able judge well said: "I conclude that the charter of the Union Pacific Railroad Company devolved upon it the duty of constructing, operating and maintaining a line of telegraph for commercial and other purposes, and that this is in its nature a public duty. I am further of the opinion that, by the provisions of the contract of September 1, 1869, and of December 20, 1871, the railroad company undertook to lease or alienate property which was necessary to the performance of this duty. The consideration for these contracts is declared to be 'the demise of their telegraph lines, property and good will, and of the rights and privileges, in the manner hereinafter specified,' etc.; and the property demised by the railroad company is 'all its telegraphic lines, wires, poles, instruments, offices, and all other property by it possessed, appertaining to the business of telegraphing, for the purpose of sending messages and doing a general telegraph business.' The lessee was to hold during the whole term of the charter of the railroad company and any renewal thereof. There is inserted a stipulation that the lessee shall perform all the duties imposed or that may be imposed upon the railroad company by their charter or by the laws of the United States. But, as already intimated, I do not think this latter clause makes the contract good. The railroad company was not at liberty to transfer to others those important duties and trusts which it, for a large consideration and for a great public purpose, had undertaken to perform. It certainly could not divest itself of these powers and duties, and devolve them upon the plaintiff, without express authority from Congress." Again: "But if the contracts in question are not *ultra vires* by reason of the transfer of property necessary to the performance, by the railroad company, of its public duties, they are so because

they attempt to transfer certain franchises of the said company. The right to operate a telegraph line, and to fix and to collect tolls for the use of the same, is, to say the least, the most valuable part of the franchise conferred by Congress upon the railroad company, as a telegraph company. This right is alienated by a clear and unequivocal assignment or transfer from the railroad company to the plaintiff. Without discussing other features of the contracts, I am compelled to hold that this feature is alone sufficient to render them in excess of the corporate power of the company."

We now come to the important contract of July 1, 1881, between the Western Union Telegraph Company and the Union Pacific Railway Company. As that contract is too lengthy to be inserted at large in the body of this opinion, we have, in our statement of the case, given such of its provisions as appear to relate directly to the issues presented by the pleadings.

We have seen that the contract of July 1, 1881, was annulled by the original decree of the Circuit Court, but was upheld by the Circuit Court of Appeals, except as to the third and fourth paragraphs, which were adjudged by that court to be null and void to the extent that they secured and granted, or were intended to secure or grant, to the Western Union Telegraph Company any exclusive rights, privileges, or advantages whatsoever.

Much said in this opinion touching the agreements of 1866, 1869, and 1871, is applicable to that of 1881, and need not be here repeated. We have no difficulty in holding that the latter was invalid in the particulars named in the final decree of the Circuit Court of Appeals. But that agreement is illegal, not simply to the extent that it assumes to give to the Western Union Telegraph Company exclusive rights and advantages in respect of the use of the way of the railroad company for telegraph business; but it is also illegal because, in effect, it transfers to the Western Union Telegraph Company the telegraphic franchise granted it by the Government of the United States. The duty to maintain and operate a telegraph line between the points specified in the act of 1862 was committed by Congress to certain corporations which it named, and neither they, nor any corporation into which they were

merged, could, without the consent of Congress, invest a state corporation with exclusive telegraphic privileges on the line of the roads it then owned or thereafter acquired. The United States was not bound to look to the Western Union Telegraph Company for the discharge of the duties the performance of which, in consideration of the aid received from the Government, the Union Pacific Railroad Company, and other named companies, undertook to discharge for the benefit of the United States and of the public. No agreement with the telegraph company, to which the assent of the Government was not given, could take from the railroad company its right at any time to itself maintain and operate the telegraph line required by the act of 1862 for the use of the Government and of the public, nor impair the power of Congress to require the performance by the railroad company itself of the duties imposed by that act. As to the object of the provisions of the agreement of 1881, the Circuit Court, speaking by Mr. Justice Brewer, properly said: "They mean that the telegraphic business and the telegraphic franchise, in the sense we have defined it, should be exercised by the Western Union Telegraph Company, and that no other company, railway or telegraph, should touch it. The purpose was — a purpose disclosed by every section and line of the contract — that the public and commercial use of the telegraph wires should belong to the Western Union Company, leaving to the railroad company only so much of the telegraph wires as was necessary for its own business." Again: "So it is that the lessons of experience support and establish the construction placed upon the contract of 1881, to the effect that the telegraphic franchise, as a franchise of independent, public, and commercial transportation, was intended to be and was transferred by the railway company to the Western Union Company, leaving only to the former so much use of telegraph wire as would facilitate and further its own railroad business."

That the purpose of the agreement of 1881 was to transfer to the Western Union Telegraph Company the telegraphic franchises granted by the United States, was asserted by that company in a bill filed by it (a copy of which is made a part

of the present record) to prevent the Union Pacific Railway Company from complying with the mandate of the act of August 7, 1888. In that bill it was claimed that the parties stipulated in the contract of 1881 that the telegraph company "might render to the Government and to the public such telegraph service as by the law of its creation it was bound to perform." And the telegraph company stated, in the same bill, that it had come about under that agreement, and through the growth of the railroad business, that the railroad company had "no wires on which it can do a general telegraph business, all those devoted to its railroad business being overburdened therewith." Again, in the same bill: "The said wires used by the defendant in the operation of its road are not equal to its necessities in that behalf, and it is impossible for it to do any business for the public or other companies on said wires without seriously interfering with and impeding the operation of its engines, cars, and trains, and if it undertake to do so it will be under the necessity of using your orator's five wires, or some of them. Upon your orator's said wires is carried on almost the entire transcontinental business of the Union; nor can your orator submit to any interference therewith by the defendant or any other party without seriously impeding and disarranging that business to its great loss and the public inconvenience." In addition to this, it may be stated that the telegraph superintendent of the railway company testified in this case that it would not be practicable to operate the wires used by the railroad company "for general commercial business without seriously interfering with the railroad business, and the railroad company's wires would be inadequate to carry any additional business." This inquiry need not be further extended, except to observe that there would be no occasion to make the Western Union Telegraph Company a defendant in this suit, and it would not have any standing in court to complain of the act of August 7, 1888, if it did not claim that the construction, or the maintenance and operation by the railway company, through its own employés, of a distinct telegraph line on the route of its road, for the use of the Government and of the public, was in violation of the contract it had made with the railroad company.

The fundamental question, therefore, is whether such a contract was permitted by the acts of Congress defining the obligations of railroad companies that had accepted the bounty of the Government. For the reasons we have given in the discussion of other parts of this case, we answer this question in the negative. Such a contract is not authorized by the fourth section of the Idaho act, or by the like section (19th) of the act of 1862. The "arrangements" authorized by those acts were not such as to admit of a contract that would disable the railroad company from entering upon the construction and maintenance itself of a telegraph line for the accommodation of the Government and of the public, or that would prevent the United States from requiring the railroad company to maintain and operate a telegraph line to be entirely controlled by itself, and which would be wholly independent of any telegraph line operated by corporations created under the laws of a State. And we may add what has been said in reference to the prior agreements of 1866, 1869, and 1871, namely, that no railroad company, operating a post road of the United States, over which interstate commerce is carried on, can, consistently with the act of July 24, 1866, bind itself, by agreement, to exclude from its roadway any telegraph company, incorporated under the laws of a State, which accepts the provisions of that act, and desires to use such roadway for its line in such manner as will not interfere with the ordinary travel thereon.

On behalf of the telegraph company it is contended that it was beyond the power of Congress to so legislate as "to impair the contracts, first, that between the United States and the several companies mentioned in the act of 1862; and, second, those between the railway company and this defendant." We perceive no ground on which this contention can properly rest. It has already been fully examined. As we have seen, Congress in the act of 1862 expressly reserved the power not only to alter, amend, or repeal that act, but to add to its provisions. To what has already been said as to the power of Congress, under this reserved power, we may add, that the object of such reservation is to enable the legislative

department to protect the public interests, and "to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measure affecting its obligation." *Tomlinson* v. *Jessup*, 15 Wall. 454, 457, 458.

Another contention of the telegraph company is that for any failure or refusal by the railway company to comply with sections one and two of the act of August 7, 1888, the remedy of the United States is an action at law by mandamus, and that equity is without jurisdiction to enforce a compliance with those sections.

It cannot be doubted that the Government could lawfully proceed by mandamus against the railway company for the purpose simply of compelling it to perform any duty imposed by its charter or by statute. But that remedy would not afford the United States the full relief to which it is entitled. Here are agreements between the railway company and the telegraph company that are wholly inconsistent with the present claims of the Government. Until cancelled — because inconsistent with the act of 1888, and prejudicial to the rights of the Government and the public — by a decree to which the telegraph company is a party, those agreements constitute an obstacle in the way of the enforcement of that act, and the protection of those rights. In a mandamus proceeding by the Government against the railway company, the telegraph company could not properly be made a defendant, and no judgment in mandamus, as between the United States and the railway company, would conclude the rights of the telegraph company. The United States is certainly entitled to the interposition of equity for the cancellation of the agreements under which the telegraph company asserts rights inconsistent with the act of 1862 and the acts amendatory thereof, as well as with the act of 1888. Jurisdiction in equity being acquired for that purpose, the court, in order to avoid a multiplicity of suits, can proceed to a decree that will settle all matters in dispute between the United States, the railway company, and the telegraph company which relate to the general subject of telegraphic communication between the

points named by Congress. Consequently a decree cancelling the agreements of 1866, 1869, 1871, and 1881, by reason of their being in the way of the full performance by the railway company of the duties imposed by the act of 1888, may also require the railway company to obey the directions of Congress as given in the last named act.

Indeed, in a proceeding by mandamus instituted against the railway company alone, it might be objected that a court of competent jurisdiction, in a suit brought by the telegraph company against the railroad company, had enjoined the latter, as between it and the telegraph company, from disregarding the agreement of 1881. *Atlantic & Pacific Tel. Co.* v. *Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co.* v. *Union Pacific Railway*, 3 Fed. Rep. 423; *Same* v. *Same*, 3 Fed. Rep. 721. It is true that the United States, with leave of court, might have intervened in that suit. But it was not bound to do so. It was entitled to institute its own suit, and bring before the court both companies, to the end that its rights might be declared and enforced by a comprehensive decree against both defendants.

In *Boyce* v. *Grundy*, 3 Pet. 210, 215, this court said: "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." The circumstances of each case must determine the application of the rule. *Watson* v. *Sutherland*, 5 Wall. 74, 79. In *Oelrichs* v. *Spain*, 15 Wall. 211, 228, an objection was raised that the remedy at law was ample. The court, observing that the remedy at law was not as effectual as in equity, said, among other things, that a "direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation." The final order in a proceeding by mandamus against the railway company would not conclude the rights of the telegraph company. Nor would a suit in equity by the telegraph company against the railway company conclude the rights of the United States. But a suit in equity by the United States against both companies for the purpose of an-

nulling the agreements under which the telegraph company claims rights adverse to the United States, can embrace all the matters in controversy and authorize a comprehensive decree that will terminate all disputes among the parties as to such matters. *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 567.

These principles are abundantly sustained by the authorities. In 1 Pomeroy's Equity Jurisprudence, § 181, many adjudged cases are cited in support of the proposition that "if the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority." This principle was applied in *Peck* v. *School Dist. &c.*, 21 Wisconsin, 516, 523. That was a suit to set aside a contract made by the officers of a municipality. The court held that the contract should be set aside, and the question arose whether the decree might not go farther and prevent the collection of the taxes assessed and levied for the purposes of the contract adjudged to be illegal. It was held that as the taxes were levied in order to carry the illegal contract into effect, their collection could be stayed as a proper subsidiary ground of relief, upon the principle that the jurisdiction of the court having once rightfully attached, it should be made effectual for all the purposes of complete relief. "The court," it was said, "will not annul the contract and at the same time permit the officers of the district to collect the taxes to be afterwards recovered back by a multiplicity of suits at law."

We are of opinion that the Circuit Court properly adjudged that equity had jurisdiction to give full relief in respect of all matters in issue between the United States and the defendant companies.

We perceive no substantial error in the decree passed by the Circuit Court. There are some minor provisions in each

of the contracts annulled by it which may not be regarded as in themselves beyond the power of the contracting parties, nor inconsistent either with the duties enjoined upon the railway company by the act of 1888 or with the rights of the United States. But they are of so little practical importance, and are so interwoven with, and so difficult to be separated from, the provisions found to be illegal and to stand in the way of the due execution of the act of Congress, that the Circuit Court properly adjudged that the contracts referred to should be set aside and annulled.

The decree of the Circuit Court of Appeals of January 29, 1894, is reversed and set aside, and the decree of the Circuit Court of October 11, 1892, is affirmed.

It is further adjudged by this court that the Circuit Court make a supplemental decree, enlarging the period within which the defendants may make such arrangements, adjustments, and changes as shall become necessary by reason of the annulling of the contracts of October 1, 1866, September 1, 1869, December 14, 1871, and July 1, 1881, and to carry out the provisions of the final decree of that court. Reversed.

MR. JUSTICE BREWER took no part in the hearing or decision of this case on the present appeal.

UNITED STATES *v.* WESTERN UNION TELEGRAPH COMPANY AND UNION PACIFIC RAILWAY COMPANY.

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

No. 19. Argued December 18, 1894. — Decided November 18, 1895.

Although the United States was entitled to retain and apply, as directed by Congress, all sums due from the Government, on account of the use by the Telegraph Company, for public business, of the telegraph line con-

structed by the Union Pacific Railway Company, the entire absence of proof as to the extent to which that line was, in fact, so used, renders it impossible to ascertain the amount improperly paid to, and without right retained by, the Telegraph Company, and subsequently divided between it and the Railroad Company.

THE case is stated in the opinion.

Mr. Solicitor General Maxwell for plaintiff in error.

Mr. Rush Taggart for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the United States to recover from the defendants in error the sum of $12,495.62, which amount, it is alleged, was paid to the Western Union Telegraph Company on account of telegraph messages transmitted for the Government, after July 1, 1881, over telegraph lines operated by that company on and over the route of the Union Pacific Railway, and was wrongfully divided between the two defendants in disregard of the rights of the United States.

The general ground upon which the Government rests this claim is that the sums paid by it on account of such messages were set apart for specific purposes by the acts of Congress under which the Union Pacific Railroad Company, the predecessor of the Union Pacific Railway Company, received the aid of the United States for the construction and maintenance of its railroad and telegraph lines.

Pursuant to the direction of the Circuit Court a verdict was returned for the defendants, and judgment was rendered in their favor.

The relations between the United States and the defendant company are fully shown in the opinion just rendered in the case of the *United States* v. *Union Pacific Railway Company, et al.*, 160 U. S. 1. In order, however, that the issue in the present case may be readily understood without frequently recurring to that opinion, it is necessary to restate some of the facts disclosed in the former case.

The Union Pacific Railroad Company was incorporated by the act of Congress of July 1, 1862, passed to aid in the con-

struction of a railroad and telegraph line between the Missouri River and the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes. 12 Stat. 489, c. 120.

That act granted to the company a right of way through the public domain for the construction of a railroad and telegraph, and, in aid of such construction granted also every alternate odd-numbered section of public land, not mineral, to the amount of five alternate sections per mile, within the limits of ten miles on each side of the road, and which had not been sold, reserved, or otherwise disposed of by the United States, and to which a preëmption or homestead claim had not attached. §§ 1, 2, 3, 4.

For the purposes mentioned, the Secretary of the Treasury was required, upon the written certificate, by commissioners appointed by the President, of the completion and equipment of each forty consecutive miles of railroad and telegraph, as prescribed by the act, to issue to the company bonds of the United States for a named amount. And to secure the repayment to the United States of any bonds so issued and delivered, with the interest thereon paid by the United States, such issue and delivery were declared to constitute, *ipso facto*, a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind belonging to the company. § 5.

By the sixth section of that act it was provided that "the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the Government shall be applied to the payment

of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

The nineteenth section was in these words: "The several railroad companies herein named are authorized to enter into an arrangement with the Pacific Telegraph Company, the Overland Telegraph Company, and the California State Telegraph Company, so that the present line of telegraph between the Missouri River and San Francisco may be moved upon or along the line of said railroad and branches as fast as said roads and branches are built; and if said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this act, be held and considered a fulfilment on the part of said railroad companies of the provisions of this act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated without prejudice to the rights of said railroad companies named herein."

This act also provided that the better to accomplish its object, "namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act." § 18.

This act was amended by an act approved July 2, 1864. 13 Stat. 356, c. 216.

The latter act contained additional grants of lands and

bonds, and by its fifth section provided that only "one-half" of the compensation for services rendered for the Government by the companies named in the act "shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads." By the fifteenth section of that act the several companies authorized to construct the roads named were required "to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one continuous line; and, in such operation and use, to afford and secure to each equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others," etc. 13 Stat. 356, 358, 362.

By an act approved May 7, 1878, known as the Thurman Act, 20 Stat. 56, c. 96, § 2, it was provided that "the whole amount of compensation which may, from time to time, be due to said several railroad companies respectively for services rendered for the Government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid, to each of said corporations severally, and the other half thereof to be turned into the sinking fund hereinafter provided, for the uses therein mentioned." The same act made it the duty of the Attorney General of the United States to enforce, by proper proceeding, against the said several railroad companies, respectively or jointly, or against either of them, and others, "all the rights of the United States under this act and under the acts hereinbefore mentioned, and under any other act of Congress or right of the United States; and in any suit or proceeding already commenced, or that may be hereafter commenced, against any of said companies, either alone or with other parties, in respect of matters arising under this act, or under the acts or rights hereinbefore mentioned or referred to, it shall be the duty of the court to determine the very right of the matter without regard to matters of form,

joinder of parties, multifariousness, or other matters not affecting the substantial rights and duties arising out of the matters and acts hereinbefore stated and referred to." § 10.

In 1865 the Union Pacific Railroad Company began to construct its road, and, in 1869, completed its main line from Omaha to Ogden. It also constructed a separate telegraph line on the *north* side of its right of way from a point at or near Omaha to Ogden.

The Leavenworth, Pawnee and Western Railway Company, a corporation of Kansas, referred to in the ninth section of the act of 1862, and in the twelfth section of the act of 1864, c. 216 — and which at the date of the latter act was known as the Union Pacific Railway Company, Eastern Division, 12 Stat. 493, 13 Stat. 361, began, in 1865, to construct, and, in 1870, completed, a railroad from Kansas City to Denver, connecting at the latter point under the authority of an act of Congress, 15 Stat. 324, c. 127, with the Denver Pacific Railroad and Telegraph Company, a corporation of Colorado, whose road extended from Denver to Cheyenne.

In 1880, these three companies — the Union Pacific Railway Company, Eastern Division, having previously changed its name to that of Kansas Pacific Railway Company — consolidated their lines, property, and franchises, and became the Union Pacific Railway Company, a defendant in this action.

As operated, at the time this action was brought, the Union Pacific Railway extended from a point at or near Council Bluffs to Ogden, and from Kansas City, by the way of Denver, to Cheyenne.

The entire line from a point at or near Omaha to Ogden, and the line from Kansas City to Boaz, between Kansas City and Denver, was aided by the United States by grants of lands and by bonds; the line from Boaz to Denver, and from Denver to Cheyenne, by grants of land alone.

The United States has never been reimbursed in full for the interest paid on these bonds, and if in this action the Government should recover the whole sum claimed by it, a large deficit would still remain over and above all payments made or credits given.

On the 16th day of June, 1860, Congress passed an act to "facilitate communication between the Atlantic and Pacific States by electric telegraph." 12 Stat. 41, c. 137.

At the date of that act, the Western Union Telegraph Company owned or operated lines extending eastward and southward from St. Joseph to Washington, New Orleans, New York, and other principal cities of the United States.

Under the act of 1860, the Pacific Telegraph Company and the California State Telegraph Company began in 1861 to construct, and prior to 1863 had completed and put in operation, a telegraph line from St. Joseph, Missouri, by way of Omaha and Salt Lake City, to San Francisco, upon substantially the route afterwards adopted by the Union Pacific Railroad Company for its road between Omaha and Ogden.

Proceeding under the nineteenth section of the act of July 1, 1862, above quoted, the Pacific Telegraph Company and the California State Telegraph Company transferred their lines from their prior location and reconstructed them upon the *south* side of the right of way of the Union Pacific Railroad Company, as rapidly as the latter constructed its road between Omaha and Ogden, and those companies or the Western Union Telegraph Company have ever since operated and maintained those lines. But this transfer was made without any arrangement with the railroad company, but under that provision of the act of 1862 declaring that, in case of disagreement, the telegraph companies "are authorized to remove their line of telegraph along and upon the line" of the railroad, without prejudice to the rights of the railroad companies named in that act. § 19.

In 1864 the Pacific Telegraph Company was consolidated with, and in 1867 the California State Telegraph Company was leased to, the Western Union Telegraph Company.

On the 1st day of September, 1869, the Union Pacific Railroad Company leased its line of telegraph to the Atlantic and Pacific Telegraph Company by an agreement of that date, which was supplemented by an agreement entered into on the 20th day of December, 1871. Under those agreements, which were examined in the case of *United States* v. *Union Pacific*

Railway Company et al., just decided, the Atlantic and Pacific Telegraph Company operated the railroad telegraph lines until about February 1, 1881, when it was merged into the Western Union Telegraph Company by consolidation.

Prior to July 2, 1864, the United States Telegraph Company began the construction of a telegraph line from Wyandotte, Kansas, westward, and was constructing it at the time the Leavenworth, Pawnee and Western Railroad Company began to build its road; and, under the act of July 2, 1864, known as the Idaho act, entitled "An act for increased facilities for telegraph communication between the Atlantic and Pacific States and the Territory of Idaho," 13 Stat. 373, c. 220, it removed its constructed line and located the same upon the right of way of the Leavenworth, Pawnee and Western Railroad Company, and continued to build and operate its line as the construction of that road progressed.

This Idaho act authorized the several railroad companies named in the act of July 1, 1862, to enter into arrangements with the United States Telegraph Company, so that the line of telegraph between the Missouri River and San Francisco could be made upon and along the line of said railroad and branches as fast as that road and branches were built. If such arrangements were entered into, and the transfer of the telegraph line was made, in accordance therewith, to the line of the railroads and branches, such transfer should, for all purposes of the act referred to, be held and considered a fulfilment on the part of the railroad companies of the provisions of the act in regard to the construction of a telegraph line; and in case of disagreement the telegraph company was authorized to remove its line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of the railroad companies. § 4.

On the 27th day of February, 1866, the United States Telegraph Company transferred its telegraph lines, and the right to extend the same, to the Western Union Telegraph Company, and the latter built a telegraph line along the railroad last named, as fast as that road was constructed, and on October 1, 1866, the latter company, and the railroad company

under the name of the Union Pacific Railway Company, Eastern Division, entered into an agreement pursuant to which that telegraph line was completed to Denver.

The Leavenworth, Pawnee and Western Railroad Company constructed no line of telegraph along its road, but received the compensation prescribed by the several acts of Congress for the full performance of the conditions of those acts, namely, land and bonds for the road from Kansas City to Boaz, and lands for the road from Boaz to Denver.

In Title LXV of the Revised Statutes will be found, substantially, all the provisions of the act of July 24, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government the use of the same for postal, military, and other purposes," 14 Stat. 221, c. 230, as well as some of the provisions of other acts relating to the same general subject. Those provisions are as follows:

"§ 5263. Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

"§ 5264. Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preëmpt and use such portion of the unoccupied public lands subject to preëmption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

Section 5265 forbids the transfer by any company to any other corporation, association, or person of the rights granted by the act of July 24, 1866, or by the above title.

"§ 5266. Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

"§ 5267. The United States may, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all companies acting under the provisions of the act of July 24, 1866, or under this title, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster General of the United States, two by the company interested, and one by the four so previously selected."

Section 5268 provides that "before any telegraph company shall exercise any of the powers or privileges conferred by law such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by law."

On the 7th of June, 1867, the Western Union Telegraph Company formally accepted the provisions of the act of July 24, 1866, and since about January 1, 1873, the compensation it was entitled to receive for sending messages for the Government has been fixed by the Postmaster General.

The Union Pacific Railway Company never accepted the provisions of the act of July 24, 1866, as to its telegraph line.

On the 1st day of July, 1881, the Western Union Telegraph Company and the Union Pacific Railway Company entered into an agreement, under which the former operated all the telegraph lines named in it, and the provisions of which have been, and at the date this action was brought were being, carried out by both parties.

The preamble of that agreement recites that it was made "for the purpose of providing telegraphic facilities for the parties hereto, and of maintaining and operating the lines of telegraph along the railway company's railroads in the most economical manner in the interest of both parties and for the purpose of fulfilling the obligations of the railway company to the Government of the United States and the public in respect to the telegraphic service required by the act of Congress of July 1, 1862, and the amendments thereto."

All the telegraph lines and wires covered by the agreement, belonging to or used by either party, were, for the purposes of the contract, to "form part of the general system of the telegraph company;" and the railway company was to be protected by the telegraph company from the payment of all taxes levied and assessed upon the telegraph property belonging to either party.

This agreement, by its terms, extended to all railroads and branches or extensions, then or thereafter owned or controlled by the railroad company, except railroads that might be subsequently acquired, on which the telegraph company already had a line in operation; and to such roads the agreement was not to apply, except by mutual consent of the parties.

The third paragraph of this agreement provided that "the railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, upon and under the line, lands and bridges of the railway company and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires, or either of them, or underground or other system of communication for commercial or public uses or business, with the right to put up from time to time or cause to be put up or constructed under the provisions of this agreement, such additional wires on its own or the railway company's poles or such additional lines of poles and wires, or either, as well on its bridges as on its right of way, or to construct such underground lines as the telegraph company may deem expedient, doing as little damage and causing as little inconvenience to the railway company as is

practicable, and the railway company will not transport men or material for the construction or operation of a line of poles and wire or wires or underground or other system of communication in competition with the lines of the telegraph company, party hereto, except at and for the railway company's regular local rates, nor will it furnish for any competing line any facilities or assistance that it may lawfully withhold, nor stop its trains, nor distribute material therefor at any other than regular stations."

By article four of the agreement it was provided that the employés of the railway company "shall transmit over the lines owned, controlled, or operated by the parties hereto, all commercial telegraph business offered at the railway company's offices, and shall account to the telegraph company exclusively for all of such business and the receipts thereon, as provided herein;" that "the telegraph company shall have the exclusive right to the occupancy of the railway company's depots or station-houses for commercial or public telegraph purposes as against any other telegraph company;" and "that if any person or party, or any officer of the Government, tender a message for transmission over the railway telegraph lines between Council Bluffs and Ogden at any railway telegraph station between those points and require that the service be rendered by the railway company, the operator to whom the same is tendered shall receive and forward the same accordingly, at rates to be fixed by the railway company, to the point of destination if not beyond its own lines. . . . *Provided*, *however*, That the local receipts of the railway company on such message shall be divided between the parties hereto in the same manner and subject to the same conditions as provided in the tenth clause of this agreement." The tenth clause provided that "at all telegraph stations of the railway company its employés shall receive, transmit, and deliver such commercial or public messages as may be offered, and shall render to the telegraph company monthly statements of such business, and full accounts of all receipts therefrom, and the railway company shall cause all of such receipts to be paid over to the telegraph company monthly;" and the telegraph

company agreed "to return to the railway company monthly one-half of the cash receipts at telegraph stations maintained and operated by and at the expense of the railway company." The telegraph company agreed to furnish at its own expense all blanks and stationery for commercial or public telegraph business, and all instruments, main and local batteries and battery material for the operation of its own and the railway company's wires and offices. It is also covenanted to save the railway company harmless and indemnify it against loss or damage from neglect or failure in the transmission or delivery of messages "for any person doing business with said telegraph company, or on account of any other public or commercial telegraph business" for which the railway company was to account.

No record was kept of business done under this agreement of 1881, and the parties have stipulated, that "it is now impossible to prove over what particular wire or wires the messages set out in the plaintiff's bill of particulars were actually transmitted, but a part were sent over what, prior to 1881, were the wires of the railroad company, and the balance over the wires owned by the telegraph company."

Since the contract of 1881, the telegraph company and the railway company have not maintained distinct offices or employed different sets of telegraph operators except at some of the larger towns and cities, where the Western Union Telegraph Company has, in addition, established separate offices for the transaction of commercial business away from the line of the railway, but the offices have been in common and the same set of operators have done the work required by both the telegraph company and the railway company.

In the agreed statement of facts it appears that "the amount of messages set out in the plaintiff's bill of particulars correctly states the date of each message therein set forth; the sender of the same, and from what point to what point the same was transmitted by the Western Union Telegraph Company; the amount collected by the Western Union Telegraph Company for the transmission of the same; the proportionate amount of the whole sum thus paid to the Western Union

Telegraph Company which was for the bonded portion of the telegraph lines along the railways of the Union Pacific Railway Company, such sum being such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph along said line or lines of railway bears to the whole distance the message was transmitted from the point of origin to the point of destination; that the compensation for each of the messages was computed and paid for as one entire service and at the then ruling rate for such entire distance fixed by the Postmaster General of the United States, in accordance with section 5266 of the Revised Statutes of the United States; all of said messages were delivered to the Western Union Telegraph Company by the agent or officer of the Government sending the same, written upon the Western Union Telegraph Company's blanks, and directed to the receiver of such message at the point of destination and without any direction to transmit the same over the bonded portion of the line of telegraph of the Union Pacific Railway Company for the whole or any part of the distance, but it was known to the Western Union Telegraph Company, from the character of the said messages, that they were from one officer or agent of the Government to another. That at all the times the said messages were thus transmitted by the Western Union Telegraph Company at the rates annually fixed by the Postmaster General of the United States, the ordinary rates, known as commercial rates, charged to other persons for transmitting like messages for the same distances were very much in excess of the rates fixed by the Postmaster General; that the ordinary or commercial rate upon the bonded portions of the lines of telegraph situated along the lines of railway of the Union Pacific Railway Company was likewise very much in excess of the rates fixed by the Postmaster General of the United States during the period covered by the account in this action. That as to a large number of messages included in said bill of particulars and known as Signal Service reports, the same were transmitted under special arrangement and differently from other classes of messages, upon what were known as 'circuits,' with 'drops' at all places receiving the said Signal Service reports. The

method of doing said business was as follows: As many places as the Chief Signal Service Officer desired should receive the said Signal Service report were connected upon one continuous line of telegraph called a 'circuit,' and the said reports were then sent over this wire, and at each point where said reports were received an operator took the said reports; each of said points thus receiving the report being called a 'drop,' and all of said points receiving the said reports at the same time; that by reason of this method of sending reports, a specially low rate was made therefor, the said rate being fixed by the Postmaster General in the circulars issued annually, and upon the basis of amount of matter and number of drops, and extent of circuits. That the circuits for the transmission of said Signal Service reports were made up between the points named in the account in this action, and included intermediate points or drops in each case; that the amount sought to be recovered in this action is such proportionate amount of the whole amount paid as the distance along the bonded portion of the telegraph lines upon the said line or lines of railway bears to the whole distance over which such messages or reports were sent."

Such is the case made by the record now before the court.

It is clear, under the acts of 1862, 1864, and 1878, that the Government was entitled to retain, and to apply as directed by Congress, all sums due on account of services rendered in its behalf, by any railroad company named in those acts, that had received the aid of the United States in the construction of its railroad and telegraph lines. All such sums were set apart by Congress for the payment of the principal and interest of any bonds delivered by the United States to such company. The Government could, therefore, have retained and applied, as in the acts of Congress required, all sums due from it on account of messages sent or received by it over the telegraph line *constructed by the Union Pacific Railroad Company. Sinking Fund cases*, 99 U. S. 700. No agreement between that company and the Western Union Telegraph Company, transferring to the latter the control of the tele-

graph line constructed by the railroad company, could affect the rights of the United States.

If it distinctly appeared that the amount sued for was only the aggregate of sums originally due from the United States, on account of public messages passing over the telegraph lines constructed by the Union Pacific Railroad Company, we should have no difficulty in sustaining the present claim of the Government. But no such state of case is presented by the record. It does not even appear that the Government, prior to the period covering the account in suit, requested the telegraph company to so keep its books as to show what messages sent or received on public business were transmitted over the telegraph line constructed by the railroad company on its route. Nor does it appear that any such account was kept by the Government.

It is agreed to be now impossible to show over what particular wire or wires — whether those belonging to the Western Union Telegraph Company or those belonging to the Union Pacific Railway Company — the messages set out in the Government's bill of particulars were, in fact, transmitted. Nothing more definite appears than that "a part" — how much cannot be now known — were sent over the wires originally established by the railroad company, and "the balance" — how much cannot be shown — over the wires owned by the telegraph company.

It is because of the impossibility of now distinguishing between these two classes of messages, that this action proceeds, and can only proceed, upon the theory that the length which the telegraph line, constructed *by the railroad company*, bears to the entire distance, in whatever part of the United States, from the point of origin of a telegraph message to the point of its destination, measures the proportion which might have been rightfully retained by the Government of the entire sum earned by the telegraph company for transmitting and delivering such messages.

According to this theory, the presumption must be indulged that every message delivered to the telegraph company for transmission, and which passed over the whole or some part

of the general route of the Union Pacific Railway, passed over the telegraph line constructed on the north side of that route by the railroad company, but operated by the telegraph company, rather than over the line, on the south side of that route, owned by the telegraph company. No such presumption can be justified upon any principle of right or justice.

The telegraph company had a line of its own on the right of way of the railway company, with the consent of the United States. It accepted the provisions of the act of Congress giving the Postmaster General authority to fix the rates to be charged for any business transacted for the Government. But it neither expressly nor impliedly agreed that, when no directions in the matter were given by the representative of the Government, it would transmit all messages, on behalf of the Government, from or to points on either side of the route of the Union Pacific Railway, over the telegraph line constructed by the railroad company, rather than over the line owned by itself. In the absence of such directions, the telegraph company was at liberty to send such messages over its own line at the rates established by the Postmaster General. If it did so, the Government was probably benefited rather than injured; for the rates fixed by the Postmaster General were less than the ordinary rates, known as commercial rates, charged against private persons, and which the railway company, by its charter, was entitled to charge for public messages sent over its telegraph line. If, in the absence of any direction not to do so, the telegraph company actually used, for the purpose of transmitting a public message, the line constructed by the railroad company, there can be no doubt that the sum due therefor could be retained by the United States and applied as indicated in the act of 1878; for the telegraph company, notwithstanding the agreement of July 1, 1881, would be bound to take notice of the fact that that telegraph line was constructed with the aid of the Government, and that *its* earnings on account of public business were dedicated by Congress to specific purposes.

It results that, although the United States was entitled to retain and apply, as directed by Congress, all sums due from

the Government, on account of the use by the telegraph company, for public business, of the telegraph line constructed by the railroad company, the entire absence of proof as to the extent to which that line was, in fact, so used, renders it impossible to ascertain the amount improperly paid to, and without right retained by, the telegraph company, and subsequently divided between it and the railroad company. Upon this ground, we adjudge that the court below did not err in directing a verdict for the defendants.

The judgment is

Affirmed.

GOLDSBY, *alias* Cherokee Bill, *v.* UNITED STATES.

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

No. 620. Submitted October 21, 1895. — Decided December 2, 1895.

There is nothing in this case to take it out of the ruling in *Isaacs* v. *United States*, 159 U. S. 487, that an application for a continuance is not ordinarily subject to review by this court.

In the trial of a person accused of crime the exercise by the trial court of its discretion to direct or refuse to direct witnesses for the defendant to be summoned at the expense of the United States is not subject to review by this court.

Moore v. *United States*, 150 U. S. 57, 61, affirmed and applied to a question raised in this case.

While it is competent, if a proper foundation has been laid, to impeach a witness by proving statements made by him, that cannot be done by proving statements made by another person, not a witness in the case.

It is within the discretion of the trial court to allow the introduction of evidence, obviously rebuttal, even if it should have been more properly introduced in the opening, and, in the absence of gross abuse, its exercise of this discretion is not reviewable.

Rev. Stat. § 1033 does not require notice to be given of the names of witnesses, called in rebuttal.

If the defendant in a criminal case wishes specific charges as to the weight to be attached in law to testimony introduced to establish an alibi, he may ask the court to give them; and, if he fails to do so, the failure by the court to give such instruction cannot be assigned as error.

The plaintiff was indicted on the 8th of February, 1895,

for the murder of Ernest Melton, a white man and not an Indian. The crime was charged to have been committed at the "Cherokee Nation in the Indian country on the 18th day of November, 1894." Prior to empanelling the jury on the 23d of February, 1895, the accused filed two affidavits for continuance until the next term of court. The first, filed on the 12th of February, 1895, based on the ground that for some time prior to the finding of the indictment the defendant had been in jail, was sick, and unable properly to prepare his defence, and that he was informed if further time were given him, there were witnesses, whose names were not disclosed in the application, who could be produced to establish that he was not guilty as charged. This was overruled. The second was filed on the 22d day of February, upon the ground that four witnesses, whom the court had allowed to be summoned at government expense, were not in attendance, and that there were others, whose names were given, who could prove his innocence, and who could be produced if the case were continued until the next term of court; the affidavit made no statement that the four witnesses had been actually found at the places indicated, and gave no reason for their non-attendance, and asked no compulsory process to secure it.

Before the trial the accused filed three requests for leave to summon a number of witnesses at government expense. The first was made on the 12th of February, and asked for twenty-five; the affidavit made by the accused gave the names of the witnesses and the substance of what was expected to be proven by them. The court allowed fifteen. Of the ten witnesses disallowed, two were government witnesses, and were already summoned; seven were the wives of witnesses whom the court ordered summoned, the affidavit stating that the husband and wife were relied on to prove the same fact; the other witness disallowed, the affidavit disclosed, was also relied on simply to corroborate the testimony of some of the witnesses who were allowed. The second request was made on the 16th of February, asking for six witnesses, all of whom were ordered to be summoned. The third request was made on the 19th of February for two additional witnesses, one Harris and wife.

This application was refused, both being government witnesses.

On the trial the uncontradicted testimony on behalf of the government was that at about noon, on the day stated, two men robbed a store at a town in the Indian Territory, and that during the course of the robbery the murder was committed by one of those engaged therein. The testimony for the prosecution tended to identify the accused not only as having been one of the robbers, but also as being the one by whom the murder was committed. The testimony for the defence tended to disprove that of the government, which identified the accused, and tended, moreover, by proof of an alibi, to demonstrate the impossibility of the offence having been committed by him. There was a verdict of guilty as charged. The defendant brought the case by error here.

Mr. William M. Cravens 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.

There are fourteen assignments of error. Two address themselves to the refusal of the court to grant the applications for continuance; three to the action of the court in denying the request to summon certain witnesses at government expense; four relate to rulings of the court, admitting or rejecting testimony; and, finally, five to errors asserted to have been committed by the court in its charge to the jury. We will consider these various matters under their respective headings.

In a recent case we said: "That the action of a trial court upon an application for continuance is purely a matter of discretion 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." *Isaacs* v. *United States*, 159 U. S. 487, and authorities there cited. We can see nothing in the action on the applications for continu-

ance, which we have recited in the statement of facts, to take it out of the control of this rule. The contention at bar that because there had been no preliminary examination of the accused, he was thereby deprived of his constitutional guarantee to be confronted by the witnesses, by mere statement demonstrates its error.

There was likewise no error in the action of the court in relation to the various requests to summon witnesses at government expense; on the contrary, the fullest latitude was allowed the accused. Were it otherwise, the right to summon witnesses at the expense of the government is by the statute, Rev. Stat. § 878, left to the discretion of the trial court, and the exercise of such discretion is not reviewable here. *Crumpton* v. *United States*, 138 U. S. 361, 364.

There was proof showing that at the time of the robbery a watch charm had been taken by the accused from one of the persons present in the house which was robbed. This charm was produced by a witness for the prosecution, who testified that it had been given him by one Verdigris Kid, whom the testimony tended to show had participated in the robbery; that this giving of the charm to the witness had taken place in the presence of the accused; that at the time it was given the fact of the robbery was talked of by the accused, he saying: "That he had made a little hold up and got about one hundred and sixty-four dollars as well as I remember, and that he had shot a fellow, I believe." To the introduction of the watch charm objection was made. We think it was clearly admissible and came directly under the rule announced in *Moore* v. *United States*, 150 U. S. 57, 61. John Schufeldt, the son of the man whose store was robbed, in his testimony on behalf of the government, identified the accused not only as one of the robbers but also as the one by whom the murder was committed. He was asked, on cross-examination, whether he had heard his father, in the presence of a Mr. John Rose, say that the robbers were, one an Indian, and the other a white man. He answered that he did not recollect hearing him make such a statement. On the opening of the defendant's case, Schufeldt was recalled for further cross-examination, and the question was again asked

him, he replying to the same effect, thereupon the defence put Rose upon the stand to testify to the conversation had by him with the father of Schufeldt in his (John Schufeldt's) presence, the father not being a witness in the cause. On objection the testimony was excluded on the ground, that whilst it would be competent if the proper foundation had been laid to impeach the witness, by proving statements made by him, it was incompetent to affect his credibility by proving statements made by another person, not a witness in the case. The ruling was manifestly correct.

The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. *Wood* v. *United States*, 16 Pet. 342, 361; *Johnston* v. *Jones*, 1 Black, 209, 227; *Commonwealth* v. *Moulton*, 4 Gray, 39; *Commonwealth* v. *Dam*, 107 Mass. 210; *Commonwealth* v. *Meaney*, 151 Mass. 55; *Gaines* v. *Commonwealth*, 50 Penn. St. 319; *Leighton* v. *People*, 88 N. Y. 117; *People* v. *Wilson*, 55 Michigan, 506, 515; *Webb* v. *State*, 29 Ohio St. 351; Wharton's Criminal Pleading and Practice, § 566; 1 Thompson on Trials, § 346, and authorities there cited.

During the course of defendant's evidence, and before he had closed his case, testimony was elicited on the subject of the defendant's hat, the purpose of which tended to disprove some of the identifying evidence given on the opening of the case. When this was adduced the prosecuting officer notified the defence that he would be obliged to call in rebuttal one Heck Thomas.

At a subsequent period in the trial Heck Thomas was sworn. As he was about to testify objection was made, as follows:

"Counsel for defendant: We were going to object to Mr. Thomas being sworn. We now object to his being examined as a witness, on the ground that under the statute the defendant is required to have forty-eight hours' notice of witnesses to be used by the government, and we have had no notice of an intention to use Mr. Thomas as a witness.

"The Court: The court has always held if it is in rebuttal it is absolutely impossible to give the defendant notice of the witness. If that is the rule, that we have to give forty-eight hours' notice to the defendant of witnesses to be used in rebuttal, it would simply amount to a defeat of justice and a defeat of a trial altogether. The reason of the rule is very manifest, but when it comes to facts that are purely in rebuttal no notice can be given, because it is impossible.

"Counsel for defendant: Of course I understand the position of the court, but we simply want to discharge what we thought our duty in this matter, and we except to any statement of what the witness will prove, and we except to the use of the witness. We do not think it is competent either in chief or rebuttal, and therefore we waive an exception to the whole pleading.

"The Assistant District Attorney: The facts I want to establish by Mr. Thomas are about these: That he, in attempting to capture the defendant, had a fight with him on the 16th of November. A witness for the defendant was on the stand and the court remembers what he says about the time he saw the defendant, a week after the Frank Daniel fight. We propose to show the date of that fight, which will be the 16th of November, and also as to the kind of hat the defendant was wearing, and that he had at that time a wire cutter in his possession.

"Counsel for defendant: The wire cutter part would certainly not be rebuttal.

"The Assistant District Attorney: Yes, it is, because they have introduced evidence to show that this country was covered with wire fences."

Conceding that the facts as to which the witness was called to testify were matters of rebuttal, the absence of the notice

required, Rev. § Stat. 1033, did not disqualify him. The provision of the statute is that "when any person is indicted for treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, . . . shall be delivered to him at least three entire days before he is tried for the same." The next sentence in the section makes the foregoing applicable to capital cases, but reduces the time to two entire days before the trial. The words "for proving the indictment," and the connection in which they are used, clearly refer to the witnesses relied upon by the prosecution to establish the charge made by the indictment. They do not extend to such witnesses as may be rendered necessary for rebuttal purposes resulting from the testimony introduced by the accused in his defence. Indeed, that they do not apply to rebuttal is obvious from the very nature of things, for if they did, as was well said by the trial judge, it would be impossible to conduct any trial. Upon state statutes containing analogous provisions the authorities are free from doubt. *State* v. *Gillick*, 10 Iowa, 98; *State* v. *Ruthven*, 58 Iowa, 121; *State* v. *Huckins*, 23 Nebraska, 309; *Gates* v. *The People*, 14 Illinois, 433; *Logg* v. *The People*, 92 Illinois, 598; *State* v. *Cook*, 30 Kansas, 82; *Hill* v. *The People*, 26 Michigan, 496.

That the testimony, as to the hat, sought to be elicited from the witness Thomas was purely rebuttal is equally clear. This is also the case with regard to the testimony as to the wire cutter. The defence in its attempt to make out the alibi introduced testimony tending to show that the defendant at a given time was many miles from the place of the murder, and that by the public road he could not have had time to reach this point, and have been present at the killing. In order to prove that he could not have reached there by any other more direct route than the public road, one of his witnesses had testified that the country was covered with wire fences. It was competent to show in rebuttal of this statement that the accused was in possession of a wire cutter, by which the jury could deduce that it was possible for him to travel across the country by cutting the fences. Of course the weight to be

attached to the proof was a matter for the jury, but it was clearly rebuttal testimony, and its admissibility as such is covered by the ruling in *Moore* v. *United States*, *ubi supra*.

The four errors assigned as to the charge of the court do not complain of the charge intrinsically but are based upon the assumption that, although correct, it was misleading and tended to cause the jury to disregard the testimony offered by the defendant to establish an alibi. But the charge in substance instructed the jury to consider all the evidence and all the circumstances of the case, and if a reasonable doubt existed to acquit. If the accused wished specific charges as to the weight in law to be attached to testimony introduced to establish an alibi, it was his privilege to request the court to give them. No such request was made, and, therefore, the assignments of error are without merit. *Texas & Pacific Railway* v. *Volk*, 151 U. S. 73, 78.

Affirmed.

WASHINGTON & IDAHO RAILROAD COMPANY *v.* CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 585. Argued November 13, 14, 1895. — Decided December 2, 1895.

An action commenced May 27, 1889, in the District Court of the Territory of Idaho, before the admission of Idaho as a State, by a corporation organized under the laws of Washington Territory, against a corporation organized under the laws of Montana Territory, and against a railroad company organized under the laws of the United States, upon which latter company service had been made and filed, was, after the admission of Idaho as a State, removable to the Circuit Court of the United States for that circuit both upon the ground of diversity of citizenship of the territorial corporations, and upon the ground that the railroad company was incorporated under a law of the United States; and, so far as the latter ground of removal is concerned, it is not affected by the fact that the railroad company afterwards ceased to take an active part in the case, as the jurisdictional question must be determined by the record at the time of the transfer.

The provision in the act of March 3, 1875, c. 152, 18 Stat. 482, granting the

right of way through the public lands of the United States to any railroad duly organized under the laws of any State or Territory, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, plainly means that no corporation can acquire a right of way upon a line not described in its charter, or articles of incorporation.

When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor.

On May 15, 1889, the Washington and Idaho Railroad Company, describing itself as a corporation duly organized under the laws of Washington Territory, brought an action of ejectment in the District Court of the First Judicial District of the Territory of Idaho against the Cœur d'Alene Railway and Navigation Company, as a corporation duly organized under the laws of Montana Territory and the Northern Pacific Railroad Company, as a corporation duly organized under the laws of the United States. The complainant alleged that, on the 10th day of July, 1887, the plaintiff was lawfully possessed, as owner in fee simple, of a certain tract of land situated in Shoshone County, Idaho Territory, being the right of way of plaintiff's railroad, consisting of a strip of land two hundred feet in width and about four thousand feet in length; that the defendant, the Cœur d'Alene Railway and Navigation Company, on the 1st day of August, 1887, entered into possession of the demanded premises, and ousted and ejected the plaintiff therefrom; that the defendant, the Northern Pacific Railroad Company, claimed to be in possession of said premises as a tenant of the Cœur d'Alene Railway and Navigation Company, and was actually in the possession of said premises at the time of the institution of the suit; that the value of the rents, issues, and profits of the said premises while the plaintiff was excluded therefrom is five thousand dollars; that the plaintiff was still the owner in fee simple and entitled to the possession of said premises; and plaintiff demanded judgment against the said defendants for the possession of the demanded premises, and for the sum of six thousand dollars as damages.

A writ of summons against the defendants was sued out

and, on the 27th day of May, 1889, was returned as served on the said defendants, by the delivery of a copy thereof to their authorized agent. On May 31, 1889, the separate answer of the Cœur d'Alene Railway and Navigation Company was filed, denying the plaintiff's title, and claiming that defendant had, in good faith, and without any knowledge that the plaintiff claimed any interest therein, entered into possession of the described land and, in the belief that it was the owner thereof, had constructed thereon its railroad and its depot, at an expense exceeding seven thousand dollars; that the plaintiff knew that the defendant was constructing its railroad and depot as aforesaid, and permitted the same to be done without making any claim to said premises, wherefore defendant claimed judgment that the plaintiff should take nothing by the action; that the plaintiff should be declared to be estopped from claiming title to said premises; and that the defendant should have such other and further relief as should be just and equitable.

On the 3d day of July, 1890, by virtue of an act of Congress of that date, the said Territory of Idaho became a State; and on August 27, 1890, the defendants filed a petition in the District Court of the First Judicial District of the State of Idaho, praying for the removal of said case to the Circuit Court of the United States, Ninth Circuit, in and for the District of Idaho; and the case was so proceeded in that, on December 6, 1892, a final judgment was entered, adjudging that the plaintiff, the Washington and Idaho Railroad Company, should take nothing by the action, and that the defendant, the Cœur d'Alene Railway and Navigation Company, should have judgment against the said plaintiff for its costs.

The trial in the Circuit Court was by the court, a jury having been waived by both parties. The court made the following findings of facts:

"First. That on the 6th day of July, 1886, the defendant, the Cœur d'Alene Railway and Navigation Company, filed its articles of incorporation in the office of the secretary of the Territory (now State) of Montana, and also filed in the office of the county clerk and recorder of the county of Lewis

and Clarke, in said Territory, a certified copy of its said articles of incorporation, which articles of incorporation are, in words and figures, following, to wit:

"'Territory of Montana, } ss:
County of Lewis and Clarke, }

"'We, Daniel C. Corbin, Samuel T. Hauser, Anton H. Holter, of the city of Helena, in the county of Lewis and Clarke, Territory of Montana; Stephen S. Glidden, of Spokane Falls, Washington Territory; James F. Wardner, of Wardner, in the Territory of Idaho; James Monaghan, of Cœur d'Alene, Idaho Territory; and Alfred M. Esler, of said Helena, Montana, do by these presents, pursuant to and in conformity with article 3 of chapter 15 of the Revised Statutes of Montana, entitled "railroad corporations," and all acts supplemental thereto or amendatory thereof, associate ourselves together and form a corporation for the purpose of locating, constructing, maintaining, and operating railroads in the Territories of Montana and Idaho, and to that end we do hereby certify as follows:

"'*First.* The name of such corporation by which it shall be known shall be "The Cœur d'Alene Railway and Navigation Company."

"'*Second.* The termini of said railroad are to be located in the county of Missoula, Territory of Montana, and in the counties of Kootenai and Shoshone, in the Territory of Idaho, and, if said corporation shall so determine, termini may also be located in the county of Nez Perces, in said Territory of Idaho; said railroad shall pass through said counties of Missoula, Kootenai, and Shoshone, and if said corporation shall so determine, then said railroad shall also pass through said county of Nez Perces, and the general route of said railroad shall be as follows: Commencing at or near the town of Thompson's Falls, in said county of Missoula, or at some convenient point between said Thompson's Falls and the western boundary line of said Territory of Montana; thence running westerly or southwesterly to that certain tributary of Cœur d'Alene River known as the South Fork; thence down the South Fork and Cœur d'Alene River to Old Mission, connecting with steamboats or other water craft, to be owned and

operated by said corporation, said steamboats or other craft to ply between said Old Mission and the town of Cœur d'Alene; and, if said corporation shall so determine, then said railroad shall again commence at said town of Cœur d'Alene, and run northwesterly to Rathdrum, in said county of Kootenai, or such point on the line of the Northern Pacific railroad between Rathdrum and the western boundary of Idaho Territory as said corporation may hereafter determine, with the right and privilege, if said corporation shall see proper, to run a branch or extension of said road in a southerly direction from said Shoshone County to the said county of Nez Perces; said steamboats or other water craft between the points in that behalf above specified to be used in connection with and as constituting a part of said railroad.

"'*Third.* The amount of capital stock necessary to construct such roads, including said connections, is five hundred thousand dollars, divided into five thousand shares of one hundred dollars each.

"'*Fourth.* The principal place of business of said corporation in the Territory of Montana shall be at Helena, in the county of Lewis and Clarke, and principal place of business of said corporation in the Territory of Idaho shall, until otherwise fixed by the board of directors of said corporation, be at Cœur d'Alene, in the said county of Kootenai.'

"Second. That the line of route of the railroad of the said Cœur d'Alene Railway and Navigation Company, as described in said article of incorporation, passes over and includes the ground in controversy in this action.

"Third. That on the 20th day of July, 1886, the defendant, the Cœur d'Alene Railway and Navigation Company, filed in the office of the Secretary of the Interior, at Washington, D. C., a certified copy of its said articles of incorporation, and proofs of its organization under the laws of the Territory (now State) of Montana, which certified copy of articles of incorporation and proofs of organization were duly approved on that day by the honorable Secretary of the Interior.

"Fourth. That in the summer and fall of 1886 the de-

fendant, the Cœur d'Alene Railway and Navigation Company, constructed its railroad over said line of route as described in said articles of incorporation, from the said Old Mission up the main Cœur d'Alene River to the town of Kingston, and thence up the South Fork of the Cœur d'Alene River to the town of Wardner Junction, a distance of about fourteen miles; and that in the month of October, 1886, the said defendant, the Cœur d'Alene Railway and Navigation Company, for the purpose of extending its line of railroad, caused a survey to be made for its said line of railroad from said Wardner Junction, up the said fork of the Cœur d'Alene River, over the line described in its said articles of incorporation, through the towns of Wallace and Mullen, and marked the centre line of said road upon the ground by planting stakes at each station at one hundred feet, and at such other points as there were angles in the line, so that the line of route of said road could be readily traced upon the ground, and that the said surveying and marking of said line was completed on the 31st day of October, 1886. That in making said survey the engineers of said Cœur d'Alene Railway and Navigation Company ran three lines through said town of Wallace, called lines 'A,' 'B,' and 'C,' said lines 'A' and 'B' both being on the south side of the South Fork of the Cœur d'Alene River, and the said line 'C' being on the north side of said river, and being the line upon which the railroad of the Cœur d'Alene Railway and Navigation Company was afterwards constructed, and upon the ground now in controversy in this action. That in the month October, 1886, and about one week after the commencement of the said survey by the engineers of the said Cœur d'Alene Railway and Navigation Company, W. H. Burrage, an engineer, with a party of assistants claiming to be acting for the plaintiff, commenced surveying a line of route for a railroad from near the town of Wardner, up the South Fork of the Cœur d'Alene River, to the said town of Mullen, and that, in making said survey, the said Burrage and the party assisting him were several days and several miles behind the engineers surveying for the defendant, the Cœur d'Alene Railway and Navigation Company; and that in surveying their

line through the town of Wallace, said Burrage surveyed the same on the north side of said river and over the ground in controversy; and that said Burrage and party also marked their line in a similar manner to what the engineers of the Cœur d'Alene Railway and Navigation Company had done, and that said Burrage and party completed their survey on the 5th day of November, 1886, and that said portion of said line run by said Burrage over the ground in controversy was run on the 28th day of October, 1886, and that said line 'C' run by the engineers of the said Cœur d'Alene Railway and Navigation Company over the land in controversy was run on the 29th day of October, 1886; and that all of the parts of the line of the Cœur d'Alene Railway and Navigation Company, except said line 'C,' were run and marked prior to the line run by the said Burrage, said line 'C' being run by the engineers of the Cœur d'Alene Railway and Navigation Company as an amendment after they had completed the survey to the town of Mullen.

"Fifth. That in the summer and fall of 1887 the defendant, the Cœur d'Alene Railway and Navigation Company, extended its road from the town of Wardner Junction over its line of survey, a point about one mile east of the town of Wallace, and over said line 'C,' the ground in controversy in this action, through the town of Wallace; and at all times thereafter, up to and at the time of the commencement of this action, occupied and used the same as a railroad and for railroad purposes; and at the time of the commencement of this action had its roadbed and track, and side tracks and depot thereon, and was using the same exclusively for railroad purposes.

"Sixth. That at all the times above mentioned the lands in controversy, and all other lands along the line of said railroad of the defendant, the Cœur d'Alene Railway and Navigation Company, as described in its articles of incorporation, were unsurveyed public lands of the United States.

"Seventh. That on the 7th day of July, 1886, the articles of incorporation of the plaintiff, the Washington and Idaho Railroad Company, were filed in the office of the secretary of the Territory (now State) of Washington; that by said articles

of incorporation so filed the plaintiff was authorized to construct a railroad from the town of Farmington, in Washington Territory, by the most practical route in general northerly direction, to a point at or near the town of Spokane Falls (now Spokane), in said Washington Territory, together with the following branch lines tributary thereto: From a junction with the said main line at the forks of Hangman Creek, near Lone Pine, in said Washington Territory, in a general northeastern direction, across the Cœur d'Alene Indian reservation, to a point near the mouth of St. Joseph's River on Cœur d'Alene Lake; thence in a northerly direction along the east side of Cœur d'Alene Lake to the Cœur d'Alene River; thence in a general easterly direction to Cœur d'Alene River; thence in a general easterly direction to Cœur d'Alene mission; thence in a southeasterly direction, by the valley of the South Fork of the Cœur d'Alene River to Wardner, in Idaho Territory. Second. From a junction with said main line, at or near the town of Spangle, in Washington Territory, in a generally northeasterly direction, to a point on Cœur d'Alene Lake, about five miles north of the mouth of the Cœur d'Alene River, in said Idaho Territory, and to maintain and operate such railroads and telegraph lines and branches thereof, carry freight and passengers thereon, and receive tolls therefor.

"Eighth. That the said line of railroad, as described in the said articles of incorporation of the plaintiff, nor any of the branches thereof, did not cover or include the ground in controversy, or any part thereof, or of the valley of the South Fork of the Cœur d'Alene River adjacent thereto; that the eastern terminus of the said branch of railroad running in the direction of the town of Wallace, as described in said articles, was at the town of Wardner, a distance of about fifteen miles westerly from the town of Wallace and from the land in controversy herein.

"Ninth. That afterwards, to wit, on the 10th day of November, 1886, and after the completion of said survey by said Burrage, and the said survey by the engineers of the defendant, the Cœur d'Alene Railway and Navigation Company, over the premises in controversy herein, the plaintiff filed in

the office of the secretary of the Territory (now State) of Washington supplemental articles of incorporation, which supplemental articles of incorporation provided for a branch line of its railroad from the town of Milo (which is near Wardner), in Shoshone County, Idaho, following the South Fork of the Cœur d'Alene River to the town of Mullen, in said Territory, a distance of about twenty miles, which extension would pass over the premises in controversy.

"Tenth. That on the 22d day of December, 1886, the plaintiff filed in the office of the Secretary of the Interior at Washington, D. C., a copy of its said articles of incorporation and a copy of the statute of the Territory of Washington under which the plaintiff's incorporation was made and proof of its organization.

"Eleventh. That from the time of the making of the said survey by said Burrage over the land in controversy, on the 28th day of October, 1886, until long after the completion of the railroad, side tracks, and depot of the defendant, the Cœur d'Alene Railway and Navigation Company, upon the ground in controversy, neither the said Burrage nor the plaintiff, nor any person for them or either of them, ever made any other survey or did any other act upon the premises in controversy or took any possession thereof; and that the first act done by said Burrage or the plaintiff upon said premises thereafter was the survey made thereon in the year 1888 by the plaintiff; and that at that time the railroad and the side track and depot of the defendant, the Cœur d'Alene Railway and Navigation Company, was fully constructed thereon, and had been so constructed, and thereon, since the fall of 1887, and the defendant, the Cœur d'Alene Railway and Navigation Company, was in full and complete operation and possession thereof and of the grounds in controversy herein.

"Twelfth. That the public surveys of the government were not extended over the land through which said surveys were made until in the month of July, 1891.

"Thirteenth. That on the 9th day of November, 1886, the defendant, the Cœur d'Alene Railway and Navigation Company, filed in the United States land office at Cœur d'Alene,

Idaho, a map or profile of that portion of its railroad running through the town of Wallace, which was approved by the Secretary of the Interior December 3, 1886, and that upon said map or profile said line 'B,' through said town of Wallace, was platted as the line of route of said road; that line 'C' was in fact and intended to be a definite line of location thereof, but that said line 'B' was so platted by a mistake, and that said mistake was not discovered until after the completion of said railroad and side track and depot upon and over the ground in controversy herein, and that the filing of said plat, showing said road to run over said line 'B,' was not done for the purpose of in any manner deceiving the plaintiff or any one else, but was done by a mistake as aforesaid, and that the plaintiff was not in any manner misled or prejudiced by the filing of said plat or by said mistake."

The case was taken, by a writ of error, to the Circuit Court of Appeals for the Ninth Circuit, where the judgment of the Circuit Court was, on February 12, 1894, affirmed. 15 U. S. App. 359. On February 4, 1895, by a writ of error of that date, the case was brought to this court.

Mr. A. A. Hoehling, Jr., and *Mr. Samuel Shellabarger*, (with whom were *Mr. W W. Cotton* and *Mr. Jeremiah M. Wilson* on the brief,) for plaintiff in error, said, upon the question of jurisdiction:

I. The fact that the Northern Pacific Company united with the Cœur d'Alene Company in making the motion for the removal of the case to the Circuit Court of the United States did not make the Northern Pacific Company a party in the case. *Parrott* v. *Alabama Gold Life Ins. Co.*, 5 Fed. Rep. 391; *Atchinson* v. *Morris*, 11 Fed. Rep. 582; *Miner* v. *Markham*, 28 Fed. Rep. 387; *Perkins* v. *Hendryx*, 40 Fed. Rep. 657; *Golden* v. *Morning News Co.*, 42 Fed. Rep. 112; *Clews* v. *Woodstock Iron Co.*, 44 Fed. Rep. 31; *Reifsnider* v. *American &c. Publishing Co.*, 45 Fed. Rep. 433; *Bentlif* v. *London &c. Finance Corporation*, 44 Fed. Rep. 667; *Tallman* v. *Baltimore & Ohio Railroad*, 45 Fed. Rep. 156.

Argument for Plaintiff in Error.

II. The United States Circuit Court for the District of Idaho had no jurisdiction to enter up judgment herein against the plaintiff in error and in favor of the defendant in error.

Under the language of this act, the Federal courts created by the act became the successors of the territorial courts only in regard to the class of cases of which the Federal courts might have had jurisdiction had such courts been in existence at the time of the commencement of the action. *Johnson* v. *Bunker Hill Mining Co.*, 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Mining Co.*, 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

Two things are necessary to give a court of the United States jurisdiction over any particular action: *First*, the action itself must be within the jurisdiction of the court; and *second*, the jurisdictional facts must affirmatively appear in the record. It is not enough for the court to see from the evidence, or know as a matter of fact, that it has jurisdiction; but such jurisdiction must actually appear by suitable allegations in the pleadings or in the petition for removal, and unless such jurisdiction affirmatively appears, then it is the duty of the court to dismiss the action, although such jurisdiction may actually exist. *Insurance Co.* v. *Pechner*, 95 U. S. 183; *Robertson* v. *Cease*, 97 U. S. 646; *Swan* v. *Manchester, Coldwater &c. Railway*, 111 U. S. 379; *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199; *Gibbs* v. *Crandall*, 120 U. S. 105.

The effect of § 18 of the Idaho enabling act was to confer jurisdiction on the state courts of all civil actions in which the United States was not a party, unless a proper written request showing the jurisdiction of the United States court was filed in the proper court, as required by the act. On familiar principles, such request for transfer, in order to oust the state court of jurisdiction and confer jurisdiction upon the United States court, must necessarily show that the United States court might have had jurisdiction of the action had such court existed at the time of the commencement of such case, as well as jurisdiction at the time when the action was

undertaken to be transferred. *Johnson* v. *Bunker Hill Mining Co.*, 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Mining Co.*, 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

Such request cannot be amended in the United States court; and a failure to properly allege therein the necessary jurisdictional facts is fatal to the jurisdiction of this court and of the court below. *Crehore* v. *Ohio & Mississippi Railway*, 131 U. S. 240; *Stevens* v. *Nichols*, 130 U. S. 230; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199.

The two grounds of jurisdiction suggested by the petition for removal, namely, diverse citizenship and the corporate character of the Northern Pacific Railroad Company, are the only grounds of jurisdiction anywhere hinted at throughout the entire record.

Upon these grounds alone was the state court sought to be deprived of the jurisdiction conferred upon it over this action by the enabling act. Unless the jurisdictional facts above mentioned actually existed and are sufficiently stated, then no transfer took place, and the court below is without jurisdiction.

III. The court below had no jurisdiction by reason of the Federal character of the Northern Pacific Company.

Under the enabling act no action could be transferred unless "pending" at the time of the transfer. *Glaspell* v. *Northern Pacific Railroad*, 144 U. S. 211. This action was not pending against the Northern Pacific Company at the time of the admission of Idaho into the Union.

The Federal charter to a corporation can only give rise to a Federal question when the corporation is an actual party to the suit, actively present, and actively engaged in the litigation. *Pacific Removal Cases*, 115 U. S. 1; *Metcalf* v. *Watertown*, 128 U. S. 586. It is only when an act of Congress is directly brought into consideration in an action that the cause can be said to arise under such act. *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Gibbs* v. *Crandall*, 120 U. S. 105; *Shreveport* v. *Coe*, 129 U. S. 36, 41.

Jurisdiction will not be entertained in an action, even where the petition for removal states a clear Federal question, if the

party at the time of filing such petition enters a special appearance for the purpose of setting aside the service of summons made in the state court. *Germania Ins. Co.* v. *Wisconsin*, 119 U. S. 473.

The only Federal question alleged in the petition for removal, or shown by the pleadings, was that suggested by the incorporation of the Northern Pacific Company; and when it appeared that that company never appeared, and that no service was made on it, that question disappeared.

IV. Diverse citizenship furnishes no ground for jurisdiction. A corporation is a citizen, resident, and inhabitant of the State or Territory which creates it, and cannot become such in another State or Territory, by doing business in it. *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

At the time of the commencement of this action, the Washington and Idaho Railroad Company was therefore a resident, citizen, and inhabitant of the Territory of Washington, and the Cœur d'Alene Railway and Navigation Company was a resident, citizen, and inhabitant of the Territory of Montana; and no suit either by or against either of such corporations could have been removed, transferred, or commenced in a Federal court on the ground of diverse citizenship. *New Orleans* v. *Winter*, 1 Wheaton, 91; *Railway Company* v. *Swan*, 111 U. S. 381; *Johnson* v. *Bunker Hill &c. Co.*, 46 Fed. Rep. 417; *Back* v. *Sierra Nevada Mining Co.*, 46 Fed. Rep. 673; *Strasburger* v. *Beecher*, 44 Fed. Rep. 209.

V. The record in this action nowhere shows jurisdiction in the Circuit Court for the District of Idaho.

Jurisdiction must affirmatively appear in the record. *Parker* v. *Ormsby*, 141 U. S. 81, 83; *Gold Washing Co.* v. *Keyes*, 96 U. S. 199. Such jurisdiction must not only affirmatively appear to exist at the time of the admission of Idaho into the Union as a State, but also must be shown affirmatively to have existed at the time the action was commenced. This is plainly required by the language of the act. *Strasburger* v. *Beecher*, 44 Fed. Rep. 209; *Back* v. *Sierra Nevada Mining Co.*, 46 Fed. Rep. 673.

Here no Federal question is alleged with sufficient accuracy in the petition or elsewhere in the record, to have authorized the court below to have entertained jurisdiction of this action. *Gold Washing Company* v. *Keyes*, 96 U. S. 199; *Gibbs* v. *Crandall*, 120 U. S. 105, 109; *Theurkauf* v. *Ireland*, 27 Fed. Rep. 769; *Austin* v. *Gagan*, 39 Fed. Rep. 626.

Mr. A. B. Browne, (with whom was *Mr. A. T. Britton* on the brief,) for defendants in error.

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

We are to answer the questions that arise on this record in the light of the findings of fact made by the Circuit Court to which no exceptions were taken.

Those questions are two — first, had the Circuit Court jurisdiction to entertain the action? and, if so, second, did the title set up by the plaintiff company show a right of possession of the land in dispute as against the title of the defendants?

It is claimed by the plaintiff in error that as, at the time when the action was originally brought in the District Court of the Territory of Idaho, the Washington and Idaho Railroad Company, the plaintiff, was a corporation organized under the laws of Washington Territory, and the Cœur d'Alene Railway and Navigation Company, defendant, was a corporation organized under the laws of Montana Territory, and as the Northern Pacific Railroad Company was not really a party to the action, there was no right to remove the cause from the state court, whose jurisdiction over the case had attached under the terms of the act of July 3, 1890, c. 356, 26 Stat. 215, providing for the admission of Idaho into the Union. The argument is based on the language of the eighteenth section of that act, wherein it is provided that "in respect to all cases, proceedings, and matters now pending in the Supreme or District Courts of the said Territory at the time of the admission into the Union of the State of Idaho, and arising within the limits of such State, whereof the Circuit or District Courts by this act

established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said Circuit and District Courts, respectively, shall be the successors of said Supreme and District Courts of said Territory; and in respect to all other cases, proceedings, and matters pending in the Supreme or District Courts of said Territory at the time of the admission of such Territory into the Union, arising within the limits of said State, the courts established by such State shall, respectively, be the successors of said Supreme and District territorial Courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such Circuit, District, and State Courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of the State shall be pending, in any territorial court in said Territory, shall abate by the admission of such State into the Union, but the same shall be transferred and proceeded with in the proper United States Circuit, District, or State Court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings in which the United States is not a party transfers shall not be made to the Circuit and District Courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper state courts."

This language is interpreted by the plaintiff in error to mean that no case can be transferred to the Federal courts if the parties to it could not have gone into such courts at the time the action was brought, if such courts had then actually existed; and the contention is that, as at the time of the commencement of this action, the Washington and Idaho Railroad Company was a resident, citizen, and inhabitant of the Territory of Washington, and the Cœur d'Alene Railway and Navigation Company was a resident, citizen, and inhabitant of the Territory of Montana, no suit either by or against either of such corporations could have been removed, transferred, or

commenced in a Federal court on the ground of diverse citizenship.

It should be observed that, while it is true that Montana and Washington were in a territorial condition when this suit was brought, they both had become States, the former on the 8th, the latter on the 11th, of November, 1889, 26 Stat. 1551, 1553, before the filing of the petition for removal.

A similar question was presented in *Koenigsberger* v. *Richmond Silver Mining Company*, 158 U. S. 41. That was a case where, at the time of the bringing of the action in a District Court of the Territory of Dakota, the plaintiff was a citizen of such Territory, and, when the Territory became a State under a statute in terms precisely similar to those of the statute we are now considering, the cause was transferred to the Circuit Court of the United States, and it was there contended, as it is here, that the Circuit Court could not acquire jurisdiction of the case by reason of the diversity of citizenship between the parties, because at the time of the commencement of the case the plaintiff was a citizen of a Territory. The subject was carefully considered and the conclusion reached was thus expressed in the language of Mr. Justice Gray:

"Upon the whole matter, the reasonable conclusion appears to us to be that Congress, by the description 'whereof the Circuit or District Courts by this act established might have had jurisdiction under the laws of the United States, had such courts existed at the time of the commencement of such cases,' intended to designate cases of which those courts might have had jurisdiction under the laws of the United States, had those courts, like the other Circuit and District Courts of the United States generally, existed, at the time in question, in a State of the Union, whose inhabitants consequently were citizens of that State. According to that hypothesis, the plaintiff would have been a citizen of the State of South Dakota, and the defendant a citizen of the State of New York, at the time of the commencement of the action, and the Circuit Court of the United States would have had jurisdiction by reason of such diversity of citizenship. The case was, therefore, rightly

transferred, at the written request of the defendant, upon the admission of the State of South Dakota into the Union, to the Circuit Court of the United States."

This view sufficiently disposes of the objection made in this case to the jurisdiction of the Circuit Court of the United States, so far as that jurisdiction depended on adverse citizenship.

The Circuit Court of Appeals maintained the jurisdiction of the Circuit Court, on the ground that there was a Federal question involved in the fact that the Northern Pacific Railroad Company, a corporation created by the laws of the United States, was a party to the action. We agree with that court in regarding such a fact as conferring jurisdiction on the Circuit Court. But it is urged that the fact did not exist — that the Northern Pacific Railroad was not a party to the action. This contention is, we think, disposed of by the record itself. That discloses that the original suit was brought against the Northern Pacific Railroad Company as well as against the Cœur d'Alene Railway and Navigation Company; that the summons included both of said defendants; that the complaint alleged that the Northern Pacific Railroad Company was in actual possession of the premises in dispute as a tenant of the Cœur d'Alene Railway and Navigation Company. The return of the summons alleged that service had been made upon both defendants. The petition for the removal or transfer of the case was joined in by the Northern Pacific Railroad Company, and in that petition it was not alleged that the latter company objected to the summons, or for any reason, to the jurisdiction of the court, but alleged that the controversy was between citizens of different States, and that the suit was of a civil nature arising under the laws of the United States.

Upon the face of the record as it existed at the time of the removal, consisting of the writ, the return of service, the complaint, and the petition for such removal, it was, therefore, plain that the Northern Pacific Railroad Company, as a corporation created by the laws of the United States, was a party both nominally and actively. It is true that the subsequent

record discloses that the Circuit Court, in rendering its opinion and judgment, speaks of the Northern Pacific Railroad Company as not having been served and as not appearing in the action. But, as was well said by the Circuit Court of Appeals, when dealing with this contention, "it cannot be said that the Northern Pacific Railroad Company was not an actual party to the litigation. It was not only made a party, but it was a proper party. It was the party in possession of the premises sought to be recovered by the action of ejectment. . . . At the time when the cause was removed the return of service was on file, but no default had been taken against the Northern Pacific Railroad Company, and no disposition had been made of the plaintiff's controversy against it; that defendant, in presenting its petition for removal to the Circuit Court, declared itself to be one of the defendants to the case, and recited the fact that the cause was pending in the state court, and was properly within the jurisdiction of the Circuit Court of the United States."

Whatever reason, therefore, the Circuit Court may have had for speaking of the Northern Pacific Railroad Company as a party not served and not appearing, it is incontrovertible, as against the record, that it was served, and whether served or not, it entered a general appearance by joining in the petition for removal. That it may have subsequently ceased to take an active part in the case is immaterial. The jurisdictional question must be determined by the record at the time of the transfer of the case.

Whether conflicting claims of railroad companies, under the right-of-way act of Congress, March 3, 1875, would give a Circuit Court of the United States jurisdiction independently of citizenship, under the doctrine of *Doolan* v. *Carr*, 125 U. S. 618, 620, we do not find it necessary to consider.

If, then, the case fell within the jurisdiction of the Circuit Court, we have next to inquire whether that jurisdiction was properly exercised.

The controversy was between two railroad companies, one organized under the laws of Washington Territory, the other organized under the laws of Montana Territory, and was as

to the right of possession of a tract of land situated in Shoshone County, in the Territory of Idaho, and over which each company claimed a right of way under the act of March 3, 1875, c. 152, 18 Stat. 482, entitled "An act granting to railroads the right of way through the public lands of the United States." This act provides that "the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road."

It was affirmatively found by the Circuit Court that the Cœur d'Alene Railway and Navigation Company, on the 6th day of July, 1886, filed its articles of incorporation in the office of the secretary of the Territory of Montana, and also filed in the office of the county clerk and recorder of the county of Lewis and Clarke, in said Territory, a certified copy of its said articles of incorporation; that the line of route of the railroad of the said company, as described in said articles of incorporation, passed over and included the land in controversy; that on the 20th day of July, 1886, the said company filed in the office of the Secretary of the Interior at Washington, D. C., a certified copy of its articles of incorporation and proofs of its organization under the laws of the Territory of Montana, which certified copy of articles of incorporation and proofs of organization were duly approved on that day by the Secretary of the Interior; that in the summer and fall of 1886 the said company constructed its railroad over said line of railroad, as described in said articles of incorporation, from the Old Mission up the main Cœur d'Alene River to the town of Kingston, and thence up the South Fork of the Cœur d'Alene River to the town of Wardner Junction, a distance of about fourteen miles; that in the month of October, 1886, the said company, for the purpose of extending its line of railroad, caused a survey to be made for its said line of railroad from said Wardner Junction up the said fork of the Cœur d'Alene River, over the

line described in its said articles of incorporation, through the towns of Wallace and Mullen, and marked the centre line of said road upon the ground by planting stakes at each station at one hundred feet, and at such other points as there were angles in the line, so that the line of route of said road could be readily traced upon the ground; that the said surveying and marking of said line was completed on the 31st day of October, 1886; that in making said survey the engineers of said company ran three lines through said town of Wallace, called lines "A," "B," and "C" — the two former being on the south and line "C" being on the north side of said river, the latter being the line upon which the railroad of said company was afterwards constructed, and upon the ground in controversy in this action; that in the summer and fall of 1887 the said company extended its road from the town of Wardner Junction over its line of survey, a point about one mile east of the town of Wallace, and over said line "C," the ground in controversy, through the town of Wallace, and at all times thereafter, up to and at the time of the commencement of this action, occupied and used the same as a railroad and for railroad purposes, and at the time of the commencement of this action had its roadbed, track, side tracks and depot thereon, and was using the same exclusively for railroad purposes; and that at all times above mentioned the lands in controversy, and all other lands along the line of said railroad of the Cœur d'Alene Railway and Navigation Company, as described in its articles of incorporation, were unsurveyed public lands of the United States.

If these facts stood unaffected by other evidence, the title of the Cœur d'Alene Railway and Navigation Company to the land in controversy would be clear.

It was, however, shown that on the 9th day of November, 1886, ten days after the completion of the survey of the three lines "A," "B," and "C," the said company filed in the United States land office at Cœur d'Alene, Idaho, a map or profile which was, December 3, 1886, approved by the Secretary of the Interior, and that on this map the line "B" through the town of Wallace was platted as the line of the said railroad.

As already stated, in the fall of 1887 the company constructed its railroad upon line "C" and across the land in controversy. But no amendment of the said map was made, nor was any approval of the Secretary of the Interior obtained to any new map covering line "C."

The plaintiff contends that the effect of the filing and approval of the map line "B" was to vest in the said company a right of way one hundred feet wide on each side of the centre line of its road, as indicated upon said map, which right could not be changed without the consent of the granting power first had and obtained. Regarding this question as one entirely between the Cœur d'Alene Railway and Navigation Company and the United States, it should be observed that the act of Congress, under which both parties claim the land in question, by its fourth section provides that, in case of unsurveyed lands of the United States, as these were, the plat need not be filed until twelve months after a survey thereof. It is, however, said that while the company might not have been required under the act to file its map at the time such filing was made, yet it had the right to do so under certain regulations of the Secretary of the Interior, in force during the period of this controversy, and that when such map was approved by the Secretary the company had secured the benefit of the act upon the line there shown, and could not thereafter alter the same. We agree with the Circuit Court of Appeals in thinking that, so far as the United States are concerned, there is nothing in the act forbidding a railroad company, having adopted one line of survey along the route provided for in its articles of incorporation, and having filed a plat thereof, to subsequently, and within the time allowed it by law for so doing, adopt another route, and that no reason is apparent why, instead of filing a second plat, it may not construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Such an actual construction and appropriation of one line would preclude the company from asserting any claim to the other lines, and hence the contention that, by running several lines through unsurveyed lands, the company sought to obtain more than the

statute gave, namely, one right of way, is met by the fact that it claimed and constructed but one line.

If the United States could not, and do not, complain, there is no foundation for the plaintiff company to do so, as it was found by the trial court that the platting of line "B," instead of line "C," was through a mistake, and that such mistake was not discovered until after the completion of the defendant's railroad and depot over and upon the ground in controversy, and that the filing of the plat showing line "B" was not done for the purpose of, in any manner, deceiving the plaintiff or any one else, and that the plaintiff was not, in any manner, misled or prejudiced by the filing of said plat or by said mistake.

Even if the Cœur d'Alene Railway and Navigation Company was duly organized as a railroad company, and, as such, was entitled to construct and maintain its road over the land in controversy, without being estopped by having filed an inaccurate map, still the plaintiff contends that the right of way in question belongs to it by virtue of a prior survey made on its behalf. The facts relevant to this contention are that the articles of incorporation, under which the plaintiff claims the land in controversy, were not filed in the office of the secretary of the Territory of Washington till the 10th day of November, 1886, and that a copy of such articles and proof of organization were not filed in the office of the Secretary of the Interior till December 22, 1886. It was, indeed, shown and found that, on October 28, 1886, W. H. Burrage, claiming to be acting for the plaintiff, surveyed a line up the Cœur d'Alene River, through the town of Wallace, and over the ground in controversy, which was the line described in the articles of incorporation subsequently filed by the plaintiff company in the offices of the secretary of the Territory and of the Secretary of the Interior.

The conclusion of the courts below, on this state of facts, was that at the time of the making of said survey by W. H. Burrage over the lands in controversy, on October 28, 1886, the plaintiff was not a corporation organized for the purpose of constructing, or authorized to construct, a railroad over the

land in controversy; was not authorized to take possession of the said premises, or to locate a line of railroad thereon; and that the said survey on October 28, 1886, conferred no right whatever on it, the plaintiff, as against the defendant, the Cœur d'Alene Railway and Navigation Company.

The argument on behalf of the plaintiff is that when, on December 22, 1886, the Washington and Idaho Railroad Company had filed its articles of incorporation and proof of organization in the office of the Secretary of Interior at Washington, D. C., it had a right to adopt the survey previously made by Burrage, as and for the location of its route under the general right-of-way act, and that when it so adopted said survey it related back to the date when the survey was made.

We are unable to accept such a view of the law, but concur in the conclusion of the court below that the language of the act of Congress, under which both parties claim, wherein it provides that "the right of way through the public lands of the United States is hereby granted to any railroad company duly authorized under the laws of any State or Territory, which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of a hundred feet on each side of the central line of said road," plainly means that no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation; that it necessarily follows that no initiatory step can be taken to secure such right of way by the survey upon the ground or otherwise; that until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company, its acts of making surveys were of no avail; and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of October 28, 1886, had not been made.

The case of *New Brighton Railroad Co.* v. *Pittsburg Railroad Co.*, 105 Penn. St. 14, was, like the present, one of a contest between two railroad companies for a right of way, and where the effect of a survey of a line before the legal organization of the company had to be considered; and it was held that

surveying, locating, and designating, by proper marks, the property to be taken for railroad purposes, cannot be done by the projectors of a railroad company before its incorporation, but only by the president and directors of a duly incorporated company, their engineers and employés, and that an unauthorized preliminary survey, though well marked by a line of stakes indicating the location of a railroad, cannot be regarded as sufficient notice of a prior legal appropriation of the land, nor will the subsequent adoption of such survey by the company, after its incorporation, give it any right to the location as against another company, which had surveyed and taken possession of the land before the first-mentioned company had passed the resolution of adoption.

The cases cited by the plaintiff in error do not sustain their position.

Morris & Essex Railroad v. *Blair*, 9 N. J. Eq. 635, was a case of a contest for a right of way between two railroad companies, both duly incorporated, and it was held that the prior right attached to the company which first actually surveyed and adopted a route and filed their survey in the office of the Secretary of State, and also that the mere experimental surveying of a route will not confer any vested or legal right until it shall have been adopted.

The Supreme Court of Iowa, in *Lower* v. *Chicago, Burlington &c. Railway*, 59 Iowa, 563, held that though a railroad company may not for some reason have the legal right to condemn a right of way for a lateral line, it may cause another company of its own stockholders to be so organized as to have that power, and that when such subsidiary company has condemned the right of way, it may lease its line to the former company, and in this there will be no fraud upon those whose lands have been condemned.

It is not perceived that these decisions, accepting them as sound, disclose any error in the ruling of the court below.

It is further made to appear, by the eleventh finding, that "from the time of making the said survey by Burrage over the land in controversy on the 28th day of October, 1886, until long after the completion of the railroad, side tracks, and

Counsel for Parties.

depot of the defendant, the Cœur d'Alene Railway and Navigation Company, upon the ground in controversy, neither the plaintiff, nor any person for it, ever made any other survey, or did any other act upon the premises, or took any possession thereof."

While it may be that such a finding, standing alone, would not make out a case of estoppel, of which the defendant could avail itself in an action of law, it is entitled to consideration when we are asked to adopt a construction of the act of Congress which would enable the plaintiff company to take and enjoy the right of way enhanced in value by the improvements put thereon by the defendant. When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor.

The decree of the court below is

Affirmed.

WASHINGTON AND IDAHO RAILROAD COMPANY *v.* CŒUR D'ALENE RAILWAY AND NAVIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 4. Argued November 13, 14, 1895. — Decided December 2, 1895.

Affirmed upon the authority of *Washington & Idaho Railroad Company* v. *Cœur d'Alene Railway & Navigation Company*, *ante*, 77.

THIS case was argued with the preceding case. The facts are stated in the opinion.

Mr. A. A. Hoehling, Jr., and *Mr. Samuel Shellabarger* for appellant. *Mr. J. F. Dillon*, *Mr. W. W. Cotton*, and *Mr. J. M. Wilson* were on their brief.

Mr. A. B. Browne for appellee. *Mr. A. H. Garland* filed a brief for same.

Opinion of the Court.

MR. JUSTICE SHIRAS delivered the opinion of the court.

This was a suit in equity brought by the Washington and Idaho Railroad Company, a corporation of the Territory of Washington, in the District Court of the First Judicial District of the Territory of Idaho, against the Cœur d'Alene Railway and Navigation Company, a corporation of the Territory of Montana, and George P. Jones. An inspection of the record discloses that the matter in dispute was a right of way two hundred feet in width and about a mile in length, situated in Shoshone County in the Territory of Idaho, and which was claimed by both railroad companies. By a bill in equity the plaintiff company sought to have its title to said strip declared paramount, and to restrain the defendant company from trespassing upon the same, and from interfering with the plaintiff's peaceful possession. The result of the suit, in the District Court of the Territory of Idaho, was a final decree adjudging that the Cœur d'Alene Railway and Navigation Company was the owner and entitled to the possession of the land in question. From this decree an appeal was taken by the plaintiff company to the Supreme court of the Territory of Idaho. That court was of opinion that, as it appeared by the findings of fact in the District Court, at the time of the trial, the defendant had completed its line of road over the disputed ground and was in the actual use and occupation thereof, the plaintiff had an adequate remedy at law, and that the District Court, while justified in refusing the injunction prayed for, should have dismissed the bill and left the plaintiff to its action at law, and, as thus modified, the judgment of the District Court was affirmed.

From this judgment of the Supreme Court of the Territory an appeal was taken to this court.

We do not find it necessary to enter into a discussion of the merits of the case, nor to decide whether a court of equity could take jurisdiction of such a controversy, because we learn, from our own records, that the Washington and Idaho Railroad Company, without awaiting the result of the present appeal, but acting upon the view of the Supreme Court of the

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Territory, brought an action at law against the Cœur d'Alene Railway and Navigation Company in the District Court of the Territory, which action was, after the admission of Idaho as a State, transferred to and tried in the Circuit Court of the United States. The result of that action was a final judgment in favor of the defendant company, and this judgment, having been taken to the Circuit Court of Appeals for the Ninth Circuit, was there affirmed, and the judgment of the latter court has at the present term been by this court affirmed. See *Washington and Idaho Railroad Co.* v. *Cœur d'Alene Railway and Navigation Co. and Northern Pacific Railroad Co.*, 160 U. S. 77.

The judgment of the Supreme Court of the Territory of Idaho is accordingly

Affirmed.

WASHINGTON AND IDAHO RAILROAD COMPANY *v.* OSBORN.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

No. 5. Argued November 13, 14, 1895. — Decided December 2, 1895.

A railroad company whose road is laid out so as, under the provisions of the act of March 3, 1875, 18 Stat. 482, entitled "An act granting to railroads the right of way through the public lands of the United States," to cross a part of such public unsurveyed domain, cannot take part thereof in the actual possession and occupation of a settler, who is entitled to claim a preëmption right thereto when the proper time shall come, and who has made improvements on the land so occupied by him, without making proper compensation therefor as may be provided by law.

The Washington and Idaho Railroad Company, a corporation organized under the laws of Washington Territory, on September 18, 1888, filed a bill of complaint in the District Court of the First Judicial District of the Territory of Idaho against S. V. William Osborn, asserting a right to construct and maintain a railroad across lands in possession of the de-

fendant. The cause was put at issue by answer and replication, and the court made the following findings of facts:

"First. That on the 5th day of July, 1886, the plaintiff became a duly organized corporation under the laws of Washington Territory for the purpose of constructing, equipping, operating, and maintaining a railroad from the town of Farmington, in Washington Territory, by the most practical route in a generally northern direction to a point at or near Spokane Falls, in said Territory, and by junction with said line near the forks of Hangman Creek, in said Territory, in a generally northeasterly direction across the Cœur d'Alene Indian reservation to a point near the mouth of the St. Joseph River, on Cœur d'Alene Lake; thence in a northerly direction along the east side of the Cœur d'Alene Lake to the Cœur d'Alene River; thence in a generally easterly direction to the Cœur d'Alene mission; thence in a southeasterly direction to the valley of the South Fork of the Cœur d'Alene River, via the town of Milo, to Wardner, Idaho Territory; and that afterwards, to wit, on the 8th day of November, 1886, by amended articles of incorporation, the plaintiff became a corporation organized to construct a like railroad from said town of Milo, following the South Fork of the Cœur d'Alene River, to the town of Mullen, and that the premises in controversy herein are situated in the valley of the said South Fork and between said towns of Milo and Mullen.

"Second. That each and all the allegations contained in the second, third, fourth, fifth, and sixth subdivisions of plaintiff's complaint are true.

"Third. That the defendant is a native-born citizen of the United States, over the age of twenty-one years, and has never had the benefit of the preëmption or homestead laws of the United States, and is in all respects qualified in law to initiate proceedings to obtain title to one hundred and sixty acres of the agricultural lands belonging to the United States, and that the lands and premises hereinafter described, and every part thereof, are a part of the unsurveyed public lands of the United States and agricultural in character, not reserved from sale, and subject to settlement under the laws of the United States.

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"Fourth. That in the year 1885, one Seth McFarren and one Samuel Norman settled upon the premises hereinafter described, who in that year erected a house and other buildings thereon, marked off the corners of the same, and partly fenced the same on its exterior boundaries as defined by their corner stakes, and that said McFarren and Norman resided constantly upon said premises, living in the dwelling-house aforesaid, and constantly engaged in improving said premises, until the 18th day of March, 1886, at which date, by a deed of conveyance, in consideration of the sum of two thousand dollars, they conveyed the said premises and all the improvements thereon to the defendant, and that the defendant at the time of said purchase caused the said premises to be surveyed by a surveyor and erected new corner posts at each corner thereof, and caused such posts to be plainly marked, so as to indicate the corners of said premises, and with the name of said Osborn as the claimant, and that after said purchase the defendant filed in the office of the county recorder of Shoshone County, Idaho, his declaration to hold said premises under the pre-emption law, under the possessory land act of said Territory, and that said premises contain less than one hundred and sixty acres, and are described as follows, to wit. . . .

"Fifth. That during all the time since the 18th day of March, 1886, the defendant has resided upon said premises and still resides thereon, making the same his home, and has made improvements thereon to the value of eight thousand dollars, consisting of a hotel, barn, stables, ice-house, cellar, fences, clearing and cultivating 60 acres of the land, etc., and that prior to the making of any survey for a railroad by plaintiff over the same in the year 1886 the defendant enclosed all of said premises by a substantial fence, excepting a portion of the line on the south side thereof where the base of the mountain and the fallen timber made a natural barrier sufficient to turn stock, and with the exception of a few places on the north line of said premises where the steep bank of the river formed a natural barrier sufficient to turn stock, and that at the time said defendant settled thereon he intended and ever since has intended and now intends to obtain title to said premises under

the preëmption laws of the United States as soon as the same shall be surveyed by the government, and that the defendant is not the proprietor of 320 acres of land in any State or Territory, and did not quit or abandon a residence on his own land to reside upon the public lands in this Territory, and that the defendant has not settled upon or improved the said premises to sell the same on speculation, but in good faith to appropriate the same to his own exclusive use, and that he has not directly nor indirectly made any agreement or contract in any way or manner with any person whatsoever by which the title which he may receive from the government shall inure in whole or in part to the benefit of any person except himself."

The conclusions of law found by the court were, in substance, that Osborn, the defendant, was, and all times since the 18th day of March, 1886, had been the owner of, as against all persons except the United States, and in possession of the land in dispute; that the title and right of possession of defendant in and to said premises were prior and paramount to the right of way of the plaintiff over the same; and that the defendant was entitled to a judgment. A judgment dismissing the bill was entered on October 4, 1888, and this judgment was, on appeal to the Supreme Court of the Territory of Idaho on March 19, 1889, affirmed.

Mr. A. A. Hoehling, Jr., and *Mr. Samuel Shellabarger*, (with whom were *Mr. J. F. Dillon*, *Mr. W. W. Cotton*, and *Mr. J. M. Wilson* on the brief,) for appellant.

Mr. A. B. Browne, (with whom was *Mr. A. T. Britton* on the brief,) for appellee.

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

This case is before us on appeal from a judgment of the Supreme Court of the Territory of Idaho affirming a decree of the District Court of that Territory, which decree dismissed

a bill of complaint brought by the Washington and Idaho Railroad Company against William Osborn.

The railroad company was organized under the laws of the Territory of Washington, and was constructing its road from a point in that Territory, by a route through the Territory of Idaho, to the town of Missoula in the Territory of Montana. In constructing its road through the Territory of Idaho the plaintiff company encountered, in Shoshone County, a tract of land in possession of Osborn, across which the company desired to run the line of its road. Osborn refusing to grant permission, the railroad company instituted, under the laws of the Territory of Idaho, proceedings in condemnation to condemn a right of way for its railroad over and through the land of Osborn. Under these proceedings, damages were assessed in favor of Osborn in the sum of $6670. The railroad company then filed its bill, alleging that prior to the commencement of said proceedings for condemnation the company did not know nor could obtain sufficient information to advise it of the nature and character of Osborn's title, and that, from the testimony in those proceedings, the company was advised and believed that Osborn had no title or right to the possession of the premises and right of way sought to be condemned, and that in equity and good conscience it should not be compelled to pay Osborn any compensation for said right of way.

Conceding, but not deciding, that it was competent for the railroad company to abandon its condemnation proceedings, and to challenge the defendant's title by a bill in equity, we shall now consider the merits of the case as disclosed in the findings of facts.

The plaintiff's side of the controversy is substantially this: The Washington and Idaho Railroad Company, as a corporation of the Territory of Washington, having filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, was entitled, under the act of March 3, 1875, c. 152, entitled "An act granting to railroads the right of way through the public lands of the United States," 18 Stat. 482, to a right of way through the public lands of the United States to the extent of

one hundred feet on each side of the central line of its road; and as the trial court found that the land claimed by Osborn was a part of the unsurveyed public domain of the United States, and that Osborn had never filed or entered the said land in any United States land office under any existing law of the United States, the company claims that it is within the doctrine of the many decisions of this court, which hold that a party, by mere settlement upon the lands of the United States, although with a declared intention to obtain a title to the same under the preëmption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232.

In brief, the plaintiff claims that, having been incorporated and organized under a law of the Territory of Washington, and having complied with the provisions of the act of March 3, 1875, the company became vested with a right of way through the public lands of the United States, subject only to the exception contained in the fifth section of said act, wherein it is enacted that the act shall not apply "to any lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale," and within which exception the defendant's claim does not come.

It is claimed on the side of the defendant that while it is true that his rights, arising out of mere prior possession and cultivation of public lands, cannot prevent Congress from conferring these very lands on other parties by a grant, yet that Congress has not, in the present case, so conferred these lands on the plaintiff company, but has, on the contrary, recognized and preserved the defendant's rights by the provisions of the third section of the act of March 3, 1875.

In the case of *Buxton* v. *Traver*, 130 U. S. 232, 235, this court said: "A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys, and the return of the township plat,

the settler takes certain steps, that is, files a declaratory statement, such as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of preëmption to the land. . . . He has been permitted by the government to occupy a certain portion of the public lands, and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to preëmpt it. The United States make no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him, if you wish to settle upon a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands which are vacant and have not been reserved from sale; and, when the public surveys are made and returned, the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them."

It must, therefore, be conceded that Osborn did not, by maintaining possession for several years and putting valuable improvements thereon, preclude the government from dealing with the lands as its own, and from conferring them on another party by a subsequent grant.

On the other hand, it would not be easy to suppose that Congress would, in authorizing railroad companies to traverse the public lands, intend thereby to give them a right to run the lines of their roads at pleasure, regardless of the rights of settlers.

Accordingly, when we examine the act of March 3, 1875, upon which the plaintiff rests its claim of right to appropriate to its use, without compensation, the land and improvements of Osborn, we find, in the third section, an express provision saving the rights of settlers in possession. That section is in the following terms: "That the legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the lands of the United States may be condemned, and where such provision shall

not have been made, such condemnation may be made in accordance with section three of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

The legislature of the Territory of Idaho, in pursuance of said third section, did provide a law for the condemnation by railroad companies of the right of way over possessory claims, (Rev. Stat. of Idaho, Title 7,) and undoubtedly the defendant's claim was a possessory one, within the meaning of the legislation of Congress. Indeed, as we have seen, the plaintiff company recognized the applicability of this section and instituted proceedings of condemnation under the Idaho act before it occurred to it to ask the aid of a court of equity in taking possession of the defendant's land and improvements without compensation.

We find no error in the judgment of the Supreme Court of the Territory of Idaho, and it is accordingly

Affirmed.

McCARTY *v.* LEHIGH VALLEY RAILROAD COMPANY.

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

No. 9. Argued November 14, 15, 1895. — Decided December 2, 1895.

The inventions claimed in the third and fourth claims of letters patent No. 339,913, dated April 13, 1886, issued to Harry C. McCarty for an improvement in car trucks, if not void for want of novelty, as the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, were inventions of such a limited character as to require a narrow construction; and, being so construed, the letters patent are not infringed by the bolsters used by the appellee.

Statement of the Case.

If, upon the face of a record, anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.

THIS was a bill in equity for the infringement of two letters patent issued to McCarty for improvements in car trucks, viz.: Patent No. 314,459, dated March 24, 1885, and patent No. 339,913, dated April 13, 1886. The application for the first patent was filed June 5, 1884, and for the second patent, August 31, 1883, so that in reality the second patent represents the prior invention. Upon the hearing in this court, complainants abandoned their claims under the first patent, No. 314,459, and asked for a decree only upon the third and fourth claims of the second patent, No. 339,913.

The invention covered by this patent consists of a metallic bolster for car trucks, upon which the whole body of the car is carried by a swinging pivot, as shown in the following drawings:

Fig. 1.

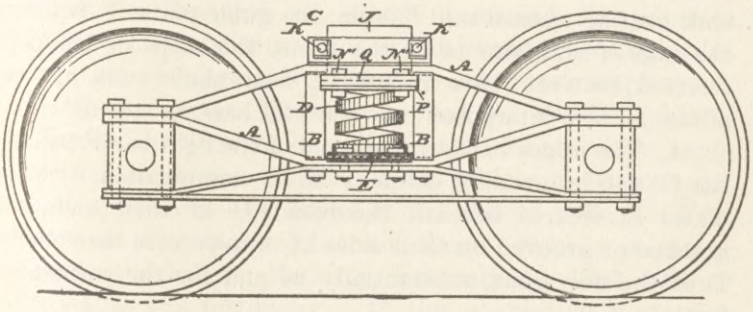


Fig. 2.

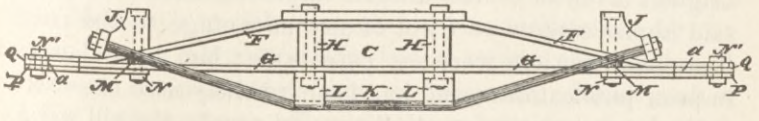


Figure 1 of these drawings represents a side view of the car truck between the wheels, the ends of the bolster resting upon the side irons A of this truck. Figure 2 represents the bolster,

Counsel for Appellants.

formed of a top iron bar, F, and a lower iron bar, G, the bar F being arched and bolted at its ends to the bar G. Between the bars are the supporting metallic columns H, which rest on the bar G. The crown or central portion of the bar F rests upon these columns, the bars and columns being firmly bolted together. J represents the side bearings, which rest on and are bolted to the bar F, and have connected with them the ends of the truss rods K, which are of inverted arch form. These side bearings and truss rods, however, are immaterial in the present case. On the under side of the ends of the bar G are screwed the plates P, whose sides are notched or grooved, as at *a*, to receive the columns B of the side irons, the plates thus forming the end guides or supports of the upper bolster. The ends of the bar G are turned upwardly, forming the flanges Q, against which the ends of the bar F abut.

The third and fourth claims, the only ones in issue, were as follows:

"3. The lower bar G having flanges Q turned up on its ends, in combination with the arched upper bar F, having its ends bearing against said flanges, the guide plates P, bolted to the ends of said bars under the same, the stops or blocks M inserted between bars F and G, near their ends, and the pillars H, also interposed between said bars, as stated."

"4. The upper bolster, composed of the bent bar F, straight bar G, and interposing columns M, in combination with the plates P, secured beneath the bars FG at their ends, and notched or grooved on their sides at *a*, to receive the columns B of the side irons, substantially as and for the purpose set forth."

The answer of the defendants denied that McCarty was the original inventor of the alleged improvements; averred that said improvements were not of any advantage to the public; that the inventions were not patentable; had been described in prior publications; and had been publicly used elsewhere.

Upon a hearing upon pleadings and proofs, the bill was dismissed, and complainants appealed to this court.

Mr. Jerome Carty and *Mr. R. A. Parker* for appellants.

Mr. Robert J. Fisher for appellee.

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

The specification of the patent in this case does not, as specifications ordinarily do, state the peculiar functions of the patented device, the defects it is designed to remedy, or the features that distinguish it from other similar devices. This omission, however, is supplied by the testimony, which shows that the invention was due to the frequent breaking of wooden bolsters, of the form in common use, in what were termed the "diamond truck," and other forms of car trucks. After some fruitless experiments, McCarty conceived the idea of using two iron plates, thereby forming a strong bolster, without the disadvantage found in the use of wood alone, or wood in connection with the iron plates. This resulted in the application for patent No. 339,913, for a bolster partly supported by truss rods. It soon appeared, however, that the form shown in the drawings of 339,913 possessed the requisite strength without the truss rods, which were accordingly dispensed with, and patent No. 314,459 subsequently applied for.

A few days after McCarty applied for his first patent, viz., September 10, 1883, one William H. Montz made application for a similar device, upon which a patent was granted, apparently by mistake of the Patent Office, and an interference then declared between them. Priority in invention was awarded to McCarty, February 24, 1886, neither party taking any testimony. In this connection there was much evidence tending to show that in October, 1882, a convention of master car builders was held at Niagara Falls, at which McCarty's model was exhibited and examined by car builders, among whom was Mr. Lentz, master car builder of the Lehigh company, defendant in this case. Shortly after this Mr. Lentz wrote an official letter in behalf of the defendant, requesting McCarty to send a blue-print of his truck, as shown at Niagara Falls the week before. A blue-print was accordingly sent to him on October 24, which cor-

responded with the drawing annexed to patent No. 339,913, soon after which the defendant company began the manufacture of bolsters for use in their cars substantially after the form in the blue-print, and in the following year, Montz made application for the patent upon which the interference was declared between him and McCarty, which resulted in awarding priority of invention to McCarty. But this question of priority, if not settled conclusively by the interference, becomes immaterial in this case in view of the anticipating device set up as a defence, which if sustained would probably apply as well to the one patent as to the other.

Freight cars are generally, if not universally, constructed so as to ride upon two four-wheeled trucks, upon which the cars are supported by means of devices called bolsters. One of these devices is attached to the bottom of the car body, and is called a body bolster. The other is attached to the truck, and is called the truck bolster. The body bolster rests upon the truck bolster, and at the point of contact there is a device called the centre bearing plate, which, acting in connection with a king bolt, permits the truck to conform to inequalities and curvatures in the track, regardless of the direction of the axis of the car body. Side supports, shown as J in figure 2, are also furnished, to secure stability of the car upon the truck, and prevent any tendency to upset, by limiting the rocking of the car body. Ordinarily, though, the weight is carried upon the centre bearing plate, that the swivelling may be done as easily as possible, in order to avoid friction between the car and the side bearings, especially in hauling a heavy train around a curve.

Truck bolsters are sometimes set rigidly upon the truck frame. These, however, were found defective since, in case of inequalities in the track, the sinking of bad joints, the unevenness of side tracks and their approaches, and more especially in cases of derailment, the trucks were subjected to a severe torsional strain, which racked them, loosened their bolts, and weakened their entire structure. To obviate this, it had become common to rest the ends of the bolster upon springs in the side trusses between the wheels, as shown in figure 1, and

also in several prior patents. These are termed floating bolsters, the object of which is to relieve the car from shocks caused by any unevenness of the tracks or roadbed.

Bolsters made of wood, which were formerly used and found to be sufficient under light loads, especially when trussed, were, when used to carry the heavy loads of modern cars, which are double, and even triple the weight formerly carried, found insufficient, and have largely given place to bolsters of iron.

The bolster in question consists of two bars of metal, F and G, placed one upon the other, the lower one, G, being horizontal, and the upper one, F, arched so as to form the truss. The lower bar is made longer than the upper, and its ends are turned up into flanges, Q, so as to form abutments or bearing surface for the ends of the upper bar, and thus to receive the end thrust caused by the weight imposed upon the bolster. Between the two bars, at their central point, are supports or columns, HH, which rest at their lower ends upon the lower bar and hold upon their upper ends the upper bar, fastening bolts being passed through the bars and the columns. Similar short columns, MM, are placed between the bars at the point where the arch of the upper bar begins. To the under side of the bolster so formed is bolted a plate, P, which serves to guide the bolster between the columns of the truck frame, the sides of this plate being notched, as shown at *a*, so as to fit around the columns of the truck frame. In connection with this truck bolster, there are truss rods, K, which pass diagonally through castings placed upon the upper side of the truss, and are supported upon seats under the lower bar, and provided with the usual screw threads and nuts for giving them the proper degree of tension. These truss rods, however, form no part of the third and fourth claims in dispute.

These claims differ from each other principally in the fact that the flanges Q at the ends of the lower bar G, as well as the pillars H, constituting elements in the third claim, are not found in the fourth; while the fourth describes the plates P, which are stated in the third claim to be "bolted to the ends of said bars under the same," as "secured beneath the bars

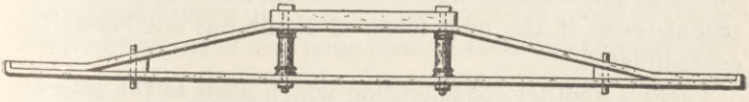
FG at their ends, and notched or grooved on their sides at *a*, to receive the columns B of the side irons, substantially as and for the purpose set forth." There is no suggestion in either of these claims that the ends of the bolster rest upon springs in the side trusses, although they are so described in the specification and exhibited in the drawings. It is suggested, however, that this feature may be read into the claims for the purpose of sustaining the patent. While this may be done with a view of showing the connection in which a device is used, and proving that it is an operative device, we know of no principle of law which would authorize us to read into a claim an element which is not present, for the purpose of making out a case of novelty or infringement. The difficulty is that if we once begin to include elements not mentioned in the claim in order to limit such claim and avoid a defence of anticipation, we should never know where to stop. If, for example, a prior device were produced exhibiting the combination of these claims *plus* the springs, the patentee might insist upon reading some other element into the claims, such for instance as the side frames and all the other operative portions of the mechanism constituting the car truck, to prove that the prior device was not an anticipation. It might also require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too obviously untenable to require argument.

The court below dismissed the bill upon the ground that the patent had been substantially anticipated by prior devices, which required nothing more than mechanical skill to adapt them to the purposes of this patent. In this connection, defendant introduced a device known as the "Old Metal Transom," which appears to have existed prior to 1882, and probably before the date of the McCarty invention, which he fixes as in June, 1881, although from his correspondence with the Patent Office it appears very doubtful whether he perfected it before July, 1882. This transom was used not as a truck bolster, but as a body bolster, and consisted of a straight bar corresponding to the bar G, having the flanges Q at the end, a bent bar corresponding to F, and interposed columns corre-

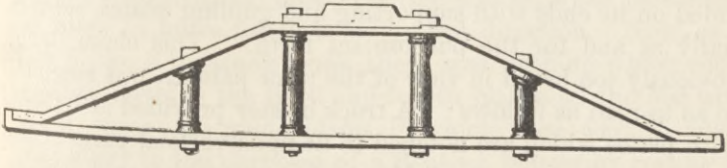
sponding to the columns M. It is in fact the McCarty bolster turned upside down, with the plates P, which are only necessary in a floating bolster, omitted. The only object of these plates, fitted as they are with notches to embrace the columns of the side trusses, is to serve as a guide for the ends of the bolster as they rise and fall upon the springs.

Defendant also exhibited the Naugatuck truck, which appeared to have been used upon the Naugatuck Railroad in the State of Connecticut as early as 1862, and was still in actual use upon the New York, New Haven and Hartford Railroad, the present owner of the Naugatuck. This contains a truck bolster having all the substantial elements of the McCarty combination, including the straight bar and flanges, the bent bar and the intervening columns, although, like the Old Metal Transom, it contained nothing corresponding to the plates P, which, as before observed, are only required in connection with a floating bolster. The ends of this bolster were fitted rigidly to the side trusses. The springs, instead of supporting the ends of the bolster, were placed over the journal bearings, and imparted a limited motion to the carriage. The guide plates are obviously unnecessary in this construction.

The following drawings exhibit the McCarty bolster so far as the combinations of the third and fourth claims are concerned, and the corresponding features of the Naugatuck bolster:



Mc Carty Truck Bolster.



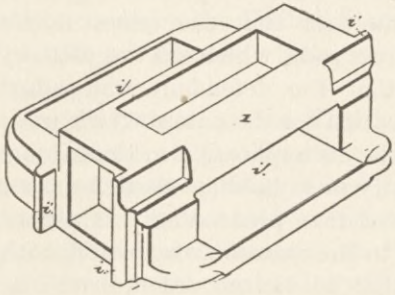
The Naugatuck Truck Bolster.

The invention, then, of McCarty consisted in taking the Naugatuck truck or bolster, turning it into a floating bolster, by adding the guide plate, P, and resting its ends upon the springs in the side trusses, which springs, however, are not made an element of either the third or fourth claims. Even if they had been claimed, they would not of themselves constitute a novel feature, as they are admitted to have been used long before, and are described in several prior patents in connection with bolsters of the old pattern. The wedge-shaped blocks or columns M are unimportant, as angle irons in analogous positions are well known in the art, and are shown in prior patents. In addition to that, it does not appear that defendant used them. The Naugatuck truck was doubtless improved by the changes made by McCarty; but if there were anything more in this than mechanical skill, or the aggregation of familiar devices, each operating in its old way to produce an aggregated result, it was invention of such a limited character as to require a narrow construction. The case is not unlike that of the *Pennsylvania Railroad* v. *Locomotive Truck Co.*, 110 U. S. 490, where a patent for employing a particular car truck, already in use on railroad cars, on the forward end of a locomotive, was held void for the want of novelty, the court referring to the familiar principle that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.

There is another consideration which leads to the same conclusion. The original application, made by McCarty, contained among other things a broad claim for "a truck bolster provided on its ends with supporting and guiding plates, substantially as and for the purpose set forth." This claim, being obviously too broad in view of the prior patents, was amended so as to read as follows: "A truck bolster provided at its ends with plates which are notched to fit upon vertical parts of the frame so as to serve as guides and supports for said bolster, substantially as set forth." This claim having been apparently

rejected, the patentee abandoned his broad claim for a notched plate, and claimed only a plate in combination with the other features of his bolster, which was finally allowed. His acquiescence in the rulings of the Patent Office in this particular indicates very clearly that he should be restricted to the combination claimed, and that the case is not one calling for a liberal construction.

In view of these limitations upon the McCarty patent, was there any infringement in defendant's device? This device contained the bars F and G, and the pillars H of the McCarty patent, but instead of having the flanges Q upon the ends of the lower bar, and the guide plates P, there was substituted a cap shown in the patent to Montz, of which the following is a drawing:



This cap contains a recess, *i*, for the reception of the ends of the bolster bar, which are thereby maintained in proper position with respect to each other, and is secured to the ends of the bolster bar by means of two bolts passing vertically through them. The cap, which fits between the posts of the side frame and rests upon a spring, is provided at each side with flanges, *i'*, which embrace the outer and inner faces of the posts, and prevent a longitudinal motion of the bolster, while permitting the same to move freely in a vertical direction. Now, as in view of the Naugatuck truck, there was nothing which could be called novel in the third and fourth claims of the McCarty patent, except the guide plates P, which were used to adapt this bolster to the purposes of a floating bolster by resting its ends on springs; and as the cap in question is an obvious de-

parture from the device in this particular, we cannot say that it is an infringement, although it accomplishes practically the same purpose as the flanges Q and plate P of the McCarty patent. Had it been wholly novel to rest the ends of the bolster upon springs, by means of guide plates, it is possible we might have been able to hold this cap to be an infringement; but as the novelty consists, not in resting the ends of bolsters generally upon springs by means of a guide plate, but in so locating the ends of a bolster of a particular construction, we think the employment of a different means of locating it avoids the charge of infringement.

It is further claimed that the defendant is estopped to question the novelty of the McCarty patent and its priority of invention by the interference proceedings in the Patent Office. Aside from the fact that the issues in those proceedings included the truss rods, which are not used by the defendant, the evidence that the defendant was a party in privity to Montz's application for the patent which was awarded to him, or that he made his application in their interest, is too inconclusive to justify us in holding that the company was bound by the result of this proceeding. It practically rests upon Montz's reply to the question why he did not proceed with the interference, that he had no orders from his superior officers of the road. This we think is insufficient, in the absence of affirmative evidence that the company had knowledge of the proceeding, and assented to the action taken by Montz. There is not that certainty to every intent, which Lord Coke held necessary to constitute an estoppel, and as observed by this court in *Russell* v. *Place*, 94 U. S. 606, 610, "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence."

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

Affirmed.

FOLSOM *v.* UNITED STATES.

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

No. 550. Argued and submitted November 19, 1895. — Decided December 2, 1895.

Circuit Courts of Appeals have no jurisdiction over the judgments of territorial courts in capital cases, and in cases of infamous crimes.

This construction of the statute is imperative from its language, and is not affected by the fact that convictions for minor offences are reviewable on a second appeal, while convictions for capital and infamous crimes are not so reviewable.

THIS was a certificate from the United States Circuit Court of Appeals for the Eighth Circuit, which, omitting the formal parts, reads as follows:

"First. At a regular term of the District Court of the Second Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States, held at Albuquerque, in said district, the plaintiff in error, Stephen M. Folsom, was, on the 15th day of March, 1894, indicted by the grand jury in said court for making certain false entries in violation of the provisions of section 5209 of the Revised Statutes of the United States.

"Second. He was thereafter arraigned. He pleaded not guilty. He was tried by the said District Court and a jury, was found guilty of making certain of the false entries charged in said indictments in violation of the provisions of section 5209, and was thereafter, on the 14th day of April, 1894, ordered and adjudged by the said court to be confined at hard labor in the territorial penitentiary at Santa Fé, New Mexico, for the term and period of five years upon each of the seven separate and distinct offences as laid and charged in the fourteen counts of the indictments upon which the jury had theretofore returned a verdict of guilty; and it was further ordered and adjudged by the said court that said term

upon each of the said offences should run concurrently each with the others, and that the defendant pay the costs to be taxed, and that execution issue therefor.

"Third. The said Stephen M. Folsom then appealed from said judgment to the Supreme Court of the Territory of New Mexico, and his case upon said appeal was heard and tried by the said Supreme Court August 27, 28, and 29, 1894; was on the latter day submitted to and taken under advisement by said court, which, on September 4, 1894, adjudged that the judgment of the District Court of the Second Judicial District aforesaid be affirmed, and that said Folsom be confined in the New Mexico penitentiary at Santa Fé, New Mexico, for the full term of five years, pursuant to the said judgment of the District Court.

"Fourth. On the 9th day of November, 1894, a writ of error was duly issued out of the United States Circuit Court of Appeals for the Eighth Judicial Circuit to the Supreme Court of the Territory of New Mexico, commanding the said court to send the records and proceedings and the judgment in said case between the United States of America, plaintiff and appellee, and Stephen M. Folsom, defendant and appellant in said Supreme Court, with all things concerning the same, to this Circuit Court of Appeals for the Eighth Circuit, together with said writ, so that the same should be filed in the office of the clerk of this court on or before the first day of January, 1895, to the end that, the records and proceedings aforesaid being inspected, the United States Circuit Court of Appeals for the Eighth Circuit might cause further to be done therein to correct the error of which the said Folsom had complained what of right and according to the law and custom of the United States should be done, and pursuant to that writ the clerk of the Supreme Court of the Territory of New Mexico made due return and transmitted to this court a true copy of the record, bill of exceptions, assignment of errors, and of all proceedings in said case before January 1, 1895, and the said case is now pending in this court.

"Fifth. January 7, 1895, the United States of America filed a motion to dismiss the writ of error, on the ground

that this Circuit Court of Appeals has no jurisdiction to hear and determine the issue raised thereby or to review the said judgment of the Supreme Court of the Territory of New Mexico, and the said motion has been argued and submitted to this court for decision.

"Sixth. The errors in the judgment and proceedings of the Supreme Court of the Territory of New Mexico which are assigned by Stephen M. Folsom, the plaintiff in error, in his complaint, upon which the said writ of error was issued from this court, are such that if upon due consideration upon the merits they should be sustained the judgment of the said Supreme Court ought to be reversed.

"And the said United States Circuit Court of Appeals further certifies that, to the end that it may properly decide this and other questions arising in this case which are duly presented by exceptions and assignments of error properly taken and filed, the said court desires the instruction of the Supreme Court of the United States upon the following question:

"Has the United States Circuit Court of Appeals for the Eighth Judicial Circuit any jurisdiction to hear and determine the issue presented by said writ of error, and to review the judgment and proceedings of the Supreme Court of the Territory of New Mexico?"

Mr. Charles A. Willard for plaintiff in error. *Mr. Neill B. Field* and *Mr. F. W. Clancy* were with him on the brief.

Mr. Solicitor General submitted on his brief.

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

The offence denounced by section 5209 of the Revised Statutes is punishable by imprisonment not less than five nor more than ten years, and is therefore an infamous crime. *In re Claassen*, 140 U. S. 200, and cases cited.

The question then is whether the Circuit Court of Appeals for the Eighth Circuit has jurisdiction of a writ of error to

review the judgment and proceedings of the Supreme Court of the Territory of New Mexico in the instance of a conviction of an infamous crime.

By section five of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, it was provided that appeals or writs of error might be taken from the District Courts or from the Circuit Courts direct to the Supreme Court in six classes of cases, one of which classes was "cases of conviction of a capital or otherwise infamous crime;" and by section six, that the Circuit Courts of Appeals should exercise appellate jurisdiction to review by appeal or writ of error final judgments of the District Courts and the Circuit Courts "in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. And the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, the revenue laws or under the criminal laws, and in admiralty cases."

In harmony with previous legislation, 25 Stat. 784, c. 323; 26 Stat. 81, c. 182, § 42, section thirteen of the act of March 3, 1891, provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States Court in the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the Eighth Circuit, in the same manner and under the same regulations as from the Circuit or District Courts of the United States under this act."

Obviously this section was designed to give a review of the decisions of the court of original jurisdiction by an appellate tribunal, and the same reason would not obtain in respect of cases where such review could already be had; nevertheless section fifteen was added, although Congress did not see fit in relation to appeals or writs of error from and to the Supreme Courts of the several Territories to make the same provision thereby as that in section thirteen, except so far as the Circuit Courts of Appeals were concerned, and as to them only in cases in which their judgments were made final by the act.

Section fifteen is as follows: "That the Circuit Court of Appeals in cases in which the judgments of the Circuit Courts of Appeals are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the Supreme Courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the District Courts and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits."

By section 702 of the Revised Statutes and the act of March 3, 1885, c. 355, 23 Stat. 443, the final judgments and decrees of the Supreme Courts of the Territories where the matter in dispute exclusive of costs exceeded the sum of five thousand dollars, might be reviewed, reversed, or affirmed in this court upon a writ of error or appeal in the same manner and under the same regulations as the final judgments or decrees of a Circuit Court.

In *Shute* v. *Keyser*, 149 U. S. 649, which was a case not falling within either of the classes in which the judgments of the Circuit Courts of Appeals were made final by the act of March 3, 1891, we held that as there was no provision by the fifteenth section of that act for appeals or writs of error except to the Circuit Courts of Appeals in cases in which their judgments were made final, and no express repeal of the provisions of the prior acts regulating appeals or writs of error from the Supreme Courts of the Territories in other cases, that an appeal or writ of error lay to this court from the judgments or decrees of those courts in such other cases.

In *Aztec Mining Company* v. *Ripley*, 10 U. S. App. 383, the Circuit Court of Appeals for the Eighth Circuit held that it had no jurisdiction under the fifteenth section, because the case at bar did not come within any one of the classes of cases wherein the judgments of that court were declared to be final, and its judgment dismissing the writ of error on that ground was affirmed by this court, while it was at the same time pointed out that as the value of the matter in dispute did not reach five thousand dollars, we could not take jurisdiction of

the particular case. *Aztec Mining Company* v. *Ripley*, 151 U. S. 79.

It was urged that Congress could not have intended that such cases should be brought to this court by reason of the discrimination in the fifteenth section, but we were constrained to the conclusion reached in view of all the legislation on the subject, and the specific language of the section which we were not at liberty to disregard.

The result was rendered inevitable, in our opinion, by the restriction of the jurisdiction of the Circuit Courts of Appeals to cases in which their judgments were made final by the act, and the same rule seems applicable in the disposal of the question under consideration.

By the sixth section the Circuit Courts of Appeals are vested with appellate jurisdiction "to review by appeal or by writ of error final decisions in the District Courts and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and their judgments are made final in, among others, cases arising under the criminal laws.

By the preceding section, appeals or writs of error may be taken from the District Courts or the existing Circuit Courts directly to this court "in cases of conviction of a capital or otherwise infamous crime."

The criminal cases in which the judgments of the Circuit Courts of Appeals are made final by section six do not embrace, therefore, capital cases or cases of infamous crimes.

The fifteenth section confers appellate jurisdiction on the Circuit Courts of Appeals to review the judgments of the Supreme Courts of the Territories, but it is in terms the same appellate jurisdiction as conferred by the sixth section in respect of the judgments of District and Circuit Courts, and this being so, is limited to those cases in which, if decided by the District and Circuit Courts, the judgments of the Circuit Courts of Appeals would be final.

Sections 5 and 6 relate to appellate jurisdiction over the judgments and decrees of District and Circuit Courts; section 13 gives the same appellate jurisdiction over the decisions of

the United States court in the Indian Territory distributed in accordance with sections 5 and 6; section 15 gives the same appellate jurisdiction over the territorial courts, but confines it to the Courts of Appeals and to particular cases as specified in section 6. The grant of jurisdiction is not general but specific and limited, and we see no escape from the conclusion that it is not conferred on the Circuit Courts of Appeals over territorial judgments in capital cases and cases of infamous crimes.

It is said that this involves the absurdity that convictions for minor offences are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the court to expound the statute as it stands. As far as Congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that Congress should have gone farther and given by this act a second review in this court in cases of convictions of capital and infamous crimes in the Territories.

It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the fifteenth section as carrying appellate jurisdiction over such cases to the Circuit Courts of Appeals, and so enlarging that jurisdiction into something other and different from "the same appellate jurisdiction" as is exercised in reviewing the judgments of District and Circuit Courts under section 6 of the act.

We answer the question in the negative, and it will be

So certified.

STREEP *v.* UNITED STATES.

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

No. 623. Argued October 30, 31, 1895. — Decided December 2, 1895.

To support an indictment on section 5480 of the Revised Statutes, as amended by the act of March 2, 1889, c. 393, for devising a scheme to sell counterfeit obligations of the United States, by means of communication through the post office, it is unnecessary to prove a scheme to defraud.

In order to come within the exception of "fleeing from justice," in section 1045 of the Revised Statutes, concerning the time after the commission of an offence within which an indictment must be found, it is sufficient that there is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been begun.

In order to constitute "fleeing from justice," within the meaning of section 1045 of the Revised Statutes, it is not necessary that there should be an intent to avoid the justice of the United States; but it is sufficient that there is an intent to avoid the justice of the State having jurisdiction over the same territory and the same act.

THIS was an indictment in the Circuit Court of the United States for the Southern District of New York, on section 5480 of the Revised Statutes, as amended by the act of March 2, 1880, c. 393, and copied in the margin,[1] for devising a scheme to sell counterfeit obligations and securities of the United States, by means of circulars through the post office. The indictment was found October 10, 1892, and contained two

[1] If any person having devised or intended to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply or furnish, or procure for unlawful use, any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation or person, or anything representing to be, or intimated or held out to be, such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected

counts, one charging the offence to have been committed on May 13, and the other on May 20, 1889.

By sections 1043 and 1044 of the Revised Statutes, as amended by the act of April 13, 1876, c. 56, "no person shall be prosecuted, tried or punished," (except for murder, or under the revenue laws or the slave trade laws of the United States,) "unless the indictment is found, or the information is instituted, within three years next after such offence shall have been committed." 19 Stat. 32. But, by section 1045, "nothing in the two preceding sections shall extend to any person fleeing from justice."

At the trial of this indictment, the United States introduced evidence tending to prove the commission of the offence at the times alleged in the indictment; and also testimony that the defendant was indicted June 20, 1889, for the same transaction, in a court of the State of New York, under the penal code of the State, and was arrested by the police and gave bail upon that indictment; that on October 10, 1889, his case was called in that court, and his bail forfeited by order of the court; that the officers afterwards made unsuccessful attempts to find him; that in August, 1890, being in New York, he stated to Anthony Comstock (who was called as a witness for the government) that he went to Europe in the fall of 1889, because his counsel advised him to do so, and told him to go abroad so that they could not call him as a witness against one Bechtold, by whom the bail had been put up; that

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by either opening or intending to open correspondence or communication with any person, whether resident within or outside of the United States, by means of the Post Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter, packet, writing, circular, pamphlet or advertisement, in any post office, branch post office, or street or hotel letter-box of the United States, to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable by a fine of not more than five hundred dollars and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. 25 Stat. 873.

in October, 1890, he made an affidavit and testified in a prosecution in behalf of the United States against Bechtold; and that the first charge made against him, for a violation of the laws of the United States, was a complaint, charging the same offence as in this indictment, and upon which he was arrested October 2, 1891.

The defendant offered no evidence; and, at the close of the evidence for the government, moved the court to direct an acquittal, because the indictment was found more than three years after the offences alleged and given in evidence, and because the words "fleeing from justice," in section 1045 of the Revised Statutes, meant a fleeing from the justice of the United States, and not from the justice of any State. The motion was denied, and the defendant excepted.

The court instructed the jury that, if they found that the defendant was fleeing from justice between the times of the commission of the offences and of the finding of the indictment, they might find him guilty, notwithstanding the indictment was found more than three years after the commission of the offences. The further instructions of the court to the jury, together with the requests and exceptions of Mr. Hess, the defendant's counsel, and a request of Mr. Mott, the attorney for the United States, were stated in the bill of exceptions as follows:

"The Court: 'The evidence as to his fleeing from justice, as I understand it, was that there was a prosecution against the accused in the state courts; that he gave bail to answer to the charge; that when the time for trial came he did not appear and his bail was forfeited, and afterwards, when he had returned, he told the witness Comstock that the reason why he was away was that he had gone away because of the prosecution, under the advice of his counsel, and that his bail had been paid by somebody else. If you find that true, I charge you that he was fleeing from justice, in the meaning of the statute of the United States, during the period of his absence, notwithstanding the fact that that was a prosecution in the courts of the State, and that there was then no prosecution of him pending in any court of the United States.' Mr. Hess: 'And to that I except.'

Statement of the Case.

"The Court: 'For the purpose of this trial, I charge that, if the jury is satisfied of the main charge in this indictment, and are likewise satisfied that during the three years mentioned he was fleeing from justice, having gone from the country to Europe to avoid the prosecution in the state courts, then you can convict him, notwithstanding the fact that it is conceded that the indictment is found more than three years after the offence.' Mr. Hess: 'To the latter part of your honor's charge I except. I ask your honor to charge the jury that the forfeiture of the bail by the state courts is not presumptive evidence of a fleeing from justice.' The Court: 'It is not conclusive evidence, but it is a circumstance which the jury may consider.'

"Mr. Hess: 'I ask your honor to charge the jury that, before they can convict this defendant under the indictment, they must be satisfied from the evidence that there was a scheme to defraud.' The Court: 'No; the statute says a scheme to defraud, and likewise a scheme to sell counterfeit money. This indictment charges a scheme to sell counterfeit money. It is a scheme to sell counterfeit money, that the jury must find to have been devised by the accused.' Mr. Hess: 'They must be satisfied, before they convict, from the evidence in the case, that there was a scheme on the part of this defendant to sell counterfeit money.' The Court: 'I charge that.'

"Mr. Hess: 'I also ask your honor to charge the jury that they cannot infer a scheme to defraud from the circulars themselves. They must be satisfied from the evidence that there was such a scheme.' The Court: 'I do not accede to the request.' Exception by defendant.

"Mr. Hess: 'I also ask the court to charge the jury that it must appear from the evidence that the defendant fled from justice of the United States, and not from the justice of the State.' The Court: 'That is declined.' Exception by defendant.

"Mr. Mott: 'I ask your honor to charge that if the jury find that the defendant was absent from the country, as stated, for six months at any time between the commission of this act

and the time of the filing of this indictment, then they can convict, notwithstanding the lapse of three years.' The Court: 'I will give that charge.' Exception by defendant."

The court also, at the request of the defendant's counsel, instructed the jury that the failure of the defendant to testify should not raise a presumption against him; and that if they had a reasonable doubt they must acquit the defendant.

The jury returned a verdict of guilty; the court sentenced the defendant to be imprisoned in a penitentiary for eighteen months; and he sued out this writ of error.

Mr. Charles C. Lancaster, (with whom was *Mr. Frank W. Angel* on the brief,) for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

Only two of the questions argued in this court are presented by the exceptions taken at the trial.

One subject of exception was the refusal of the court to instruct the jury, as requested by the defendant, that they could not infer a scheme to defraud from the circulars themselves, but must be satisfied from the evidence that there was such a scheme. That instruction was rightly refused as immaterial. The court had already instructed the jury, without exception by the defendant, that they need not, under this indictment, be satisfied that there was a scheme to defraud; that the statute spoke of a scheme to defraud, and also of a scheme to sell counterfeit money; that the indictment charged a scheme to sell counterfeit money, and it was a scheme to sell counterfeit money that the jury must find to have been devised by the accused. The statute, in very words as well as in manifest intent, applies to any person who devises either a scheme to defraud, or a scheme to sell counterfeit money or counterfeit obligations of the United States, provided the scheme is intended to be effected, and is effected, by com-

munications through the post office. This indictment charged, not a scheme to defraud, but a scheme to sell counterfeit obligations of the United States; and, therefore, no proof of a scheme to defraud was necessary to support it.

Upon the question whether there had been such a "fleeing from justice," by the defendant, as to take the case out of the statute of limitations, the only point taken at the trial was that there must have been a fleeing from the justice of the United States, and not from the justice of any State. No exception was taken to the sufficiency of the whole evidence to prove that there had been a fleeing from the justice of the State of New York, or to the statement of that evidence in the instructions of the court to the jury.

By section 1045 of the Revised Statutes, it is provided that "nothing in the two preceding sections" (one of which, as amended in 1876, requires the indictment, in such a case as this, to be found within three years after the commission of the offence) "shall extend to any person fleeing from justice."

The statute, while laying down the general rule that charges of crime shall be formally presented within a limited time after the act complained of, expressly excepts from that rule the case of "any person fleeing from justice." It is unnecessary, for the purposes of the present case, to undertake to give an exhaustive definition of these words; for it is quite clear that any person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offence, can have no benefit of the limitation, at least when prosecuted for that offence in a court of the United States.

In order to constitute a fleeing from justice, it is not necessary that the course of justice should have been put in operation by the presentment of an indictment by a grand jury, or by the filing of an information by the attorney for the government, or by the making of a complaint before a magistrate. It is sufficient that there is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not been actually begun. Chief Justice Ellsworth so held.

Williams's case, cited in *United States* v. *Smith*, (1809) 4 Day, 121, 125. And there can be no doubt that, in this respect, section 1045 of the Revised Statutes must receive the same construction that has been given to section 5278 by this court, saying: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence, he has left its jurisdiction and is found within the territory of another." *Roberts* v. *Reilly*, 116 U. S. 80, 97.

Nor is it necessary, in order to satisfy the terms of the statute now before us, that the fugitive should have the intention of fleeing from justice as administered by any particular court, or system of courts, having criminal jurisdiction over the territory where the act supposed to have been criminal was committed.

The statute speaks generally of "fleeing from justice," without restriction either to the justice of the State, or to the justice of the United States. A person fleeing from the justice of his country is not supposed to have in mind the object of avoiding the process of a particular court, or the question whether he is amenable to the justice of the nation or of the State, or of both. Proof of a specific intent to avoid either could seldom be had; and to make it an essential requisite would often defeat the whole object of the provision in question.

In the Constitution, laws and treaties of the United States, the words "fleeing from justice," or "fugitive from justice," have not been used as of themselves implying a flight from the justice of the nation only.

Section 1045 of the Revised Statutes is a reënactment of the corresponding proviso in the first Crimes Act of the United States: "Provided, that nothing herein contained

shall extend to any person or persons fleeing from justice." Act of April 30, 1790, c. 9, § 32; 1 Stat. 119.

At the time of the passage of that act, the only use, in the Constitution or statutes of the United States, of the words "flee from justice," was in article 4, section 2, of the Constitution, concerning persons charged with crime in one State and found in another State of the Union. And the earliest act passed by Congress in execution of that provision of the Constitution used, both in the title and in the enacting clause, the general words "fugitive from justice," as applicable to that class of cases. The whole title of that act, so far as it related to this subject, was "An act respecting fugitives from justice." Act of February 12, 1793, c. 7; 1 Stat. 302. And that part of the act is reënacted in section 5278 of the Revised Statutes.

The treaties made by the United States with foreign countries, for the extradition of persons accused of crime, make no distinction between crimes against one of the States of the Union and crimes against the United States. By successive treaties between the United States and Great Britain, for instance, each nation engages to "deliver up to justice all persons" who, being charged with certain crimes committed within the jurisdiction of either nation, seek an asylum in the country of the other. Treaties of 1794, art. 27; 1842, art. 10; 8 Stat. 129, 576. There can be no doubt that these treaties apply to all offences of the kinds specified, committed within the territorial jurisdiction of the United States, even if cognizable only in the courts of the several States. *United States* v. *Rauscher*, 119 U. S. 407, 430.

From these considerations, our conclusion is that, in order to constitute "fleeing from justice," within the meaning of section 1045 of the Revised Statutes, it is not necessary that there should be an intent to avoid the justice of the United States; but it is sufficient that there is an intent to avoid the justice of the State having criminal jurisdiction over the same territory and the same act.

The only case cited at the bar which restricts the effect of this section to persons fleeing from the justice of the United States, is *United States* v. *O'Brian*, 3 Dillon, 381, which ap-

pears to us to have proceeded upon too narrow a construction of the section, inconsistent alike with its words and with its purpose.

Judgment affirmed.

UNITED STATES *v.* HEALEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 378. Argued October 22, 23, 1895. — Decided December 2, 1895.

The act of March 3, 1877, c. 107, 19 Stat. 377, providing for the sale of desert lands in certain States and Territories, does not embrace alternate sections, reserved to the United States, along the lines of railroads for the construction of which Congress has made grants of lands.

Cases initiated under that act, but not completed, by final proof, until after the passage of the act of March 3, 1891, c. 561, 26 Stat. 1095, were left by the latter act, as to the price to be paid for the lands entered, to be governed by the law in force at the time the entry was made.

When the practice in a department in interpreting a statute is uniform, and the meaning of the statute, upon examination, is found to be doubtful or obscure, this court will accept the interpretation by the department as the true one; but where the departmental practice has not been uniform, the court must determine for itself what is the true interpretation.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dodge for appellant. *Mr. George H. Gorman* was on his brief.

Mr. Harvey Spaulding for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

On the 5th day of February, 1889, the appellant, Benjamin Healey, filed in the local land office at Visalia, California, a declaration of his intention to reclaim a tract of land containing 639.20 acres, and belonging to the United States.

The declaration stated all the facts required in the cases embraced by the act of Congress of March 3, 1877, c. 107, providing for the sale of "desert lands" in certain States and Territories. 19 Stat. 377; Supp. Rev. Stat. 2d ed. 137. That act fixed $1.25 per acre as the price of such lands.

Opinion of the Court.

The lands described in the declaration constituted one of the alternate reserved sections of public lands reserved to the United States, along the line of the railroad extending from the States of Missouri and Arkansas to the Pacific coast, for the construction of which provision was made by the act of Congress of July 27, 1866, c. 278, 14 Stat. 292, 294.

At the time of filing his declaration the plaintiff — "being so required, without protest and without taking any steps for relief against the demand of the receiver" — paid the sum of $319.60, or 50 cents per acre, for the lands described. He made, September 21, 1891, satisfactory proof of the reclamation of the tract in question and, without protest, paid for the land reclaimed, in addition to the amount paid at the time of filing his declaration, the sum of $1278.40, or $2 per acre; in all, $2.50 per acre. A patent was thereupon issued to him.

This action was brought against the United States to recover the sum of $799, which amount, it is claimed, was in excess of what the receiver was entitled to demand from the appellee — his contention being that the statute only required the payment of 25 cents per acre at the time of filing his declaration, and $1 per acre more when making his final proof; in all, $1.25 per acre.

The Court of Claims sustained this demand, and gave judgment in favor of the appellee for $799.

An examination of the statutes regulating the sale of the public lands is necessary in order to determine the question now presented. That question is, whether the act of 1877, providing for the sale of "desert lands," embraces alternate sections reserved to the United States, along the line of railroads for the construction of which Congress made a grant of lands.

By the act of April 24, 1820, making further provision for the sale of the public lands, 3 Stat. 566, c. 51, it was provided that from and after the first day of July thereafter no lands should be sold, either at public or private sale, for less than one dollar and twenty-five cents an acre.

The next act referred to in the opinion of the Court of Claims is that of September 4, 1841, c. 16, appropriating the

proceeds of the sales of the public lands and granting preemption rights. 5 Stat. 453, 455. That act allowed every person of the class described in it to enter not exceeding one hundred and sixty acres or one quarter-section of public land, upon paying the minimum price therefor, subject, however, to certain limitations and exceptions, one of which was that "no sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement" should be liable to entry under that act. § 10.

By the act of March 3, 1853, c. 143, the preëmption laws of the United States, as they then existed, were extended over the alternate reserved sections of public lands along the lines of all railroads for the construction of which public lands had been or might thereafter be granted by acts of Congress. But that act contained a proviso declaring that "the price to be paid shall in all cases be $2.50 per acre, or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted." 10 Stat. 244.

Other enactments show that Congress steadily held to the policy of requiring double the minimum price for alternate sections of public lands reserved to the United States in grants to aid in the construction of railroads. In the first grant of this character — that of September 20, 1850, to the States of Illinois, Mississippi, and Alabama of alternate even-numbered sections in aid of the construction of a railroad from Chicago to Mobile — it was provided "that the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of said road and branches, shall not be sold for less than double the minimum price of the public lands when sold." 9 Stat. 466, c. 61, § 3. A similar provision will be found in nearly all, if not in all, subsequent acts making grants of public lands for the construction of railroads.[1]

[1] 1852, 10 Stat. 8, c. 45, § 2; 1853, id. p. 155, c. 59, § 3; 1856, 11 Stat. 9, c. 28, § 2; id. p. 15, c. 31, § 16; id. p. 17, c. 41, § 2; id. p. 18, c. 42, § 2; id. p. 20, c. 43, § 2; id. p. 21, c. 44, § 2; id. p. 30, c. 83, § 2; 1857, id. p. 195, c. 99, § 2; 1863, 12 Stat. 772, c. 98, § 2; 1864, 13 Stat. 66, c. 80, § 4; id. p.

Opinion of the Court.

An examination of these acts makes it clear that up to the revision of the statutes of the United States, it was the settled policy of the government to hold for sale, at a price not less than double the minimum price of public lands, all alternate reserved sections on the lines of railroads constructed with the aid of the United States.

That policy was recognized in section 2357 of the Revised Statutes, which provides that "the price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: *Provided*, That the price to be paid *for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress*, shall be two dollars and fifty cents per acre."

It is to be observed, in passing, that this proviso applies to all alternate reserved lands described in any act of Congress, and makes no exception of any lands of that class on account of their fitness or unfitness, in their natural condition, for agricultural purposes.

Thus the law stood at the date of the act of March 3, 1877, c. 107, providing for the sale of "desert lands" in certain States and Territories. 19 Stat. 377, c. 107. That act is as follows:

"That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to be-

72, c. 84, § 2; id. p. 365, c. 217, § 6; 1865, id. p. 526, c. 105, § 4; 1866, 14 Stat. 83, c. 165, § 3; id. p. 87, c. 168, § 2; id. p. 94, c. 182, § 5; id. p. 210, c. 212, § 2; id. p. 236, c. 241, § 2; id. 239, c. 242, § 2; 1867, id. p. 548, c. 189, § 5; 1870, 16 Stat. 94, c. 69, § 4.

come such' and upon payment of twenty-five cents per acre — to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: *Provided, however*, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

"SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

"SECTION 3. That this act shall only apply to and take

effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

It is said that the administration of this act by the Interior Department for many years succeeding its passage was upon the theory that "desert lands" (unless they were timber and mineral lands) included all public lands in the States and Territories named that required irrigation — even if they were alternate reserved sections along the lines of land-grant railroads. The object of this suggestion is to bring the present case within the rule, often announced, that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, where that construction has, for many years, controlled the conduct of the public business. *Edwards* v. *Darby*, 12 Wheat. 206; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Robertson* v. *Downing*, 127 U. S. 607, 613.

Let us see what has been the practice in the Interior Department in cases arising, or which have been treated as having arisen, under the act of 1877.

As soon as that act was passed, the Commissioner of the Land Office issued a circular, addressed to the registers and receivers of land offices, in which he said that, after the applicant for a patent for "desert lands" had made the required proof, the officer should receive from him the sum of twenty-five cents per acre for the land applied for, and after the expiration of the period named in the statute, and upon proof that water had been conducted upon the land, he should receive the additional payment of one dollar per acre. But it does not appear that the Commissioner intended to make any ruling upon the specific question whether the act of 1877 embraced alternate reserved sections along the line of land-grant railroads. No reference is made by him to the proviso of section 2357 of the Revised Statutes. Nevertheless, for many years after the passage of the act of 1877 it was held

in the Department that "lands entered under that act should be paid for at the rate of $1.25 per acre without regard to railroad limits." 14 Land Dec. 75.

But the precise question before the court was considered by the Land Office at a later date and a new policy was inaugurated. In a circular from that office, of date June 27, 1887, it was distinctly stated that "the price at which lands may be entered under the desert land act is the same as under the pre-emption law, viz., single minimum lands at $1.25 per acre, and double minimum lands at $2.50 per acre" — the Commissioner referring, in his circular, to section 2357 of the Revised Statutes as his authority for that regulation. That circular received the approval of Secretary Lamar. 5 Land Dec. 708, 712.

In *Tilton's case*, decided March 25, 1889, the point was made that the desert land act of 1877, being subsequent in point of time to section 2357, must control as to *all* lands that required irrigation. Secretary Noble, after observing that these statutes were parts of one general system of laws regulating the disposal of the public domain, and, therefore, to be regarded as explanatory of each other and to be construed as if they were one law, said: "Under such construction, section 2357 of the Revised Statutes and the desert land act do not conflict, but each has a separate and appropriate field of operation; the former, regulating the price of desert lands reserved to the United States along railway lines; and the latter, the price of other desert lands not so located. There is nothing in the nature of the case which renders it proper that desert lands be made an exception to the general rule any more than lands entered under the preëmption laws. Lands reserved to the United States along the line of railroads are made double minimum in price because of their enhanced value in consequence of the proximity of such roads. Desert lands subject to reclamation are as much liable to be increased in value by proximity to railroads as any other class of lands, and hence the reason of the law applies to them as well as to other public lands made double minimum in price. To hold desert lands an exception to the general rule regulating

the price of lands reserved along the lines of railroads, would be to make the laws on this subject inharmonious and inconsistent." 8 Land Dec. 368, 369. The same ruling was made by the Interior Department July 2, 1889, in *Knaggs' case*, the Secretary saying that "the Department construes the desert land act as fixing the price of desert land within railroad limits at two dollars and fifty cents an acre." 9 Land Dec. 49, 50. A like decision was made in *Wheeler's case*, August 16, 1889, and in *Reese's case*, May 9, 1890. 9 Land Dec. 271; 10 Land Dec. 541.

This brings us to the act of Congress of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes." 26 Stat. 1095, c. 561.

The second section of that act provides that the above act of 1877, providing for the sale of desert lands in certain States and Territories, "is hereby amended by adding thereto the following sections." Then follow five sections, numbered four to eight inclusive, which were added to the statute of 1877. Sections 6 and 7 of the sections so added to the act of 1877 are in these words:

"SEC. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all *bona fide* claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented, under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

"SEC. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the

additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act. . . ."

In *Gardiner's Case*, 1894, 19 Land Dec. 83 — which was the case of an entry made in 1889, the final proof, however, not being furnished until after the passage of the act of 1891 — the present Secretary referred to the above seventh section of the act of 1891, and to the decision of Secretary Noble in 14 Land Dec. 74, and said:

"This section operates upon entries then existing, as well as upon subsequent entries of desert land. It contains the following language: 'But no person or association of persons shall hold by assignment or otherwise prior to the issue of patent more than three hundred and twenty acres of such arid or desert lands; but this section shall not apply to entries made or initiated prior to the approval of this act.' The words, 'but this *section*,' do not, in my opinion, relate to the provisions of the entire section, but do relate simply to the quantity of lands which one person could thereafter enter, and the word 'section,' in the above act quoted, should be construed to mean 'provision.' It would then read: 'But this *provision* shall not apply to entries made prior to the passage of this act.' This is manifest, in my judgment, from the fact that the act of 1891 is similar to the act of 1877 — of which the act of 1891 was amendatory — in reference to the price to be paid for desert lands, and it amends the act of 1877 as to the quantity of land that could be entered by any one person or association of persons. Evidently the words above quoted, taken from the act of 1891, were intended by Congress to limit the operation of the act to entries *thereafter* to be made, as to the quantity of land, and saved all entries *theretofore* made, as to the quantity of land; but it was not intended to limit the benefits as to price to such entries as might be made subsequently to the date of the passage of the act. The

declaration in this case was made March 11, 1889; and before reclamation was completed as required by the statute, the act of 1891 was passed, which, as construed by Secretary Noble, fixed the price at one dollar and a quarter per acre, regardless of location. Construing the act as I do, as to the price the entryman should be required to pay for desert land, I am of opinion that this entryman should be allowed to purchase at one dollar and a quarter per acre."

A similar ruling was made (1895) in *Organ's Case*, 20 Land Dec. 406.

From this review of the administration by the Interior Department of the act of 1877, it appears that, for ten years after the passage of that act, "desert lands," even if they were alternate reserved sections along the lines of land-grant railroads, could be obtained from the government at the price of $1.25 per acre; that after June 27, 1887, and until the passage of the act of March 3, 1891, c. 561, the act of 1877 was administered upon the theory that it did not modify or conflict with section 2357 of the Revised Statutes, and therefore did not include alternate sections reserved to the United States along the line of land-grant railroads, the price for which was fixed at $2.50 per acre; that the act of 1891 was interpreted to mean *all* desert lands, those within as well as those without the granted limits of a railroad, and to authorize their sale at $1.25 per acre; and that cases *initiated* under the act of 1877 should, in respect to price per acre of lands, be completed according to the terms prescribed by the act of 1891.

If, prior to the passage of the act of 1891, the Interior Department had uniformly interpreted the act of 1877 as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from $2.50 to $1.25 per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure. But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the act of 1877, without reference to the practice in the Department.

Did the act of 1877 supersede or modify the proviso of sec-

tion 2357 of the Revised Statutes, which expressly declared that the price to be paid for alternate reserved lands along the line of railroads, within the limits defined by any act of Congress, should be two dollars and fifty cents per acre?

The principal, if not the only, object of the requirement that the alternate reserved sections along the lines of land-grant railroads should not be sold for less than double the minimum price fixed for other public lands, was to compensate the United States for the loss of the sections given away by the government.

The act of 1877 and the proviso of section 2357 of the Revised Statutes both relate to public lands; the former, to desert lands, that is, such lands — not timber and mineral lands — as required irrigation in order to produce agricultural crops, and the price for which was $1.25 per acre; the latter, to such lands, along the line of railroads, as were reserved to the United States in any grant made by Congress, and the price for which was $2.50 per acre. As the statute last enacted contains no words of repeal, and as repeals of statutes by implication merely are never favored, our duty is to give effect to both the old and new statute, if that can be done consistently with the words employed by Congress in each. We perceive no difficulty in holding that the desert lands referred to in the act of 1877 are those in the States and Territories specified, which required irrigation before they could be used for agricultural purposes, but which were not alternate sections reserved by Congress in a railroad land grant. It is as if the act of 1877, in terms, excepted from its operation such lands as are described in the proviso of section 2357 of the Revised Statutes. Thus construed, both statutes can be given the fullest effect which the words of each necessarily require. In the absence of some declaration that Congress intended to modify the long-established policy indicated by the proviso of section 2357 of the Revised Statutes, we ought not to suppose that there was any purpose to except from that proviso any public lands of the kind therein described, even if, without irrigation they were unprofitable for agricultural purposes. To hold that alternate sections along the lines of a railroad

aided by a grant of public lands, being also desert lands, could be obtained, under the act of 1877, at one dollar and twenty-five cents an acre, would be to modify the previous law by implication merely. In *Frost* v. *Wenie*, 157 U. S. 46, 58, we said: "It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court — no purpose to repeal being clearly expressed or indicated — is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute."

Giving effect to these rules of interpretation, we hold that Secretaries Lamar and Noble properly decided that the act of 1877 did not supersede the proviso of section 2357 of the Revised Statutes, and, therefore, did not embrace alternate sections reserved to the United States by a railroad land grant.

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert lands, could not properly be disposed of at less than $2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?

If it be true, as seems to have been held by the Interior Department, that the act of 1877, as amended by that of 1891, embraces alternate reserved sections along the lines of land-grant railroads that require irrigation in order to fit them for agricultural purposes — upon which question we express no opinion — it is necessary to determine whether a case begun, as this one was, prior to the passage of the act of 1891 is controlled by the law as it was when the original entry was made. This question is important in view of the fact that the appellee's entry was made under the act of 1877, before it was amended, and his final proof was made after the act of 1891 took effect.

The present Secretary of the Interior, as we have seen, held that entries initiated under the act of 1877 and prior to the act of 1891 could be completed upon the terms fixed by the latter act as to price of desert lands. If that construction be correct, and if the plaintiff is not precluded from recovering money voluntarily paid by him, with full knowledge of all the facts, then the judgment below was right. Otherwise, it must be reversed.

We are of opinion that the act of 1891 did not authorize the lands in dispute to be sold at $1.25 per acre, where, as in this case, the proceedings to obtain them were begun before its passage.

Although the act of 1891 was, in some particulars, clumsily drawn, it is manifest that the words "this act," in the section added by it to the act of 1877 and numbered six, refer to the act of 1891, and that the words "said act" refer to the act of 1877. It is equally clear that the purpose of that section, thus added to the former act, was to preserve the right to perfect all *bona fide* claims "lawfully initiated" under the act of 1877, and "upon the same terms and conditions" as were prescribed in that act. It is true that the claimant, at his option, could perfect his claim, thus initiated, and have the lands patented under the act of 1877, as amended by that of 1891, so far as the latter act was applicable to the case. But this did not mean that land entered under the act of 1877, when the price was $2.50 per acre, could be patented, after the passage of the act of 1891, upon paying only $1.25 per acre.

If any doubt could exist as to the object of section six, added by the act of 1891 to the act of 1877 — to which section the attention of the present Secretary seems not to have been drawn — that doubt must be removed by the explicit language of added section seven. The latter section fixes the price of desert lands at $1.25 per acre, and declares that "this *section* shall not apply to entries made or initiated prior to the approval of this act" — that is, to entries made prior to the approval of the act of 1891. The Secretary construed the word "section" to mean "provision," and as referring not to the entire section, but only to the clause or provision relating

to the quantity of desert lands that any person or association of persons might appropriate. We cannot assent to this view. The words "section" and "provision" frequently occur in the act of 1891, and there is no reason to suppose that Congress, when using the words "but this section shall not apply to entries made or initiated prior to the approval of this act," intended that only one provision or clause of that section should apply to such entries.

We are of opinion that cases initiated under the original act of 1877, but not completed, by final proof, until after the passage of the act of 1891, were left by the latter act — at least as to the price to be paid for the lands entered — to be governed by the law in force at the time the entry was made. So far as the price of the public lands was concerned, the act of 1891 did not change, but expressly declined to change, the terms and conditions that were applicable to entries made before its passage. Such terms and conditions were expressly preserved in respect of all entries initiated before the passage of that act.

The judgment of the Court of Claims is reversed, with directions to dismiss the claimant's petition.

BAMBERGER *v.* SCHOOLFIELD

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

No. 48. Submitted April 11, 1895. — Decided December 9, 1895.

It was not the province of the court to instruct the jury in this case to render a verdict in the plaintiffs' favor, and had it done so it would have usurped the province of the jury, by determining the proper inference to be drawn from the evidence, and by deciding on which side lay the preponderance of proof.

As the controversy below in this case was what is known in the jurisprudence of Alabama as a statutory claim suit, growing out of attachment proceedings, the law of Alabama, as interpreted by the Supreme Court of that State in its rulings, will be followed here.

Statement of the Case.

Under the law of Alabama a debtor has the right to prefer a creditor, either by paying his debt in money, or by paying it by a sale and transfer of property to the debtor; and if such sale and transfer are real, and are made in good faith, for a fair price, if they are honestly executed to extinguish the debt and do extinguish it, and contain no reservation of an interest or benefit in favor of the vendor, they are valid, and pass the property to the vendee, even if it further appears that the vendor was insolvent at the time, that the vendee knew that fact, and that, in making the sale the vendor had a fraudulent intent to defraud his other creditors by the preference, and the remaining creditors would, in consequence of the sale, be unable to obtain the payment of their debts.

In such case if the fact of indebtedness, and the fact that the goods were sold in payment thereof at their reasonable fair value are established to the satisfaction of the jury, and if it be contended, in avoidance thereof, that the trade was simulated, and that there was a secret trust or benefit reserved to the debtor, the burden is on the contesting creditor to establish it.

The employment of such a vendor by the vendee in a clerical capacity, and the subsequent transfer of the property by the vendee to the wife of the vendor, though circumstances which may be considered by the jury in determining the validity of the sale and transfer, do not of themselves render them illegal in law.

When a request for instructions presents a suppositious case, for the establishment of which there is no proof of any kind in the case, it should be refused.

The second section of the fourteenth article of the Constitution of Alabama, and the act of the legislature of that State of February 28, 1887, have been held by the courts of Alabama as not intended to interfere with matters of commerce between the States, and to have no application to transactions such as here under consideration.

There was no error in the instructions as to the bearing on the rights of the parties of the letter written by the Memphis firm and the settlement made by the latter after it.

The controversy below was what is known in the jurisprudence of Alabama as a statutory claim suit, and grew out of an attachment proceeding instituted by plaintiffs in error against one Henry Warten. Under the writ, a levy was made on certain merchandise, treated as belonging to Warten. The defendants in error intervened and claimed the things seized, and thereby an issue was formed as to whether they were owned by the defendant in attachment or were the property of the claimants. The undisputed facts are as follows: Henry Warten embarked in trade at Athens, Alabama, in 1881; his business consisted of a general country merchandise store, of

advancing to farmers money or provisions wherewith to cultivate and market a crop of cotton, of buying and selling cotton on his own account and as agent for others. Almost at the opening of his career at Athens, Warten began a course of dealings with the commercial firm of Schoolfield, Hanauer & Co. of Memphis, Tenn. (whom we designate hereafter as the Memphis firm); they became his general factors, selling him merchandise, loaning him money, cashing his sight drafts, given to others in payment of merchandise bought by him or for debts due, he consigning them cotton for sale, the proceeds passing to the credit of his account. This course of dealing continued until April, 1889, when the Memphis firm went into liquidation. There was then formed, under the laws of Tennessee, a corporation styled the Schoolfield Hanauer Company, designated hereafter as the Memphis company, with whom Warten carried on business of the same general nature as that previously conducted with the firm.

The cotton crop of 1889, in the region of country where Warten dealt, was a disastrous failure, and in consequence of this fact, by the month of December of that year, Warten had a large amount of outstanding debts due him by unsecured accounts, which were either permanently lost or were unavailable as quick realizable assets. At this time he owed a large amount of money for merchandize and for money borrowed during the course of his business. This condition of things produced disorder in his affairs and a state of actual, if not ultimate, insolvency. By the 20th of December, 1889, Warten owed the Memphis firm a considerable debt, evidenced by four notes, three of which were dated May 22, 1889, two for $5000 each were past due, one for $3794 was to become due on January 1, 1890, the other for $2500 was dated June 10, 1890, and had also matured.

The last-mentioned note (dated June 10, 1890) had been made by Warten to the order of the Memphis house, was by it endorsed, and had been discounted by the Memphis company, who put the proceeds to the credit of Warten, he thereafter drawing against the credit to the full extent thereof. Warten at that time also owed the firm of Bamberger, Bloom

& Company, of Louisville, hereafter called the Louisville firm, a past-due note, amounting to $4719.36 and an open account, both together making the total of his indebtedness to that firm between six thousand five hundred and seven thousand dollars. The embarrassed condition of Warten's affairs was known to the Memphis and the Louisville firms. Late in December, after conferring with his creditors in Memphis, Warten went to Louisville for the purpose of asking an extension from the Louisville firm, and delivered to them the following letter:

"MEMPHIS, TENN., *December* 27, 1889.

"MESSRS. BAMBERGER, BLOOM & COMPANY,

"*Louisville, Ky.*

"DEAR SIRS: Our mutual friend and customer, Mr. Henry Warten, through, we believe, no fault of his own, but owing to disastrous failure of crops in his own section, finds himself forced to ask for extension of his particular friends, and he recognizes you among that number and from whom he can ask that favor. Having confidence in his honor and integrity and business qualifications, we have agreed to give him extension, provided you will do so. He informs us that one of his creditors has agreed to give him extension and he will only ask it of three houses, viz., yourselves, ourselves, and the party who has agreed to.

"Yours very truly,

"THE SCHOOLFIELD HANAUER CO."

After arriving at Louisville, Warten telegraphed the Memphis company that the Louisville firm refused the extension unless he paid three thousand dollars in cash, and the company replied that they could not give him the money. A settlement was made on the 30th of December between Warten and the Louisville firm, by which the outstanding past-due note was taken up, and Warten furnished an acceptance due on the 15th of January for one thousand dollars, and four other acceptances for five hundred dollars each, maturing on the first and fifteenth of February and first and fifteenth of March following, and the balance of the debt, except an item

of about two hundred dollars, was settled by acceptances maturing the following November and December. At the time of making this settlement or thereafter (up to the 13th of January) the Louisville firm made no reply to the letter from the Memphis firm. From January 1 the embarrassment of Warten became rapidly more flagrant, in consequence of the results of the crop disaster becoming absolutely assured. On the 13th of January, 1890, at about six o'clock in the morning, Warten sold to the Memphis firm his stock of goods, safe, and store fixtures at Athens, with also a small stock and store fixtures owned by him at Elkmont, and certain accounts, a lot of mules, and an interest in real estate, for the price of $17,032.40, this being the amount of the principal and interest of the notes held by the firm, which have been already mentioned. The sale was accepted in full acquittance and discharge of the debt. A member of the firm, who had come from Memphis, took possession of the property. On the same day Warten sold to the Memphis company certain assets in full payment of an open account due by him, and other transfers of assets in payment of other debts, to various creditors, were also made at or about that time. On the same day as the sale to the Memphis firm, (13th of January, 1890,) between eleven and twelve o'clock, Warten made a general assignment of all but his exempt property in favor of his general creditors; the assets covered by this assignment being open accounts due him, and the remaining avails of his business, amounting to the face value of about $50,000, the claim of the creditors, in whose favor this assignment was made, including that of the Louisville firm, aggregating about fifteen thousand dollars. Of the accounts assigned, about thirty thousand dollars were debts due Warten for business of the current crop year.

A few days after this sale the Louisville firm attached the stock of goods in the Athens store as being yet the property of Warten. The Memphis firm claimed the property seized and bonded it, thus raising the issue to which we have in the outset referred. After the sale by Warten to the Memphis firm, he acted as an employé in the store, generally assisting

in the conduct of the business, continuing to do so until the 10th of June, 1890, when what remained of the stock and some other of the property which had been sold to the Memphis firm was resold to the wife of Warten. Although there is no dispute as to the foregoing facts, on every other question of fact there is conflict. The claimants' evidence tended to show that the sale by Warten to them was real, was made for a just price, and that it absolutely extinguished their debt, and that no benefit or expected benefit was expressly or impliedly reserved to the seller; that actual delivery was made of the property sold, and that they were in possession as owners at the time of the attachment; that the employment of Warten was simply in a clerical capacity and was rendered advisable from his knowledge of the business and consequent ability to assist the vendors in converting the stock and assets into cash. On the other hand, the evidence of the attaching creditor (the Louisville firm) tended to show by a mass of circumstances that the sale was intended to and did reserve a benefit to Warten; that his presence in the store after the sale, while ostensibly in the capacity of an employé, was really in that of an owner or of one having an expectancy of ownership. As to the facts connected with the settlement made by the Memphis firm, there was also much conflict in the evidence, Warten swearing that when he presented the letter from the Louisville firm the extension to the next crop year asked by him was refused, unless he paid three thousand dollars cash, and that it was in consequence of this demand that he telegraphed the Memphis company that the Louisville firm refused the extension and asked three thousand dollars; that when he could not procure the amount of the cash payment demanded, then the settlement was effected, the short term acceptances for three thousand dollars having been given by him as an equivalent of the cash demanded, the remainder of the debt, except a small sum, having been extended to the next crop season. On the other hand, the testimony of a member of the Louisville house was that no demand of cash was made and that the extension asked by Warten was granted, without objection, and was evidenced by the acceptances.

Argument for Plaintiffs in Error.

There was a verdict for the claimants, (the Memphis firm,) and the seizing creditor (the Louisville firm) prosecutes this writ of error, on which he assigns thirty-six errors, twelve of which are predicated on erroneous rulings asserted to have been made in admitting or rejecting testimony, and the others are directed to the charge of the court to the jury. Only a fragment of the general charge is in the record. Each party, however, presented a series of requests stating the propositions of law which they respectively deemed applicable to the facts, and all the errors assigned growing out of the charge of the court involve the correctness of the court's action in having substantially given the special charges asked by the claimants (the Memphis firm) and rejecting those presented by the attaching creditor (the Louisville firm).

Mr. Milton Humes for plaintiffs in error.

It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether, on all the evidence, the preponderating weight is in his favor — that is the business of the jury — but, conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury.

This is the rule of practice, as we understand, prescribed by this court for the trial court in all cases, and the principle is especially applicable to the case of the plaintiff and the

defendant. When a creditor shows facts that raise a strong presumption of fraud in a conveyance made by his debtor, the history of which is necessarily known to the debtor only, the burden of proof lies on him to explain it, his estate being involved. *Clements* v. *Moore*, 6 Wall. 299.

It is proved without conflict and it is conceded that the debt of the plaintiffs was contracted prior to the transfer we are assailing. This fact appearing, the onus of proving that the transfer was not merely voluntary but founded on an adequate and valuable consideration is, consequently, by law cast on the claimants. Whatever may have been the motives of the parties in its execution as to creditors whose rights were existing, these deeds and transfers must be regarded as merely voluntary, and they must be presumed to be fraudulent until the contrary is shown. *Hubbard* v. *Allen*, 59 Alabama, 283.

Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. *Commissioners of Marion County* v. *Clark*, 94 U. S. 278.

On the trial of a statutory claim suit, and that is what this suit is, the plaintiff must first make out a *prima facie* case of liability to his execution or attachment; and when he has done this, the onus is devolved on the claimant to establish a valid title in himself as against the plaintiff. *Foster* v. *Goodwin*, 82 Alabama, 384.

When transactions such as the one at bar are assailed as fraudulent the material inquiries are directed to the existence and validity of the debts, the sufficiency of the consideration and the reservation of a benefit to the debtor. In a case such as the present the burden of proving the existence of these essentials is cast upon the claimant. *Moore* v. *Penn*, 95 Alabama, 200; *Hodges* v. *Coleman*, 76 Alabama, 103.

In the race of diligence the creditor who seeks to become preferred must do no more than, by fair methods, obtain

payment of his own claim. If he go further and secure a benefit to the failing debtor, this taints the whole transaction. *Seamen* v. *Nolen*, 68 Alabama, 463; *Levy* v. *Williams*, 79 Alabama, 171.

If by the transaction the failing debtor secured to himself a paying employment which but for the sale he would not have had, this was a benefit reserved, which renders the transaction fraudulent. *Lukins* v. *Aird*, 6 Wall. 78; *Harmon* v. *McRae*, 91 Alabama, 401; *Page* v. *Francis*, 97 Alabama, 379; *Stephens* v. *Regenstein*, 89 Alabama, 561.

If the court should disagree with us in the foregoing portion of our argument, and conclude that the testimony should have been submitted to the jury, then we say that the sufficiency of the circumstantial evidence was not properly presented to the jury, but, on the contrary, the manifest tendency of many of the special charges asked by claimants and given, was to create the impression upon the jury that evidence of a more positive and direct character was required. This was erroneous.

Mr. F. P. Poston and *Mr. Lawrence Cooper* for defendants in error.

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

In the discussion at bar the plaintiff in error has devoted much of the argument to demonstrate that the trial court erred in declining a request by him made to instruct the jury to render a verdict in his favor, if they believed the testimony, but this request was manifestly rightly refused. It involved a finding by the court as to weight of evidence and practically asked it to usurp the province of the jury, by determining the proper inference to be drawn from the evidence and deciding on which side lay the preponderance of proof. In so far as this request asked the court to instruct that under any hypothesis of fact, as a matter of law, the attaching creditor was entitled to a verdict, it can be more properly considered in reviewing the exceptions taken to the instructions given at the request of

the one, and the consequent refusal to give the converse propositions asked by the other party. It would lead only to confusion and repetition to follow the various assignments of error and review them separately. They group themselves under six headings: First, assertion of error in the charges given as to the legal effect of the sale to the Memphis firm; second, error in the instructions as to the general assignment; third, error as to the ruling with reference to the burden of proof to establish fraud; fourth, error in the charge as to the effect of the employment of Warten after the sale and the resale to Mrs. Warten; fifth, error as to the effect of having included in the debt for which the sale was made the note dated June 10 for $2500; and, sixth, error as to the bearing on the rights of the parties, of the letter written by the Memphis firm to the Louisville firm, and the settlement had by the latter with Warten after the letter was received. The consideration of the controversies under these various headings will embrace all the errors assigned, and will dispose of every question in the case, except the twelve errors asserted to have been committed in the admission or rejection of testimony.

First. The validity of the sale to the Memphis firm.

The court charged that, under the law of Alabama, a debtor had the right to prefer a creditor, and that, if the sale was real and was made in good faith for a fair price — was honestly executed to extinguish the debt, and did extinguish it, and contained no reservation of any interest or benefit in favor of the vendor — it was valid and passed the property to the vendee; that the sale, if it possessed these enumerated qualities, would be legal, although any of the following facts might be found by the jury to have existed: (*a*) that the vendor was insolvent to the knowledge of the vendee; (*b*) even although there was a fraudulent intent on the part of the vendor to defeat his other creditors, because, if the sale possessed the attributes necessary to make it valid, as the law permitted the preference under the conditions stated, the mere intention of the vendor to defraud his other creditors by giving a preference to one would not render the sale invalid; and (*c*) although its known effect and

necessary consequence was that the remaining creditors of the vendor would be unable to obtain the payment of their debts.

The correctness of these instructions depends necessarily upon the law of Alabama as interpreted and construed by the Supreme Court of that State, whose rulings in this regard will be followed here. *Union National Bank* v. *Bank of Kansas City*, 136 U. S. 233; *Peters* v. *Bain*, 133 U. S. 670. It was in consonance with this rule that in a given case we enforced the law of the State of Illinois, *White* v. *Cotzhausen*, 129 U. S. 329, and in another that of the State of Iowa. *Etheridge* v. *Sperry*, 139 U. S. 267. The instructions given as above recited were in direct accord with the settled law of Alabama. In *Pollock* v. *Meyer*, 96 Alabama, 172, it was held that:

"If the property conveyed by an insolvent debtor in payment of preëxisting debts does not materially exceed in value the amount of indebtedness actually owing and paid by the conveyance, and no benefit is reserved to the grantor, the conveyance is lawful as against his other creditors, regardless of the motives of the parties to the conveyance or of badges of fraud in the transaction."

On page 175 the court cites approvingly from the decision in *First National Bank of Birmingham* v. *Smith*, 93 Alabama, 97, as follows:

"An insolvent debtor may select which of his creditors, one or more, he will pay, and pay them in full, and thus disable himself to pay the others anything; and it makes no difference if the one or more preferred creditors know the effect of the transaction will be to deprive the debtor of all means with which to pay his other debts. Nor is the wish, motive, or intention of the debtor a material inquiry, if the requisite conditions exist. Those conditions, in a case like the present, are: First, the debt must be *bona fide* and enforceable, not simulated; second, the payment must be absolute, and, if made in property, must not be materially in excess of the debt; third, no pecuniary benefit or consideration of value, other than the liquidation of the debt, must inure or be secured to the debtor.

. . . The true inquiry at last is, did the creditor bargain for and receive overpayment, or payment in excess of his just demand?"

The court further observed, on page 176, as follows:

"The principle of law settled by the decisions of this court is, that the payment of an antecedent debt by an insolvent debtor, by a conveyance of his property, rests upon entirely different grounds than when a cash or present consideration is paid. It matters not whether the grantor alone, or grantor and grantee both, devised and intended to get the advantage of other creditors, if, in fact, the effect of the transaction was solely to pay a debt honestly due, and the property was received by the creditor in payment of his debt at a fair and adequate price, and no interest or benefit reserved to the grantor debtor. 'If the transaction is not assailable on one of these grounds, fraud has no room for operation.' As was said in *Hodges* v. *Coleman*, 76 Alabama, 103: 'What injury can the motive do to a non-preferred creditor? The act, as we have seen, is lawful. Can human tribunals set aside a transaction, lawful in itself, because the actors had an evil mind in doing it? Can there be fraud in doing a lawful act, even though it be prompted by an evil malice or badges of fraud?'"

Second. The effect of the general assignment.

The error alleged to exist in the charge of the court as to the legal consequences of the general assignment and its effect on the sale to the Memphis firm, which was made a few hours before the general assignment, is equally unfounded. The instruction given substantially was that if the sale to the Memphis firm was valid, the making of the general assignment on the same day did not render it illegal. The decision of the Supreme Court of Alabama in *Ellison* v. *Moses*, 95 Alabama, 221, is decisive of the correctness of this instruction. In that case creditors of a partnership sought to have several conveyances which had been executed by the partnership declared parts of a general assignment subsequently executed. The court held, however, that:

"An insolvent debtor having, under repeated decisions of this court, the right to sell and convey property in absolute

payment of an existing debt, provided the price is fair and reasonable, and no use or benefit is reserved to himself, such absolute sale and conveyance will not, at the instance of other creditors, be declared and treated as part of a general assignment executed soon afterwards (Code, 1737), though executed in anticipation of it, and with notice on the part of the creditor that the debtor intended to make a general assignment."

In its opinion the court further said (p. 224):

"The law of this State permits an insolvent debtor to make preferences among his creditors in the payment of his debts, by an absolute sale or transfer of his property in discharge of such debts. He may convey the whole or any part of his property in payment of an antecedent debt, and if the price is reasonably fair, and there is no reservation of a benefit or trust in his favor, the sale is valid and will be sustained, whatever may have been the debtor's intentions, and though the preferred creditor knew of such intentions, and that the sale would leave the debtor unable to pay his other debts. That such preferences are allowable is settled by numerous decisions of this court. *Chipman* v. *Stern*, 89 Alabama, 207; *Hodges* v. *Coleman*, 76 Alabama, 103; *Crawford* v. *Kirksey*, 55 Alabama, 282; 3 Brick. Dig. 517. The statutory prohibition against preferences in general assignments (Code, 1737) does not operate upon an absolute and unconditional sale of a debtor's property to his creditors in payment of the debts due to them. This question, also, is well settled by the former decisions of this court. The general assignment, in which preferences or priorities of payment given to one or more creditors over the others are prohibited, implies the idea of a trust, under the operation of which there is a possibility of a reversion to the debtor of some interest in the proceeds of a sale of the property assigned. No such idea is involved in an unconditional sale of property in absolute payment and discharge of a debt. Here the debt is extinguished, and the debtor is stripped of all interest in the property sold. Such a sale is not within the purview of the statute, and if a preference is thereby effected, it is not such a preference as the statute prohibits. *Otis* v. *McGuire*, 76 Alabama, 295; *Danner* v. *Brewer*, 69 Alabama, 191; *Comer* v. *Constan-*

tine, 86 Alabama, 492. The result is, that the law as it now stands permits an insolvent debtor to prefer one or more of his creditors over the others in the payment of debts by a sale of property in satisfaction thereof, and prohibits preferences or priorities of payment in a general assignment by the debtor for the benefit of his creditors. Only the legislature can make the prohibition against preferences equally operative in both classes of cases. The courts must recognize and enforce the law as it exists. They cannot ignore distinctions created by the law-making power."

By recent legislation in Alabama the provisions of section 1737 of the Alabama code, upon which these rulings were made, have been amended, so that a conveyance substantially of all a debtor's property in payment of prior debts is put upon the same footing with conveyances for the security of debts. *Strickland* v. *Gay*, 16 South. Rep. 77, 78. The questions, however, here are obviously to be determined by the law of Alabama existing at the time the transactions occurred.

Third. Burden of proof to establish fraud.

The instruction complained of on this subject was that if the proof showed that the Memphis firm had an honest debt, and they purchased the stock at a fair and reasonable price in payment of that indebtedness, the burden was on the plaintiffs to show that a benefit or interest in the sale was reserved to Warten; in other words, that the transfer was fraudulent. It is urged that this instruction ignored the rule of evidence as to the presumption of law which arises from proof of circumstances of suspicion and badges of fraud, which, it is asserted, were shown in this case by the evidence offered in behalf of the Louisville firm. In *Curran* v. *Olmstead*, 101 Alabama, 692, it was said (page 694):

"When the transaction is assailed by an antecedent creditor, the burden rests on a creditor who has been preferred to prove the existence, amount, and justness of his claim, and when paid in property he must also prove that the property was taken at a price not materially below its fair market value."

The burden of proof to show fraud and notice of fraud was

on the party alleging fraud. *Hodges* v. *Coleman*, 76 Alabama, 103; *Pollak* v. *Searcy*, 84 Alabama, 259. See also *Jones* v. *Simpson*, 116 U. S. 609, 615. In *Pollak* v. *Searcy*, *supra*, the court said:

"If the facts of indebtedness and that the goods were sold in payment of such indebtedness at their reasonable fair value are established to the satisfaction of the jury, and if it be contended, in avoidance thereof, that the trade was simulated, that there was a secret trust or benefit reserved to the debtors, the burden was then on the contesting creditor to establish it."

So in *Roswald* v. *Hobbie*, 85 Alabama, 73, it was held that:

"As against creditors of an insolvent debtor, the one claiming as a purchaser must prove that he paid a valuable and adequate consideration, but is not bound to negative the reservation of a benefit to a debtor."

Fourth. As to the effect of the employment of Warten after the sale and the resale to Mrs. Warten.

The charges given by the court on this subject were as follows:

"If the jury find from the evidence, under the instructions given by the court, that Schoolfield, Hanauer & Co. made a valid purchase of the stock of goods in controversy from Henry Warten, then Schoolfield, Hanauer & Co. had a legal right to employ Warten for their benefit to assist in winding up the business, and turning the goods into money as promptly and economically as possible."

"If the jury find from evidence that prior to the 13th day of January, 1890, Henry Warten had been engaged for several years in an established and extensive business at Athens, Ala., and that he sold his stock of goods to Schoolfield, Hanauer & Co. in a valid way, it is but reasonable that Warten might be employed by Schoolfield, Hanauer & Co. as a clerk to assist in the winding up of the business for the benefit of Schoolfield, Hanauer & Co. Such circumstance is not of itself fraudulent."

"If the jury find from the evidence in this cause, under the instructions given by the court, that the sale by Henry Warten

to Schoolfield, Hanauer & Co. is valid, then Schoolfield, Hanauer & Co. had the legal right to give the stock of goods to Mrs. Warten or sell the same to her on such terms as they desired."

In considering the correctness of these instructions, we necessarily assume the *bona fides* of the sale made to the Memphis firm and its validity, except in so far as its legality may have been affected by the employment of Warten and the subsequent sale to his wife. But the proof on the subject of the circumstances which gave rise to the employment of Warten and the resale to Mrs. Warten was conflicting. The fact of the employment and resale, no question being made as to the reality of the transfer, could at best have been only competent evidence to be considered by the jury in determining whether or not a secret benefit was reserved to the debtor in the original transaction, which was the issue on this branch of the case. Certainly, if nothing else appeared but the mere employment of Warten, subsequent to the sale, to assist in the disposition of the goods and the getting in of the book accounts, such fact would not be a circumstance in itself sufficient to prove within the meaning of the Alabama law that the transaction was fraudulent. Even if, at the time of the sale, there had been an agreement to employ, such fact would not of itself have necessarily implied a reservation of benefit in favor of the seller so as to have rendered the sale invalid under the Alabama law. *Murray* v. *McNealy*, 86 Alabama, 234. Such also is the general rule. *Smith* v. *Kraft*, 123 U. S. 436; Burrell on Assignments, 6th ed. p. 471, § 343, and authorities there cited. Indeed, under the rule as announced in Alabama, the court could have affirmatively instructed that the employment of the vendor in a clerical capacity could not affect the validity of the sale. *Richardson* v. *Stringfellow*, 100 Alabama, 416, 422.

The instruction that if the original sale by Warten was valid the purchasers had a legal right to dispose of the property to Mrs. Warten, is within the principle of the decision in *Young* v. *Dumas*, 39 Alabama, 60, 62, where the court said — speaking of a gift, by a father to his daughter, of property

which the father had received from his son-in-law in payment of an indebtedness due from the son-in-law to the father — as follows:

"Mr. Horn had the clear right to collect his demand, which we have seen was just, from his son-in-law, Mr. Dumas; and after he thus became the owner of the property, his right to give that property to the sole and exclusive use of his daughter, Mrs. Dumas, cannot be successfully controverted by the creditors of Mr. Dumas. As to them, the gift was harmless. That the effect may have been to delay, and, possibly, defeat all other creditors in the collection of their demands, cannot, of itself, avoid the sale."

It is argued that whilst these charges may not have been intrinsically erroneous they were yet illegal, because they singled out some of the strongest badges of fraud upon which the plaintiff relied, and weakened, impaired, or destroyed their force and weight as evidence; that they were argumentative deductions, the necessary effect of which was to obscure the force of the inferences of fraud which the jury might have deduced from the fact of the employment and the resale, and, therefore, practically prevented the jury in drawing its conclusions from giving due consideration to these matters. But it nowhere appears that the court instructed the jury that they might not, in reaching a determination upon the *bona fides* of the sale by Warten to the Memphis firm, and the question whether a secret benefit was reserved in his favor, consider such facts as the subsequent employment of Warten, and the sale thereafter to his wife. As a matter of fact, the portions of the general charge of the court set forth in the record make it clear that the question of reservation of a secret benefit to Warten in the sale, was particularly called to the attention of the jury, as necessary to be considered by them in arriving at a conclusion as to the validity of the transfer. We are unable to see that the charges in question had a tendency to cause the jury to regard the fact of the employment of Warten and the sale to his wife as not important to be weighed by them in passing upon the *bona fides* of the sale to the Memphis firm.

Fifth. Error as to the effect of having included in the debt for which the sale was made the note dated June 10, for two thousand five hundred dollars.

The three following instructions on the subject were asked and refused:

"33. If any part of the debt claimed by Schoolfield, Hanauer & Company against Warten as the consideration of the transfer of the goods to them is simulated or pretended, that fact would vitiate the whole transaction. If the jury find from the evidence that part of the consideration is composed of the note of Warten for $2500, which was due and payable to the Schoolfield Hanauer Company, a corporation under the laws of Tennessee, and that said note was taken from the account of said corporation and placed upon the account of the claimants for the purpose of increasing the account of Schoolfield, Hanauer & Company, that account to the extent of said $2500 would be simulated, and this would vitiate the transaction, and if the jury so find, their verdict should be for the plaintiffs.

"34. If part of the consideration of the transfer from Warten to the claimants is a note for $2500, payable to the Schoolfield Hanauer Company and owned by them, and if the said note was transferred to the account of Schoolfield, Hanauer & Company, and if said transfer was made for the purpose of increasing the firm's debt against Warten, so as to make it equal in amount to the value of the goods and property transferred by Warten to the claimants, the consideration for such transfer to the extent of said note for $2500 would be simulated, and this would vitiate the transfer, and if the jury so find the facts, their verdict must be for the plaintiffs."

"36. If the jury believe from the evidence that the promissory note for $2500, made by Henry Warten on June 10th, 1889, payable to the order of Schoolfield, Hanauer & Company, at the office of the Schoolfield Hanauer Company, four months after date, and endorsed 'The Schoolfield Hanauer Company, p'r W. W. Schoolfield, treasurer,' was taken and endorsed by said corporation, and it let said Warten have the amount thereof, less discount, being $———, by crediting his

account with said corporation for $———, as shown by said statements of said accounts in evidence in this case, then said draft became the property of said corporation, and it was an indebtedness due by said Warten to it; and if the jury further believe from the evidence that said indebtedness was transferred from the account of said Warten with said corporation to the account of said Warten with said firm on or about the 11th day of January, 1890, for the purpose of evading the law of the State of Alabama, which prohibits foreign corporations from doing business in the State of Alabama without known place of business and authorized agent therein, the jury would be authorized to find that said indebtedness was the property of and due to said corporation, and not said firm, when said alleged transfer of the stock of goods in dispute in this suit to said firm by said Warten was made, and should they so find, in that event their verdict should be for the plaintiffs."

They were rightly refused. There was no proof of any kind even tending to show the simulation of the note. It was certainly, under the undisputed proof, due by Warten; it was drawn to the order of the Memphis firm, who were, as endorsers, necessary parties to its negotiation. That firm had an obvious right, with the consent of the company by whom the paper had been discounted, to use it as a debt due them, and thus protect their endorsement. Nor was the sending of a note to Tennessee for discount, and its discounting in that State by the Memphis company, carrying on business in Alabama by the Memphis company. The second section of the fourteenth article of the constitution of Alabama, and the act of the legislature of 1886–7, pp. 102, 104, relied on by the plaintiff in error, have been held by the courts of Alabama not to have been intended to (as of course they could not) interfere with matters of commerce between the States, and to have no application to transactions such as that here under consideration. *Ware* v. *Hamilton Shoe Co.*, 92 Alabama, 145; *Cook* v. *Rome Brick Co.*, 98 Alabama, 409.

Sixth. Error as to the bearing on the rights of the parties, of the letter written by the Memphis firm, and the settlement had by the latter with Warten after the writing of the letter.

Much stress is placed by counsel on this proposition. The contention is that the Louisville firm having been induced to give an extension on the faith of the letter written them by the Memphis firm, the latter could not receive payment by sale, from the debtor, which created a preference, without operating a fraud upon the Louisville firm. To support this contention authorities are cited holding that when creditors have jointly agreed, each upon the faith of the other's promises, to extend the indebtedness of their co-debtor for a fixed and definite period, a party to such an agreement who secures an advantage to himself out of the mutual debtor's property, during such extended period, may be compelled to account for the property received and permit the other creditors to share *pro rata* with him. But the fallacy is not in the legal proposition, but in its application to the facts here considered and consists in treating the Memphis firm as consenting to and being bound by the terms of the extension granted to Warten by the firm in Louisville. There was no evidence even tending to so prove. The only connection of the Memphis firm with the settlement, even if all the disputed questions of fact were determined in favor of the firm at Louisville, was the letter from the Memphis firm, presented by Warten when the extension was made. But the letter could not give rise to the obligations contended for, since the extension granted by the Louisville firm was in conflict with the obvious intent of the letter. It stated that Warten, "through we believe no fault of his own, but owing to disastrous failure of crops in his own section, finds himself forced to ask for extension," and expressed a willingness to grant the extension provided the Louisville firm would do likewise. The extension referred to must necessarily have meant an extension to the next crop year, otherwise the letter was meaningless. The disaster calling for the extension was the crop failure, and the substantial results of the crop being realized by the end of December, it was self-evident that the extension proposed, and which the Memphis firm was willing to give, in conjunction with the Louisville firm, was one which would carry the debtor to another crop. This becomes more manifest when it is

considered that the extension was only to be asked of three creditors, the Louisville firm, the Memphis firm, and one other, leaving the other debts unextended. But the extension granted by the Louisville firm did not accede to this proposal, since it embraced short time acceptances for three thousand dollars, which they could only hope to be paid out of the avails of the disastrous failure of the crop which had by the terms of the letter given rise to the necessity for the extension. Doubtless it was this view of the relation of the parties which caused the court to instruct the jury that if the Louisville firm took short time paper from Warten in the hope of obtaining an advantage over the Memphis firm, they would have no right to complain because the Memphis firm overtook them in the race of diligence. Whether, however, this instruction was given because the court took this view of the letter and the legal effect of its unaccepted proposal, is immaterial. The entire charge is not in the record. The court may have expressed itself in this matter to the jury, in connection with observations possibly advanced in argument by counsel for plaintiffs in error upon their claim that the Memphis firm in the letter in question had sought to gain an advantage. And if such were the case, it was not error for the court to call the attention of the jury to the opposing view of the transaction.

These conclusions dispose of all the errors assigned which relate to the instructions given by the court, and leave only the exceptions taken to rulings admitting or rejecting testimony. They are twelve in number. We have examined them all, and content ourselves with saying that we find them either not well taken or of such a character on account of their immateriality as to create no reversible error.

Affirmed.

NEW ORLEANS FLOUR INSPECTORS *v.* GLOVER.

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

No. 88. Argued November 22 and submitted December 2, 1895. — Decided December 9, 1895.

Mills v. *Green*, 159 U. S. 651, affirmed to the point 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 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.

The case is sufficiently stated in the short opinion of the court.

Mr. J. R. Beckwith argued for appellant on the 22d day of November, 1895. At the close of his argument the court adjourned until the 2d day of December following. *Mr. William Wirt Howe* on that day presented himself to argue for appellees, but the court declined to hear further argument in the case.

The Chief Justice: The decree below enjoined appellants from enforcing against appellees act No. 71 of the extra session of the general assembly of Louisiana of 1870, (Session Laws La. Ex. Sess. 1870, 156). This act was repealed June 28, 1892, (No. 23 of 1892, Acts La. 1892, 34,) and the appeal is dismissed on the authority of *Mills* v. *Green*, 159 U. S. 651.

Appeal dismissed.

DOUGHERTY v. NEVADA BANK.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 98. Argued and submitted December 6, 1895. — Decided December 9, 1895.

Wood v. *Brady*, 150 U. S. 18, affirmed and applied to this case.

THIS was an action brought by the plaintiff in error to foreclose a municipal tax or street assessment lien. In a brief filed for defendant in error it was stated that the judgment here sought to be reversed involved the validity of precisely similar extensions to those sought to be reversed in *Wood* v. *Brady*, 150 U. S. 18, and under the same statute. This statement was not denied or challenged by the counsel for the plaintiff in error.

Mr. J. C. Bates for plaintiff in error submitted on his brief.

Mr. James G. Maguire for defendant in error.

Mr. John Garber, *Mr. John H. Boalt*, and *Mr. Thomas B. Bishop* filed a brief for defendant in error.

MR. JUSTICE FIELD: The writ of error is dismissed on the authority of *Wood* v. *Brady*, 150 U. S. 18.

Writ dismissed.

TOWNSEND v. VANDERWERKER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 73. Argued November 20, 1895. — Decided December 16, 1895.

A court of equity in the District of Columbia may take jurisdiction of a bill brought against the administrator and heirs of an intestate, alleging a verbal agreement between the intestate and the plaintiff by which the plaintiff was to contribute one half of the cost of a tract of land and of a dwelling-house to be erected thereon, and the intestate, after entering on the property, was to convey to him a half interest therein,

and setting forth his performance of his part of the agreement, and her repeated recognition of her obligation to perform her part thereof, and her death without having done so after having mortgaged the property for a debt of her own, and praying for an accounting, and a decree directing payment to the plaintiff of one half of the value of the real estate and improvements, and a sale of the same; and the court may decree specific performance of so much of the contract proved as can be enforced, and compensation to the plaintiff in damages for the deficiency.

While the mere payment of the consideration in money in such case is insufficient to remove the bar of the statute of frauds, such payment, accompanied by an entry of the other party into possession under the contract, is such a part performance as will support a bill like the present one.

The question of laches does not depend upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier; and, under the peculiar circumstances of this case, the bill is not open to the defence of laches.

The bill in this case is not open to the charge of multifariousness.

This was a bill in equity to recover one-half the value of a certain piece of real estate in Washington, with the house thereon standing, of which one Julia R. Marvin died seized, together with a like proportion of the rents of the said house and lot received by Mrs. Marvin during her lifetime, or due and unpaid since her death.

The amended bill, which was brought against the heirs at law of Julia R. Marvin, the administrator of her estate, and the trustee named in a deed of trust of the property in question, averred in substance that said Julia R. Marvin was seized in fee and possessed of a certain lot of land upon Sixteenth Street in the city of Washington; that she died on February 3, 1889, intestate as to her real estate; and that letters of administration were granted by the probate court to the defendant Hood.

After several immaterial averments as to the relationship of the several defendants, the execution of a trust deed to secure the payment of $10,000, the collection of rents by the intestate Marvin and her administrator, the bill averred in substance as follows:

That in March, 1879, an agreement was entered into be-

Statement of the Case.

tween the plaintiff and Mrs. Marvin by which he agreed to contribute in money and in labor one-half of the original cost of the said parcel of land and a dwelling-house to be erected thereon, and in consideration thereof Mrs. Marvin agreed to convey to him a half interest in the land and dwelling-house, so that the same should be owned jointly by himself and Mrs. Marvin; "that at the time of making said agreement there was no note or memorandum thereof in writing, but in performance of the same on his part the plaintiff gave his personal attention and supervision to the selection and purchase of the materials for the said dwelling-house and the erection of the same," and also expended the sum of four thousand dollars ($4000) in defraying the cost of the house; that this agreement, although not reduced to writing, on account of the intimate personal relations existing between the parties and the entire confidence they reposed in each other, had been fully performed by the plaintiff, the amount of money contributed by him, and the value of his services in selecting and purchasing the materials for the dwelling-house and in superintending the erection of the same being equal altogether to one-half the cost of the land and house; that Mrs. Marvin died without having executed her part of the agreement by conveying to the plaintiff the half interest in the land and house, although she had repeatedly recognized the claim in her lifetime, and had declared to plaintiff and others that she had made adequate provisions for the same in her last will and testament; that the services of the plaintiff were rendered in the years 1879 and 1880, and the money paid by him in defraying the cost of the house and land was paid during the years 1879, 1880, 1881, 1882, 1883, and 1884 in various sums to Mrs. Marvin, and sent to her in drafts by mail, as is evidenced by her repeated acknowledgments to him and others during her lifetime and by certain checks endorsed by her.

That from the time of the rendition of the said services and the payment of the said money by the plaintiff in performance of his said agreement, until the day of the death of the said Julia R. Marvin, the plaintiff constantly and repeatedly urged her to come to a settlement with him and to perform her part

of the agreement by conveying to him a one half interest in the parcel of land and the dwelling-house erected thereon; that she always, whenever the subject was referred to, recognized and acknowledged the validity and justice of the claim, and assured the plaintiff that she had provided for the same in her last will and testament; that on the 4th day of January, 1888, she "admitted to a mutual friend that the house never would have been built but for the fact that she and the plaintiff had built it together, and that he had taken the management of it all, as she never could have done and never would have attempted; that he had paid her in all four thousand dollars ($4000), which she had used; that such was her feeling towards him that she intended the house should be his when she was done with it, and should belong to them jointly while she lived; that on the 14th day of November, 1887, she acknowledged to the same mutual friend that the plaintiff had since 1878, when the lot was bought and they began planning for the house, up to 1883 paid her four thousand dollars ($4000); that she had always regarded the house as belonging to them jointly; that she intended it should be his at her death, and that her will, then written, had so provided;" that on account of her repeated and constant acknowledgment of the validity of his claim by her, and on account of the representations hereinbefore referred to as having been made to the said mutual friend and others, which representations were communicated to the plaintiff, and on account of the intimate personal relations always existing between them, and the unlimited confidence he reposed in her, they having lived together for a long time in the same dwelling-house, and she having treated and spoken of him as a foster child, the plaintiff failed and omitted to take such measures for the enforcement of his rights as under other circumstances he would have taken. The plaintiff averred that by the course adopted by her and without any fault on his part he had been lulled into a false security, and that he would have instituted his suit during her lifetime for the specific performance of her contract but for the assurance, repeatedly made to him and to others, that she had by her will devised the entire property to him; that the

Argument for Appellees.

plaintiff did not know until the death of Mrs. Marvin of her failure to carry out her agreement, when he learned to his surprise that she had died intestate as to her real estate.

The prayer of the bill was that an account might be taken of the debt claimed by the plaintiff to be due him; an account of the debt due to White, in whose favor the trust deed had been executed, and of other debts and demands against the estate; an account of the value of the lot and house and of other real estate of which Mrs. Marvin died seized; an account of the rents received by Mrs. Marvin during her lifetime, and since her death; and for a decree directing payment to the plaintiff of a sum equal to half the value of the house and lot and of the rents received or due, for a sale of the house and lot for the purpose of paying the same, and for a distribution of the residue of the proceeds among those entitled thereto as next of kin or heirs at law.

A demurrer was interposed to this amended bill, which was sustained by the Supreme Court, and an appeal taken to the general term, by which the decree of the special term was affirmed, and the bill dismissed. 20 Dist. Col. 197. Plaintiff thereupon took an appeal to this court.

Mr. John Goode and *Mr. Benjamin Butterworth*, (with whom was *Mr. J. C. Dowell* on the brief,) for appellant.

Mr. J. H. Lichliter for appellees.

I. The suit as for recovery of a debt, or of damages for a breach of an oral agreement for the sale of land, is barred by the statute of limitations.

If the suit be regarded as one brought to recover a debt from the estate of the deceased, Julia R. Marvin, or damages for a breach of the alleged oral agreement to convey a half interest in the lot of ground mentioned in the bill, the case is barred by the statute of limitations.

By the law of the District of Columbia actions for a simple contract debt and for debt for arrearages of rent and for damages for the breach of a contract are barred by the statute of limitations unless brought within three years ensuing the

causes of such actions. Maryland Statute 1715, c. 23, § 2; *Shepherd* v. *Thompson*, 122 U. S. 231.

II. The appellant's remedy was plain, adequate, and complete at law. Recovery of damages for breach of a contract cannot be had in equity. *Kempshall* v. *Stone*, 5 Johns. Ch. 193.

The appellant had ample time during the lifetime of Julia R. Marvin, from March, 1879, to February, 1889, to assert his claim for a debt, or for damages.

III. The alleged agreement, if made, for a conveyance of a half interest in the lot and house mentioned in the bill, comes within the statute of frauds, and, not being in writing, no action can be brought upon it.

If the bill be regarded as brought to secure the specific performance, directly or indirectly, of the alleged oral agreement for the conveyance of a half interest in the lot of ground mentioned in the amended bill, the statute of frauds is a complete bar, and it is presented as a defence by the demurrer. *Purcell* v. *Miner*, 4 Wall. 513; *Williams* v. *Morris*, 95 U. S. 444; *Randall* v. *Howard*, 2 Black, 585; *Dunphy* v. *Ryan*, 116 U. S. 491; *May* v. *Sloan*, 101 U. S. 231; *Repetti* v. *Maisak*, 6 Mackey, 366; *Wristen* v. *Bowles*, 82 California, 84; *Fortescue* v. *Crawford*, 105 N. C. 31; *Tilton* v. *Tilton*, 9 N. H. 385; *Brown* v. *Lord*, 7 Oregon, 302, 309.

IV. The allegations of the amended bill do not show acts sufficient to constitute part performance so as to take the alleged verbal agreement out of the statute of frauds.

The allegations are that the complainant paid a certain sum of money and gave his personal attention and supervision to the selection and purchase of the materials for the house and the erection of the same, the amount of money paid by him and the value of his services being equal altogether to one half the cost of the land and the house erected thereon.

The amended bill shows that the deceased owned and had the possession of the land or lot at the time of the making of the alleged agreement; that she built the house; that she rented the house and collected all the rents, paid the taxes, made all the repairs, controlled and dealt with and encum-

bered the property at will; that she retained the possession to the time of her death, and now her heirs have it.

Assuming the allegations of the bill to be true, the appellant has done nothing more than pay money, through a period of six years, and render services that could be adequately measured and fully compensated by pecuniary recovery or damages. Such acts do not meet the equitable doctrine of part performance.

The least act that constitutes part performance to take a verbal contract for the sale of land out of the statute of frauds is possession taken of the land in pursuance of the contract. *Purcell* v. *Miner*, 4 Wall. 513; *Williams* v. *Morris*, 95 U. S. 444; *Moore* v. *Small*, 19 Penn. St. 461; *Ackerman* v. *Fisher*, 57 Penn. St. 457; *Cuppy* v. *Hixon*, 29 Indiana, 522; *Dugan* v. *Gittings*, 3 Gill, 138, 157; *Gangwer* v. *Fry*, 17 Penn. St. 491.

The payment of the purchase money, (whether in money or in services whose value can be estimated,) is not of itself an act of part performance to take a verbal agreement for the sale of land out of the statute of frauds. The cases sustaining this proposition are summed up and cited in Story's Eq. Jur. § 761; Pomeroy on Contracts, §§ 112, 114; Browne on Statute of Frauds, § 461; Reed on Statute of Frauds, § 592; *Lester* v. *Foxcroft*, 1 Lead. Cas. Eq. 881, notes, 885 *et seq.*

V. The appellant has been guilty of laches — his claim is stale and such as a court of equity will not countenance.

The amended bill shows that the alleged agreement was made on the — day of March, 1879, between the complainant in person and Julia R. Marvin; that Julia R. Marvin died February 3, 1889, nine years and eleven months after the making of the alleged agreement; that during that time she had unquestioned possession of the lot and house mentioned in the bill and collected the rents without protest from the complainant or demand for any part of them; that the complainant did not take any steps to assert his alleged rights in the property until after her death; that as late as August 9, 1888, the said Julia R. Marvin in dealing with the property encumbered it by a deed of trust to secure the payment of $10,000, and that she died seized of it.

And, in addition to the facts that the appellant had full personal knowledge of his rights, if any, for almost ten years before Mrs. Marvin's death, and there was no impediment to an earlier suit, there were many inducements for him to act with diligence.

Some of the later cases decided upon the subject of laches by this court are: *Halstead* v. *Grinnan*, 152 U. S. 412, 416; *Johnston* v. *Standard Mining Co.*, 148 U. S. 360; *Galliher* v. *Cadwell*, 145 U. S. 368; *Hammond* v. *Hopkins*, 143 U. S. 224, 250, 273; *Underwood* v. *Dugan*, 139 U. S. 380; *Hanner* v. *Moulton*, 138 U. S. 486, 492, 495.

In cases of this kind the death of parties who could explain the transaction has always been regarded as a controlling circumstance. *Hammond* v. *Hopkins*, 143 U. S. 224, 273, 274; *Mackall* v. *Casilear*, 137 U. S. 556; *Godden* v. *Kimmell*, 99 U. S. 201; *Jenkins* v. *Pye*, 12 Pet. 241.

VI. The amended bill is multifarious.

The special prayer of the amended bill in the case at bar is peculiar, to say the least; and if it is to be considered, it renders the bill multifarious. The tenth paragraph of the bill sets out a verbal agreement to convey an interest in land; and the eleventh paragraph declares the object of the bill to be to secure the "benefit of the same." The special prayer is for the payment of "a debt;" not, however, a debt in a definite and fixed sum, but "equal to one-half the value of said house and lot and one-half of the rents of the same received and collected by the said Julia R. Marvin in her lifetime and accruing since her death."

A contract to convey land is not, and cannot be, a contract to pay a debt. In respect of one and the same transaction, if it ever occurred, the complainant demands the performance of a contract to convey land and prays the payment of a debt — matters of different natures.

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

1. The ultimate object of the bill in this case is the recovery of a pecuniary demand, and, if this were its only object, it

would be obnoxious to the general rule embodied in Rev. Stat. § 723, inhibiting the maintenance of a suit in equity where the remedy at law is plain, adequate, and complete.

The bill, however, in addition to the recovery of money, seeks to establish a trust in favor of the plaintiff, and to obtain a sale of the property to satisfy his claim. The prayer is, not for a reimbursement to the plaintiff of the sums advanced, but for the payment to him of a sum equal to one-half the value of the house and lot in which he claims an interest, and of the rents accrued thereon. Had it not been for the fact that, subsequent to the outlays made by the plaintiff in improving the property, Mrs. Marvin had encumbered it by a trust deed in favor of Amos White, in the sum of $10,000, an ordinary bill for a specific performance would have been the proper remedy; but as the court upon such a bill could only decree him one half the property subject to such mortgage, he claims in this bill the full moiety of the value of the property, as it stood when the disbursements were made, and before it was incumbered by the mortgage, and prays that such amount may be awarded him from the sale of the property; and that in respect to the residue, if any, he stand as a general creditor of her estate.

The case is not unlike that of *Wylie* v. *Coxe*, 15 How. 415, where a bill was filed to recover a contingent fee of five per cent out of a certain fund arising from the prosecution of a claim against the Republic of Mexico. It was held that the death of the owner of the fund did not dissolve the contract, but that the right to compensation constituted a lien upon the money when recovered, and that this was sufficient ground for jurisdiction in equity, inasmuch as the payment of the fund to the executrix in Mexico would place it probably beyond the reach of the complainant.

Still more nearly analogous in principle is the case of *Seymour* v. *Freer*, 8 Wall. 202, 215. This suit was founded upon an agreement between Seymour and one Price, by which Price undertook to devote his time and judgment to the selection and purchase of land to a certain amount, with a stipulation that the lands should be sold within five years, and one-half

of the profits should be paid to Price and the other to Seymour. It was held that Seymour took the legal title in trust for the purpose specified, and to this extent Seymour was a trustee and Price the *cestui qui trust;* that the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim, and that the land which was to be converted into money should be regarded and treated in equity as money. "The agreement," said Mr. Justice Swayne, "that the property should be sold, and half of the profits paid to Price, was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms." In reply to the contention that Price had a complete remedy at law, he further observed: "An action at law, sounding in damages, may undoubtedly be maintained in such cases for the breach of an express agreement by the trustee, but this in nowise affects the right to proceed in equity to enforce the trust and lien created by the contract. They are concurrent remedies. Either, which is preferred, may be selected. The remedy in equity is the better one. The right to resort to it under the circumstances of this case admits of no doubt, either upon principle or authority. Such, in our judgment, were the effect and consequences of the contract."

The earlier English cases held broadly that where a vendor of land had disabled himself from carrying out a contract to sell the land to the plaintiff, by a subsequent sale to another party, a court of equity would entertain a bill as for a specific performance, and award damages to the plaintiff. This was the distinct ruling in *Denton* v. *Stewart*, 1 Cox Ch. Cas. 258, where the court directed an inquiry as to what damages the plaintiff had sustained, and decreed that such damages should be paid by the defendant. A similar ruling was made in *Greenaway* v. *Adams*, 12 Ves. 395, although the Master of Rolls indicated a doubt with regard to the soundness of the principle announced in *Denton* v. *Stewart.* In *Gwillim* v. *Stone*, 14 Ves. 128, the bill asserted from the first that defendant could not make a good title, and asked for compensation by reason of the failure of the contract, and a decree was

made for delivering up the contract, without prejudice to an action, instead of an inquiry before the master.

In *Todd* v. *Gee*, 17 Ves. 273, 279, the case of *Denton* v. *Stewart* was practically overruled by Lord Chancellor Eldon, who held that the plaintiff in a bill for specific performance was not entitled generally to satisfaction by way of damages for the non-performance, to be ascertained by an issue, or reference to a master, the court saying "that, except in very special cases, it is not the course of proceeding in equity to file a bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue or an inquiry before the master with a view to damages. The plaintiff must take that remedy, if he chooses it at law. Generally, I do not say universally, he cannot have it in equity, and this is not a case of exception." This case was followed in *Ferguson* v. *Wilson*, L. R. 2 Ch. 77, where the plaintiff prayed the specific performance of a resolution, passed by the board of directors of a railway company, under which he alleged that he was entitled to have a certain number of shares allotted to him; and also prayed that if it should appear that all the shares had been allotted to other shareholders, the directors might indemnify him out of their own shares, or might be charged with damages. All the shares having been allotted before the filing of the bill, it was held that, as no remedy by way of specific performance was possible, plaintiff's claim for damages failed also.

The principle of these cases was also adopted by Chancellor Kent in *Kempshall* v. *Stone*, 5 Johns. Ch. 193, which is strongly relied upon by the appellees in this connection. In that case, the defendant entered into an agreement with the plaintiff to sell and convey him a lot of land, and, after the time of performance had elapsed, sold the land to a third person for a valuable consideration without notice of the agreement. Plaintiff filed his bill for a specific performance, which it was held could not be decreed, the lands having passed into the hands of a *bona fide* purchaser without notice, and the court further held that the plaintiff's remedy was at law for compensation in damages. In this case, as well as in the English

cases above cited, there was no possible lien upon the land, and no trust in favor of the plaintiff which the court could execute, and it was very properly held that his only remedy was at law.

But if the defendant has not wholly disabled himself from carrying out the contract, he may be decreed to perform specifically so much as he is still able to perform, and plaintiff may recover damages for the residue. Thus in *Burrow* v. *Scammel*, 19 Ch. D. 175, when the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises she had agreed to lease to the plaintiff, the other moiety being vested in her son, a minor. She was decreed to specifically perform so much of the contract as she was able to perform, with an abatement of half the rent, and an inquiry as to damages was refused only upon the ground that there was no evidence that plaintiff had sustained any damages. The American cases are also to the effect that, where the defendant has only partially disabled himself from carrying out the contract, the plaintiff may be entitled to a specific performance so far as it can be enforced, and may receive compensation in damages for the deficiency. 3 Pomeroy Eq. Juris. §§ 1405, 1407; *Bostwick* v. *Beach*, 103 N. Y. 414.

In the case under consideration, Mrs. Marvin had but partially disabled herself from carrying out her contract with the plaintiff according to its original terms, by incumbering the property with the trust deed in favor of White. Under such circumstances, the plaintiff might have filed a bill for a specific performance *pro tanto*, and obtained a decree for a conveyance of one half of the property to himself, subject to a moiety of the trust deed; but we think he also had the option of treating the whole property as subject to a lien in his favor, and praying that it be sold to satisfy his claim for half of its original value. He would doubtless have a remedy at law to recover the value of his services as well as the moneys disbursed by him. This, however, under the averments of his bill, would not be the amount to which he would be justly entitled. It is possible that, in an action at law, he might also recover a personal judgment against the estate for one

half the value of the property in question; but this is not the complete and adequate remedy which a bill to enforce a trust in his favor upon the property in dispute would afford to him, and we think it is not beyond the power of a court of equity to entertain a bill for this purpose. *Sullivan* v. *O'Neal*, 66 Texas, 433.

2. Does the Statute of Frauds stand in the way of a decree in his favor? As there was no contract in writing, plaintiff must maintain his bill, if at all, upon the theory of a part performance. He must maintain it, too, upon the same principles and with the same cogency of proof as if it were in fact, as well as in substance, a bill for a specific performance. In this connection, the allegation is in effect that the plaintiff arranged with Mrs. Marvin to pay half the cost of the lot, and half the cost of erecting a dwelling thereon, he to purchase the materials and superintend the erection of the dwelling, and that each was to own half the property; that he performed his contract in full; that she not only never questioned that he had paid his half in full, but stated to him and to mutual friends that he had paid in full, and was jointly interested with her in the premises; that his ownership of half of the premises was never disputed by her, but was openly recognized, and that, when he requested a settlement and that she convey his half to him, she replied that she had provided for that in her will, by which she gave him the entire property.

Admitting to the fullest extent the proposition that a mere payment of the consideration in money is insufficient to remove the bar of the statute, there is no doubt that such payment, accompanied by an entry into possession under the contract, is such a part performance as will support the bill. This court so expressly decided in the case of *Neale* v. *Neales*, 9 Wall. 1. And in *Brown* v. *Sutton*, 129 U. S. 238, it was held that, where the defendant's intestate bought certain property for the complainant, under a promise made orally that he would make over the title to her upon consideration that she should take care of him during the remainder of his life, as she had done in the past, there had been sufficient part performance of this parol contract to take it out of the operation of the statute

of frauds, and render it capable of being enforced by a decree for specific performance. Similar cases of promises to convey property upon the consideration of support are frequent in the books. *Gupton* v. *Gupton*, 47 Missouri, 37; *Sutton* v. *Hayden*, 62 Missouri, 101; *Hiatt* v. *Williams*, 72 Missouri, 214; *Watson* v. *Mahan*, 20 Indiana, 223; *Twiss* v. *George*, 33 Michigan, 253; *Warren* v. *Warren*, 105 Illinois, 568; *Patterson* v. *Patterson*, 13 Johns. 379.

The general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so change the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a *quantum meruit* for the value of his services. In discussing what are and what are not acts done in part performance, which will entitle the plaintiff to a decree in his favor, the entry into possession of the land and the making of valuable improvements thereon is treated by all the cases as one of the most satisfactory evidences of part performance, and entitling plaintiff to a decree in his favor. 3 Pomeroy Eq. Juris. § 1409; Fry on Spec. Perf. § 585. *Wills* v. *Stradling*, 3 Ves. Jr. 378; *Mundy* v. *Jolliffe*, 5 My. & Cr. 167; *Williams* v. *Evans*, L. R. 19 Eq. 547.

Although there is no distinct allegation in this bill that the plaintiff entered into possession, there is an allegation that the land in question consisted of a lot 34 feet in width by 110 feet in depth, and that the plaintiff gave his personal attention to the selection and purchase of the materials for a dwelling-house, and the erection of the same upon this lot, and paid $4000 in defraying the cost of the house — facts which are inconsistent with any other theory than that he took possession of the lot for the purpose of erecting the house. *Whitsitt* v. *Trustees Presbyterian Church*, 110 Illinois, 125. If he subsequently, and after the completion of the house, allowed Mrs.

Marvin to take possession of the lot, in view of the intimate relations between them, he lost no rights as against her which he obtained by his original entry, and the erection of the house. The possession thus taken was evidently in performance of and in reliance upon the original agreement with the owner, and, we think, taken in connection with the improvements made by him it makes a case of part performance sufficient to remove the bar of the statute. His subsequent relinquishment of such possession was evidently with no intention to abandon the interest he had already acquired in the property. *Drum* v. *Stevens*, 94 Indiana, 181.

3. We are also of opinion that, under the peculiar circumstances of this case, the bill is not open to the defence of laches. It is true the advances were made at sundry times from 1879 to 1884, and the bill was not filed until 1889, but the delay is sufficiently accounted for by the intimate personal relations that had always existed between the plaintiff and Mrs. Marvin, and the unlimited confidence he had reposed in her. It is alleged in this connection that they had long lived together in the same house; that she had treated him and spoken of him as a foster child; that from the time the services were rendered until her death he had repeatedly urged her to come to a settlement with him; that, whenever the subject was referred to, she acknowledged the justice of the claim, and assured him she had provided for him in her will, saying that she intended the house to be his when she was done with it, and that it should belong to them both while she lived; that on this account he had neglected to take measures for the enforcement of his rights; and that he did not know until her death that she had failed to carry out her promise to devise the entire property to him.

Dealing with a person who stood in this relation to him, and with whom he had always been upon friendly and even intimate terms, the same diligence could not be expected of him as would have been if he had been treating with a stranger. If, as he avers, she had promised to leave him the entire property at her death, he may have considered it to his advantage to await this contingency, rather than to pursue

her for half the property during her life. As she died in February, 1889, and the bill was filed in October of the same year, there can be no claim that, with reference to this event, he did not act with sufficient promptness. The only circumstance that occurred during the period of nine years from the time the contract was made which was calculated to excite his suspicion that she did not intend to carry out her alleged agreement, was the execution of a trust deed in favor of White, of which, however, there is nothing in the bill to indicate that he had actual notice. While the record of this trust deed would operate as constructive notice to subsequent purchasers or encumbrancers of the property, it is at least doubtful whether it would have the same effect as to one who stood in plaintiff's relation to the property. *Howard Ins. Co.* v. *Halsey*, 8 N. Y. 271; *Bates* v. *Norcross*, 14 Pick. 224; *James* v. *Brown*, 11 Michigan, 25; *Cooper* v. *Bigly*, 13 Michigan, 463; *Idlehart* v. *Crane*, 42 Illinois, 261; *Doolittle* v. *Cook*, 75 Illinois, 354.

The question of laches does not depend, as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute proceedings before he did. In this case, we think the delay is fully explained. *Gunton* v. *Carroll*, 101 U. S. 426. It is true that one of the parties to this alleged agreement has died, and that the court has lost the benefit of her testimony with regard to the alleged agreement. This, however, is a circumstance to be considered by the court in weighing the evidence, rather than as an obstacle to the maintenance of the bill upon demurrer.

There are doubtless circumstances in the case which indicate at least a difficulty of proof, if not to arouse a suspicion, that perhaps the plaintiff may have overstated his case, but the pleader in a bill in equity is not bound to state either the testimony or facts which militate against his theory, but only to present his case in the light most favorable to his own interests, and ask that, upon such presentation, the court shall decide upon the sufficiency of his bill.

Syllabus.

4. We do not think the bill is open to the charge of multifariousness. While the tenth paragraph sets out a verbal agreement to convey an interest in land, and the prayer is for the payment of a certain amount of money, the discrepancy is explained by the fact that, in view of the trust deed to White, a decree for a half interest in the land will fail to satisfy plaintiff's claim, and that his lien is claimed to extend not merely to the half interest but to the whole property, to satisfy her promise to convey to him a moiety of its unencumbered value. Of course, nothing that is here said can affect the rights of White.

The decree of the court below is therefore

Reversed and the case remanded with directions to overrule the demurrer and for further proceedings in conformity with this opinion.

BALLEW *v.* UNITED STATES.

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

No. 547. Argued October 28, 1895.— Decided December 16, 1895.

A certificate by the Commissioner of Pensions that an accompanying paper "is truly copied from the original in the office of the Commissioner of Pensions," taken together with a certificate signed by the Secretary of the Interior and under the seal of that Department, certifying to the official character of the Commissioner of Pensions, is a substantial compliance with the provisions of Rev. Stat. § 882, and authorizes the paper so certified to be admitted in evidence.

For the committing of the offence under Rev. Stat. § 4786, (as amended by the act of July 4, 1884, c. 181, § 4, 23 Stat. 98, 101,) of wrongfully withholding from a pensioner the whole, or any part of the pension due him, an actual withholding of the money before it reaches the hands of the pensioner is essential; and it is not enough that it is fraudulently obtained from him, after it had reached his hands; and that act does not forbid or punish the act of obtaining the money from the pensioner by a false or fraudulent pretence.

A general verdict of guilty, where the indictment charges the commission of two crimes, imports of necessity a conviction as to each; and if it

Statement of the Case.

appears that there was error as to one and no error as to the other, the judgment below may be reversed here as to the first, and the cause remanded to that court with instructions to enter judgment upon the second count.

At the October term, 1893, of the Circuit Court of the United States for the Northern District of Georgia, an indictment was found against the plaintiff in error, embracing two counts, the first charging him with wrongfully withholding from a pensioner of the United States, one Lucy Burrell, part of a pension allowed and due her, and the second accusing him of demanding and receiving, as agent, a greater compensation for services in prosecuting the claim for pension than is provided by the title of the Revised Statutes pertaining to pensions.

The offences charged in the indictment are made punishable by the final paragraph of Rev. Stat. § 4786, as amended by the pension appropriation act of July 4, 1884, c. 181, § 4, 23 Stat. 98, 101.

On the trial of the case there was conflict in the testimony in many particulars as to the offence charged in the first count. The evidence tended to show that the check, issued for the payment of the pensioner, was received by the accused, a pension agent; that he went with the pensioner to a bank; that there in the presence of an officer of the bank the check was endorsed, and was presented to the paying teller, by whom the amount was paid over to or "put in the hat" of the pensioner — who was shown to be an illiterate negro woman; that, either by the suggestion of the bank officer or of the accused, the money was deposited in the bank for account of the pensioner, a deposit slip being issued therefor. The proof, moreover, was that immediately after this deposit the pensioner went to an office in the vicinity, where a check for $1887.34, one-half of the amount of the pension check, was drawn by her, she making her mark, this check being payable to the order of Hurley Ballew, a son of the accused, by whom it was immediately collected. There was conflict as to whether the accused participated in the fraud by which the drawing of the check was brought about, or whether the amount enured to

his benefit. The pensioner testified that she supposed the check was drawn for twenty-five dollars in favor of her son, while the drawee of the check, Hurley Ballew, testified that it was given him in payment for an insignificant service rendered in connection with the procuring of testimony during the prosecution of the claim for the pension. There was testimony on the second count tending to support the same, although as to this count there was also a conflict in the evidence.

During the course of the trial a page from the records of the Pension Office, showing the issue of the pension to the pensioner named in the indictment, was offered and admitted in evidence over the objection of the accused, to which action of the court exception was duly reserved.

One J. B. Chamblee was examined as a witness for the defendant, and exception was reserved to the exclusion of testimony given on his redirect examination. At the close of the evidence the following instruction was requested by counsel for the accused, which was refused and exception noted.

"When a pension check is delivered to a pensioner, and she takes the same to a bank and has it cashed, and then deposits the said fund in a bank and takes a deposit slip therefor, the fund loses its nature and character as pension money, and the ordinary relation of debtor and creditor exists between the pensioner and the bank, and if thereafter, by any device or in any way whatever, the pension attorney obtains a draft from her and draws it out of her general account, he cannot be convicted of withholding under section 5485 of the Revised Statutes, and it would be your duty to acquit him on that count, if these be the facts as to that branch of the case."

The giving of the following as part of the charge of the court was also excepted to by defendant:

"Now, the defence here is that the amount of the check received from Mr. Rule, the pension agent, really went into the possession of the pensioner in this case, and the contention for the government is that under the facts of the case the money really did not go into her possession in contemplation of law, and they also contend that the attorney, the de-

fendant in this case, could not withhold the money or any part of it by getting the check, which is in evidence here, for eighteen hundred and odd dollars.

"Upon that branch of the case I instruct you thus: If you believe that the receipt of the pension check under all the circumstances connected with it, and the possession of the pension check by the defendant in this case, and the taking of the check to the bank and his accompanying the pensioner to the bank, the turning of the check into cash and the payment of money to her, the physical possession placed in her by putting the money in her hat, the deposit of the money in the bank, and the taking of the pensioner to the office of the defendant and the drawing of the check for eighteen hundred dollars; if you believe that this was all one transaction arranged and designed by the defendant in this case for the purpose of getting into his possession eighteen hundred dollars of the money which the pensioner received; that it was a scheme designed by him, one continuous transaction, for that purpose, and that he was a party to it and was the beneficiary of the money received, then that would be in law a withholding of the money under this statute, and the defendant would be guilty, and it would be your duty to convict him; but it would be necessary for you to believe that. The other rule which I gave you is true and exists in law, that is, that the money can be paid by their attorney to the pensioner, and thereafter there might be a transaction between them which, of course, would be entirely legal and honest, by which the cash could pass from the pensioner to the attorney, but that would depend on the character of the transaction. The jury will see the facts, and I state it to you again, that if all these facts or series of facts are one continuous transaction designed by the defendant and arranged by him, as contended by the government, for the purpose of getting into his possession eighteen hundred and odd dollars of the money of the pensioner, and that he did receive it or was the beneficiary of the receipt of it, then that would be withholding in the meaning of the statute. Now, the facts in this case are for the jury to determine. The check signed by the pensioner, which

seems to be made to Hurley Ballew and endorsed by him, is in evidence and you will have that out with you."

The court instructed the jury that if they considered the defendant guilty on one count and innocent on the other, they should so find; and if they found him guilty on both counts, that they should return a general verdict of guilty. This last was the verdict returned. After an ineffectual effort for a new trial, the case was brought here on error.

Mr. W. C. Glenn, (with whom was *Mr. Daniel W. Rountree* on the brief,) 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 assignments of error address themselves to four rulings of the court, the one admitting in evidence the pension certificate and the other excluding certain testimony, and two to the refusal to give the instruction requested, as well as to the error alleged in the instruction given.

The ground of objection relied upon as to the record from the Pension Office is that the copy was improperly authenticated, because the certificate signed by the acting Secretary of the Interior, and under the seal of the department, referred only to the official character of the Commissioner of Pensions, and the faith and credit to which his attestations were entitled, and Rev. Stat. § 882 is cited in support of the contention. That section reads as follows:

"Copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof."

By reference to the transcript in question in the record, we find that the certificate of the acting Secretary of the Interior was preceded by a certificate signed "Wm. Lochren, Commissioner of Pensions," certifying that "the accompanying page,

numbered 1, is truly copied from the original in the office of the Commissioner of Pensions." The records of the Pension Office constitute part of the records of the Department of the Interior, of which Executive Department the Pension Office is but a constituent. We think that the certificates in question, taken together, were a substantial compliance with the statute.

The exception taken to the ruling out of certain answers made by Chamblee, one of defendant's witnesses, on his redirect examination, results from the following facts: The witness upon his examination in chief testified solely with reference to the circumstances connected with the giving by the pensioner of the check of $1887.34, which formed the basis of the charge of withholding covered by the first count in the indictment. The cross examination was confined to the same subject. At the close of the cross examination the witness stated that he had been asked by a special examiner of pensions, who was investigating the matter, what he knew about the consideration of the check in question. The witness further said that A. W. Ballew came and asked him if he had been interviewed by the examiner, to which inquiry of Ballew the witness stated he had answered yes, and had informed Ballew that the examiner had questioned him about the eighteen hundred dollar check, and that he told him that he thought the check had been given for a house and lot. The witness next stated that Mr. Ballew then told him that the pensioner had given the check to Hurley Ballew.

Upon redirect examination he testified as follows:

"Q. In that conversation with A. W. Ballew, the defendant here, what did he say was the basis of that money given to Hurley Ballew?

"A. What did A. W. Ballew say he done as a matter of inducement to her?

"Q. Yes.

"A. I don't know anything, only that he prosecuted this pension claim, and as to what he had to do with Hurley I don't know that he ever said anything. I think he told me he got his fee from the pension department as attorney.

"Q. That is all he ever got?

"A. That is all he got, I think he told me.

"Q. That he got his fee from the pension department?

"A. That is all he ever got."

Objection being interposed by the district attorney to proof of Ballew's declarations, the objection was sustained and the testimony excluded from the consideration of the jury.

The ground upon which counsel for plaintiff in error rests his claim of admissibility is that when a confession is put in evidence by the prosecution, it is the right of the accused to demand that all of the conversation in which the alleged confession was made should be received. We are unable to reach the conclusion that Ballew's mere statement to a witness, that the pensioner had given his son the check, was a confession, or in the nature of a confession. It had no tendency to establish his guilt or to operate to his prejudice, and confessions are only admitted as being statements against the interest of the party by whom they are claimed to have been made. But the reëxamination of the witness was not directed to the ascertainment of what other statements had been made in the conversation upon the subject about which he had testified on his cross-examination, to wit, the check to Hurley Ballew, but to the drawing out of new matter, not connected with the subject to which the cross-examination related. This was clearly improper. 1 Greenleaf on Evidence, § 467, and cases cited. See, also, cases cited in note *a* to *Ibid.* 15th ed. § 201, and *People* v. *Beach*, 87 N. Y. 508, 512.

The statute upon which the first count is based reads as follows:

"Any agent or attorney or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pen-

sioner or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for every such offence be fined not exceeding five hundred dollars, or imprisonment at hard labor not exceeding two years, or both, in the discretion of the court."

The refusal of the court to give the charge asked, and the charge by it given, proceeded upon the theory that although pension money was actually paid over to the pensioner and by her deposited in bank, the obtaining thereafter of such money from the pensioner constituted a withholding under the statute just quoted. The word "withholding" has a definite signification, and we think contemplates, as used in the statute under consideration, not the fraudulent obtaining of money from a pensioner, but the withholding of the money before it reaches the hands of the pensioner and passes under his dominion and absolute control. The context of the statute supports this view, for its penalty is imposed for the wrongful withholding of the whole or any part of the pension claim allowed and due such pensioner, and not for a wrongful obtaining of the same. The fact that the offence of withholding is limited to any agent or attorney or other person instrumental in prosecuting any claim for pension demonstrates that Congress intended to legislate merely against the wrongful withholding by certain individuals, who, by reason of their relation to the pensioner and his claim, might lawfully obtain possession of the same from the government, and upon whom rested the duty of paying it over to the pensioner. If withholding had been considered as applicable to the retaining of pension money obtained from the pensioner by false pretences, the limitation as to particular persons would not have been enacted. Indeed, to construe the word "withholding" as relating to money received from a pensioner, not only reads the word "due" out of the statute, but also leads to the inevitable conclusion that Congress, whilst intending to make it an offence to obtain from a pensioner pension money by false pretences, has yet confined the offence to particular individuals, and permitted all others to commit with impunity the crime it was intended to punish. It also follows if the

statute be construed as embracing money obtained from a pensioner by false pretence, that the act forbids withholding money thus obtained, but does not forbid or punish the act of obtaining the money by a false or fraudulent pretence. These reasons make it clear that the purpose of the statute in punishing a withholding by certain persons standing in a fiduciary relation to the pensioner is consistent only with the theory that Congress was legislating to prevent an embezzlement of pension money, not a larceny thereof from the pensioner or the obtaining of the same from him by false pretences. This construction of the statute is further supported by reference to the act of March 3, 1873, c. 234, 17 Stat. 566, in § 31 (p. 575) of which is contained the original provision making it an offence to withhold pension money. In juxtaposition to that section, in section 32, was the following:

"Any person acting as attorney to receive and receipt for money for and in behalf of any person entitled to a pension shall, before receiving said money, take and subscribe an oath, to be filed with the pension agent, and by him to be transmitted, with the vouchers now required by law, to the proper accounting officer of the treasury that he has no interest in said money by any pledge, mortgage, sale, assignment, or transfer, and that he does not know or believe that the same has been so disposed of to any person."

The portion of section 32, above quoted, was subsequently embodied in section 4745 of the Revised Statutes.

The signification which we affix to the word "withholding" is also shown to be the one intended by Congress, by the previous portion of the paragraph of the act of 1884, which not only makes it an offence to directly or indirectly contract for, demand, or receive, or retain any greater compensation for services, or for instrumentality in prosecuting a pension claim than allowed by the act, but specifically inhibits the obtaining of payment thereof "at any other time or in any other manner" than as provided in the act, thus making it clear that where it was intended to punish the offence of receiving an illegal fee as well after the payment of the pension to the pensioner as before the receipt by him of the money, the in-

tention was unequivocally conveyed. The clause "payment thereof at any other time or in any other manner than is herein provided" was not contained in the act of 1873, nor in section 5485 of the Revised Statutes, but was first embodied in the act of 1884, whereas the provision as to withholding of a pension has always been confined to the withholding of a pension "due" the pensioner. In the very next sentence of the act of 1873, following the designation of the offence of withholding, there is a provision affixing a penalty to the offence of embezzlement of pension money by a guardian from his ward. This latter offence is now embodied in Revised Statutes, section 4783, which reads as follows:

"Every guardian having the charge and custody of the pension of his ward who embezzles the same in violation of his trust, or fraudulently converts the same to his own use, shall be punished by fine not exceeding two thousand dollars or imprisonment at hard labor for a term not exceeding five years, or both."

It may be remarked, in passing, that it would be as reasonable to argue that one who had fully accounted as guardian and paid over to his ward the balance due, when the ward had attained his or her majority, could be prosecuted under section 4783, if, after such accounting and payment, he fraudulently obtained money from his former ward which might from the proof appear to be a portion of the balance so paid on the accounting, as to contend that when a pension, allowed and due from the government, had been paid to the pensioner, it continued to be "due," in any money transaction between the pensioner or his former agent or attorney.

The instruction given by the trial court that there was a withholding under the statute if the transaction in this case was a continuous scheme designed by the accused for the purpose of getting into his possession a portion of the pension money, made his guilt or innocence depend, not alone upon whether there was a withholding in the statutory sense of the word, but on whether there was a scheme to defraud. It was tantamount to instructing the jury that they should convict even though they were satisfied that the money had not

been withheld, if they believed that before payment over a scheme to defraud had arisen which was carried out after the pensioner had received the amount of the pension, and after it had been by her deposited in bank, and had created between her and the bank the legal relation of debtor and creditor. *Scammon* v. *Kimball*, 92 U. S. 362, 369–370; *Florence Mining Co.* v. *Brown*, 124 U. S. 385, 391. Of course, if the indictment had been so framed as to bring the facts, which it alleged constituted a withholding, within the reach of the first clause of the statute, which forbids the taking of illegal compensation, the instruction given by the court would have been sound. In that case, the taking of the money is made criminal, whether done before payment to the pensioner, at the time of such payment, or at any other time; withholding, on the contrary, is confined to money due, which, in no sense, embraces that which has been actually paid over to a pensioner and has passed under his complete control. However much pension money, even when taken into the possession of a pensioner, may retain its identity for certain purposes, we do not think, for the reasons just stated, that this instruction given was sound in law. The elementary rule is that penal statutes must be strictly construed, and it is essential that the crime punished must be plainly and unmistakably within the statute. *United States* v. *Brewer*, 139 U. S. 278. It follows, therefore, that the instruction asked was wrongfully refused and the instruction given was erroneous, and that there was error in the conviction as to the first count in the indictment.

The verdict was a general verdict. That in a case such as this a general verdict is proper and imports of necessity a conviction as to both crimes, is settled. *Claassen* v. *United States*, 142 U. S. 140, 146. It follows, then, that though there was error as to the conviction of one of the offences charged, there was no error in the conviction upon the other. The question, therefore, arises whether error as to one only of the counts must lead to reversal of the conviction on that count alone or to like reversal as to the count where no error exists; in other words, whether, after reversing the judgment, which was on both counts, we can annul the verdict upon the first

count alone, and leave the verdict to stand as to the second count unaffected by the reversal.

It was held in England that at common law a reviewing court upon a writ of error in a criminal case had not the power, upon a reversal, to enter a proper judgment or to remand the cause for that purpose. *In re Frederich*, 149 U. S. 70, 74, citing *Rex* v. *Bourne*, 7 Ad. & El. 58. This conclusion rested upon the theory that a court of error was confined exclusively to the determination whether error existed, and if it found that it did, its duty was to reverse and discharge the prisoner. In *Holloway* v. *Queen*, 17 Q. B. 317, 328, it was held that since the passage of the act of 11 & 12 Vict. c. 78, § 5, the English courts possessed ample power upon the reversal of a judgment to remand the case for a proper judgment. The act referred to provided as follows:

"That whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition."

In order to save all doubt on the subject, so also in the several States statutes have been adopted expressly conferring upon reviewing courts authority upon reversal to remand the cause to the lower court with such directions for further proceedings as would promote substantial justice.

The statutes in reference to the power of Federal appellate tribunals have from the beginning dealt with the subject.

By the judiciary act of September 24, 1789, c. 20, 1 Stat. 73, 85, it was provided in § 24 "that when a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree as the District Court should have rendered or passed, and the Supreme Court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed,

are uncertain, in which case they shall remand the cause for a final decision."

By § 25 of the same act, this court was given power on writs of error to the state courts to reëxamine, reverse, or affirm their final judgments "in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision, . . . may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution."

Under the power thus conferred it has never been questioned that this court possessed authority upon reversal for error of a final judgment to award a new trial. The recognition of this right involves necessarily a denial of the principle upon which the case of *Rex* v. *Bourne* proceeded. As we have seen, the postulate upon which that case rested was the absence of power to render such judgment or order as the ends of justice might require, because of the want of authority to do anything else but determine the existence of the error complained of. It is clear that by section 24 of the judiciary act of 1789, power was conferred upon the Circuit Courts when reviewing the judgments or decrees of District Courts to render such judgment or pass such decree as the District Court should have rendered or passed, and that upon this court was conferred the same power. True, at the time the judiciary act was passed no jurisdiction to review final judgments in criminal cases was vested in Circuit Courts or in this court, except in cases of error to courts of last resort of a State, but as the power on writs of error to state courts embraced criminal cases, it could not have been contemplated that the general grant of authority on such writs to render the judgment required by the justice of the case was restricted to civil cases alone. The subsequent statutes add cogency to the view that this was not contemplated.

The second section of the act of June 1, 1872, c. 255, 17

Stat. 196, provided that the appellate court (referring to this court and Circuit Courts) may affirm, modify, or reverse the judgment, decree, or order brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require.

The subsequent embodiment of the provision just quoted in section 701 of the Revised Statutes makes clear the fact that Congress in conferring the power to review on error did not intend that the power, on reversal, to make such order as was called for by the nature of the error found to exist, should be limited to civil cases. Section 701 reads as follows:

"The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require."

The reënactment of the provisions as to writs of error to the highest court of a State, contained in § 709 of the Revised Statutes, manifests the purpose to continue in force the power in such cases to render the judgment required by the ends of justice. The language of the statute is that on such writs the judgment of the state court —

"May be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

By the act of March 3, 1879, c. 176, 20 Stat. 354, jurisdiction was conferred in certain criminal cases upon Circuit Courts to review judgments of the District Courts, and it was provided in § 3 that "in case of an affirmance of the judgment of the District Court, the Circuit Court shall pro-

ceed to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the Circuit Court may proceed with the trial of said cause *de novo* or remand the same to the District Court for further proceedings."

The act of February 6, 1889, c. 113, 25 Stat. 655, which gave jurisdiction to this court by writ of error in all capital cases, tried before any court of the United States, provided that the final judgment of such court against the respondent, upon the application of the respondent, should be reëxamined, reversed, or affirmed, upon writ of error, under such rules and regulation as this court might prescribe. And the act further declared (§ 6):

"When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution."

By the act of March 3, 1891, c. 517, 26 Stat. 826, jurisdiction was conferred upon this court "in cases of conviction of a capital or otherwise infamous crime;" and jurisdiction was conferred in other criminal cases upon the Circuit Courts of Appeal established by that act.

With reference to the newly established courts in section 11 of the act it was provided as follows:

"And all provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error."

It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases, to state courts and to the Circuit Courts in capital cases, was confessedly conferred by express statutory

provisions, and that a like power was conferred upon the Circuit Courts of Appeals and Circuit Courts in cases where they exercised jurisdiction by error in criminal cases over the District Court.

From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require. To contend otherwise presupposes that Congress had conferred this power upon this court on writs of error to state courts, on writs of error to the Circuit Courts in capital cases, and had also conferred like power upon Circuit Courts and the Circuit Courts of Appeals, and yet had denied it to this court in a class of criminal cases where jurisdiction was conferred by writ of error under the act of 1891. To so conclude would work out an absurdity, and would destroy the unity of the Federal judicial system. The contrary conclusion finds support only in the contention that because in each concession of jurisdiction, by writ of error, there was not a reëxpression of the general method by which such writ should be exercised, therefore the grant of power was divested of its efficacy. But this is fully answered by the entire history of the legislation which demonstrates that the general grant of power to render a proper judgment on writs of error was evidently not reiterated in express terms when new subjects-matter of jurisdiction were vested in this court, because such authority was deemed to be already adequately provided by the general statutes on the subject. For this reason, in speaking of the act of 1891, this court said, in *Hudson* v. *Parker*, 156 U. S. 277, 282: "As to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the Circuit Court or the District Court, Congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system."

In *In re Bonner*, 151 U. S. 242, 262, we held that an error

in a sentence did not vitiate a verdict, and that this court, sitting in *habeas corpus*, might remand for resentence one whose conviction was lawful but against whom a judgment, erroneous in part, had been rendered. In this case, as the only errors found in the record relate to and affect the crime covered by the first count, substantial justice requires, and it is so ordered, that the general judgment rendered by the court below should be

Reversed and the cause be remanded to that court with instructions to enter judgment upon the second count of the indictment, and for such proceedings with reference to the first count as may be in conformity to law.

ALLISON *v.* UNITED STATES.

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

No. 693. Submitted November 20, 1895. — Decided December 16, 1895.

When a person indicted for the commission of murder, offers himself at the trial as a witness on his own behalf under the provisions of the act of March 16, 1878, c. 37, 20 Stat. 30, the policy of that enactment should not be defeated by hostile intimations of the trial judge. *Hicks* v. *United States*, 150 U. S. 442, affirmed.

The defendant in this case having offered himself as a witness in his own behalf, and having testified to circumstances which tended to show that the killing was done in self-defence, the court charged the jury: "You must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness, when he is confronted with a charge of murder. All men would say that." *Held*, that this was reversible error.

Other statements made by the court to the jury are held to seriously trench on that untrammelled determination of the facts by a jury to which parties accused of the commission of crime are entitled.

What is or what is not an overt demonstration of violence sufficient to justify a resistance which ends in the death of the party making the demonstration varies with the circumstances; and it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine whether the circumstances justified instant action, because of reasonable apprehension of danger.

Statement of the Case.

Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and be so intermingled with inferences springing from forensic ardor, that the jury will be left without proper instructions, their province of dealing with the facts invaded, and errors intervene.

JOHN ALLISON, some twenty years old, was indicted for the murder of his father, William Allison, on the fifth day of January, 1895, at the Cherokee Nation in the Indian country, in the Western District of Arkansas, found guilty by a jury, under the instructions of the court, and sentenced to be hanged, whereupon he sued out this writ of error.

The evidence tended to show that the Allisons resided up to the year 1893 in the State of Washington; that the parents had been divorced; that the father had repeatedly threatened the lives of the members of his family, and for an assault upon one of his sons and his son-in-law, by shooting at them with a pistol, had been sent to the penitentiary for a year; and that thereupon the family left the State of Washington and came to the Indian country. In about a year the father appeared, first at Hot Springs, Arkansas, where one daughter had located, and then in the neighborhood of the other members of the family in the Indian country; and at once began threatening the lives of the entire family, and particularly that of his son John. A great variety of vindictive threats by the deceased in Washington, at Hot Springs, and in the Indian country was testified to.

Evidence was also adduced that on one occasion he came to the house where the mother and her children were living and demanded to see the children, who (except John and one whom he had seen) were not at home, and he then wished to see their mother, who objected to meeting him; that he persisted, whereupon his son John, who had a gun in his hand, told him he must leave, and the father dared John to come out and he would fight him outside, but John answered that he did not want any trouble with him — only wanted him to stay away from there, and the deceased replied: "God damn you, I will go off and get a gun and kill the last damned one of you;" that he subsequently told his son-in-law to tell John Allison

"that he would blow his God damned brains out the first time he seen him; told him to tell him he would kill his mother and the entire family;" that the day after this occurrence John Allison and his mother made an affidavit to get a peace warrant for William Allison, and on that occasion John told the prosecuting attorney that the old man threatened his life, and he thought he was in danger, and asked him if he killed the old man what would be done with him, and he replied that "if the old man came to his house and raised a racket and tried to carry out his threats that he told me he had made on him, I told him he would be justified in doing it," but that he must not go "hunting the old man up and trying to kill him," and that John said, "I will not bother him; if he will let me alone, I will let him alone;" and that this was five or six days before the killing. The evidence further tended to show that the deceased had been in the habit of carrying a pistol; that he stated that he had one; that on New Year's day he threatened one of the witnesses with that weapon, and another witness testified to catching a glimpse of it once when he put his hand around to his hip pocket; but that he had no pistol on him when he was killed. The deceased was staying at the house of one Farris, and a witness testified in rebuttal to conversing with John when he was "warming" on one occasion at the barn — presumably Farris' barn — and asking him why he did not go up to the house, and he said he did not want to go up there; that he was afraid he and his father would have some trouble; that he was afraid his father would hurt him; and that he was going to kill him just as quick as he caught him away from the house.

As to the circumstances immediately surrounding the homicide, the defendant testified that he and a man by the name of Rucker had killed a deer near Rucker's the day before, and that he had promised Rucker to come back the next day to hunt for others, and was riding by Farris' place, which was on the road to Rucker's, with his gun in his hand, on that errand, on the morning of January 5, when he saw a person whom he took to be his brother Jasper up at Farris' house;

that this person turned out to be Farris with his brother's coat on; but he stopped at the stable thinking that his brother would come down that way, as he had learned from his sister that his brother was to be at the place at that time for the purpose of removing some household goods; that he did not go up to the house because he did not want to meet his father; that shortly after he arrived at the barn his father came through the gate, and he stepped to one side to let him go into the barn if he wished to, but deceased did not go towards the door, came straight towards him, and when he got a few feet from him said: "You have got it, have you?" and threw his hand back as if he was going to get a pistol; "made a demonstration that way," and that this demonstration and the threats he had made led defendant to believe that he was going to draw a pistol, and he fired; that he fired three shots, but none after the deceased fell. Defendant was corroborated by Rucker and others in many particulars, but contradicted by the government's witnesses in respect of firing after his father was down, they testifying that he fell at the first shot.

Mr. William M. Cravens for plaintiff 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.

It was claimed on behalf of defendant that the homicide was excusable because committed in self-defence, in that, his life having been repeatedly threatened by deceased, when he saw him on this occasion moving his hand as if to take a pistol from his hip pocket, he believed, and, as a prudent man, might reasonably have believed, at that time and under those circumstances, that he was in imminent and deadly peril which could only be averted by the course he pursued; or that, at the most, he could only be found guilty of manslaughter for acting under an unreasonable access of fear, but without malice.

The threats were conceded; and there was evidence that

the deceased was in the habit of carrying a pistol; that he had recently carried one in his hip pocket; that he had sent word to defendant that he should kill him on sight; that defendant had started on a hunting expedition that morning; and that his stopping at Farris' place was accidental; but the facts that he at first stepped away from his father, and that the latter advanced on him and made the threatening demonstration as if to draw a pistol, which the defendant knew he was accustomed to have upon him, apparently depended on defendant's testimony alone. The question for the jury to determine, from all the facts and circumstances adduced in evidence, was the reasonableness of the belief, or fear, of the existence of such peril of death or great bodily harm as would excuse the killing. And it was for the jury to test the credibility of the defendant as a witness, giving his testimony such weight under all the circumstances as they thought it entitled to, as in the instance of other witnesses, uninfluenced by instructions which might operate to strip him of the competency accorded by the law.

We repeat what was said by Mr. Justice Shiras, speaking for the court, in *Hicks* v. *United States*, 150 U. S. 442, 452: "It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices, and, perhaps, a judge cannot be considered as going out of his province in giving similar caution as to the testimony of the accused person. Still, it must be remembered, that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury properly enough give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is, that 'the person charged shall at his own request, and not otherwise, be a competent witness.' The policy of this enactment should not be defeated by hostile intimations of the trial judge, whose duty it is to give reasonable effect and force to the law."

Similar views have been expressed in many cases in the state courts.

In *Commonwealth* v. *Wright*, 107 Mass. 403, it was held that there was no presumption either way as to the truthfulness of a defendant's testimony in a criminal case, and that his testimony is to be considered and weighed by the jury, taking all the circumstances of the case and all the other evidence into consideration, and giving such weight to the testimony as in their judgment it ought to have.

"It cannot," observed Scholfield, J., in *Chambers* v. *The People*, 105 Illinois, 409, "be true that the evidence given by the defendant charged with crime is not to be treated the same as the evidence of other witnesses. It could not even be true, as a universal proposition, that, as matter of law, it is not to have the same effect as the evidence of other witnesses. Many times it certainly cannot have that effect, but there are times when it can and should, — and of this the jury are made the judges."

And see *Greer* v. *State*, 53 Indiana, 420; *Veatch* v. *State*, 56 Indiana, 584; *Buckley* v. *State*, 62 Mississippi, 705; *State* v. *Johnson*, 16 Nevada, 36.

Among the errors assigned in the present case was one to so much of the charge as is given below in italics, in respect of which a sufficient exception was preserved. The trial judge said:

"You have heard in argument here, incidentally dropped, no doubt, because these things have been repeated here so often in this court that every child knows what the law of self-defence is, that if a man thinks he has a right to slay he can slay. That is a great misapprehension of what this proposition of the law is and what it means. If that was the case how many men, when they were arraigned for the killing of a human being, would not assert that they thought they had a right to kill; they might be mistaken, but they thought so. They perhaps had a misunderstanding of the law, but then they thought they had the right to kill. What a perversion of this protection agency called the law of the land this would be! No, that is not the law. It must be shown

by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. *The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing.*"

In this there was error. While the trial judge may not have intended to be understood that the defendant could not prove his defence by his own testimony, and had it in his mind simply to warn the jury that they should not rely on the defendant's opinion that his conduct was justifiable, but on the facts, or what reasonably appeared to him to be such, we think these remarks had a much wider scope, and must have been so understood by the jury. The "state of case" put to the jury was whether William Allison was at the time doing something that would satisfy a reasonable man, situated as defendant was, that he was about to do what would destroy defendant's life, and which defendant could not prevent except by doing as he did; and the question as to the existence of that state of case was required by the instruction to be passed on by the jury on something more than defendant's declaration, which, it was stated, would certainly be made by any man created when confronted with a charge of murder.

Defendant had testified to the facts upon which he based his belief that he was in peril, and it was for the jury to say from the evidence whether the facts as he stated them actually or apparently existed, and whether the homicide could,

therefore, be excused either wholly or in part. And if the jury regarded the remarks of the court as applicable generally to defendant's testimony, then defendant was practically deprived of its benefit, and the statute enabling him to testify was rendered unavailing. In our opinion the liability of the jury to thus understand these observations was so great that their utterance constitutes reversible error.

Nor was this error obviated by what, some time after — the intervening portion of the charge occupies six closely printed pages — was said by the trial judge, as follows: "The defendant has gone upon the stand, and he has made his statement. See if it is in harmony with the statements of witnesses you find to be reliable. If they are not, they stand before you as contradicted. If they are, they stand before you as strengthened as you may attach credit to the corroborating facts. In passing upon his evidence you are necessarily to consider his interest in the result of this trial, in the result of this case. He is related to the case more intimately than anybody else, and you are to apply the principle of the law that is laid down everywhere in all civilized countries, commanding you to look at a man's statements in the light of the interest that he has in the case. There is no odor of sanctity thrown around the statements of the defendant as a witness, as is sometimes supposed, because he is charged with crime. You are to view his statements in the light of their consistency, their reasonableness, and their probability, the same as the statements of any other witness, and you are to look at them in the light of the interest he has in the result of the case." If this could be, in any aspect, treated as a modification of the previous assertions of the court, it was too far separated from that connection to permit us to attribute that operation to it, and, moreover, it was in itself erroneous. As a witness, a defendant is no more to be visited with condemnation than he is to be clothed with sanctity, simply because he is under accusation, and there is no presumption of law in favor of or against his truthfulness.

Exception was taken, not with much precision, but, we are disposed to hold, sufficiently to save the point, to the following

instruction, given in discussing the question of malice aforethought:

"Now, of course, you are to distinguish (and I have to be particular upon this point; I have my reasons for it, and it is not necessary to name to you what they are) between a case where a man prepares simply to defend himself and keeps himself in the right in that defence, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and he is on the lookout for the man he has thus prepared himself to kill and he kills him upon sight, that is murder, and it would shock humanity or even the most technical and hair splitting court to decide anything else. That can be nothing else but murder. If he is in the right — if he is in the right at the time of the killing — and simply prepared himself to defend his own life, that is preparation not to take the life of another, but preparation to defend himself. That is the distinction, a distinction that is clear and comprehensive."

And also to this in reference to the exercise of the right of self-defence:

"The first proposition is as follows: 'A man, who, in the lawful pursuit of his business' — I will tell you after a while what is meant by that. I will tell you, in short, in this connection it means that the man is doing at the time just exactly what he had a right to do under the law. When so situated — 'is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, may lawfully kill the assailant, provided he uses all the means in his power, otherwise, to save his own life or to prevent the intended harm — such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.' Now, that means by its very language that the party was in the right at the time. If he was hunting up his father for the purpose of getting an opportunity to slay him without just cause and in the absence of legal provocation, he was not in the right, and the consequence would be that he would be deprived of the law of self-defence, as you will learn presently, when such a condition as that exists. Now, of

course, in this connection — and I am this particular again for certain reasons — you are to draw the distinction between a state of case where a man arms himself, where there is ill will, or grudge, or spite, or animosity, existing, and he hunts up his adversary and slays him, and the state of case where he simply arms himself for self-defence. He has a right to do the latter as long as he is in the right, but he has no right to do the former, and if he does the former and slays because of that condition he is guilty of murder."

We are of opinion that defendant's objections to these portions of the charge are well founded. The hypothesis upon which the defence rested on the trial was that John Allison had a gun with him on the morning of the tragedy, in order to hunt deer, and that his stopping at Farris' place, which was on his way to Rucker's, was accidental. His testimony to this effect was corroborated, and was not contradicted.

Justice and the law demanded that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded. His guilt or innocence turned on a narrow hinge, and great caution should have been used not to complicate and confuse the issue. But the charge above quoted ignored the evidence tending to show that defendant had not armed himself at all, but had a gun with him for purposes of sport, and that his halt at Farris' had no connection whatever with the deceased; and invited the jury to contemplate the spectacle of a son hunting up his father with the deliberately preconceived intention of murdering him, unrelieved by allusion to defensive matter, which threw a different light on the transaction.

If defendant were "in the right at the time of the killing," the inquiry as to how he came to be armed was immaterial, or, at least, embraced by that expression. If there were evidence, and as to this the record permits no doubt, tending to establish that defendant carried his gun that morning for no purpose of offence or defence, then this disquisition of the court was calculated to darken the light cast on the homicide by the attendant circumstances as defendant claimed them to be; and of this he had just cause to complain, even though

there were competent evidence indicating that he harbored designs against his father's life, as frequently intimated by the court — intimations which we fear seriously trenched on that untrammelled determination of the facts by a jury to which parties accused are entitled.

As will have been seen, the theory of the defence was that defendant was in terror of his life by reason of the threats of deceased to take it, and was, therefore, led to interpret the alleged menacing action of deceased as demonstrating an intention then and there to carry those threats into execution. The bearing of the previous threats then was very important, and in relation to them the trial judge admonished the jury as follows:

"Now, then, these mitigating facts which reduce the killing so as to make it manslaughter cannot be previous acts of violence exerted at some other time, and so far in the past as that there was time for the blood to cool, or the party to think or to deliberate — it cannot be an act of that kind that can be taken into account to mitigate the crime. Nor can they exist in the shape of previous threats, made at some other time than the killing, or, if you please, if the proof had shown that they were made at the time of the killing, because threats of violence, mere threats of that character, cannot be used to justify nor to mitigate a killing, unless they are coupled with some other condition which I will give you in connection with the law given you showing the figure that threats cut in a case. . . . If threats were made previous to the time of the killing, and they were not coupled with the condition that they may be used to illustrate, as I will give it to you presently, and the party kills because of those threats, that is evidence of spite, that is evidence of grudge, that is evidence showing that he kills because of ill will and special animosity existing upon his part against the party who is slain."

After much intervening discussion on other matters, the subject was returned to thus:

"You want to know, of course, what figure threats cut. Evidence has been offered here of threats made by the deceased. You want to know what office they perform in the

case, how you are to view them, whether you are to say that the law authorizes you to say that if a man has been threatened at some time previous to the killing and that he kills because of these threats, or he kills when no overt demonstration of violence, really or apparently, is being made by the party slain at the time, whether or not those threats can be taken into consideration by you to excuse that killing or to mitigate it. . . . Now, you see, they do not cut any office at all in favor of a defendant unless at the time, in this case, his father was doing some act, making some actual attempt, to execute the threat, as shown by some act or demonstration at the time of the killing, taken in connection with the threat, that would induce a reasonable belief upon the part of the slayer that it was necessary to deprive his father of life in order to save his own or prevent some felony upon his person. That is the law, stated plainly, as to the office of communicated threats. . . . If he (the deceased) was doing some act or making some demonstration that really or apparently was of a character that indicated a design to take life, then the defendant could couple previous threats made with the act or demonstration. Now, the act or demonstration must have gone sufficiently far to show a reasonable purpose or to induce a reasonable belief, when coupled with threats, under the circumstances, that that was William Allison's purpose at the time. It must have gone to that extent. It must have gone sufficiently far, the overt act done by him, as to induce a reasonable belief, when coupled with threats, that that was his purpose. . . . Now, you see that no matter how many threats William Allison may have made against his family, and no matter to what extent this family broil had gone, this defendant because of threats of that character could not hunt him up and shoot him down because of those threats. If that was the state of case the threats cannot be considered in his favor, but they may be considered to show that he killed him because of malice, because of malice aforethought existing, because of a spirit of spite, or ill will, or grudge, that he was seeking to satisfy by that sort of attack."

Defendant excepted to so much of these instructions as ruled

that threats to take his life might be treated as constituting evidence of spite, or ill will, or grudge on his part.

In *Wiggins* v. *People*, 93 U. S. 465, it was held that, on a trial for a homicide committed in an encounter, where the question as to which of the parties commenced the attack is in doubt, it is competent to prove threats of violence against defendant made by deceased, though not brought to defendant's knowledge, for the evidence, though not relevant to show the *quo animo* of the defendant, would be relevant, under such circumstances, to show that at the time of the meeting deceased was seeking defendant's life. Wharton Crim. Ev. § 757; *Stokes* v. *People*, 53 N. Y. 164; *Campbell* v. *People*, 16 Illinois, 17; *People* v. *Scoggins*, 37 California, 676; *Roberts* v. *State*, 68 Alabama, 156. It is from the dissenting opinion in Wiggins' case that the trial judge indulged in quotation in connection with the undisputed proposition that a person's life is not to be taken simply because he has made threats.

Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack, fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause for apprehension of danger and reason for promptness to repel attack, but they could not have been admitted on a record such as this, if offered by the prosecution as tending to show spite, ill will, or grudge on the part of the person threatened; nor could they, being admitted on defendant's behalf, if coupled with an actual or apparent hostile demonstration, be turned against him in the absence of evidence justifying such a construction. The logical inference was that these threats excited apprehension, and another and inconsistent inference could not be arbitrarily substituted. If defendant, to use the graphic language of the court, hunted his father up and shot him down merely because he had made the threats, speculation as to his mental processes was uncalled for. If defendant committed the homicide because of the threats, in the sense

of acting upon emotions aroused by them, then some basis must be laid by the evidence other than the threats themselves before a particular emotion different from those they would ordinarily inspire under the circumstances, could be imputed as a motive for the fatal shot.

What is or is not an overt demonstration of violence varies with the circumstances. Under some circumstances a slight movement may justify instant action because of reasonable apprehension of danger; under other circumstances this would not be so. And it is for the jury, and not for the judge, passing upon the weight and effect of the evidence, to determine how this may be. In this case it was essential to the defence that the jury should be clearly and distinctly advised as to the bearing of the threats and the appearance of danger, at the moment, from defendant's standpoint, and particularly so as it did not appear that the deceased then had a pistol upon him, though there was evidence that it was his habit to carry one, and that he had had one immediately before.

We think that the language of the court in the particulars named is open to the criticism made in reference to like instructions under consideration in *Thompson* v. *United States*, 155 U. S. 271, 281, where we remarked: "While it is no doubt true that previous threats will not, in all circumstances, justify or, perhaps, even extenuate the act of the party threatened in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill will and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all reference to the conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats."

Other exceptions to parts of the charge were taken, but, while not to be understood as holding that there was no error in respect thereof, we do not feel called upon to prolong this opinion by their consideration, and they may not arise upon another trial.

Statement of the Case.

Where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided.

Judgment reversed and cause remanded, with a direction to set aside the verdict and grant a new trial.

INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY *v.* GIBNEY.

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

No. 99. Argued December 6, 1895. — Decided December 16, 1895.

Where the record shows that the only matter tried and decided in the Circuit Court was a demurrer to a plea to the jurisdiction, and the petition upon which the writ of error was allowed asked only for the review of the judgment that the court had no jurisdiction of the action, the question of jurisdiction alone is sufficiently certified to this court, as required by the act of March 3, 1891, c. 517, § 5.

Under the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, a defendant, who enters a general appearance, in an action between citizens of different States, thereby waives the right afterwards to object that he or another defendant is not an inhabitant of the district in which the action is brought.

This was an action at law, brought June 9, 1890, in the Circuit Court of the United States for the District of Indiana, by the Interior Construction and Improvement Company against John C. Gibney and Harvey Bartley, copartners under the name of J. C. Gibney and Company, and James B. McElwaine and James B. Wheeler, upon a bond, by which "J. C. Gibney & Co., as principals, and J. B. McElwaine and J. B. Wheeler, as sureties, are holden and firmly bound,"

Counsel for Plaintiff in Error.

jointly and severally, to the plaintiff, in the sum of $20,000, for the performance of a contract made by "said J. C. Gibney & Co." with the plaintiff.

The complaint alleged that the plaintiff was incorporated under the laws of the State of New Jersey, and was a citizen thereof; and that all the defendants were citizens and residents of the State of Indiana.

On June 19, 1890, the defendants Gibney, McElwaine and Wheeler, by their attorney, entered a general appearance. But Gibney never pleaded or answered; and the defendant Bartley never appeared, or made any defence.

On September 19, 1891, McElwaine and Wheeler pleaded in abatement that at the time of the bringing of this action, and ever since, Gibney and Bartley were citizens of the State of Pennsylvania, and not citizens or residents of the State of Indiana; and that, therefore, the court had no jurisdiction of the case.

The plaintiff demurred to this plea, as not containing facts sufficient to constitute a cause for the abatement of the action. The plaintiff declining to plead further, but electing to stand upon its demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs.

The plaintiff thereupon presented a petition for the allowance of a writ of error "for the review of the judgment heretofore rendered therein in favor of the defendants and against the plaintiff, therein holding and deciding that this court has no jurisdiction of said action;" and assigned, as errors, that the Circuit Court erred, 1st, in overruling the plaintiff's demurrer to the plea in abatement; 2d, in sustaining the plea in abatement, and holding that the court had no jurisdiction of the cause; 3d, in entering judgment in favor of the defendants and against the plaintiff on the plea in abatement, and dismissing and quashing the proceedings. The writ of error was thereupon allowed by the judge presiding in the Circuit Court.

Mr. John C. Donnelly for plaintiff in error.

Opinion of the Court.

No appearance for defendant in error.

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

The record shows that the only matter tried and decided in the Circuit Court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891, c. 517, § 5. 26 Stat. 828; *In re Lehigh Co.*, 156 U. S. 322; *Shields* v. *Coleman*, 157 U. S. 168.

The act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, confers upon the Circuit Courts of the United States original jurisdiction of all civil actions, at common law or in equity, between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000; and provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 433.

The Circuit Courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different States. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action, within the general jurisdiction of the court, is brought in the wrong district, is waived

by entering a general appearance, without taking the objection. *Gracie* v. *Palmer*, 8 Wheat. 699; *Toland* v. *Sprague*, 12 Pet. 300, 330; *Ex parte Schollenberger*, 96 U. S. 369, 378; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 206; *Texas & Pacific Railway* v. *Saunders*, 151 U. S. 105; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Southern Express Co.* v. *Todd*, 12 U. S. App. 351.

In *Smith* v. *Lyon*, 133 U. S. 315, this court held that the provision of the act of 1888, as to the district in which a suit between citizens of different States should be brought, required such a suit, in which there was more than one plaintiff or more than one defendant, to be brought in the district in which all the plaintiffs, or all the defendants, were inhabitants.

When there are several defendants, some of whom are, and some of whom are not, inhabitants of the district in which the suit is brought, the question whether those defendants who are inhabitants of the district may take the objection, if the non-resident defendants have not appeared in the suit, has never been decided by this court. Strong reasons might be given for holding that, especially where, as in this case, an action is brought against the principals and sureties on a bond, and one of the principals is a non-resident and does not appear, the defendants who do come in may object, at the proper stage of the proceedings, to being compelled to answer the suit.

But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all the defendants who pleaded to the jurisdiction, had entered a general appearance long before they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and, of course, cannot object that others of the defendants were such.

Judgment reversed, and case remanded with directions to sustain the demurrer to the plea, and for further proceedings not inconsistent with this opinion.

In re KEASBEY AND MATTISON COMPANY, Petitioner.

ORIGINAL.

No. 6. Original. Submitted October 14, 1895. — Decided December 16, 1895.

By virtue of the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, a corporation incorporated by a State of the Union cannot be compelled to answer to a suit for infringement of a trade-mark under the act of March 3, 1881, c. 138, in a district in which it is not incorporated and of which the plaintiff is not an inhabitant, although it does business and has a general agent in that district.

THIS was a petition for a writ of mandamus to the judges of the Circuit Court of the United States for the Southern District of New York, to command them to take jurisdiction and proceed against the E. L. Patch Company upon a bill in equity, filed in that court on January 26, 1895, by the petitioner, described in the bill as a corporation organized and existing under the laws of the State of Pennsylvania, against the E. L. Patch Company, alleged in the bill to be a corporation organized and existing under the laws of the State of Massachusetts, and having its principal office and place of business in the city and State of New York, and against Henry E. C. Kuehne and Edward H. Lubbers, alleged to be citizens of the United States and of the State of New York, and managing or general agents of the E. L. Patch Company in that State, for infringement of a trade-mark, owned by the petitioner, registered in the Patent Office under the laws of the United States, and used in commerce between the United States and several foreign nations named in the bill; and alleging that "this is a suit of a civil nature in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the laws of the United States, and also in which there is a controversy between citizens of different States, within the intent and meaning of the statute in such case made and provided."

Argument for Petitioner.

Upon the filing of the bill in equity, a subpœna addressed to all the defendants was issued, and was served in the city of New York upon the E. L. Patch Company by exhibiting the original and delivering a copy to Kuehne, one of its managing agents in the district, and was also served upon Kuehne and Lubbers individually.

Upon the return of the subpœna, the E. L. Patch Company, by its solicitor appearing specially for this purpose, moved to set aside the alleged service of the subpœna upon the company; and the Circuit Court, upon a hearing, ordered that the motion be granted, and that service set aside as null and void, and the company relieved from appearing to plead or answer to the bill.

Mr. Edward K. Jones for petitioner.

The questions to be passed on by this court are: (1) Whether or not that part of the first section of the act of March 3, 1887, c. 373, relating to the jurisdiction of the District and Circuit Courts as amended by the act of August 13, 1888, c. 866, which provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," is applicable to suits brought under a prior special act of Congress authorizing the registration of certain trade-marks and providing remedies in the courts of the United States for their infringement, such special act in itself not containing any such restriction upon the exercise of jurisdiction; and (2) Whether or not, if the provision of the act of 1887, as amended, and above quoted, does apply to such suits, the defendant corporation has waived its privilege of being sued in the district of its residence by doing business and having agents for the transaction thereof in the State and district where the suit is brought, the laws of that State providing that such foreign or non-resident corporations shall be subject to suit therein as a condition to their right to do business there?

The case in no aspect can be considered to fall within the

decisions of this court construing the application of the further provision of the first section of the judiciary act of 1887, as amended, declaring that "where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the district of the residence of either the plaintiff or the defendant," for the plain reason that the jurisdiction invoked in this case does not depend only on that fact.

The contention in behalf of the petitioner is,

(1) That there is really no question of jurisdiction at all in this case, as the learned judge of the Circuit Court supposed, the real question being whether or not the exercise of jurisdiction has been prohibited or restricted so as to exclude the defendant from its operation, upon its pleading the privilege of being sued only in the district of its residence or inhabitancy.

(2) That the provisions of the first section of the present judiciary act above quoted are inapplicable to this case, because the suit being founded on a special act of Congress, to wit, the act authorizing the registration and suits for the infringement of trade-marks; and that act contains no such prohibition or restriction.

(3) Even if the case is governed by the judiciary act of 1887, as amended, and conceding that the limitations of the exercise of jurisdiction above quoted would otherwise operate, the defendant has waived its privilege of being sued only in the district of its residence by doing business in the State and district where it is sued and committing there the injury for which the suit is brought.

The Circuit Court clearly has jurisdiction of the defendant corporation.

This proposition is evident not only from the express terms of the act relating to trade-marks, but also from the act of 1887, as amended.

There can, therefore, be no question of jurisdiction. The only question is, as before stated, whether or not the exercise of jurisdiction in a case like the present is, by some other provision of law, excluded or forbidden when pleaded by the defendant. In other words, has this defendant the privilege

of being sued only in the district of its residence? or has it waived that privilege?

That the place or district where suits in the courts of the United States are to be brought is a mere privilege, which the defendant may waive, is well established. *Ex parte Schollenberger*, 96 U. S. 369; *St. Louis & San Francisco Railway* v. *McBride*, 141 U. S. 127; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129.

The present suit being founded on the special act of Congress relating to trade-marks, the privilege of being sued only in the district of the defendant's residence, provided by the act of 1887 as amended, does not apply.

Of course, it is not intended to be argued in behalf of the petitioner that this leaves a plaintiff to sue the defendant in any place or district he may select, as the learned Circuit Judge suggested at the argument in the Circuit Court. But it is argued that, as the trade-mark statute, unlike the act of 1887, does not confer upon defendants the privilege of being sued only in the districts of their residence, it leaves it to the Circuit Court to assume jurisdiction whenever the ordinary conditions to its exercise exist, *i.e.* whenever the defendant is present in such a way that courts of general jurisdiction may assert their authority over his person or property. And in the case of a foreign or non-resident corporation it is abundantly established that this condition exists whenever such foreign or non-resident corporation comes within the territorial limits of a State and Federal district, and there carries on business by agents or servants pursuant to local laws providing, as a condition to such corporation doing business there, that it shall submit to the authority of the courts of the place where it is thus permitted to exercise its functions. *Ins. Co.* v. *French*, 18 How. 404; *Railroad Co.* v. *Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Co.* v. *Koontz*, 104 U. S. 5, 10; *St. Clair* v. *Cox*, 106 U. S. 350; *N. E. Mut. Ins. Co.* v. *Woodworth*, 111 U. S. 138; *In re Louisville Underwriters*, 134 U. S. 488.

This suit being, therefore, as above stated, founded upon a special act of Congress, is not subject to the operation of the

general Judiciary Act, as amended. *In re Hohorst*, 150 U. S. 653; *United States* v. *Mooney*, 116 U. S. 104.

By doing business in the State the laws of which require a non-resident corporation to designate a person upon whom service may be made, or, in case such designation be not made, that service may be made upon its managing agent, the defendant waived its privilege of being sued only in the place of its inhabitancy; and the suit not being one where jurisdiction depends only on diverse citizenship, the court is not only competent to take cognizance of the case, but may subject the defendant to its process.

Even if this case can be considered as subject to the operation of the act of 1887, as amended, the decisions in cases where the sole ground of jurisdiction was diverse citizenship do not apply, because, as previously observed, that is not the only ground of jurisdiction here. This is notably true of the cases of *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Company* v. *Denton*, 146 U. S. 202; and *Empire Coal Co.* v. *Empire Coal & Mining Co.*, 150 U. S. 159, relied upon by the respondents' counsel. Those were cases where the sole ground of jurisdiction was diverse citizenship, and both parties being nonresidents, it was held, upon a construction of the statute which provided that in such cases suit may be brought only in the place of the residence of the plaintiff or the defendant, the actions could not be maintained in any other district.

Therefore, conceding that the act of 1887, as amended, applies, this case rests upon the other clause which provides that "no civil suit shall be brought before either of the said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant;" and under this clause it is insisted that the defendant may waive its privilege of being sued in its place of residence, and that it has waived it by doing business and having agents in the State and city of New York. *Railroad Co.* v. *Harris*, 12 Wall. 65; *St. Clair* v. *Cox*, 106 U. S. 350; *New York, Lake Erie & Western Railroad* v. *Estill*, 147 U. S. 591.

Mr. William A. Abbott opposing.

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

This case presents a single question of jurisdiction of the Circuit Court of the United States, and involves no consideration of the merits of the cause of action asserted in the bill filed in that court.

By the act of March 3, 1881, c. 138, "owners of trade-marks used in commerce with foreign nations, or with the Indian tribes, provided such owners shall be domiciled in the United States, or located in any foreign country or tribe which by treaty, convention or law affords similar privileges to citizens of the United States, may obtain registration of such trade-marks," by causing to be recorded in the Patent Office a statement and description thereof, and complying with other requirements of the act. 21 Stat. 502.

By section 7 of that act, "any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable to an action on the case for damages for the wrongful use of said trade-mark at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes, as aforesaid, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy."

By section 11, nothing in this act shall be construed "to give cognizance to any court of the United States in an action or suit between citizens of the same State, unless the trade-mark in controversy is used on goods intended to be transported to a foreign country, or in lawful commercial intercourse with an Indian tribe."

While section 7 provides that "courts of the United States shall have original and appellate jurisdiction in such cases, without regard to the amount in controversy;" and while the provision of section 11, that nothing in the act shall be construed to give "cognizance to any court of the United States in an action or suit between citizens of the same State," unless the trade-mark is used in commerce with a foreign country or an Indian tribe, implies that a suit for infringement of a trade-mark used in such commerce may be maintained in some court of the United States; yet neither of those sections, and no other provision of the act, specifies in what court of the United States, or in what district, suits under the act may be brought; but the jurisdiction of such suits, in these respects, is left to be ascertained from the acts regulating the jurisdiction of the courts of the United States.

At the time of the passage of the Trade-Mark Act of 1881, the only act to which reference could be had to ascertain such jurisdiction was the Judiciary Act of March 3, 1875, c. 137, § 1, providing that "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, 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 there shall be a controversy between citizens of different States," "or a controversy between citizens of a State and foreign States, citizens or subjects." "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding," except in certain cases not material to the present inquiry. 18 Stat. 470.

The restriction of jurisdiction, with respect to amount, in the act of 1875, was perhaps superseded, as to trade-mark

cases, by the express provision of section 7 of the act of 1881; but the jurisdiction, with regard to the court, as well as to the district, in which such suits should be brought, was controlled by the act of 1875, as the only act in force upon the subject. Under the provision of that act, which allowed a defendant to be sued in the district of which he was an inhabitant, or in that in which he was found, a corporation could doubtless have been sued either in the district in which it was incorporated, or in any district in which it carried on business and had a general agent. *Ex parte Schollenberger*, 96 U. S. 369, 377; *New England Ins. Co.* v. *Woodworth*, 111 U. S. 138, 146; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 452; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 207.

But when this suit was brought, the first section of the Judiciary Act of 1875 had been amended by the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866, in the parts above quoted, by substituting, for the jurisdictional amount of $500, exclusive of costs, the amount of $2000, exclusive of interest and costs; and by striking out, after the clause "and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant," the alternative, "or in which he shall be found at the time of serving such process, or commencing such proceeding," and by adding "but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 433.

The last clause is added by way of proviso to the next preceding clause, which, in its present form, forbids any suit to be brought in any other district than that of which the defendant is an inhabitant; and the effect is that, in every suit between citizens of the United States, when the jurisdiction is founded upon any of the grounds mentioned in this section, other than the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but when the jurisdiction is founded only on the fact that the par-

ties are citizens of different States, the suit shall be brought in the district of which either party is an inhabitant. And it is established by the decisions of this court that, within the meaning of this act, a corporation cannot be considered a citizen, an inhabitant or a resident of a State in which it has not been incorporated; and, consequently, that a corporation incorporated in a State of the Union cannot be compelled to answer to a civil suit, at law or in equity, in a Circuit Court of the United States held in another State, even if the corporation has a usual place of business in that State. *McCormick Co.* v. *Walthers*, 134 U. S. 41, 43; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202. Those cases, it is true, were of the class in which the jurisdiction is founded only upon the fact that the parties are citizens or corporations of different States. But the reasoning on which they proceeded is equally applicable to the other class, mentioned in the same section, of suits arising under the Constitution, laws or treaties of the United States; and the only difference is that, by the very terms of the statute, a suit of this class is to be brought in the district of which the defendant is an inhabitant, and cannot, without the consent of the defendant, be brought in any other district, even in one of which the plaintiff is an inhabitant.

When the parties are citizens of different States, so that the case comes within the general grant of jurisdiction in the first part of the section, the defendant, by entering a general appearance in a suit brought against him in a district of which he is not an inhabitant, waives the right to object that it is brought in the wrong district. *Interior Construction Co.* v. *Gibney*, *ante*, 217, and cases there cited. But a corporation, by doing business or appointing a general agent in a district other than that in which it is created, does not waive its right, if seasonably availed of, to insist that the suit should have been brought in the latter district. *Shaw* v. *Quincy Mining Co.* and *Southern Pacific Co.* v. *Denton*, above cited.

In the case of *Hohorst, petitioner*, 150 U. S. 653, on which the petitioner in this case principally relied, the decision was that the provision of the act of 1888, forbidding suits to be

brought in any other district than that of which the defendant is an inhabitant, had no application to an alien or a foreign corporation sued here, and especially in a suit for infringement of a patent right; and therefore such a firm or corporation might be so sued by a citizen of a State of the Union in any district in which valid service could be made on the defendant. That case is distinguishable from the one now before the court in two essential particulars: First. It was a suit against a foreign corporation, which, like an alien, is not a citizen or an inhabitant of any district within the United States; and was therefore not within the scope or intent of the provision requiring suit to be brought in the district of which the defendant is an inhabitant. See *Galveston &c. Railway* v. *Gonzales*, 151 U. S. 496. Second. It was a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the Circuit Courts of the United States by section 629, cl. 9, and section 711, cl. 5, of the Revised Statutes, reënacting earlier acts of Congress; and was therefore not affected by general provisions regulating the jurisdiction of the courts of the United States, concurrent with that of the several States.

In *United States* v. *Mooney*, 116 U. S. 104, it was likewise held that the first section of the Judiciary Act of 1875 did not take away the exclusive jurisdiction, conferred by earlier statutes upon the District Courts of the United States, over suits for the recovery of penalties and forfeitures under the customs laws of the United States.

No such rule is applicable to a suit for infringement of a trade-mark under the act of 1881. That act, while conferring upon the courts of the United States, in general terms, jurisdiction over such suits, without regard to the amount in controversy, does not specify either the court or the district of the United States in which such suits shall be brought; nor does it assume to take away or impair the jurisdiction which the courts of the several States always had over suits for infringement of trade-marks.

This suit, then, assuming it to be maintainable under the act of 1881, is one of which the courts of the United States

have jurisdiction concurrently with the courts of the several States. The only existing act of Congress, which enables it to be brought in the Circuit Court of the United States, is the act of 1888. The suit comes within the terms of that act, both as arising under a law of the United States, and as being between citizens of different States. In either aspect, by the provisions of the same act, the defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the Circuit Court.

Whether the provision in section 7 of the Trade-Mark Act of 1881, that the courts of the United States should have original jurisdiction in such cases, without regard to the amount in controversy, would control the pecuniary limit of jurisdiction in the subsequent act of 1888, as in the prior act of 1875, of which that act was an amendment, it is unnecessary to consider, because this bill distinctly alleges that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000.

Writ of mandamus denied.

WHITTEN *v.* TOMLINSON.

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

No. 619. Argued November 20, 1895. — Decided December 16, 1895.

Under section 753 of the Revised Statutes, the courts of the United States have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any person in jail, in custody under the authority of a State, in violation of the Constitution, or of a law or treaty of the United States; but, except in cases of peculiar urgency, will not discharge the prisoner in advance of a final determination of his case in the courts of the State; and, even after such final

determination in those courts, will generally leave the petitioner to his remedy by writ of error from this court.

In a petition for a writ of *habeas corpus*, verified by oath, as required by Rev. Stat. § 754, only distinct and unambiguous allegations of fact, not denied by the return, nor controlled by other evidence, can be assumed to be admitted.

A warrant of extradition of the Governor of a State, issued upon the requisition of the Governor of another State, accompanied by a copy of an indictment, is *prima facie* evidence, at least, that the accused had been indicted and was a fugitive from justice; and, when the court in which the indictment was found had jurisdiction of the offence, is sufficient to make it the duty of the courts of the United States to decline interposition by writ of *habeas corpus*, and to leave the question of the lawfulness of the detention of the prisoner, in the State in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the State.

A prisoner in custody under authority of a State will not be discharged by a court of the United States by writ of *habeas corpus*, because an indictment against him lacked the words "a true bill," or was found by the grand jury by mistake or misconception; or because a mittimus issued by a justice of the peace, under a statute of the State, upon application of a surety on a recognizance, and affidavit that the principal intended to abscond, does not conform to that statute.

This was a petition, filed March 26, 1895, in the Circuit Court of the United States for the District of Connecticut, and addressed to the Honorable William K. Townsend, the District Judge, as a judge of the Circuit Court, for a writ of *habeas corpus* to the sheriff of the county of New Haven in the State of Connecticut. The petition was signed by the petitioner, and verified by his oath, and was as follows:

"The petition of George E. Whitten respectfully shows to your honor that he is now a prisoner confined in the custody of Charles A. Tomlinson, sheriff of the county of New Haven, in the county jail in the city of New Haven in said county, for a supposed criminal offence, to wit, a crime of murder in the second degree.

"Your petitioner also shows that such confinement is by virtue of a warrant, a copy whereof is in the possession of said sheriff; and your petitioner avers that, to the best of his knowledge, he is not committed or detained by virtue of any process of law known to the courts of the United States or

the several States, but he is now detained in violation of the Constitution of the United States, in violation of the laws of the United States, and in violation of the constitution and laws of the State of Connecticut; and that he is not held in confinement by virtue of any final judgment or decree of any competent court or tribunal of criminal jurisdiction, or by virtue of any process issued upon such judgment or decree, but is held without due process of law.

"And your petitioner further says that at the time of his arrest, and for a long time prior thereto, he was a citizen of Massachusetts, and was extradited from Massachusetts for said alleged crime in January, 1895; and he says that he is advised by his counsel, William H. Baker, residing at Boston, and so believes, that his said imprisonment is illegal, and that said illegality consisted in this, to wit:

"That in August and September, 1893, this petitioner was tried before the local court sitting within and for the county of New Haven, State of Connecticut, upon a charge of murder in the second degree, being the same alleged charge for which he was extradited, and was after a full hearing thereof discharged from said court.

"That thereafterwards this petitioner remained in the city of New Haven, State of Connecticut, for a long time — during at least two sessions of the grand jury — and then removed to Newton in the Commonwealth of Massachusetts, some time early in the year 1894.

"That he was in January, 1895, while such citizen of Massachusetts, arrested and extradited from the State of Massachusetts upon a warrant issued by the Governor of Massachusetts, on demand and application of the Governor of Connecticut, alleging that an indictment had been found by the grand jury against him of murder within and for the county of New Haven, being the same charge on which he was tried as above. This petitioner was taken to the said city of New Haven by virtue thereof.

"This petitioner avers that no indictment was ever found against him by any grand jury sitting at any time within the State of Connecticut, nor no indictment as and for a true bill

ever was presented by any grand jury in said State of Connecticut against him, which he is ready to verify and prove, and any pretended indictment was found by mistake or misconception and was not their true verdict or finding.

"Further, your petitioner says that he was not, at the time of this extradition as aforesaid, a fugitive from justice from said State of Connecticut.

"Wherefore your petitioner prays a writ of *habeas corpus*, to the end that he may be discharged from custody, and be allowed to depart safely from out the State of Connecticut to the Commonwealth of Massachusetts, without interference in any way by the state authorities of the State of Connecticut, without reference to said charge made against him."

On March 27, a writ of *habeas corpus* was issued accordingly by the District Judge, returnable forthwith at a special term of the Circuit Court.

On March 28, the sheriff made his return to the writ, stating, as the cause of the petitioner's detention and imprisonment, that he was committed to the jail by virtue of the following mittimus:

"To the Sheriff of New Haven County, his deputy, or any proper officer or indifferent person, Greeting:

"Whereas Lucius B. Hinman, of New Haven, Conn., did on the 17th day of January, 1895, enter into a recognizance in the sum of five thousand dollars for the appearance of George E. Whitten, of the town of Newton, State of Massachusetts, before the Superior Court to be holden at New Haven within and for the county of New Haven on the first Tuesday of January, 1895, and the said Lucius B. Hinman now believes that said George E. Whitten intends to abscond, and having produced the evidence that he is surety as aforesaid for the said George E. Whitten, and hath applied to me for a mittimus, and hath made oath before me that the statements in his said application are true:

"These are, therefore, by authority of the State of Connecticut, to command you that you forthwith arrest the said George E. Whitten, and him commit to the jail of said New Haven

Statement of the Case.

County; and the keeper of said jail is hereby ordered to receive the said George E. Whitten, and him safely keep within said jail until he be discharged by due order of law. Hereof fail not, but due service and return make.

"Dated at New Haven this 26th day of March, A.D. 1895.

"JOHN S. FOWLER, Justice of the Peace."

The petitioner moved to quash the return, as insufficient to justify his detention.

The Circuit Court, upon a hearing, denied the motion, and discharged the writ of *habeas corpus*, without prejudice to the right of the petitioner to renew the motion; and filed an opinion by the District Judge (67 Fed. Rep. 230) in which the grounds of decision were stated as follows:

"The writ was issued; and the sheriff brought the petitioner into this court, and made return, as to the cause of his detention and imprisonment, that he was committed to jail by virtue of a mittimus, in the form provided for by statute, duly issued by a justice of the peace on the application of the bondsman, upon oath, that the petitioner intended to abscond. A hearing was had upon a motion to quash the return."

"The petitioner was arrested in Massachusetts, and brought into this State under a warrant issued by the Governor of Massachusetts, upon the requisition of the Governor of Connecticut, accompanied by a certified copy of the indictment charging the crime, and an affidavit that the petitioner was a fugitive from justice.

"It is claimed, in support of the petition, that the indictment was procured by mistake, and that the prisoner was not in fact a fugitive from justice. These claims are denied by the attorney for the State. In view of the conclusions reached, it is not necessary to pass upon these questions of fact. It may be assumed, in the disposition of this motion, that all the allegations in the petition are true.

"Counsel for the petitioner claims that he can prove, in the first place, that the indictment is invalid or void, by reason of some mistake on the part of the grand jury. But the effect of

an inquiry into this question, assuming such evidence to be admissible and true, would be to call upon the Federal court to examine into the proceedings under which said indictment was obtained, and to determine collaterally its sufficiency under the laws of this State."

"It is further claimed that the petitioner was not a fugitive from justice, and that, inasmuch as extradition proceedings are based upon the statutes of the United States, the question whether he was in fact such fugitive is a Federal question, which it is the duty of this court to decide. But it is not denied that the demand made upon the executive authority of the asylum State, and his action thereon, were proper in form; and it will not be assumed in advance that he has surrendered the petitioner upon insufficient evidence."

"I do not mean to be understood as denying the right to this prisoner, at an appropriate time, to introduce evidence that he was not a fugitive from justice, or that the evidence before the Governor of Massachusetts was insufficient to authorize his action; nor do I intend at this time to pass upon the merits of this or any other questions presented, nor to intimate what disposition might be made of these claims, in case they were brought before this court after final action in the state court. All that is now decided is that it must be assumed in advance that the petitioner may obtain all the protection to which he may be entitled in the courts of this State."

"In view of the principle of right and law, underlying the forbearance which the Federal and state courts exercise towards each other in order to avoid conflict, I should not be justified in passing upon such questions in advance of the proceedings in the state courts."

On April 25, the petitioner filed in the Circuit Court an appeal, reciting the petition, the return, and the motion to quash the return, and concluding as follows:

"The said Circuit Court of the United States for the District of Connecticut, on the twenty-eighth day of March, 1895, made final ruling and decreed that upon the face of the petition, without hearing any evidence to sustain the petition, [and

denying the petitioner the right to introduce any evidence to sustain said petition or tending to sustain it, which the plaintiff duly offered,] the writ should be discharged, and that the motion to quash said return be denied, and it was afterwards so decreed and ordered.

"Wherefore this petitioner appeals from the whole of said decree of said Circuit Court, and the petition, return, motion to quash, decree, writ and all other papers forming a record of said cause may be sent to the Supreme Court of the United States without delay, together with this appeal, and moves that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the said Circuit Court be reversed, and for such further order and decree to be made as will to the Supreme Court of the United States seem just and right. The petition for the writ of *habeas corpus*, the writ of *habeas corpus*, the return of the sheriff, the motion to quash, and the decree of the court, are hereby made a part of this appeal."

On the same day, that appeal was allowed by the District Judge.

On May 8, the petitioner filed a paper, purporting to amend his appeal by inserting the words above printed in brackets; and with this paper filed the following letter addressed to his counsel by the District Judge:

"United States Courts, Judges' Chambers, New Haven, May 4, 1895. William H. Baker, Esq., 39 Court Street, Boston, Mass. Dear Sir: Continuous court engagements night and day for two days have prevented an earlier reply to your letter of April 29th. I had supposed that the record contained a statement of the fact that the court declined to hear the evidence; and, if not, I am willing that the statement of said fact should be inserted in the record, provided it can be properly done at this time.

"Yours truly, WILLIAM K. TOWNSEND."

The record transmitted to this court set forth the matters

above stated; but showed no further order amending the record, or allowing the amendment of the appeal.

Mr. William H. Baker for appellant.

Mr. Edward H. Rogers, (with whom was *Mr. Tilton E. Doolittle* on the brief,) for appellee.

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

By the judicial system of the United States, established by Congress under the power conferred upon it by the Constitution, the jurisdiction of the courts of the several States has not been controlled or interfered with, except so far as necessary to secure the supremacy of the Constitution, laws and treaties of the United States.

With this end, three different methods have been provided by statute for bringing before the courts of the United States proceedings begun in the courts of the States.

First. From the earliest organization of the courts of the United States, final judgments, whether in civil or in criminal cases, rendered by the highest court of a State in which a decision in the case could be had, against a right specially set up or claimed under the Constitution, laws or treaties of the United States, may be reëxamined and reversed or affirmed by this court on writ of error. Acts of September 24, 1789, c. 20, § 25, 1 Stat. 85; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat. § 709; *Martin* v. *Hunter*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264. Such appellate jurisdiction is expressly limited to cases in which the decision of the state court is against the right claimed under the Constitution, laws or treaties of the United States, because, when the decision of that court is in favor of such a right, no revision by this court is necessary to protect the national government in the exercise of its rightful powers. *Gordon* v. *Caldcleugh*, 3 Cranch, 268; *Montgomery* v. *Hernandez*, 12 Wheat. 129; *Commonwealth Bank* v. *Griffith*, 14 Pet. 56, 58; *Missouri* v. *Andriano*, 138 U. S. 496, 500, 501.

Second. By the Judiciary Act of 1789, the only other way of transferring a case from a state court to a court of the United States was under section 12, by removal into the Circuit Court of the United States, before trial, of civil actions against aliens, or between citizens of different States. 1 Stat. 79. Such right of removal for trial has been regulated, and extended to cases arising under the Constitution, laws or treaties of the United States, by successive acts of Congress, which need not be particularly referred to, inasmuch as the present case is not one of such a removal.

Third. By section 14 of the old Judiciary Act, the courts of the United States were authorized, in general terms, to issue writs of *habeas corpus* and other writs necessary for the exercise of their respective jurisdictions; "provided that writs of *habeas corpus* shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81. Under that act, no writ of *habeas corpus*, except *ad testificandum*, could be issued in the case of a prisoner in jail under commitment by a court or magistrate of a State. *Ex parte Dorr*, 3 How. 103; *In re Burrus*, 136 U. S. 586, 593.

By subsequent acts of Congress, however, the power of the courts of the United States to issue writs of *habeas corpus* of prisoners in jail has been extended to the case of any person in custody for an act done or omitted in pursuance of a law of the United States, or of an order or process of a court or judge thereof; or in custody in violation of the Constitution, or of a law or treaty of the United States; or who, being a subject or citizen of and domiciled in a foreign State, is in custody for an act done or omitted under any right or exemption claimed under a foreign State, and depending upon the law of nations. Acts of March 2, 1833, c. 57, § 7, 4 Stat., 634; August 29, 1842, c. 257, 5 Stat. 539; February 5, 1867, c. 28, § 1, 14 Stat. 385; Rev. Stat. § 753.

By the existing statutes, this court and the Circuit and District Courts, and any justice or judge thereof, have power

to grant writs of *habeas corpus* for the purpose of inquiring into the cause of restraint of liberty of any prisoner in jail, who "is in custody in violation of the Constitution, or of a law or treaty of the United States;" and "the court or justice or judge, to whom the application is made, shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto;" and "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." Rev. Stat. §§ 751–755, 761.

The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a State, in violation of the Constitution, laws or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of *habeas corpus* every such prisoner.

The principles which should govern their action in this matter were stated, upon great consideration, in the leading case of *Ex parte Royall*, 117 U. S. 241, and were repeated in one of the most recent cases upon the subject, as follows:

"We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." "Where a person is in custody, under process from a state court of origi-

nal jurisdiction, for an alleged offence against the laws of such State, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the Circuit Court has a discretion, whether it will discharge him, upon *habeas corpus*, in advance of his trial in the court in which he is indicted; that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the Circuit Court has still a discretion whether, under all the circumstances then existing, the accused, if convicted, shall be put to his writ of error from the highest court of the State, or whether it will proceed, by writ of *habeas corpus*, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." *Ex parte Royall*, 117 U. S. 241, 251–253; *New York* v. *Eno*, 155 U. S. 89, 93–95.

In *Ex parte Royall* and in *New York* v. *Eno*, it was recognized that in cases of urgency, such as those of prisoners in custody, by authority of a State, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations to foreign nations, the courts of the United States should interpose by writ of *habeas corpus*.

Such an exceptional case was *In re Neagle*, 135 U. S. 1, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on *habeas corpus* from custody under commitment by a magistrate of a State on a charge of homicide committed in the performance of that duty.

Such also was *In re Loney*, 134 U. S. 372, in which a person arrested by order of a magistrate of a State, for perjury in testimony given in the case of a contested Congressional election, was discharged on *habeas corpus*, because a charge of such perjury was within the exclusive cognizance of the courts of the

United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

Such, again, was *Wildenhus's case*, 120 U. S. 1, in which the question was decided on *habeas corpus* whether an arrest, under authority of a State, of one of the crew of a foreign merchant vessel, charged with the commission of a crime on board of her while in a port within the State, was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by *habeas corpus* in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, 117 U. S. 516; *In re Duncan*, 139 U. S. 449; *In re Wood*, 140 U. S. 278; *In re Jugiro*, 140 U. S. 291; *Cook* v. *Hart*, 146 U. S. 183; *In re Frederich*, 149 U. S. 70; *New York* v. *Eno*, 155 U. S. 89; *Pepke* v. *Cronan*, 155 U. S. 100; *Bergemann* v. *Backer*, 157 U. S. 655.

In a petition for a writ of *habeas corpus*, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.

The facts upon which the lawfulness of the imprisonment of this petitioner depends are obscurely and imperfectly presented in his petition, and in the record transmitted to this court.

The general allegations in the petition, that the petitioner is detained in violation of the Constitution and laws of the United States, and of the constitution and laws of the State of Connecticut, and is held without due process of law, are averments of mere conclusions of law, and not of matters of fact. *Cuddy's case*, 131 U. S. 280, 286.

Opinion of the Court.

The petition begins by alleging that the petitioner is a prisoner confined by the sheriff of the county of New Haven in the county jail for a supposed criminal offence, to wit, the crime of murder in the second degree, and that his imprisonment is by virtue of a warrant, a copy whereof is in the possession of the sheriff. It also alleges that the petitioner was a citizen of Massachusetts, and was extradited from that State for said alleged crime in January, 1895. So far, certainly, no unlawful imprisonment is shown.

The allegation that in August and September, 1893, he was tried before a local court in New Haven upon the same charge, and, upon a full hearing, was discharged by the court, would seem to point to a hearing and discharge upon an application for his committal to jail to await prosecution, rather than to a formal trial and acquittal; and, whatever effect it might have, if pleaded to a subsequent indictment, affords no ground for his discharge on *habeas corpus*. *Ex parte Bigelow*, 113 U. S. 328; *Belt, petitioner*, 159 U. S. 95.

It is then alleged that he remained in New Haven during at least two sessions of the grand jury, and then, early in 1894, removed to Massachusetts; and that in January, 1895, he was arrested in Massachusetts and brought to New Haven upon a warrant of extradition, issued by the Governor of Massachusetts, upon the demand of the Governor of Connecticut, alleging that an indictment for murder had been found against him by the grand jury of the county of New Haven. These allegations are immaterial, except as introductory to the remaining allegations of the petition.

One of these allegations is "that no indictment was ever found against him by any grand jury sitting at any time within the State of Connecticut, nor no indictment as and for a true bill ever was presented by any grand jury in said State of Connecticut against him, which he is ready to verify and prove, and any pretended indictment was found by mistake or misconception, and was not their true verdict or finding."

It is not alleged that it appears by the records of the court that no indictment was presented by the grand jury; and it is by no means clear that it was intended to allege anything

more than that an indictment, actually presented by the grand jury to the court, lacked the words "a true bill," and was found by the grand jury by mistake and misconception. Such matters are proper subjects of inquiry in the courts of the State, but afford no ground for interposition by the courts of the United States by writ of *habeas corpus*. *In re Wood*, 140 U. S. 278; *In re Wilson*, 140 U. S. 575.

The only other allegation in the petition is that the petitioner was not, at the time of his extradition from Massachusetts, a fugitive from the justice of Connecticut.

The record, independently of the opinion of the Circuit Court, does not show what, if any, evidence was introduced at the hearing upon which the writ of *habeas corpus* was discharged and the prisoner left in custody. The case was heard by the Circuit Court, and not by the District Judge at chambers or out of court. Had it been so heard by him, there could have been no appeal to this court from his decision. Rev. Stat. §§ 751, 752, 764; Act of March 3, 1885, c. 353, 23 Stat. 437; *Carper* v. *Fitzgerald*, 121 U. S. 87; *Lambert* v. *Barrett*, 157 U. S. 697. The subsequent correspondence between the District Judge and the petitioner's counsel had no proper place in the record of the court, and it does not appear that the judge intended or expected his letter to be filed or recorded. In that letter he did no more than express his willingness that the record should be amended, provided it could properly be done. It does not appear that the judge afterwards allowed, or was requested to allow, any amendment of the record, or of the appeal; and the petitioner or his counsel could not amend either the record or the appeal by his own act, without leave of the judge.

If, in order to ascertain what was proved, or offered to be proved, at the hearing, we turn to the opinion filed in the court below and sent up with the record, it thereby appears that the petitioner offered to prove that the indictment against him was procured by some mistake of the grand jury, and that he was not in fact a fugitive from justice; and that the judge assumed, for the purpose of the disposition of the writ of *habeas corpus*, that all the allegations of the petition were true.

But if the opinion can be referred to as showing part of what took place at the hearing, it may likewise be referred to as showing other matters then before the court, and especially the proceedings for extradition.

As to those proceedings, the opinion (consistently with the allegations of the petition, so far as anything upon the subject is distinctly and unequivocally alleged therein,) not only states, as uncontroverted facts, that the petitioner was arrested in Massachusetts, and brought into Connecticut, under a warrant of extradition issued by the Governor of Massachusetts, upon a requisition of the Governor of Connecticut, accompanied by a certified copy of the indictment, and by an affidavit that the petitioner was a fugitive from justice; but expressly says that it was not denied that the demand upon the executive authority of Massachusetts, and his action thereon, were proper in form.

A warrant of extradition of the Governor of a State, issued upon the requisition of the Governor of another State, accompanied by a copy of an indictment, is *prima facie* evidence, at least, that the accused had been indicted and was a fugitive from justice; and, when the court in which the indictment was found has jurisdiction of the offence, (which there is nothing in this case to impugn,) is sufficient to make it the duty of the courts of the United States to decline interposition by writ of *habeas corpus*, and to leave the question of the lawfulness of the detention of the prisoner, in the State in which he was indicted, to be inquired into and determined, in the first instance, by the courts of the State, which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the Constitution and laws of the United States. *Robb* v. *Connolly*, 111 U. S. 624; *Ex parte Reggel*, 114 U. S. 642; *Roberts* v. *Reilly*, 116 U. S. 80; *Cook* v. *Hart*, 146 U. S. 183; *Pearce* v. *Texas*, 155 U. S. 311.

The return of the sheriff to the writ of *habeas corpus* does not (as it might well have done) set forth the indictment, and the warrant of extradition, as grounds for the detention of the prisoner. But any defect in the return in this respect affords no

reason why the courts of the United States should take the prisoner out of the custody of the authorities of the State.

The return does show that the petitioner is held in custody by the sheriff by virtue of a mittimus issued to him by a justice of the peace, in accordance with sections 962 and 1613 of the General Statutes of Connecticut of 1887,[1] which authorize the surety on a recognizance, either in civil or in criminal proceedings, upon making affidavit that his principal intends to abscond, to obtain from a justice of the peace a mittimus to commit him to jail.

The only objections taken by the petitioner to the sufficiency of this mittimus are, 1st, that it shows that the recognizance was entered into on the 17th of January, 1895, for his appearance "before the Superior Court to be holden at New Haven within and for the county of New Haven on the first Tuesday of January, 1895," which was a day already passed; and 2d, that it describes him as "of the town of Newton, State of Massachusetts," while the statute only authorizes the issue of a mittimus by "a justice of the peace of the county in which such principal resides." But the first Tuesday of January was the day appointed by law for the beginning of the term of the Superior Court. Conn. Gen. Stat. § 1615. And the question whether the recognizance might be construed as requiring an appearance at a subsequent day in the course of the term,

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[1] SEC. 962. Any bail or surety who has entered into a recognizance for the personal appearance of another, and shall afterwards believe that his principal intends to abscond, may apply to a justice of the peace in the county in which such principal resides, produce his bail bond, or evidence of his being bail or surety, and verify the reason of his application by oath or otherwise; and thereupon such justice shall forthwith grant a mittimus, directed to a proper officer or indifferent person of such county, commanding him forthwith to arrest such principal, and commit him to the jail of such county; and the keeper of such jail shall receive such principal, and retain him in jail until discharged by due order of law; and such surrender of the principal shall be a full discharge of the surety upon his bond or recognizance.

SEC. 1613. Any surety in a recognizance in criminal proceedings, who believes that his principal intends to abscond, may have the same remedy, and proceed and be discharged in the same manner, as sureties upon bail bonds in civil actions.

as well as the question whether the word "resides," as used in the statute, implies domicil, or only presence in the county, is a question which should be left to the decision of the courts of the State.

There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule, established by the decisions of this court, above cited, that a prisoner in custody under the authority of a State should not, except in a case of peculiar urgency, be discharged by a court or judge of the United States upon a writ of *habeas corpus*, in advance of any proceedings in the courts of the State to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several States, and with the performance by this court of its appropriate duties.

Order affirmed.

In re SANFORD FORK AND TOOL COMPANY, Petitioner.

ORIGINAL.

No. 8. Original. Submitted December 2, 1895. — Decided December 23, 1895.

When a case has once been decided by this court on appeal, and remanded to the Circuit Court, that court must execute the decree of this court according to the mandate. If it does not, its action may be controlled, either by a new appeal, or by writ of mandamus; but it may consider and decide any matters left open by the mandate, and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by the mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate.

When the Circuit Court, at a hearing upon exceptions to an answer in equity, sustains the exceptions, and (the defendant electing to stand by his answer) enters a final decree for the plaintiff; and this court, upon appeal, orders that decree to be reversed, and the cause remanded for further proceedings not inconsistent with its opinion; the plaintiff is entitled to file a replication, and may be allowed by the Circuit Court to amend his bill.

Statement of the Case.

This was a petition for a writ of mandamus to the Honorable William A. Woods, as Judge of the Circuit Court of the United States for the District of Indiana, to command him to enter, in a suit in equity pending before him, a final decree in favor of the present petitioners, defendants in that suit, in accordance with a mandate of this court upon reversing a decree of that court, on an appeal reported as *Sanford Fork & Tool Co.* v. *Howe, Brown & Co.*, 157 U. S. 312.

By the former opinion and mandate of this court, the petition for a mandamus, and the return to the rule to show cause, the case appeared to be as follows:

A bill in equity was filed in the Circuit Court of the United States for the District of Indiana, by creditors of the Sanford Fork and Tool Company, against that company and certain of its directors and stockholders, to set aside a mortgage made by the company to the other defendants to secure them for their indorsements of promissory notes of the company.

To that bill the defendants filed an answer under oath, insisting that the mortgage was valid; and the plaintiffs filed exceptions to the answer, upon the ground that the matters therein averred were insufficient to constitute a defence to the bill or to any part thereof, as well as upon the ground that the defendants had not duly answered specific allegations of the bill. The Circuit Court, held by Judge Woods, after hearing arguments upon those exceptions, sustained them; and the defendants declining to plead further, and electing to stand by their answer, the court, "having considered the pleadings, and being fully advised in the premises," entered a final decree, adjudging the mortgage to be void as against the plaintiffs, and granting them the relief prayed for.

The defendants appealed to this court, which, after hearing the appeal, delivered an opinion beginning thus: "In the absence of any testimony, and in the manner in which this case was submitted for decision, it must be assumed that the matters alleged in the bill and not denied in the answer, and the new matters set forth in the answer, are true. And the question which arises is, whether, upon these admitted facts, the decree in favor of the plaintiffs can be sustained." 157

U. S. 316. This court, for reasons stated in that opinion, held that the mortgage was valid, and, therefore, that the Circuit Court erred; and in the opinion, as well as by its mandate sent down to the Circuit Court, ordered the decree of that court to be "reversed, and the cause remanded to that court for further proceedings not inconsistent with the opinion of this court." The mandate concluded, in usual form, as follows: "You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding."

The defendants presented the mandate and a certified copy of the opinion of this court to the Circuit Court, held by Judge Woods; and moved for a final decree that the former decree of the Circuit Court be reversed; that the cause be held to have been submitted by the plaintiffs upon bill and answer; and that, upon the facts alleged in the bill and answer, the law is with the defendants, and the plaintiffs take nothing by their bill, and the defendants have judgment for their costs.

The Circuit Court overruled the motion of the defendants; and, on motion of the plaintiffs, granted leave to amend the bill; but stayed proceedings to enable the defendants to apply to this court for a writ of mandamus.

The petition to this court for a writ of mandamus alleged that the order of the Circuit Court, overruling the motion of the defendants for a final decree in their favor, and granting the motion of the plaintiffs for leave to amend their bill, was inconsistent with and in violation of the opinion, decree and mandate of this court; and prayed for a writ of mandamus to Judge Woods to grant the motion of the defendants, and to overrule the motion of the plaintiffs.

This court granted a rule to show cause, in the return to which Judge Woods stated that his action, complained of by the petitioners, arose upon his construction of the opinion and mandate of this court on reversing his former decree; and set forth his view of the matter as follows:

"Exceptions had been improperly sustained to the answer of defendants (petitioners). For this error, as respondent construes the opinion and mandate, the decree was reversed, and the cause remanded to the Circuit Court, with the usual directions for further proceedings there. Upon the return of the cause there, and after the erroneous decree had been set aside, but before other step was taken, petitioners moved for decree in their favor, on the ground that this court had treated the cause as having been submitted below on bill and answer, and that, this court having held the answer sufficient, it followed they were entitled to such decree. Respondent could not adopt that view, since it plainly was not what had occurred. There was no such submission of the cause below on bill and answer. Nor, in rendering the decree in favor of complainants, had respondent 'considered' the answer; but had, since sweeping exceptions had been sustained to it, treated it as out of the record, for any purpose of the decree — a fact plainly manifest in the record before this court on appeal. He could not, therefore, suppose that this court meant, in what is said upon this point, to hold more, or other, than that the answer was sufficient, and that he had erred in holding it insufficient.

"Respondent, therefore, having in view the rules of practice prescribed by this court for the government of the Circuit Court, held that since, if he had overruled the exceptions to the answer, complainants would have been entitled to file replication, as provided by Rule 66 in Equity, and, if they desired it, to have leave to amend their bill, under Rule 45, he did not, nor does, believe this court, in reversing the decree, meant to deprive complainants of these rights; but inferred rather, as the more reasonable and logical deduction, that, when the Circuit Court had retraced its steps to the point where the first error occurred, the parties would stand, in respect of the case, and of each other, as if, in the progress of the cause, it had but then arrived at that juncture. To hold, instead of this view, that complainants had, by their mistake in filing exceptions, or by the court's mistake in sustaining them, or by both things together, forfeited their right to have the cause proceed, when the errors had been corrected, in the

orderly manner indicated above, seemed and seems entirely illogical, and as, therefore, foreign to the purpose of this court. Respondent accordingly ruled that, when he retraced the steps held erroneous by this court, the cause should progress as if they had not been taken at all, and as if we were but now arrived at that point. To that end, he granted, when it was craved, leave to complainants to amend their bill, and would have entered the usual order against them to file replication on or before the next rule day, had not petitioners thereupon interposed their motion for stay of proceedings until this application could be heard here."

Judge Woods, in his return, declared himself ready, if his construction of the opinion and mandate should not accord with that of this court, to make and enter such order and decree, under its direction, as would carry out its opinion and mandate.

Mr. Alpheus H. Snow and *Mr. George A. Knight* for petitioners.

I. If this court, by its opinion, decree, and mandate had authorized any further proceedings after reversal except an entry of a decree by the court below in favor of the defendants on the bill and answer, it must necessarily have held that the Circuit Court had jurisdiction to receive and rule upon the so-called "exceptions to answer," which were, in fact, demurrers to the answer, and that it erred in its ruling on the so-called exceptions. The effect of the opinion, decree, and mandate, had such further proceedings been authorized, would have been to put this court in the position of having conferred jurisdiction upon the Circuit Courts of the United States to receive and rule upon a demurrer to a sworn answer in equity, and thus of having indirectly promulgated a new rule in equity setting aside the settled principle of equity practice which forbids that the sufficiency of an answer to constitute a defence to the bill should ever be tested.

This court, however, carefully guarded against such a result of its decision in this case by holding in its opinion that the

case had been decided and should be thereafter treated as if submitted on the bill and answer, and that the Circuit Court erred in its finding and decree on the facts stated in the bill and answer; and by issuing a mandate commanding the court below to proceed in conformity with the opinion and decree, plainly meaning to command the court below to set aside its decree in favor of the complainants on the bill and answer and to proceed to render a decree, in favor of the defendants on the bill and answer.

The writ of mandamus prayed for should issue to effectuate the plain language and purpose of the opinion, decree, and mandate.

It is evident that the decree of the court below is explicable on either one of two grounds, — that the court sustained the so-called "exceptions to answer" as a demurrer to the answer, and based its final decree on this interlocutory ruling and the refusal of defendants to plead farther; or that it treated the case as submitted for final decree on the bill and sworn answer by the election of the defendants to stand on their sworn answer and the acquiescence of the complainants therein. The decree is equally applicable to the previous recitals on either hypothesis, but the recital that the court "considered the pleadings" as the basis of its decree seems to point strongly to the conclusion that the court treated the case as submitted for final decree on the bill and answer, when it is remembered that the only "pleadings" which the court could have "considered" were the bill and answer, and that the answer was a sworn answer.

But the decree of the court below was not to be explained, when the cause came to this court on appeal, on the hypothesis that the court based its decree on an interlocutory ruling sustaining what was practically a demurrer to the answer, because this would be to assume that the court below had permitted an unauthorized pleading to be filed, and made a ruling upon such unauthorized pleading, and thus had done an act not merely erroneous, but beyond its jurisdiction.

Neither the general rules of equity practice nor the Rules in Equity established by this court for the guidance of the

Circuit Courts of the United States authorize any pleading whatever for the purpose of testing the sufficiency of an answer to constitute a defence to the bill. On the contrary, they describe clearly the proceedings subsequent to the answer which are authorized, and thus, by necessary implication, prohibit any other proceedings.

This court has held that the Circuit Courts of the United States have no authority or jurisdiction to receive on their files and rule upon a demurrer to an answer in equity, and that if a demurrer is filed, the case will be treated as if set down for hearing on bill and answer. *Banks* v. *Manchester*, 128 U. S. 244, 250.

II. Assuming (but by no means admitting) that the opinion, decree, and mandate of this court are open to a construction which would authorize the ruling of the respondent, as sole judge of the Circuit Court, counsel for petitioners cannot believe, as was claimed by counsel for the complainants in the Circuit Court, that this court intended that such construction should be placed upon them in order to relieve the complainants from the consequences of their mistake in filing their so-called "exceptions to answer," and in order to punish the defendants because they did not point out the mistake by filing a motion to strike the so-called "exceptions to answer" from the files. Had this court intended that any such construction should be placed upon the opinion, decree, and mandate, the effect of its decision would have been to hold that the parties by their agreement or acquiescence may set aside the settled rules of equity practice and confer jurisdiction on the Circuit Courts of the United States.

The complainants having had, by the action of the defendants in refusing to plead further, every benefit that they could have had, if they had elected to submit the case on bill and answer, there is no injustice done to them by holding them to the facts stated in the bill and answer; and the ruling of the respondent, as sole judge of the Circuit Court, opening up the case for a trial on the facts, is not to be upheld on the ground that it is necessary to prevent an injustice to complainants. If complainants had filed a general replication,

they could have had a trial on the facts. They elected not to do so, and filed an unauthorized pleading. There is no good reason why they should not take the consequences. It will not do to say that the defendants ought to have opened their eyes to the danger they were in, by filing a motion to strike out the unauthorized pleading, because such a statement, when sifted down, merely results in the conclusion, that if the parties agree, or do not disagree, that a demurrer may be filed to an answer in equity, this court will recognize such a pleading as one authorized by equity practice, and if it is of the opinion that the Circuit Court ruled erroneously on the demurrer, it will, by its mandate, direct the Circuit Court to proceed in the case in the same manner as the state court would proceed under like circumstances.

III. The rulings of the respondent, as judge, adverse to the petitioners, are not justified by the words of the mandate directing that "such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had." These words are not inconsistent with an entry by the Circuit Court of a final decree for the appellants. This court has held that a mandate framed in similar language may necessitate the entry of a final decree in favor of the appellants.

It was contended by counsel for complainants in the Circuit Court that the court was not justified in merely rendering a decree in favor of the defendants because the case was remanded for "further proceedings" in conformity with the opinion, and "according to right and justice and the laws of the United States," and the respondent, as judge, seemed to be influenced by this suggestion.

Exactly this argument has twice been made in this court, on a similar state of facts, and this court has held that the words of the mandate justified a final judgment. *Stewart* v. *Salamon*, 94 U. S. 434; *Gaines* v. *Rugg*, 148 U. S. 228.

IV. The method adopted by the petitioners to obtain a construction by this court of its mandate, of making an application for leave to file a petition for a writ of mandamus,

after notice, and of presenting therewith a verified petition to be filed, is authorized by the statutes of the United States and numerous decisions of this court. Such petition, upon leave being granted to file it, seems necessarily to be an advanced cause. If, however, a motion to advance the cause for hearing is necessary, the petitioners have complied with the requirement by incorporating such motion in their application for leave to file.

That the method of proceeding adopted by the petitioners to obtain a construction of its mandate is proper, is shown by the sections of the Statutes of the United States, and the decisions of this court, cited below: Rev. St. §§ 688, 716. *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *Gaines* v. *Rugg*, 148 U. S. 228; *In re Humes, Petitioner*, 149 U. S. 192; *In re City Bank, Petitioner*, 153 U. S. 246.

Mr. C. F. McNutt and *Mr. S. B. Davis* opposing.

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

When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. *Sibbald* v. *United States*, 12 Pet. 488, 492; *Texas & Pacific Railway* v. *Anderson*, 149 U. S. 237. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins* v.

Fourniquet, 14 How. 313, 330; *In re Washington & Georgetown Railroad*, 140 U. S. 91; *City Bank* v. *Hunter*, 152 U. S. 512; *City Bank, petitioner*, 153 U. S. 246. But the Circuit Court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley* v. *Morton*, 103 U. S. 764; *Mason* v. *Pewabic Co.*, 153 U. S. 361; *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 5 U. S. App. 97. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by its mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly. *Sibbald* v. *United States*, 12 Pet. 488, 493; *West* v. *Brashear*, 14 Pet. 51; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Gaines* v. *Rugg*, 148 U. S. 228, 238, 244.

In the case now before us, it is important, in determining what was heard and decided by the Circuit Court in the first instance, and by this court upon the appeal, to bear in mind the settled practice of courts of chancery, recognized and regulated by the rules established by this court for the Circuit Courts sitting in equity. Rev. Stat. §§ 916–918.

Upon the coming in of the defendant's answer, several courses are open to the plaintiff.

First. The plaintiff may, upon motion, without notice to the defendant, have leave to amend his bill, with or without the payment of costs, as the court may direct. Equity Rules 29, 45.

Second. The plaintiff may file exceptions to the answer for insufficiency. Equity Rule 61. If the defendant does not submit to the exceptions, and file an amended answer, the plaintiff may set down the exceptions for hearing. Equity Rule 63. If the exceptions are thereupon allowed by the court, the defendant must put in a full and complete answer; otherwise the plaintiff may take the bill, so far as the matter of the exceptions is concerned, as confessed. Equity Rule 64.

Third. If the answer is not excepted to, or if it is adjudged or deemed sufficient, the plaintiff may file a general replication; whereupon the cause is to be deemed, to all intents and

purposes, at issue, without further pleading on either side. Equity Rule 66.

Fourth. A demurrer to the answer is unknown in equity practice. But the plaintiff may set down the case for hearing upon bill and answer; whereupon all the facts alleged in the bill and not denied in the answer, as well as all new facts alleged in the answer, are deemed admitted, as upon a demurrer to an answer in an action at law. Equity Rule 41, as amended at December Term, 1871, 13 Wall. xi; Equity Rule 60; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380; *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405, 409; *Banks* v. *Manchester*, 128 U. S. 244, 250, 251.

For the purpose of the hearing upon exceptions to an answer, the facts alleged in the bill and in the answer must indeed be considered as admitted, and only matter of law is presented for decision, as in a case set down for hearing upon bill and answer. But the difference between the two cases is this: When a case in equity is set down for hearing on bill and answer, the whole case is presented for final decree in favor of either party. But when the matter set down for hearing is the plaintiff's exceptions to the answer, the case is not ripe for a final decree; the only question to be decided is the sufficiency of the answer; and no final decree can be entered against either party, unless it declines or omits to plead further.

In the present case, the plaintiffs, upon the coming in of the answer, neither moved for leave to amend the bill, nor filed a replication, nor set down the case for hearing upon bill and answer.

But they filed exceptions to the answer; and those exceptions only were set down for hearing, and were heard and passed upon by the court. While some of the exceptions were directed, as is usual, to the want of due answer to specific allegations of the bill, others of the exceptions related to the sufficiency of the whole answer to constitute any defence. Its sufficiency in the latter respect might properly have been questioned by setting down the case for hearing upon bill and answer. But neither for this nor for any other reason, was

any objection made to the exceptions as irregular or improper in form.

The Circuit Court, upon sustaining the exceptions, could not (unless the defendants chose to stand by their answer) enter a final decree against the defendants; or do anything more than order them to put in a full and complete answer, on pain of being held to have confessed the bill. If the Circuit Court, instead of sustaining the exceptions to the answer, had overruled those exceptions, the plaintiffs would have had the right to file a replication, and the bill could not be dismissed unless and until they neglected to file one.

When the decree of the Circuit Court, sustaining the plaintiffs' exceptions to the answer, and (because the defendants declined to plead further) granting to the plaintiffs the relief prayed for in the bill, was reversed by this court, the only matter which was or could be decided by this court, upon the record before it, was that the answer was sufficient. This court, in so deciding, could go no further than the Circuit Court could have done, had it made the like decision. Neither the Circuit Court, nor this court, upon adjudging that the answer was sufficient, could, without any consent or neglect on the part of the plaintiffs, deprive them of their right, under the general rules in equity, to file a replication.

Nor did this court undertake, either by its opinion or by its mandate, to preclude the plaintiffs from filing a replication. On the contrary, at the outset of the opinion, after observing that, in the manner in which the case was submitted for decision, the facts alleged in the bill and not denied in the answer, and the new facts alleged in the answer, must be assumed to be true, the question arising upon those admitted facts was stated to be "whether the decree in favor of the plaintiffs can be sustained;" and, while the opinion declared that, assuming those facts, the mortgage was valid, yet both the opinion and the mandate ordered no final judgment for the defendant, but only ordered the judgment for the plaintiff to be reversed, and the cause remanded to the Circuit Court for further proceedings not inconsistent with the opinion of this court.

Syllabus.

The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right in the plaintiffs to file a replication, putting the cause at issue, the Circuit Court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. *Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 218; *Neale* v. *Neales*, 9 Wall. 1; *Hardin* v. *Boyd*, 113 U. S. 756.

The case is quite different, in this respect, from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied on by the petitioner. *Stewart* v. *Salamon*, 94 U. S. 434, and 97 U. S. 361; *Gaines* v. *Rugg*, 148 U. S. 228; *Ex Parte Dubuque & Pacific Railroad*, 1 Wall. 69; *In re Washington & Georgetown Railroad*, 140 U. S. 91.

It must be remembered, however, that no question, once considered and decided by this court, can be reëxamined at any subsequent stage of the same case. *Clark* v. *Keith*, 106 U. S. 464; *Sibbald* v. *United States*, and *Texas & Pacific Railway* v. *Anderson*, cited at the beginning of this opinion.

Writ of mandamus denied.

CENTRAL RAILROAD COMPANY *v.* KEEGAN.

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

No. 373. Submitted December 3, 1894. — Decided December 23, 1895.

A force of five men, in the night service of a railroad company, was employed in uncoupling from the rear of trains cars which were to be sent elsewhere, and in attaching other cars in their places. The force was under the orders of O., who directed G. what cars to uncouple, and K. what cars

Statement of the Case.

to couple. As the train backed down, G. uncoupled a car as directed. K., in walking to the car which was to be attached to the train in its place, caught his foot in a switch and fell across the track. As the train was moving towards him he called out. The engine was stopped, but the rear car, having been uncoupled by G., continued moving on, and passed over him, inflicting severe injuries. K. sued the railroad company to recover damages for the injuries thus received. *Held*, that K. and O. were fellow-servants, and that the railroad company was not responsible for any negligence of O. in not placing himself at the brake of the uncoupled car.

The action below was brought by Keegan to recover damages for personal injuries sustained while acting as brakeman in the employ of the railroad company. Judgment having been rendered upon the verdict of a jury, in favor of Keegan, the company sued out a writ of error from the Circuit Court of Appeals for the Second Circuit. Two circuit judges, sitting as the court, differed in opinion upon questions of law arising, and thereupon certified two questions to this court. The certificate sets forth the following statement of facts:

"Five men — O'Brien, Keegan, Lally, Gooley, and Ward — were, on the night of the accident, (October 7, 1889,) in the service of the Central Railroad of New Jersey, and employed in its yard at Jersey City. They comprised what was called the 'night float drill crew,' the duty of such crews being to take cars from the tracks on which they had been left by incoming trains and place them on the floats, by which they were transported across the North River to the city of New York. The drill crews, like others employed in the same yard, received their general instructions from Dent, the yardmaster. The men composing such crews were hired by Dent and discharged by him, and he had the general charge of the yard and yardmen, and assigned them to their duties.

"The course of business was as follows: Dent, the yardmaster, gave to O'Brien drill slips — that is, slips of paper containing the numbers of the cars and the particular tracks leading to the floats on which these cars were to be placed. These float tracks were five in number and were connected, by switches, with the other tracks in the yard. The execution of this order required frequent switching of cars from one

set of tracks to another in order to sort out from arriving trains the particular car or cars to be placed on a particular float track. It also required the making up of trains of cars sometimes longer, sometimes shorter; their movement by the engine attached to them, forward or backward and at varying rates of speed; the braking, coupling, and uncoupling of the cars composing them. Ward was engineer. Lally had his post on some car near the engine in order to transmit to the engineer any signals received. He also helped the engineer with coal and water, and acted as brakeman. Keegan did the coupling; Gooley the uncoupling and acted as brakeman, while the turning of the switches was attended to by O'Brien. The direction of all these operations was with O'Brien, who is called in the evidence sometimes 'foreman driller,' sometimes 'conductor of the drill crew.' He was the one to direct what cars should be taken on by the engine, and when and where they should be moved to, when the movement should start, and where it should stop, and it was in obedience to his orders that one or another of the men employed in his crew went to one place or another and coupled or uncoupled particular cars. The general management of the operation was with him, and he had control over the persons employed therein.

"On the night of the accident Keegan, who had been relighting his lantern at the engine, which was then standing still, attached to several cars, walked to the rear end of the train. O'Brien and Gooley were standing there looking over the drill slip. There were some other cars standing on the same track, about 40 feet beyond the end of the cars to which the engine was attached. O'Brien told Gooley what cars were to be uncoupled. He then told Keegan to couple the train onto the cars beyond. Keegan took the coupling link of the rear car in his right hand, and, having signalled for the train to back slowly, walked towards the detached cars, with the rear end of the last car at his back. Before he reached them he caught his right foot in the guard rail of a switch, and at once called out to hold up the train. His call was heard and the engine stopped immediately. Gooley, however,

had already, on O'Brien's order, drawn the pin and thus uncoupled the cars indicated, so that when the engine pulled up it did not stop their backward movement. Neither Gooley nor O'Brien were on the cars thus moving backwards, so there was no one to check their motion by applying the brakes, and as a consequence the rear wheel passed over Keegan's leg, producing the injuries complained of.

"There was evidence tending to show that under circumstances such as these O'Brien or some one else should have been on the rear car of those moving backward, and the negligence complained of was his ordering defendant in error to couple cars which he had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond them without himself being on the moving cars or seeing that either Gooley or Lally were there to exercise control over their movement.

"The jury, by their verdict, found that O'Brien was negligent."

The questions of law arising from these facts, upon which the court desired instruction for the proper decision of the writ of error, were certified as follows: 1, whether the defendant in error and O'Brien were or were not fellow-servants; and, 2, whether from negligence of O'Brien in failing to place himself or some one else at the brake of the backwardly moving cars, the plaintiff in error is responsible.

Mr. Robert W. De Forest and *Mr. George Holmes* for plaintiff in error.

Mr. A. G. Vanderpoel for defendant in error.

Chicago, Milwaukee & St. Paul Railway v. *Ross*, 112 U. S. 337, stands as the law to-day. In that case the conductor of the freight train was present. In *Baltimore & Ohio Railroad* v. *Baugh*, 149 U. S. 368, there was no conductor present. *Northern Pacific Railroad* v. *Hambly*, 154 U. S. 349, may be regarded as the judicial construction of the relation of the *Baugh case* to the *Ross case*.

Opinion of the Court.

The test of liability of the master for the act of a servant is given in the *Ross case*, in the following words: "The conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what station it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders." These words are cited with approval in the *Baugh case*. In the *Hambly case* it is said, of the *Ross case:* "The case was decided not to be one of fellow service upon the ground that the conductor was in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. The court drew a distinction between servants of a corporation exercising no supervision over others engaged with them in the same employment and agents of a corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. In that particular case the court found that the conductor had entire control and management of the train to which he was assigned, directed at what time it should start, at what speed it should run, at what stations it should stop, and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. The word 'orders' referred to the orders of the conductor.

Under such circumstances he was held not to be a fellow-servant with the fireman, brakeman, and engineer, citing certain cases from Kentucky and Ohio."

O'Brien was a conductor, and the proximate cause of plaintiff's injury was his, O'Brien's, negligent order to Gooley to pull the pin, and it is respectfully submitted that the giving that order was a negligent masterial act in law.

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

We held in *Baltimore & Ohio Railroad Company* v. *Baugh*,

149 U. S. 368, than an engineer and fireman of a locomotive engine running alone on a railroad, without any train attached, when engaged on such duty, were fellow-servants of the railroad company, hence that the fireman was precluded from recovering damages from the company for injuries caused, during the running, by the negligence of the engineer. In that case it was declared that: "*Prima facie*, all who enter the employment of a single master are engaged in a common service, and are fellow-servants. . . . All enter in the service of the same master to further his interests in the one enterprise." And whilst we in that case recognized that the heads of separate and distinct departments of a diversified business may, under certain circumstances, be considered, with respect to employés under them, vice-principals or representatives of the master, as fully and as completely as if the entire business of the master was by him placed under the charge of one superintendent, we declined to affirm that each separate piece of work was a distinct department, and made the one having control of that piece of work a vice-principal or representative of the master. It was further declared that "the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it; each is equally with the other an ordinary risk of the employment," which the employé assumes when entering upon the employment, whether the risk be obvious or not. It was laid down that the rightful test to determine whether the negligence complained of was an ordinary risk of the employment was whether the negligent act constituted a breach of positive duty owing by the master, such as that of taking fair and reasonable precautions to surround his employés with fit and careful coworkers, and the furnishing to such employés of a reasonably safe place to work and reasonably safe tools or machinery with which to do the work, thus making the question of liability of an employer for an injury to his employé turn rather on the character of the alleged negligent act than on the relations of the employés to each other, so that, if the act is one done in the discharge of some positive duty of

the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor.

There is nothing in the later decision of this court in *Northern Pacific Railroad Company* v. *Hambly*, 154 U. S. 349, militating against the views expressed in the *Baugh case*. On the contrary, that case is approvingly referred to, (p. 359,) although said there to involve a different question from that which was in the *Hambly case*.

The principles thus applied, in the case referred to, are in perfect harmony with the rules enforced by the Supreme Court of the State of New Jersey, within whose territory the accident happened which gave rise to the present controversy.

In *O'Brien* v. *American Dredging Co.*, 53 N. J. Law, 291, 297, O'Brien sought to hold the company liable for an injury sustained by him while employed as a deck hand on one of their dredges, at the time used in dredging the James River, near Richmond, under a contract with the United States government. The ground of liability alleged was that the injury had been caused by the negligence of another employé, one Cannon, who was called the "captain" of the dredge. Cannon was authorized to employ men to work on the dredge, subject to the approval of the general superintendent, (who had his headquarters at the home office of the company,) who had power to disapprove or discharge them; the duty of the captain was to operate the dredge in said dredging; plaintiff was employed by Cannon as a deck hand on the dredge, and his duty was to aid in the operation of the dredge; and Cannon had charge of the men so employed and they were under him. The court held that while Cannon was entrusted with some authority to employ the workmen, yet with respect to the operation of the dredge in the prosecution of defendant's business, he was not a general superintendent, but a mere foreman of the gang of workmen, engaged with them in the execution of the master's work. He was a superior, and they

were inferior workmen, but all were employed in a common operation, though in different grades of service. In the course of the opinion, on the question of the risks which, it must be contemplated, are assumed by one entering the service of another, the court said:

"Whether the master retain the superintendence and management of his business, or withdraw himself from it and devolve it on a vice-principal or representative, it is quite apparent that, although the master or his representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be entrusted to workmen, and, where necessary, to groups or gangs of workmen, and in such case that one should be selected as the leader, boss, or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in that respect, in the precise position of his other fellow-servants."

Applying the principles announced by this court and the Supreme Court of New Jersey to the facts of the case at bar, it is clear that O'Brien and Keegan were fellow servants. O'Brien's duties were not even those of simple direction and superintendence over the operations of the drill crew; he was a component part of the crew, an active coworker in the manual work of switching, with the specific duty assigned to him by the yardmaster of turning the switches. He was subordinate to the yardmaster who had jurisdiction over this and other drill crews, and it was the yardmaster who employed and discharged all the workers in the yard, giving them their general instructions, and assigning them to their duties. O'Brien's control over the other members of the drill crew

was similar to the control which a section foreman exercises over the men in his section; and, following its construction of the decisions of this court in the *Baugh* and *Hambly cases*, the Circuit Court of Appeals for the Eighth Circuit has held that a section foreman is a fellow servant of a member of his crew, and that one of the crew injured by the negligence of the foreman could not recover. *Kansas & Arkansas Valley Railway* v. *Waters*, 70 Fed. Rep. 28.

In *Potter* v. *N. Y. Central & Hudson River Railroad*, 136 N. Y. 77, employés of a railroad company, while switching cars in the company's yard, under the direction of a yardmaster, shunted a number of cars onto a track so that they collided with a car being inspected, and caused the death of the inspector. It was claimed that proper and reasonable care required that there should have been a brakeman on the front of the cars to control in an emergency their motion, when detached from the engine. In the absence of allegation of proof to the contrary, the court presumed that competent and sufficient servants were employed, and proper regulations for the management of the business had been established, and observed (p. 82): "It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants of the railroad who are entrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employés is to provide competent coservants, and prescribe such regulations as experience shows may be best calculated to secure their safety."

We adopt this statement as proper to be applied to the case at bar. A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor.

These conclusions determine both questions certified for our decision, and, accordingly, the first question is answered in the affirmative, and the second in the negative.

So answered.

Mr. Chief Justice Fuller, Mr. Justice Field, and Mr Justice Harlan dissented.

MOORE *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

No. 719. Submitted November 20, 1895.— Decided December 23, 1895.

A count in an indictment which charges that the accused, "being then and there an assistant, clerk, or employé in or connected with the business or operations of the United States post office in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars, money of the United States, of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars, the said money being the personal property of the United States," is defective in that it does not further allege that such sum came into his possession in that capacity.

The count having been demurred to, and the demurrer having been overruled, the objection to it is not covered by Rev. Stat. § 1025, and is not cured by verdict.

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while, in larceny, the felonious intent must have existed at the time of the taking.

Plaintiff in error, late assistant postmaster of the city of Mobile, was indicted and convicted of embezzling certain moneys of the United States to the amount of $1652.59.

There were four counts in the indictment, to one of which a demurrer was sustained, and upon two others defendant was acquitted. The fourth count, upon which he was convicted, charged that "the said George S. Moore, being then and there an assistant, clerk, or employé in or connected with the busi-

ness or operations of the United States post office in the city of Mobile, in the State of Alabama, did embezzle the sum of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1652.59), money of the United States, of the value of sixteen hundred and fifty-two and $\frac{59}{100}$ dollars ($1652.59), the said money being the personal property of the United States."

Moore, having been sentenced to imprisonment at hard labor, sued out this writ of error.

Mr. M. D. Wickersham and *Mr. W. H. McIntosh* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

Defendant was indicted under the first section of the act of March 3, 1875, "to punish certain larcenies, and the receivers of stolen goods," 18 Stat. 479, which enacts "that any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony," etc.

The principal assignment of error is to the action of the court in overruling a demurrer to the fourth count of the indictment, which charges, in the words of the statute, that "the said George S. Moore, being then and there an assistant, clerk, or employé in or connected with the business or operations of the United States post office in the city of Mobile, in the State of Alabama, did embezzle the sum of . . . money of the United States, of the value of . . . the said money being the personal property of the United States."

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful,

or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

It is objected to the indictment in this case that there is no direct allegation that defendant was an assistant, clerk, or employé in or connected with the business or operations of the post office at Mobile; that the money of the United States is not identified or described, and that there is no allegation that it came into the possession of the defendant by virtue of his employment.

The act in question has never been interpreted by this court, nor has our attention been called to any case where it has received a construction in this particular, except that of *McCann* v. *United States*, 2 Wyoming, 274, decided in the territorial Supreme Court of Wyoming, in which the allegation was that "McCann, . . . at and within the district aforesaid, twenty thousand pounds of sugar . . . of the goods, chattels, and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal, and purloin," etc. This allegation was held to be defective in charging a mere legal conclusion, "leaving it impossible to determine whether the offence was committed, and the conclusion correct." It was said that the indictment for this offence must set forth the actual fiduciary relation and its breach; that the indictment did not identify the offence on the record; and did not secure the accused in his right to plead a former acquittal or conviction to a second prosecution for the offence. It was held that the words "to embezzle" were equivalent to the words "to commit embezzlement," and that a count in the words of the statute was not sufficient; that "all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant precisely and clearly within the statute; if that can be done by simply following the words of the statute, that will do; if not, other allegations must be used." The general principle here alluded to has been applied by this court in several cases. *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Cook*, 17 Wall. 168; *United States* v. *Cruikshank*, 92 U. S. 542.

In the case of *United States* v. *Northway*, 120 U. S. 327,

the word "embezzle" was recognized as having a settled technical meaning of its own, like the words "steal, take, and carry away," as used to define the offence of larceny. In this case the allegation was that the defendant "as such president and agent" (of a national bank) "then and there had and received in and into his possession certain of moneys and funds of said banking association . . . and then and there being in possession of the said" defendant "as such president and agent aforesaid, he, the said" defendant, "then and there . . . wrongly, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his . . . own use." In respect to this it was said to be quite clear that the allegation was sufficient, as it distinctly alleged that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. "This necessarily means," said the court, "that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and accurately describes the offence of embezzlement under the act by an officer and agent of the association."

In the case of *Claassen* v. *United States*, 142 U. S. 140, an allegation similar in substance and effect was also held to be sufficient. The indictment, said the court, "avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds, (fully described,) the property of the association; and that, with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged."

The cases reported from the English courts, and from the courts of the several States, have usually arisen under statutes limiting the offence to certain officers, clerks, agents, or servants of individuals or corporations, and the rulings that the

agency or fiduciary relation must be averred, as well as the fact that the money embezzled had come into the possession of the prisoner in that capacity, are not wholly applicable to a statute which extends to every person, regardless of his employment, or of the fact that the money had come into his possession by virtue of any office or fiduciary relation he happened to occupy. These cases undoubtedly hold, with great uniformity, that the relationship must be averred in the exact terms of the statute; that the property embezzled must be identified with great particularity; and that it must also be averred to have come into the possession of the prisoner by virtue of his fiduciary relation to the owner of the property.

Thus in *Commonwealth* v. *Smart*, 6 Gray, 15, it was held that an indictment which averred that the defendant "was entrusted" by the owner "with certain property, the same being the subject of larceny," (describing it,) "and to deliver the same to" the owner "on demand," and afterwards "refused to deliver said property to said" owner, "and feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded of him by said" owner, was fatally defective, by reason of omitting to state the purpose for which the defendant was entrusted with the property, or what property he fraudulently converted to his own use. So in *People* v. *Allen*, 5 Denio, 76, under a statute limiting the offence to *clerks* and *servants*, it was held that a count charging the defendant with having collected and received certain money as the *agent* of an individual was defective.

On the other hand, in *Lowenthal* v. *State*, 32 Alabama, 589, an indictment charging in the form prescribed by the code that the defendant, being agent or clerk of another, "embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars ($1800) . . . which came into his possession by virtue of his employment," was sufficient. See also *People* v. *Tomlinson*, 66 California, 344; *Commonwealth* v. *Hussey*, 111 Mass. 432. It was held, however, in *State* v. *Stimson*, 4 Zabr. (24 N. J. Law) 9, that it was not sufficient to describe the offence in the words of the statute, and that there should be some description either

of the number or denomination of the coins and of the notes, and also an averment of the value of the notes.

Indeed, the rulings in this class of cases became in some instances so strict, that statutes were passed in several of the States defining what should be necessary and sufficient in indictments for embezzlement. Thus, in the criminal code of Illinois, it is declared to be sufficient to allege, generally, in the indictment, an embezzlement, fraudulent conversion or taking, with intent to embezzle and convert funds of any person, bank, corporation, company, or copartnership, to a certain value or amount, without specifying any particulars of such embezzlement. Under this statute, it was held proper for the court to permit all the evidence of what the defendant did by reason of his confidential relations with the banking firm whose clerk he was, to go to the jury, and if the jury found, from the whole evidence, any funds or credits for money had been embezzled or fraudulently converted to his own use by defendant, it was sufficient to maintain the charge of embezzlement. "The view taken by the defence," said the court, "of this statute is too narrow and technical to be adopted. It has a broader meaning, and when correctly read, it will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused." *Ker* v. *People*, 110 Illinois, 627, 647.

The ordinary form of an indictment for larceny is that J. S., late of, etc., at, etc., in the county aforesaid, (specifying the property,) of the goods and chattels of one J. N. "feloniously did steal, take, and carry away." In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried away specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcenies of government property. It applies to "any person," and uses the words "embezzle, steal, or purloin" in the same connection, and as applicable to the same persons and to the same property. There can be no doubt that a count charging the prisoner

with stealing or purloining certain described goods, the property of the United States, would be sufficient, without further specification of the offence; but whether an indictment charging in such general terms that the prisoner "embezzled" the property of the government, (identifying it,) would be sufficient, we do not undertake to determine; although we think the rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employé of the post office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless and might even be misleading, since the defendant might be held for property received in a wholly different capacity — such, for instance, as a simple bailee of the government. In the absence of a statutory regulation the authorities upon this subject are practically uniform. Wharton's Crim. Law, § 1942; *Rex* v. *Snowley*, 4 Car. & P. 390; *Commonwealth* v. *Simpson*, 9 Met. 138; *People* v. *Sherman*, 10 Wend. 298; *Rex* v. *Prince*, 2 Car. & P. 517; *Rex* v. *Thorley*, 1 Mood. C. C. 343; *Rex* v. *Bakewell*, Russ. & Ry. 35.

On the other hand, if these words be rejected as surplusage and mere *descriptio personæ*, then the property embezzled should be identified with particularity, the general rule in the absence of a statute being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient. *Rex* v. *Furneaux*, Russ. & Ry. 335; *Rex* v. *Flower*, 5 B. & C. 736; *Commonwealth* v. *Sawtelle*, 11 Cush. 142; *People* v. *Bogart*, 36 California, 245; *People* v. *Cox*, 40 California, 275; *Barton* v. *State*, 29 Arkansas, 68; *State* v. *Thompson*, 42 Arkansas, 517; *State* v. *Ward*, 48 Arkansas, 36.

There are undoubtedly cases which hold that, where the crime consists, not in the embezzlement of a single definite quantity of coin or bills, but in a failure to account for a num-

ber of small sums received — a series of petty and continuous peculations — where it would be manifestly impossible, probably for the defendant himself, but much more for the prosecution, to tell of what the money embezzled consisted, an allegation of a particular amount is sufficient. These cases, however, are confined to public officers, or to the officers of corporations, and where the embezzlement consists of a single amount of property, the general rule above stated still holds good. The leading case upon this point is that of *People* v. *McKinney*, 10 Michigan, 54, 89. In this case the treasurer of the State of Michigan was charged with the embezzlement of four thousand dollars belonging to the State. It was held that, as the treasurer had by law the entire custody and management of the public money, with authority to receive such descriptions of funds as he chose, the public could exercise no control or constant supervision over him, and that it would be wholly impracticable to trace or identify the particular pieces of money or bills received by him, and hence, that the allegation of a certain amount was sufficient. This case has been followed by several others, and may be said to apply to all instances where it would be impracticable to set forth or identify the particular character of the property embezzled. *State* v. *Munch*, 22 Minnesota, 67; *State* v. *Ring*, 29 Minnesota, 78; *State* v. *Smith*, 13 Kansas, 274, 294; *State* v. *Carrick*, 16 Nevada, 120; *United States* v. *Bornemann*, 36 Fed. Rep. 257. In some jurisdictions, however, notably in England, California, Louisiana, and Massachusetts, the difficulty has been entirely remedied by statute. Greaves' Crim. Law, 156; *Rex* v. *Grove*, 1 Moody Cr. Cas. 447; *Commonwealth* v. *Butterick*, 100 Mass. 1; *Commonwealth* v. *Bennett*, 118 Mass. 443; *People* v. *Treadwell*, 69 California, 226; *State* v. *Thompson*, 32 La. Ann. 796.

If, then, the indictment in this case had charged that the defendant, being then and there assistant, clerk, or employé in or connected with the business or operations of the United States post office in the city of Mobile, embezzled the sum stated, and had further alleged that such sum came into his possession in that capacity, we should have held the indict-

ment sufficient, notwithstanding the general description of the property embezzled as consisting of so many dollars and cents. But, if the words charging him with being in the employ of the government be stricken out, then there would be nothing left to show why the property embezzled could not be identified with particularity, and the general rule above cited would apply. The indictment would then reduce itself to a simple allegation that the said George S. Moore, at a certain time and place, did embezzle the sum of $1652.59, money of the United States, of the value, etc., said money being the personal property of the United States, which generality of description would be clearly bad. As there was a demurrer to this count, which was overruled, we do not think the objection is covered by Rev. Stat. § 1025, or cured by the verdict.

As we hold the indictment in this case to be bad, we find it unnecessary to consider the other errors assigned.

The judgment of the court below is, therefore,

Reversed, and the case remanded with directions to quash the indictment.

KEANE *v.* BRYGGER.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 94. Argued December 4, 5, 1895. — Decided December 23, 1895.

A voluntary relinquishment of his entry by a homestead entryman made in 1864 was a relinquishment of his claim to the United States, and operated to restore the land to the public domain.

Prior to 1864 H. made a homestead entry of the land in controversy in this action. In February, 1864, he relinquished his right, title, and interest in the same. In March, 1864, the University Commissioners of Washington Territory, under the act of July 17, 1854, c. 84, selected this as part of the Territory's lands for university purposes, and on the 10th day of that month conveyed the tract to R., who, on the 4th of April, 1876, conveyed it to B. *Held*, that the title so acquired should prevail over a title acquired by homestead entry in October, 1888.

Statement of the Case.

THIS was an action for the possession of certain parcels of land in Washington Territory, brought in its third judicial district. The land constituted the southwest quarter of the northwest quarter of section eleven in township 25 north, of range 3 east, in King County, in that Territory.

The complaint alleged that one Johan Brygger was, in his lifetime, the owner in fee and entitled to the possession of the land described; that he died in that county and Territory on the 20th of November, 1888, the owner in fee and entitled to the possession of the premises; that he left a last will and testament, which was admitted to probate in the probate court of King County, in that Territory, on the 20th of December, 1888; that the plaintiff, Anna Sophia Brygger, was appointed executrix, and the plaintiff, Ole Schillestead, was appointed executor of the estate of decedent on the 20th day of December, 1888, and that both qualified and entered upon the discharge of their duties. The plaintiffs also alleged that the real property described was assets in their hands for the payment of debts and legacies and expenses of administration, and that they had been in possession of the same since their appointment, and that the decedent, at the time of his death, was in its possession, and had been in actual possession thereof for over ten years before his death; that a part of the dwelling-house of the decedent, in which his family resided, was on the property, and that there were on the land a large and costly barn and outhouses, and orchard and garden, and the same was surrounded with a fence, and was mostly improved. And the plaintiffs alleged that the defendant, on the 12th of February, A.D. 1889, opened the fences surrounding the land, and with servants and teams and lumber entered upon the same with the declared intention of building a house thereon and to claim the same, and announced his intention to hold the possession of all the described lands. They also alleged that Anna Sophia Brygger was not only executrix of the estate of said Johan Brygger, deceased, but the residuary devisee of all of his estate remaining after the payment of the legacies and bequests mentioned in the will of the decedent; that the plaintiffs' title to the land and the

claim to the possession thereof was as executors of the estate of Johan Brygger, deceased, and that the estate was unsettled, and that legacies, bequests, and expenses of administration were to be paid. That the defendant had threatened to continue the opening and breaking of the fences on the land, and to continue the hauling of lumber and other materials thereon, and to continue to enter the same by himself and servants, and to erect a house and other buildings thereon.

And the plaintiffs also averred that the orchard and garden and dwelling-house, outhouses, and barn were all thereby exposed to destruction or great damage by stock and the estate of Johan Brygger, deceased, to be greatly impaired; that the defendant was unable to answer in damages for the injury already done and that which was threatened by him, and that there was great danger that he would put the same into execution; and they asked for judgment for the recovery of the land and for an order restraining the defendant, his servants or agents, from interfering with their possession of the land or the improvements thereon, and restraining him or his servants from opening or breaking the fences or doing other damage thereto during the pendency of this litigation, and for their costs and disbursements to be taxed.

The complaint was filed on the 15th of February, 1889, and on the same day an order was issued by the court directing the defendant to show cause on a day named why a temporary restraining order should not be granted, and in the meantime enjoining him from opening or breaking down the fences enclosing the land, and from entering upon the same with wagons, teams, or otherwise, and from erecting a house or other structure thereon, and from interfering with the buildings or any of them upon the same.

On the 21st of February, 1889, the defendant filed an answer and counterclaim, protesting that the court had not jurisdiction over the subject-matter of the action, and, saving all his rights by reason of the want of such jurisdiction, yet for answer and defence, denied each and every allegation of the first and second paragraphs of the complaint, except the allegation as to the place and date of the death of Johan

Brygger; alleging that, as to the third paragraph, he had not sufficient knowledge or information upon which to form a belief respecting the allegations therein, and therefore denied each of them; and, answering the fourth paragraph, he denied that the real property therein referred to was assets in the hands of the plaintiffs or any of them for the payment of debts, legacies, and expenses of administration, or of any or either of said matters, or for any purpose whatever, or in any respect or manner whatever. He further denied that the plaintiffs had or that any or either of them had been in the possession of the real property since their or either of their appointment as executrix and executor respectively, as in the complaint set forth, if such appointment had been made, or at any time or at all, and alleged that if they had or any or either of them had been in such possession the same was at all times wrongful and unlawful and without any color of right. He further denied that Johan Brygger at the time of his death, or at any time or at all, was in possession of said real property, and alleged that if said Brygger ever was in such possession the same was at all times wrongful and unlawful and without any color of right. And also denied that Johan Brygger was in possession of said real property for over ten years before his death, or for ten years, or for any time, or at all, and alleged that if he ever was in such possession the same was wrongful and unlawful and without any color of right.

The defendant, further answering, alleged that if a part of the dwelling-house of Johan Brygger was on the said property the same was wrongfully and unlawfully placed there, and that if the barn, outhouses, orchard, and garden mentioned were upon the property, the same were and each of them was put there wrongfully and unlawfully, and without any color of right. And he denied that there was any fence surrounding the land, or that he opened fences surrounding the same, and alleged that the rails temporarily removed by him for the purpose of reaching the land had been wrongfully and unlawfully placed where they were, notwithstanding which he had restored the same to the position in which he had first found them.

And the defendant, answering the fifth paragraph, alleged

that he had not had sufficient knowledge or information upon which to form a belief respecting the allegations or any of them therein contained; wherefore he denied the same. And also denied that Johan Brygger ever had any title, legal, equitable, or otherwise, to the land or any part thereof, and denied that the estate of Johan Brygger had, or ever had, any right, title, interest, or claim in or to the land or any part thereof.

Answering the seventh paragraph of the complaint, the defendant denied that the orchard and garden and dwelling-house, outhouses, and barn therein mentioned were, or that any or either of them was, in the least exposed to destruction or damage by stock or otherwise, or to any injury or loss whatsoever by reason of anything done or intended or attempted by the defendant, and denied that the estate of Johan Brygger was thereby exposed in any manner to the least impairment or damage. And he further alleged that he had done and intended to do no damage whatsoever to any fence or fences on the land, if any there were, notwithstanding that the same, if any, had been wrongfully and unlawfully placed thereon without color of right.

Answering the eighth paragraph of the complaint, the defendant denied each and every allegation therein contained, and in particular that any injury had been done or threatened by him to any interest, property, or claim of the plaintiff, and denied that he had any intention to do such injury, and alleged that he was fully able to answer in damages for any injury which could or might arise from his occupation of the land.

And further answering the complaint, and as and for new matter constituting a first and separate defence thereto, the defendant alleged that on and before the 20th day of October, 1888, the land described in the complaint, and forty acres, according to the United States survey, was unappropriated public land of the United States; that on the date mentioned the defendant was the head of a family, over the age of twenty-one years, and was a citizen of the United States, and had never theretofore taken up or entered any public land of the United States under the homestead laws;

that on the date mentioned, being duly qualified, he tendered at the United States land office in Seattle his application to enter and appropriate the land described under the provisions of the homestead laws; that he made application for his exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person, and paid to the United States the legal fees in such cases prescribed, and was thereupon duly permitted to enter the land, and did on the day mentioned enter the same; that his entry of the land was thereupon duly made of record, and has ever since continued to be and now is a valid subsisting entry, and that six months have not elapsed since the appropriation of the land by him; and that neither Johan Brygger nor the plaintiffs, nor either of them, ever had or now have any right, title, or interest in the land or any part thereof.

To the fourth paragraph of the defendant's answer, the plaintiffs replied and denied that the possession of Johan Brygger, their testator, or their possession after his death, was wrongful or unlawful, or without color of right, and denied that the dwelling-house on the property described was wrongfully and unlawfully placed there, or that the barn, outhouses, orchard, and garden on the land were wrongfully or unlawfully placed there; also denied that the rails removed by the defendant had been wrongfully or unlawfully placed where they were; denied also that the defendant was not doing damage, and denied that he did not intend to do any damage to the fence or fences on the land.

In reply to the second defence and counterclaim, they denied that the land described in the first paragraph of the defence or counterclaim, being the same as that described in the complaint, was, on and before the 20th day of October, 1888, unappropriated and public land of the United States, and denied that the same had been unappropriated and public land since the 10th day of March, A.D. 1864.

In reply to the third paragraph of the defence, the plaintiffs denied that the defendant, on the 20th day of October, A.D. 1888, or at any other time, duly tendered to the United States

land office in Seattle or elsewhere his application to enter or take up or appropriate the land under the provisions of the homestead law.

In reply to paragraph four they denied that the defendant was duly permitted to enter the land under the provisions of the homestead law; and denied that his application or entry was duly made of record in the land office mentioned; and that the same had been since or continued to be and then was a valid or subsisting entry and appropriation of the land. And in reply to the seventh paragraph of the defence, they denied each and every allegation of the same.

On the 9th of August, 1890, the defendant requested the court to find the following facts:

1st. That on the 14th day of February, 1864, and on the 10th day of March, 1864, and at all times in February and March, 1864, the land in controversy was included in homestead entry No. 204, of Lemuel J. Holgate, and was included in and covered by his homestead entry until the 20th day of December, 1871. 2d. That on the 14th day of February, 1864, and on the 10th day of March, 1864, and on the 14th day of March, 1864, and at all times in February and March, 1864, Holgate was living upon the land as a homestead settler and entryman, and improving the same for the purpose of making it his permanent home, and did not leave the same until about December, 1864. 3d. That on the 4th day of April, 1889, the receiver of the United States land office at Seattle, Washington, transmitted to the defendant by unregistered mail, in care of his attorney, a letter to the effect that the Commissioner of the General Land Office held defendant's entry for cancellation, which letter was the first and only notice of the holding or decision given to defendant. 4th. That by No. 77 of the rules of practice in cases before the district land offices, the General Land Office, and the Department of the Interior in force at the time, the defendant had thirty (30) days, together with ten (10) days for transmission through the mail to him and from him, from the 4th day of April, 1889, for filing, either in the Seattle land office or in the office of the Commissioner of the General Land Office, a motion for re-

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hearing or review of the holding or decision of the Commissioner of the General Land Office; that within the period so allowed by that rule the defendant did file both in the Seattle land office and in the office of the Commissioner of the General Land Office a motion for rehearing and review of the holding and decision. 5th. That before the period had elapsed and on the 22d day of April, 1889, the Secretary of the Interior certified the land to the University of the Territory of Washington, which certification was subsequently entered of record under the seal of the Commissioner of the General Land Office on the 9th day of May, 1889, and before the period had elapsed within which defendant could legally file his motion for rehearing and review. 6th. That by reason of the certification of the land department the United States lost jurisdiction over the land. 7th. That by the loss of jurisdiction the defendant had no further remedy in the land department. 8th. That the complaint in this action was filed in this court on the 15th day of February, 1889, prior to the time of the certification and before the time had elapsed for the defendant to move for such rehearing and review, and before the land department had lost jurisdiction over the land, and while the title to the land was still in the United States. 9th. That on the 11th day of January, 1861, the legislative assembly of the Territory of Washington passed an act appointing Daniel Bagley, John Webster, and Edmund Carr a board of commissioners to select, locate, and dispose of lands reserved for university purposes in the Territory of Washington by the act of Congress of July 17, 1854.

And the defendant requested the court to find the following conclusions of law: 1st. That by reason of the homestead entry No. 204 of Lemuel J. Holgate remaining uncancelled on the records of the land department until December 20, 1871, the land did not become vacant public land of the United States and subject to selection for the University of the Territory of Washington until the last-named date. 2d. That upon that date it became vacant public land of the United States, and open to preëmption or homestead settlement, and was so vacant when the defendant filed his homestead entry

thereon. 3d. That by defendant's homestead entry the land was appropriated to him. 4th. That defendant's homestead entry was unlawfully cancelled. 5th. That the land was unlawfully certified by the land department to the Territory of Washington, and no right passed to the plaintiffs or to their testator, his grantors, by such certification. 6th. That the legal title to the land conveyed by that certification inures to the benefit of the defendant, and the plaintiffs hold the same in trust for him. 7th. That the defendant is entitled to a decree for the conveyance of the legal title to him, and for the dismissal of this action, and for the dissolution of the temporary restraining order heretofore issued in this cause.

The issues involved in this cause came on to a hearing on the 18th and 19th days of June, 1890, in the Superior Court of King County, State of Washington, upon the pleadings and evidence taken, and the court found that said tract of land was selected by the Territory of Washington, through its university commissioners, on the 10th day of March, 1864, as university lands, and that the university commissioners did, upon that date, execute and deliver to one John Ross a deed to the land in controversy for the consideration of two hundred and forty dollars, paid by him to them; that on the 4th day of April, A.D. 1876, Ross sold and conveyed the lands by deed to Johan Brygger, the testator herein, and that both of the deeds were duly recorded; that prior to the year 1864 one Lemuel Holgate had made a homestead filing on the land in controversy, but that he had relinquished his right, title, and interest in and to the same in the month of February, 1864; that the university commissioners filed a list of such selections in the local land office in the Territory, which list was known and recognized in the land department of the government as list number two, and that the same was filed in the proper local land office in March, 1867, and that in that list the land was located and selected for university purposes; that on the 22d day of April, A.D. 1889, the Secretary of the Interior issued his certificate under the act of Congress approved March 14, 1864, after due proof, including the land in controversy, and approving the same as a grant in fee simple

to the Territory, and to its vendees, under and by virtue of said act; that on or about October 20, A.D. 1888, the plaintiff in error entered his homestead filing in the land office at Seattle, on the land in controversy, and that in February, 1889, he took up his residence on a portion of the land and erected a building on the same; that prior to the erection of that building defendants in error notified him of their rights, claims, and titles to the land.

Mr. James K. Redington and *Mr. Samuel Field Phillips* for plaintiff in error. *Mr. Frederic D. McKenney* was on the brief.

Mr. Charles K. Jenner for defendant in error. *Mr. Louis Henry Legg* was on the brief.

MR. JUSTICE FIELD, after stating the facts as above and referring to the act of Congress mentioned, reserving to the States, respectively, certain lands for university purposes and authorizing each of the States named to appoint commissioners for the selection and location of such lands, delivered the opinion of the court, as follows:

The contest between the parties to the premises in controversy arises from a claim made by each of them to a segregation of a portion of such lands for a homestead under the act of Congress of July 17, 1854, c. 84, 10 Stat. 305.

By the fourth section of that act it is provided: "That, in lieu of the two townships of land granted to the Territory of Oregon by the tenth section of the act of eighteen hundred and fifty, for universities, there shall be reserved to each of the Territories of Washington and Oregon two townships of land of thirty-six sections each, to be selected in legal subdivisions, for university purposes, under direction of the legislatures of said Territories, respectively."

On the 11th day of January, 1861, the legislative assembly of the Territory of Washington passed an act appointing a board of commissioners to select, locate, and dispose of lands

reserved for university purposes in the Territory of Washington by the act of Congress quoted.

It appears, from an examination of the proceedings, read in connection with the legislation of Congress and the action of the commissioners of the State, that a doubt was created as to the legality of the conveyance by the commissioners of the land in controversy, to John Ross, from the fact that previous to that conveyance one Lemuel J. Holgate had filed upon and entered, as a homestead, the land described, which was not cancelled until December 20, 1871. It appears that Holgate executed a relinquishment of his homestead entry upon the land previous to the execution by the commissioners of their conveyance of the same to John Ross. That relinquishment was executed and delivered in February, 1864, and the selection of lands by the university commissioners was on the 10th day of March, 1864. But it is contended by the plaintiff that the relinquishment was in effect a quitclaim from Holgate to Ross, as there was no provision for a voluntary relinquishment prior to May 14, 1880, and that the only way by which lands once filed on under the homestead acts could be restored to the public domain was either by lapse of time or by contest.

But this position is not sustained by the judgment of the Secretary of the Interior, nor was it in harmony with the rulings of the land department. In its legal effect the relinquishment by Holgate was to the United States.

Section 1 of the act of May 14, 1880, c. 89, 21 Stat. 140, provides "that when a preëmption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office;" and, as held by the Commissioner, the effect of the law was to give authority to local land officers to cancel the entry at once without awaiting the action of the Commissioner of the General Land Office as had been preceding that time its custom.

As stated by the Commissioner, it had previously been the

uniform practice of the land department to cancel entries on the voluntary relinquishment of the entryman, and it would be a strange doctrine to announce that a party did not have the right to relinquish any right that he had to or in any property, and that it was the intention of the government to compel its citizens to go to the expense and delay of a contest to extinguish an interest of another citizen who was willing to make a disclaimer of that interest.

He very justly remarks that the object of the homestead law was to furnish homes to the citizens of the government and to encourage the settlement of its public domain, and to make the accession of these homes as easy and cheap as possible, and not to wantonly and senselessly place obstructions in the way of such acquisition. He observed that it is the policy of the government to protect the rights of the homestead claimant while he is endeavoring to comply with the requirements of the law; but when the government becomes satisfied that there has been an abandonment of such right by the applicant, the entry will be cancelled, and the land will be subject to the reëntry of some one who will comply with the law, and that the question whether or not there has been an abandonment must be determined, like every other question of the kind, by evidence, and there certainly could be no higher or more convincing testimony than the testimony of the applicant himself, by a formal relinquishment of his rights to the land endorsed on his original receipt and filed in the land office. Secretary Teller well said that the fact that Holgate's relinquishment was not returned to and noted on the records of the land office until 1871 showed irregularity on the part of the local officers but could not affect the rights of the university.

It appearing, therefore, that the action of the board of university commissioners, in conveying to John Ross the land involved in this case, who subsequently conveyed it to Johan Brygger, under whose will the appellees claim title to the same, was in conformity with the act of Congress of July 17, 1854, 10 Stat. 305, § 4, and the amendatory act of March 14, 1864, c. 31, 13 Stat. 28, this court finds no error in the decision

of the Supreme Court of the State of Washington, and its judgment is hereby

Affirmed.

JERSEY CITY AND BERGEN RAILROAD COMPANY *v.* MORGAN.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW JERSEY.

No. 97. Submitted December 2, 1895. — Decided December 23, 1895.

In an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defence was that a silver coin, offered by him in payment of his fare, was so abraded as to be no longer legal tender. The Supreme Court of the State, after referring to the Congressional legislation on the subject, held that, "so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value." The railroad company, although denying the plaintiff's claim, set up no right under any statute of the United States in reference to the effect of the reduction in weight of silver coin by natural abrasion. Judgment being given for plaintiff, the railroad company sued out a writ of error for its review. *Held,* that this court was without jurisdiction.

This was an action of trespass brought by James E. Morgan against the Jersey City and Bergen Railroad Company in the Circuit Court of Hudson County, New Jersey, to recover damages for his ejection from a street car of the company by the conductor thereof. The defendant pleaded the general issue and a special plea of *mollitur manus imposuit* in defence of possession, to which plaintiff filed a replication *de injuria.* Issues were joined accordingly. There was verdict and judgment for plaintiff, which was affirmed on error by the Supreme Court, 52 N. J. Law, 60; that judgment was affirmed by the Court of Errors and Appeals for the reasons given by the court below, Id. 558; the record remitted to the Supreme Court; and this writ of error allowed.

The facts were that the company was running a horse car railroad in certain streets of Jersey City; that plaintiff and his

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wife entered one of the cars, and, after riding a short distance, plaintiff handed to the conductor a ten cent piece, which was the requisite amount for two fares, but the conductor refused to receive the coin because it was worn smooth. Plaintiff protested, paid his wife's fare of five cents, and, on refusal to pay for himself with any other money than the dime he had offered, was ejected from the car. Thereupon this action was brought. The foregoing facts were proven, and, as stated by the Supreme Court, the coin was shown to the jury, and it did not appear in the evidence to have been so worn that it was light in weight or not distinguishable as a genuine dime; nor was it defaced, cut, or mutilated, but only made smooth by constant and long continued handling while being circulated as part of the national currency. At the close of the evidence, defendant's counsel asked the court "to direct the jury to bring in a verdict for defendant on the ground that the coin was not a current coin, one that was not mutilated, a perfect coin, one that is worth its face value." The trial judge remarked: "It is not mutilated in the ordinary sense. Mutilation implies the taking away of some part. It is not mutilated in the ordinary sense of the term; a portion of it is gone only by use, by currency, and that happens to any coin after it has passed through numerous hands. How soon after use, such use as the government intends — how soon does the coin cease to be coin? I have looked into the statutes and am unable to find any limitation upon the legal tender character of silver coin; there is an express limitation on the gold coin, and that is when its circulation has resulted in the loss of one-half of one per cent of its standard weight for 20 years of circulation. But that limitation does not extend to silver coin, and the provision of the statutes is that silver coin shall be lawful tender so long as it remains lawful money of the country;" and overruled the motion to direct the verdict for the defendant, who excepted. The judge charged the jury, among other things, as follows: "The first question to decide is whether the plaintiff tendered his lawful fare. He tendered this ten cent piece, a genuine and recognizable coin of the

United States, and that was his lawful fare, provided you believe that the coin is in the condition in which it was when issued from the mint, except as it has been changed by proper use. If there has been no other abrasion, no other wearing away, no other defacement of that coin, except such as it has received in passing from hand to hand, then it is still, under the laws of the country, a good ten cent piece, and was the fare of the plaintiff. If you think it has been otherwise changed, wilfully changed, by being rubbed or in any other way, why, then, it has ceased to be a lawful coin of the country; it has ceased to be lawful tender. This distinction rests upon the idea that the government issues this coin for circulation, and if the government does not choose to put any limit upon the circulation it shall receive it continues to be legal tender just as long as it is circulating and receiving only such injury as circulation gives. Every piece of money that passes through our hands is to some extent abraded thereby, and the government knows and expects that its coin will be abraded, will be worn, and will be in that way defaced, and the government does not withdraw coin that is only defaced in that way; it is still a legal tender. But if anybody chooses to resort to any other means of defacement, then the government does not any longer sanction that coin. But so long as it is only defaced by lawful use, this coin remains good current coin and lawful tender for all debts. Now if you believe that is the character of this ten cent piece, then this plaintiff lawfully tendered his fare. If you do not believe it is of that sort, then plaintiff did not lawfully tender his fare."

To this portion of the charge defendant excepted.

The following are sections of the Revised Statutes:

"SEC. 3505. Any gold coins of the United States, if reduced in weight by natural abrasion not more than one-half of one per centum below the standard weight prescribed by law, after a circulation of twenty years, as shown by the date of coinage, and at a ratable proportion for any period less than twenty years, shall be received at their nominal value by the United States Treasury and its offices, under such regulations as the Secretary of the Treasury may prescribe for the

protection of the government against fraudulent abrasion or other practices."

"SEC. 3511. The gold coins of the United States shall be a one dollar piece, which, at the standard weight of twenty-five and eight tenths grains, shall be the unit of value; a quarter eagle, or two and a half dollar piece; a three dollar piece; a half eagle, or five dollar piece; an eagle, or ten dollar piece; and a double eagle, or twenty dollar piece. And the standard weight of the gold dollar shall be twenty-five and eight tenths grains; of the quarter eagle, or two and a half dollar piece, sixty-four and a half grains; of the three dollar piece, seventy-seven and four tenths grains; of the half eagle, or five dollar piece, one hundred and twenty-nine grains; of the eagle, or ten dollar piece, two hundred and fifty-eight grains; of the double eagle, or twenty dollar piece, five hundred and sixteen grains."

[Section 3513 enumerates the dime or ten cent piece among the silver coins of the United States.]

"SEC. 3585. The gold coins of the United States shall be a legal tender in all payments at their nominal value when not below the standard weight and limit of tolerance provided by law for the single piece, and, when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight."

"SEC. 3586. The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment."

The first and third sections of the act of June 9, 1879, c. 12, 21 Stat. 7, are as follows:

"That the holder of any of the silver coins of the United States of smaller denominations than one dollar, may, on presentation of the same in sums of twenty dollars, or any multiple thereof, at the office of the Treasurer or any assistant treasurer of the United States, receive therefor lawful money of the United States."

"SEC. 3. That the present silver coins of the United States of smaller denominations than one dollar shall hereafter be a legal tender in all sums not exceeding ten dollars in full payment of all dues, public and private."

Mr. A. Q. Garretson for plaintiff in error.

Mr. Thomas J. Kennedy for defendant in error.

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

The Supreme Court of New Jersey, after referring to the legislation of Congress above quoted, said: "This particularity in the limitation and allowance as to gold coin, is not found in the case of natural abrasion in silver coin. This difference is very noticeable and important in a question of statutory construction and legislative intention. It seems by these statutes, that so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value. *United States* v. *Lissner*, 12 Fed. Rep. 840." The instructions of the trial court were, therefore, sustained and the judgment affirmed.

By section 709 of the Revised Statutes a final judgment or decree in any suit in the highest court of a State in which a decision could be had, may be reëxamined and reversed or affirmed in this court upon a writ of error, where, among other things, "any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority." Neither in defendant's pleadings, nor in the motion to direct the jury to find for defendant, nor in the objection and exception to the instructions, was any such right specially set up or claimed. The claim which defendant now states it relied on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged,

the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. *Missouri* v. *Andriano*, 138 U. S. 496, and cases cited. And, although denying plaintiff's claim, defendant did not pretend to set up any right it had under any statute of the United States in reference to the effect of reduction in weight of silver coin by natural abrasion.

No other ground of jurisdiction under section 709 is suggested, and this is insufficient to maintain it.

Writ of error dismissed.

KOHL *v.* LEHLBACK.

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

No. 650. Argued December 13, 1895. — Decided December 23, 1895.

In a petition for a writ of *habeas corpus*, verified by the petitioner's oath as required by Rev. Stat. § 754, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence; but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.

General allegations in such a petition that the petitioner is detained in violation of the Constitution and laws of the United States or of the particular State, and is held without due process of law, are averments of conclusions of law, and not of matters of fact.

It is for the state court, having jurisdiction of the offence charged in a proceeding before it, and of the accused, to determine whether the indictment sufficiently charges the offence of murder in the first degree. *Bergemann* v. *Backer*, 157 U. S. 655, affirmed and applied.

Independently of constitutional or statutory provisions allowing it, an appeal to a higher court of a State from a judgment of conviction in a lower court is not a matter of absolute right; and as it may be accorded upon such terms as the State thinks proper, the refusal to grant a writ of error or to stay an execution does not warrant a Federal court to interfere in the prisoner's behalf by writ of *habeas corpus*.

When one of the jury by which a person accused of murder is convicted is an alien, and the accused takes no exception to his acting as a juror and makes no challenge, and on trial is convicted and sentenced, it is for

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the state court to determine whether the verdict shall be set aside, since as the disqualification of alienage is only cause of challenge, which may be waived, either voluntarily, or through negligence, or through want of knowledge.

This was an appeal from an order of the Circuit Court of the United States for the District of New Jersey, entered May 16, 1895, denying a writ of *habeas corpus* on the petition of Henry Kohl therefor. Petitioner represented that he was indicted in the court of oyer and terminer and general jail delivery of Essex County, New Jersey, for the crime of murder, in December, 1894; that he moved to quash the indictment, which motion was denied, and an exception duly taken; that his trial commenced January 14 and ended January 25, 1895, in the rendition of a verdict of murder in the first degree; that on February 12 application was made for a new trial, and rule to show cause was granted and discharged February 14, 1895; that he was sentenced, February 21, to be hanged on March 21, 1895; and that he was unlawfully held in imprisonment by Herman Lehlback, sheriff of Essex County, by virtue of said sentence.

It was also averred that "Samuel Ader, a juror on the jury that convicted your petitioner, is not and never was a citizen of the United States of America;" and that petitioner was restrained of his liberty in violation of the Constitution and laws of the United States and of the State of New Jersey in that petitioner was indicted for an offence having no existence under the laws of New Jersey, which recognized no such crime as murder, the common law crime of murder having been divided by statute into two degrees, and the indictment not having distinctly set out the statutory crime.

Petitioner further showed that on the twenty-seventh day of February application for a writ of error was made to the Chancellor of New Jersey, which was denied, and "that an appeal had been duly taken from the order of the said chancellor to the Court of Errors and Appeals, where such appeals are reviewable, and said appeal is now pending in said Court of Errors and Appeals in the State of New Jersey." It was further represented that petitioner was entitled, and

Counsel for Parties.

desired, to have the verdict and all the proceedings on his trial, various objections and exceptions thereto having been made and taken, adjudicated by the highest courts of New Jersey; "that on the sixth day of April last past, your petitioner's counsel, in open court, in the said Essex oyer and terminer, in the presence of the prosecutor, presented a writ of error, signed by the clerk of the Supreme Court of New Jersey, sealed with the seal of said court, from the said Supreme Court to the said oyer and terminer; that the said court would not allow the writ, but permitted it to be filed with the clerk of said court. That said writ was presented under and by virtue of the act of 1881 of New Jersey. That the said act is valid and effectual; that the act of 1878 of New Jersey made writs of error writs of right in all cases;" and further, "that the presiding judge of the said oyer and terminer court has instructed the clerk of Essex County, who is the clerk of said oyer and terminer, not to furnish your petitioner's counsel with a copy of the record and proceedings in this case; that the Supreme Court of New Jersey has refused your petitioner a stay of execution, and your petitioner has exhausted all remedies in the state court."

The petition then assigned in repetition the several grounds, on which it was contended that the conviction was unlawful, to the effect that the indictment was insufficient; that petitioner had been denied by the State of New Jersey the equal protection of the laws; and that petitioner's conviction not only was in violation of the laws of New Jersey but of the Fourteenth Amendment of the Constitution of the United States, because not by due process of law. And it was further alleged that, under and by virtue of the sentence, the sheriff of Essex County threatened to execute the sentence of death on petitioner, May 16, to which time he had been reprieved.

Mr. Arthur English for appellant. *Mr. Thomas S. Henry* was on his brief.

Mr. Elvin W. Crane for appellee.

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

In *Whitten* v. *Tomlinson*, *ante*, 231, the power vested in the courts and judges of the United States to grant writs of *habeas corpus* for the purpose of inquiring into the cause of the restraint of liberty of persons held in custody under state authority, in alleged violation of the Constitution, laws, or treaties of the United States, is considered, and the principles which should govern their action in the exercise of this power stated; and attention is there called to the necessary and settled rule that, "in a petition for a writ of *habeas corpus*, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence, but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous;" and that "the general allegations in the petition, that the petitioner is detained in violation of the Constitution and laws of the United States, and of the constitution and laws of the particular State, and is held without due process of law, are averments of mere conclusions of law, and not of matters of fact. *Cuddy's case*, 131 U. S. 280, 286."

1. Having jurisdiction of the offence charged and of the accused, it was for the state courts to determine whether the indictment in this case sufficiently charged the crime of murder in the first degree. *Caldwell* v. *Texas*, 137 U. S. 692, 698; *Bergemann* v. *Backer*, 157 U. S. 655.

In the latter case, it was decided, in reference to a similar objection to the indictment to that made here, and upon an examination of the statutes and judicial decisions of the highest courts of New Jersey, that it could not be held that the accused was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the Fourteenth Amendment to the Constitution. *Graves* v. *State*, 45 N. J. Law, 203; *S. C.* on appeal, 45 N. J. Law, 358; *Titus* v. *State*, 49 N. J. Law, 36. We do not deem it necessary to reconsider in this case the conclusion there reached.

2. In *McKane* v. *Durston*, 153 U. S. 684, we held that an appeal to a higher court from a judgment of conviction is not a matter of absolute right independently of constitutional or statutory provisions allowing it, and that a State may accord it to a person convicted of crime upon such terms as it thinks proper; and in *Bergemann* v. *Backer*, *supra*, that the refusal of the courts of New Jersey to grant a writ of error to a person convicted of murder, or to stay the execution of a sentence, will not itself warrant a court of the United States in interfering in his behalf by writ of *habeas corpus*.

Appellant insists that he has been denied the equal protection of the laws because he has been deprived of a writ of error for the review of the record and proceedings in his case in violation of the laws of New Jersey.

Section 83 of the Criminal Procedure Act of New Jersey, brought forward from section 13 of an act of March 6, 1795, (Paterson's Laws N. J. 162,) provided that "writs of error in all criminal cases not punishable with death, shall be considered as writs of right, and issue of course; and in criminal cases punishable with death, writs of error shall be considered as writs of grace, and shall not issue but by order of the chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney general or the prosecutor for the State." Revision of New Jersey, 283. By an act approved March 12, 1878, this section was amended so as to read: "Writs of error in all criminal cases shall be considered as writs of right and issue of course; but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the Court of Errors and Appeals alone, and shall be heard and determined at the term of said court next after the judgment of the court below, unless for good reasons the Court of Errors and Appeals shall continue the cause to any subsequent term." Supp. Rev. N. J. 209, 210.

In *Entries* v. *State*, 47 N. J. Law, 140, a writ of error under this act was dismissed by the Court of Errors and Appeals, the court holding that such a writ would not go directly from that court to the oyer and terminer, and that "the legislature cannot sanction such a proceeding, as it is one of the preroga-

tives of the Supreme Court to exercise, in the first instance, jurisdiction in such cases."

By an act of March 9, 1881, it was provided in the first section that "in case a writ of error shall be brought to remove any judgment rendered in any criminal action or proceeding, in any court of this State, and such writ of error shall be presented to such court, the said writ of error shall have the effect of staying all proceedings upon the said judgment, and upon the sentence which the court or any judge thereof may have pronounced against the person or persons obtaining and prosecuting the said writ of error, pending and during the prosecution of such writ of error;" and by the second section, that pending the prosecution of such writ of error, the court may require the party prosecuting the writ to give bail, "*provided*, that this section of this act shall not apply to capital cases." Supp. Rev. 210. And by an act passed May 9, 1894, it was provided that the entire record of the proceedings on the trial of any criminal cause might be returned by the plaintiff in error with the writ of error and form part thereof, and if it appeared from said record that the plaintiff in error had suffered manifest wrong or injury in the matters therein referred to, the appellate court might order a new trial. Laws of N. J. 1894, 246.

Clearly whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under these various acts, unless allowed by the chancellor of the State under section 83 of the Criminal Procedure Act, and if so, under what circumstances and on what conditions, are matters for the state courts to determine. Petitioner alleged that an appeal from the chancellor's order refusing a writ of error was pending in the Court of Errors and Appeals, and also that a writ of error signed by the clerk of the Supreme Court of New Jersey and sealed with the seal of that court, from the Supreme Court to the oyer and terminer, had been presented to the latter court under the act of 1881, but that the court of oyer and terminer would not allow the writ and instructed its clerk not to furnish a copy of the record and proceedings. It is, however, averred that the Supreme Court had refused a stay

of execution, so that it would appear that if that court really issued a writ of error, it had either arrived at the conclusion that this was improvidently done or that for other reasons it could not be maintained.

And the petition set up no action by the Supreme Court to compel its writ to be respected and no effort on petitioner's part to procure such action, nor any effort to supply a copy of the record and proceedings. *Ableman* v. *Booth*, 21 How. 506, 512.

The averments in reference to this matter are so vague and indefinite that interference might well be declined for that reason. At all events, inasmuch as the right of review in an appellate court is purely a matter of state concern, we can neither anticipate nor overrule the action of the state courts in that regard, since a denial of the right altogether would constitute no violation of the Constitution of the United States. What petitioner asks us to do is to construe the laws of New Jersey for ourselves, hold that they give a writ of error to the Supreme Court, and discharge petitioner on the ground either that the courts of New Jersey have arrived at a different conclusion and denied the writ, or have granted it and refused to make it effectual. In either aspect, we are unable thus to revise the proceedings in those courts.

3. It is further contended that petitioner was denied due process of law and the equal protection of the laws in that one of the jurors by whom he was tried was an alien. The allegation of the petition is "that Samuel Ader, a juror on the jury that convicted your petitioner, is not and never was a citizen of the United States of America."

Nothing is said as to when this matter came to petitioner's knowledge, and for aught that appears, it may have been inquired into by the courts of New Jersey, and the fact determined to be otherwise than alleged, or the objection may have been raised after verdict and overruled because coming too late. The statute of New Jersey provides that every petit juror returned for the trial of any action of a criminal nature shall be a citizen of the State, and resident within the county from which he shall be taken, and above the age of twenty-

one and under the age of sixty-five years; and if any person, who is not so qualified, shall be summoned as a juror on a trial of any such action in any of the courts of the State, it shall be good cause of challenge to any such juror, "*provided*, that no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn or affirmed." Revision N. J. 532. This proviso is brought forward from an act of November 10, 1797, (Acts 22d Gen. Ass. N. J., 1797, 250). The constitution of New Jersey of 1776 provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." And the constitution of 1844 declares that "the right of trial by jury shall remain inviolate." It is urged that the above mentioned proviso, which has been part of the laws of New Jersey for nearly one hundred years, should now be held by this court contrary to the constitution of that State, although the courts of the State may have held it in this case in harmony therewith, and have certainly not pronounced it invalid.

The line of argument seems to be that by the common law as obtaining in New Jersey an alien was disqualified from serving on a jury; that the disqualification was absolute; that the common law could not be changed in that particular under the state constitution; that the proviso was, therefore, void; and that, if an alien sat upon a jury, the common law right of trial by jury would have been invaded. So far as the petition shows, this contention may have been disposed of adversely to petitioner by the state courts; and, moreover, we are of opinion that in itself it cannot be sustained as involving an infraction of the Constitution of the United States.

In *Hollingsworth* v. *Duane*, reported in Wallace C. C. Reports, 147, and also, but imperfectly, in 4 Dall. 353, it was held by the Circuit Court of the United States for the Eastern District of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but it is not *per se* sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law as shown by authorities cited from the Year Books and otherwise.

Opinion of the Court.

In *Wassum* v. *Feeney*, 121 Mass. 93, the Supreme Judicial Court of Massachusetts held that: "A verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and empanelled, though the losing party did not know of the infancy until after the verdict." And Mr. Justice Gray, then Chief Justice of Massachusetts, delivering the opinion, said: "When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation, *Jeffries* v. *Randall*, 14 Mass. 205; *Woodward* v. *Dean*, 113 Mass. 297; but, even in a capital case, to a juror who was not of the county or vicinage, as required by the Constitution. Declaration of Rights, art. 13; *Anon.*, cited by Jackson, J., in 1 Pick. 41, 42. The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after verdict. *Hollingsworth* v. *Duane*, 4 Dall. 353; *S. C.* Wall. C. C. 147; *State* v. *Quarrel*, 2 Bay, 150; *Presbury* v. *Commonwealth*, 9 Dana, 203; *The King* v. *Sutton*, 8 B. & C. 417; *S. C.*, *nom.*, *The King* v. *Despard*, 2 Man. & Ry. 406. In the *Case of the Chelsea Waterworks Co.*, 10 Exch. 731, Baron Parke said: 'In the case of a trial by jury *de medietate linguæ*, which by the 47th section of the jury act is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them.'" See also the *Case of a Juryman*, 12 East, 231, note; *Hill* v. *Yates*, 12 East, 229.

The great weight of authority is to that effect,[1] though

[1] *Wharton's Case*, Yelv. 24; 1 Inst. 158 *a*; 21 Vin. Abr. 274, Trial; 2 Hale P. C. c. 36, 271; 2 Hawk. P. C. 568, 572; *Queen* v. *Hepburn*, 7 Cranch, 290; *Brewer* v. *Jacobs*, 22 Fed. Rep. 217; *Gillespie* v. *State*, 8 Yerger, 507; *Costly* v. *State*, 19 Ga. 614, 628; *Siller* v. *Cooper*, 4 Bibb, 90; *State* v. *Bunger*, 14 La. Ann. 461; *State* v. *Beeder*, 44 La. Ann. 1007; *Foreman* v. *Hunter*, 59 Iowa, 550; *State* v. *Patrick*, 3 Jones (N. C.), 443; *Brown* v. *State*, 52 Ala. 345; *Brown* v. *People*, 20 Col. 161; *State* v. *Jackson*, 27 Kans. 581, and cases there collected.

there are a few cases to the contrary. Thus in *Guykowski* v. *People*, 1 Scam. 476, it was held that a new trial should be granted because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in *Greenup* v. *Stoker*, 3 Gilm. 202, the Supreme Court of Illinois, through Purple, J., reluctantly concluded that it was not indispensable to hold that that case was not the law, but limited its application to capital cases; and in *Chase* v. *People*, 40 Illinois, 352, it was finally overruled. Mr. Justice Breese spoke for the court, and it was held that alienage in a juror was not a positive disqualification, but ground of exemption or of challenge, and nothing more.

It has been held that, under the constitution of New York, the defendant in a capital case cannot consent to be tried by less than a full jury of twelve men, *Cancemi* v. *People*, 18 N. Y. 128, and that, under the constitution of California, a law authorizing a change of the place of trial of a criminal action to another county than that where the crime was committed on application of the prosecution without defendant's consent, was invalid, *People* v. *Powell*, 87 California, 348; but in neither of these cases was it intimated that objection to individual jurors could not be waived by the accused or that trial by jury would be violated if persons who were open to challenge happened to be empanelled. The disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if, voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. *United States* v. *Gale*, 109 U. S. 65, 72. Whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such a ground, is another question. That is not the inquiry here, but whether the law of New Jersey is invalid under the constitution of that State, and this judgment void because one of the jurors who tried petitioner may have been an alien. If, prior to the filing of the petition, the objection had been

brought before the state courts and overruled, we perceive no reason for declining to be bound by their view of the effect of the state constitution; and if the matter had not been called to their attention, it does not appear why that should not have been, or should not now be, done.

In any view, we cannot hold, on this petition, that petitioner has been denied due process of law or that protection of the laws accorded to all others similarly situated.

The Circuit Court was right in declining by writ of *habeas corpus* to obstruct the ordinary administration of the criminal laws of New Jersey through the tribunals of that State, (*In re Wood*, 140 U. S. 278, 289,) and its order is

Affirmed.

HAWS *v.* VICTORIA COPPER MINING COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 66. Argued November 15, 18, 1895. — Decided December 23, 1895.

On an appeal from a judgment of a territorial court, this court is limited to determining whether the facts found are sufficient to sustain the judgment rendered, and to reviewing the rulings of the court on the admission or rejection of testimony, when exceptions thereto have been duly taken.

This case comes within the general rule that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed.

The decree and complaint, taken together, fully describe, and furnish ample means for identification of the property to which the defendant in error was adjudged to be entitled.

The contention that the complaint did not aver a discovery of a vein or lode prior to the location under which the plaintiffs in error claim is wholly without merit.

Likewise is the contention without merit that the discovery under which the defendant in error claims was of only one vein.

Possession alone is adequate against a mere intruder or trespasser, without even color of title, and especially so against one who has taken possession by force and violence.

Sundry exceptions as to the rulings of the court upon the admissibility of testimony considered, and held to be immaterial, or unfounded.

The case is stated in the opinion.

Mr. Frederic D. McKenney for appellant. *Mr. S. F. Phillips*, *Mr. Charles H. Toll*, and *Mr. D. V. Burns* were on his brief.

Mr. Charles H. Armes and *Mr. Arthur H. Birney* for appellee. *Mr. C. C. Dey* was on their brief.

Mr. Justice White delivered the opinion of the court.

The Victoria Copper Mining Company, a corporation created under the laws of the State of Illinois, brought its action to recover possession of two mining claims known as the "Antietam lode" and the "Copper the Ace lode." The mines thus designated were fully and specifically described in the complaint, which averred that the defendant had by force and violence ousted the complainants from the property. In addition to the averments essential to justify a judgment for possession, the complaint contained allegations deemed to be sufficient to authorize the granting of an injunction, which was prayed for, restraining the defendant from taking, or shipping, or selling ore extracted, or to be extracted, from the mines in controversy. The prayer of the complaint was for possession, and twenty-five thousand dollars damages, the value of ore averred to have been previously unlawfully taken by the defendants. The defendants jointly answered, specifically denying each allegation of the complaint, and by cross-complaint, Edward W. Keith, Samuel R. Whitall, William V. R. Whitall and Michael Smith alleged that they were the owners in fee of the mines, subject to the paramount title of the United States, and they prayed that their title be quieted. The averments of the cross-bill were traversed by specific denials. Upon these issues, a jury having first been waived, the case was tried by the court, which found the following facts, which findings were tantamount to concluding that the averments of the bill of complaint had been proven:

"*Findings of fact.*

"First. That Lewis R. Dyer, the locator of the two mining claims described in the complaint herein, called respectively

'Antietam lode' and 'Copper the Ace lode,' and situated in Uintah County, Territory of Utah, at and prior to the time of locating the same discovered and appropriated a mineral vein or lode of rock in place.

"Second. That at the time of the discovery of said vein or lode and the location of said mining claims the land included within the boundaries of said mining claims was public mineral land, wholly unoccupied and unclaimed.

"Third. That after the discovery of said vein or lode or mineral-bearing rock in place, to wit, on the 17th day of September, 1887, said Lewis R. Dyer, being a citizen of the United States, located the two mining claims described in the complaint herein by writing on a tree standing at, or in close proximity to, the place or places of discovery of said vein or lode the two notices of location, one for each of said claims.

"Fourth. That said notices each described the respective claims by reference to said tree; also respectively described the boundaries of each claim by courses and distances from said tree; that each of said notices contained the name of the locator and date of location; that said tree was a sufficient natural object by which said claims and each of them could be identified.

"Fifth. That soon after the writing of said notices of location and during the month of September, 1887, said Dyer marked sufficiently on the ground the boundaries of said mining claims and each of them by setting suitable stakes or posts at the corners of each of said claims; also at the centre of the respective side lines of each of said claims; also by writing on the stakes to identify them with reference to the respective claims, and securing said stakes by stones piled around them.

"Sixth. That thereafter, on the 13th day of February, 1888, said Dyer caused a copy of said location notices and each of them to be recorded in the office of the county recorder of said county of Uintah; that there was not at that time, or at the time of locating said claims, any mining district recorder; that said mining claims were situated in what

had been known as the 'Carbonate mining district;' that the rules and regulations of said mining district had long prior to the said 17th day of September, 1887, fallen into disuse, and were not then, or for a long time prior thereto had not been, in force and effect.

"Seventh. That the plaintiff is a corporation, duly organized and existing under the laws of the State of Illinois, and was so organized on the 15th day of May, 1888.

"Eighth. That on the 4th day of May, 1888, said Lewis R. Dyer duly transferred an equal undivided one half of said mining claims, and each of them, to Edward A. Ferguson and August Bohn, Jr., and that thereafter, to wit, on the 28th day of May, 1888, said Lewis R. Dyer, Edward A. Ferguson, and August Bohn, Jr., duly transferred and conveyed said mining claims and each of them to the plaintiff company.

"Ninth. That since said 17th day of September, 1887, until the 10th day of June, 1889, said Dyer and his grantee, the plaintiff herein, continuously worked upon and improved said mining claims, and each of them, and actually possessed the same, and have expended in said work and improvements upward of the sum of $7000; that said mining claims are contiguous to each other, and were worked jointly and in common; that the work done and improvements made on said claims were such as did develop said claims and each of them, and that for each of the calendar years of 1887, 1888, and 1889 more than one hundred dollars' worth of work was actually done on each of said claims by said Dyer and his grantee, the plaintiff herein.

"Tenth. That on Sunday night, the 9th day of June, 1889, while said plaintiff was in actual possession of said claims and working the same, by its agents and employés, the defendant William Haws went upon the ground of said mining claims with two men and wrongfully took possession of the same, and the working upon the same, prepared to hold such possession by force, and did wrongfully keep the plaintiff and its employés from thereafter working on said mining claims, and wrongfully excluded them therefrom, and that said William Haws and Heber Timothy and their grantees, the other de-

fendants therein, have ever since wrongfully excluded the plaintiff from the possession of said mining claims.

"Eleventh. That prior to the said 9th day of June, 1889, said William Haws was an employé of the plaintiff and its grantors working on said mining claims; that said Haws so worked from the 11th day of February, 1888, until the 13th day of August, 1888, and from October 24, 1888, to December 21, 1888, and again resumed work in the month of March, 1889, and continued to work for plaintiff up to and including the 1st day of June, 1889, when he voluntarily left the employ of plaintiff; that while at work for plaintiff in the year of 1888 said Haws formed the secret intention of taking possession of said mines and mining claims.

"Twelfth. That on or about the 7th day of June, 1889, said Haws procured the defendant Heber Timothy to join and assist him in making a location of the ground described in the complaint herein, which was then being actually possessed and worked by plaintiff, and on that day said Haws and Timothy, without right of entry on the ground, set sufficient stakes to mark the boundaries of the two claims, which they called 'Scottish Chief' and 'Ontario mine' lode mining claims; that they also posted on a stake placed near the place of discovery of plaintiff's aforesaid claims location notice for each of said claims; that the location notice of said 'Scottish Chief' lode was signed by said Heber Timothy and William Haws, and recited that the location was a 'relocation' of the 'Antietam' lode; that the said location notice of the 'Ontario mine lode' was signed by said William Haws, and recited that the location was a 'relocation' of the 'Copper the Ace.'

"Thirteenth. That on the 4th day of June, 1889, a mining district was organized including within its boundaries the ground heretofore described called the Carbonate district; that said 'Scottish Chief' and 'Ontario mine' location notices were recorded on the 11th day of June, 1889, in the records of said 'Carbonate mining district.'

"Fourteenth. That on or about the 12th day of September, 1889, while holding possession of said mining claims of plaintiff aforesaid, under the wrongful entry of said Haws afore-

said, aided by said Timothy, with the consent of said Haws and at his instigation, and for the purpose of omitting the name of said Haws from the location notices, in anticipation of proceedings being taken by plaintiff to regain possession of its said mining claims, set a discovery stake within the limits and boundaries of plaintiff's said mining locations and not far distant from the place of discovery of plaintiff's said mining claims, and then and there placed two notices of locations signed by said Heber Timothy, claiming to locate two mining claims under the respective names of Valao and Copper King, and set sufficient stakes and marks to describe and designate the boundaries of said mining locations and each of them.

"Fifteenth. That said Haws was to have and own by agreement made with said Timothy all of said Copper King and one-half of said Valao; that said claims include substantially the same ground included in and covered by plaintiff's aforesaid claims.

"Sixteenth. That on the 9th day of August, 1890, said William Haws, by an instrument in writing, conveyed to the defendant Heber Timothy his interest in the Scottish Chief and Ontario mine mining claims aforesaid, and that on the same day said Timothy conveyed to the defendant Michael E. Smith the aforesaid Scottish Chief and Ontario described in said deed as relocated September 12, 1889, as the Copper King and Valao lode claims, and that on the 11th day of August, 1890, said defendant Smith, by an instrument in writing, conveyed to the defendants Samuel R. Whitall, William V. R. Whitall, Edward Keith, and Frank A. Keith an undivided one-half interest in said Valao and Copper King claims.

"Seventeenth. That on or about the 29th day of August, 1890, plaintiff had its aforesaid mining claims surveyed and stakes reset that sufficiently marked the boundaries of said claims and each of them and the place of discovery; that at the place of discovery plaintiff caused to be posted, on the 29th day of August, 1890, an addendum notice to each of the original notices of location, which said addendum notices were duly signed by the secretary of plaintiff company and dated, and respectively described the claims by metes and bounds as

ascertained by actual survey, and also by reference to the permanent workings of the claims; that said notices were recorded in the office of the county recorder of said county of Uintah on the 29th day of August, 1890.

"Eighteenth. That the description of said claims as given in said addendum notices is the same description as given in the complaint of the plaintiff herein; also that the official survey for patent of said mining claims of plaintiff was made in exact accordance with said description and the boundary stakes of said claims.

"Nineteenth. That in the months of August and September, 1890, and prior to the commencement of this action, the defendants wrongfully extracted and carried away 25 tons of ore taken from plaintiff's said mining claims and sold all but 7 tons thereof for the net sum of $1897.57, except as to the cost of hauling and extracting, amounting to $34.00 per ton."

From these findings the court deduced the following conclusions of law:

"1. That the plaintiff was at the time of the commencement of this action and still is the owner of and entitled to the possession of the mining claims particularly and specifically described in the complaint of the plaintiff herein and called respectively 'Antietam lode' and 'Copper the Ace lode' mining claims, which said mining claims and each of them were at the time of the commencement of this action and have ever since continued to be and now still are valid mining claims, embracing the premises described in the complaint herein, subject only to the paramount title of the United States.

"2. That the defendants or any of them or any person claiming under them have no title or interest in said premises whatsoever and had none at the time of the commencement of this action.

"3. That said plaintiff is entitled to a judgment or a decree against said defendants for the possession of the 'Antietam lode' and 'Copper the Ace lode' mining claims and premises embraced therein, as described in said complaint, and confirming its title to the same, and that the defendants have no right, title, or interest in said premises or any part thereof or

in the ores extracted therefrom; also that plaintiff is entitled to the 7 tons of ore removed by the defendants and not disposed of, and also for $1047.57 damages, and also for the costs of this action; also enjoining the said defendants and each of them, their servants, agents, and employés, and every one acting under them or any of them, from extracting or removing ore therefrom."

Upon these findings and conclusions a judgment was rendered in favor of the plaintiff, that it "recover from the defendants William Haws, Heber Timothy, Edward W. Keith, Frank H. Keith, Samuel R. Whitall, William V. R. Whitall, and Michael E. Smith, the possession of the Antietam lode and Copper the Ace lode mining claims, situated in the Carbonate mining district, in the county of Uintah, Territory of Utah, and the premises embraced therein and each and every part thereof, the same being specifically described in the complaint of the complainant herein, and confirming the title to said plaintiff in and to the same." There was also judgment for damages and costs in the sum of $1692.17, and a decree for an injunction restraining the defendants from extracting or removing ore from the mines.

On December 3, 1890, the defendants filed their notice of intention to apply for a new trial on the following grounds:

"1. Irregularities in the proceedings of the court and an abuse of discretion in the court by which defendants were prevented from having a fair trial.

"2. Insufficiency of the evidence to justify the findings and decision.

"3. Newly discovered evidence material to defendants and which could not with reasonable diligence have been discovered and produced at the trial.

"4. That the findings are against law.

"5. Errors in law occurring at the trial and excepted to by defendants."

On the day this notice was given the court extended the time for filing the "specifications of particulars in which the evidence is insufficient to support the findings and the affidavits as to the newly discovered evidence." When this period

elapsed the defendants presented their specifications of particulars, (which was required by the Utah law, *Stringfellow* v. *Cain*, 99 U. S. 610, 613,) complaining only of the insufficiency of the evidence to support the findings numbered 3, 4, 5, 6, 10, 12, 14, 17, and 19. The affidavits relied on as to the newly discovered evidence, for the purpose of obtaining a new trial, were also filed. In support of the complaint as to the insufficiency of the evidence to sustain the findings specially objected to on that ground, there was filed an excerpt from the testimony, the certificate appended thereto reciting: "The foregoing, together with Exhibits C and D and the map Exhibit 3, is the substance of all the evidence tending to support the findings which are pointed out in defendant's specification of errors as not supported by the evidence and the substance of all the evidence pertaining to or illustrating defendant's assignments of error." Previously to the filing of this statement of the proof which related solely to the controverted findings, the defendant presented his "assignment as to errors of law occurring at the time of the trial, and duly excepted to by the defendants." The errors thus assigned were eleven in number, and all referred to the rulings of the court, in the progress of the trial, rejecting or admitting testimony. On the 13th of February, 1891, the application for a new trial was overruled, the order to that end reciting: "Said motion is heard upon the records and statements, and upon affidavits filed by the defendants in support of their motion." An appeal was taken to the Supreme Court of the Territory, where the judgment was affirmed. 7 Utah, 515. The opinion of the court announced that the findings of the court below were sustained by the proof, and that, as these findings were supported by "competent, relevant, and material evidence," without reference to the action of the court admitting or rejecting testimony, it was unnecessary to determine whether error had been committed in such respect, since, if it had been, it was not reversible because not prejudicial. Subsequently, there was filed in the Supreme Court an assignment of errors, alleging that the court had erroneously affirmed the judgment below, when it should have reversed the same because of

errors committed by the trial court in admitting incompetent testimony. The matters referred to in the assignment thus filed in the Supreme Court are identical with those which were embraced in the assignment which had been made below on the application for a new trial, except that the eleventh alleged error assigned upon the appeal to the territorial appellate court is omitted from the later assignment. Thereafter a paper was filed in the Supreme Court of the Territory beginning as follows:

"This is to certify that on the trial of this cause in the trial court the following rulings of the court on the rejection and admission of evidence were made, all of which were excepted to by defendants and assigned by them as error on appeal in this court, to wit."

This was followed by a brief excerpt from the proceedings had before the trial court, purporting to show exactly what occurred when the rulings rejecting or admitting testimony were made. All the facts which are stated in this paper are also in the record in connection with the specification of errors presented and the assignment of errors made in the trial court on the appeal taken to the Supreme Court. Appended to the paper is the following certificate:

"The above statement embraces part of the testimony of the witnesses named, but not all, nor does it contain the testimony of other witnesses sworn in the case, but is correct so far as it goes, except showing the corrections and explanations appearing.

"October 12, 1891. JAMES A. MINER, *Judge.*
C. S. ZANE, *C. J.*"

The defendants below prosecute this appeal from the judgment of the Supreme Court of the Territory of Utah.

Under the act of April 7, 1874, c. 80, 18 Stat. 27, our jurisdiction on appeal from the judgment of a territorial Supreme Court is limited to determining whether the facts found are sufficient to sustain the judgment rendered, and to reviewing the rulings of the court on the admission or rejection of testi-

mony, when exceptions have been duly taken to such rulings. We cannot, therefore, enter into an investigation of the preponderance of proof, but confine ourselves to the findings and their sufficiency to support the legal conclusions which the court below has rested on them. *Stringfellow* v. *Cain*, 99 U. S. 610, 613; *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 447. The statement of facts contemplated by the statute is one to be made by the Supreme Court from whose judgment the appeal is taken. But where that court affirms the findings of the trial court, being thus adopted by the Supreme Court of the Territory, they subserve the purpose of a finding of fact on the appeal to this court. *Stringfellow* v. *Cain*, *ubi supra*. Guided by this rule, we will examine the errors pressed upon our attention, considering first in order those which are general in their nature, and, second, those which it is claimed result from the action of the trial court, in rejecting or admitting testimony.

1. The contention that the trial court did not consider the affidavits as to the newly discovered evidence presented for the purpose of obtaining a new trial, is fully answered by the order refusing the new trial, which recites: "That it was heard upon the record and statement and upon the affidavits filed by the defendants in support of their motion." This takes the case entirely out of the principle announced in *Mattox* v. *United States*, 146 U. S. 140. That case involved a refusal to exercise discretion, whilst the contention here amounts to the assertion of a right to control a discretion when it has been lawfully exerted.

2. A further claim of error is that the findings are insufficient to support the judgment, because the Utah statute, 2 Comp. Law, § 3241, requires that "in an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it;" and that the mines in dispute are designated in the findings solely by reference to the descriptions contained in the complaint, which it is asserted does not sufficiently identify the premises to enable an officer to execute a writ of

possession. If this proposition was supported by the record, the necessary result would be that the judgment of the court below operates upon no property which can be identified; hence the defendant, and not plaintiffs in error, would be prejudiced thereby, and would be the only party entitled to complain. But the findings amply support the reference made in the judgment to the premises sued for, to wit, the "Antietam lode and Copper the Ace lode mining claims, situated in the Carbonate mining district, in the county of Uintah, Territory of Utah, and premises embraced therein, and each and every part thereof, the same being specifically described in the complaint herein." It is not doubtful that the decree and complaint taken together fully describe and furnish ample means for identification of the property to which defendant in error was adjudged to be entitled.

3. It was also urged, for the first time, upon the argument at bar, that as the United States Statutes, Rev. Stat. § 2320, provide that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the mine located, the complaint was fatally defective in not averring such a discovery prior to Dyer's alleged location, and that there was an entire absence of evidence to justify the trial judge in concluding as he did in his first finding that Dyer, "at and prior to the time of locating the claims, discovered and appropriated a mineral vein or lode of rock in place." The contention that the complaint did not aver discovery is without merit. No demurrer was filed and, so far as the record discloses, no objection was made to the admissibility of proof of discovery on the ground that it was not alleged, nor was error in this particular assigned in the lower court or in the Supreme Court of the Territory or in the record as required by law. We might well dismiss the assertion that there was no evidence which justified the trial judge in stating in his first proposition of fact that there had been a discovery, with the answer that it amounts merely to a contention that the evidence did not justify the finding. The record, however, demonstrates the unsoundness of the contention. Under the law of Utah, those against whom the judgment

was rendered in the trial court were obliged, on motion for a new trial, to specify what particular findings of fact were objected to as unsupported by the evidence. In obedience to this requirement, the defendant specified the findings which he charged were not borne out by the proof, and in so doing made no complaint as to the first finding which contains the matter now asserted here to have no support whatever in the proof. The practice in addition required the trial court to certify to the Supreme Court of the Territory only "so much of the evidence as may be necessary to explain the particular errors or grounds specified and no more," (*Stringfellow* v. *Cain*, *ubi supra*,) and such is the certificate annexed to the extracts from the evidence which made up the record taken to the Supreme Court of the Territory. It therefore follows that the defendants below, after failing in the trial court to object to the first finding as unsupported by the evidence, and thereby securing the omission from the record of all the testimony supporting such finding, now seek to avail themselves of the absence of the proof which they have caused to be omitted from the record.

4. It is contended that the findings do not justify the decree because on their face it appears that the discovery by Dyer was merely of one vein, and as the claims located under this discovery were two in number and three thousand feet in length, they were void because in excess of the quantity allowed by law. Rev. Stat. § 2320.

Pretermitting the question whether this contention is not in reality a mere assertion that the findings are not supported by the evidence, it is without merit. Obviously, if the legal proposition upon which it depends be well founded, as to which we express no opinion, it is equally applicable to the mining claims asserted by the plaintiff in error. The findings conclusively establish that the Haws and Timothy pretended locations, upon which the whole case, as to the plaintiffs in error, rests, were placed upon practically the same ground covered by the mining claims of the defendant in error; indeed, the finding is that they (the Haws' claims) were mere relocations of the existing mines, and, therefore, equal to them

in length. It follows that if there was an excess of quantity as to the claims asserted, on the one hand, a like excess necessarily existed in the claims relied upon on the other. True the location by Haws was made not only in his own name, but in the name of Timothy, thereby, on the face of such location, implying that there was not one location of three thousand feet but two locations of fifteen hundred feet each, by different persons. The findings, however, completely dispel this situation, for they conclusively determine that Timothy was a mere instrumentality for Haws in the execution of his wrongful purposes, and hence that the two mines, which were apparently located in the name of Haws and Timothy, were in reality each located by Haws himself. But the findings go further than this; they absolutely preclude the possibility of a discovery or valid location by Haws or his confederate Timothy. The facts on this subject established by the findings are briefly these: Haws, an employé of the defendant in error, while engaged in such employment in working the mines by it located and of which it was in the actual possession, conceived the secret intention of taking possession of the property of his employers for his own benefit. In execution of this illegal purpose he procured the assistance of Timothy in making a so-called location on the ground which was then occupied by his employer and upon which he (Haws) was working as its servant. That they set stakes and posted notices so as to cover the claims already discovered and which he knew were being worked at the time these stakes were placed and notices posted, and that shortly after this wrongful driving of stakes, Haws, in the night time, ousted the defendant in error from the possession which it enjoyed, and the illegal dispossession thus accomplished was thereafter maintained by force. The elementary rule is that one must recover on the strength of his own and not on the weakness of the title of his adversary, but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the

most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been by him committed. In *Christy* v. *Scott*, 14 How. 282, 292, this court, speaking through Mr. Justice Curtis, said:

"A mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title. He may do so by a writ of entry, where that remedy is still practised, *Jackson* v. *Boston & Worcester Railroad*, 1 Cush. 575, or by an ejectment, *Allen* v. *Rivington*, 2 Saund. 111; *Doe* v. *Read*, 8 East. 356; *Doe* v. *Dyeball*, 1 Moody & M. 346; *Jackson* v. *Hazen*, 2 Johns. 438; *Whitney* v. *Wright*, 15 Wend. 171, or he may maintain trespass, *Catteris* v. *Cowper*, 4 Taunt. 548; *Graham* v. *Peat*, 1 East. 246."

So also, in *Burt* v. *Panjaud*, 99 U. S. 180, 182, it was said, Mr. Justice Miller expressing the opinion of the court, that in ejectment, or trespass *quare clausum fregit*, actual possession of the land by the plaintiff, or his receipt of rent therefor prior to his eviction, is *prima facie* evidence of title, on which he can recover against a mere trespasser. The same principle was enforced in *Campbell* v. *Rankin*, 99 U. S. 261, 262, and application of it to various conditions of fact is shown in *Atherton* v. *Fowler*, 96 U. S. 513; *Belk* v. *Meagher*, 104 U. S. 279, 287; *Glacier Mining Co.* v. *Willis*, 127 U. S. 471, 481.

There remains only to consider the errors which are asserted to have arisen from rulings of the trial court, admitting or rejecting testimony.

(*a*) The objections to the admissibility of the copies of Dyer's notice of location become wholly immaterial, in view of the findings on the subject of the actual location made by Dyer. The sixth finding establishes that there was not at the

time the copies were left for record any mining district recorder, and that the rules and regulations of what had been known as the "Carbonate mining district," in which said claim was situated, had long prior to Dyer's location fallen into disuse, and were not then, and for a long time prior thereto had not been, in force and effect. In such event there was no statutory requirement that notices should be recorded. Rev. Stat. § 2324; *North Noonday Mining Co.* v. *Orient Mining Co.*, 1 Fed. Rep. 522, 533. Moreover, the acts of Dyer, enumerated in the fourth finding, constituted a sufficient location by him of the two claims, as against subsequent locators, irrespective of the posting of notices. Rev. Stat. § 2324 merely required that the locations shall be distinctly marked on the ground, so that their boundaries can be readily traced. *Book* v. *Justice Mining Co.*, 58 Fed. Rep. 106, 109, 112, *et seq.*, and authorities cited, page 113.

(*b*) The testimony of McLaughlin, tending to show knowledge by Haws of Dyer's location, that he recognized it, also becomes immaterial, in view of the findings establishing the nature and extent of such location. The same reason is applicable to the objection made to the testimony of Doneher.

(*c*) It is contended that the District Court erred in permitting two witnesses to testify as to the conversation had with Haws relative to his intention to take possession of the mines operated by the plaintiff. This evidence tended to support certain allegations contained in the second cause of action set out in the complaint, and appears material to such allegations; and was doubtless accepted as evidence in support of the fact, stated at the close of the eleventh finding of the trial judge, "that while at work for the plaintiff in the year 1888, said Haws formed a secret intention of taking possession of the mines and mining claims of plaintiff." There was no attack upon the sufficiency of the proof to sustain this finding; moreover, the testimony of Haws as contained in the record admits that he formed the intention to take possession under the suggestion that he considered that he had the right to make a relocation.

(*d*) Lastly, it is contended that the District Court erred in

permitting the plaintiff to prove that it had expended between seven and eight thousand dollars in working the mines, from the time it took possession until it was ousted therefrom by the defendant Haws. This testimony was offered to show good faith in working the property by the plaintiff company. We think it was competent, in view of the requirements of Rev. Stat. sec. 2324, "that on each claim located after May 10, 1872, and until a patent has been issued therefor, no less than one hundred dollars' worth of labor shall be performed or improvements made during each year."

Judgment affirmed.

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

MARKHAM *v.* UNITED STATES.

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

No. 544. Submitted November 18, 1895. — Decided December 16, 1895.

An indictment for perjury in a deposition made before a special examiner of the pension bureau which charges the oath to have been wilfully and corruptly taken before a named special examiner of the Pension Bureau of the United States, then and there a competent officer, and having lawful authority to administer said oath, is sufficient to inform the accused of the official character and authority of the officer before whom the oath was taken.

In such an indictment it is not necessary to set forth all the details or facts involved in the issue as to the materiality of the statement, and as to the authority of the Commissioner of Pensions to institute the inquiry in which the deposition of the accused was taken.

The provision in Rev. Stat. § 1025 that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," is not to be interpreted as dispensing with the requirement in § 5396 that an indictment for perjury must set forth the substance of the offence charged.

Statement of the Case.

An indictment for perjury that does not set forth the substance of the offence will not authorize judgment upon verdict of guilty. *Dunbar* v. *United States*, 156 U. S. 185, affirmed.

THE plaintiff in error was indicted in the District Court of the United States for the District of Kentucky, for the crime of perjury as defined in section 5392 of the Revised Statutes.

The defendant pleaded not guilty. The first and second counts related to certain statements by the accused, alleged to have been wilfully, falsely, and feloniously made, in a deposition, given, under oath, before G. C. Loomis, a special examiner of the Pension Bureau of the United States, such statements being material to an inquiry pending before the Commissioner of Pensions in reference to a claim of the accused for a pension from the United States. The third count set out another statement of the accused in the same deposition, and charged that he did not believe it to be true.

The defendant was found guilty upon the fourth count of the indictment, which was as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, the matter of the hereinaftermentioned deposition became and was material to an inquiry then pending before and within the jurisdiction of the Commissioner of Pensions of the United States, at Washington, in the District of Columbia; whereupon said William H. Markham did then, at said Bowling Green, wilfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath, that a certain written deposition then and there by said Markham subscribed was then and there true, and in giving said deposition said Markham was asked by said Loomis a question in substance and effect as follows, to wit, 'Have you received any injury to forefinger of right hand since the war or since your discharge from the army?' (by which said question said

Loomis referred and said Markham well understood said Loomis to refer to the right hand of said Markham,) and in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows, to wit, 'No, sir; I never have;' which said statement that said Markham never had received any injury to the forefinger of his right hand since his, said Markham's, discharge from the army was then and there material to said inquiry, and was then and there not true. Whereas in truth and in fact the said Markham had then and theretofore received an injury to the forefinger of his, said Markham's, right hand, as he, the said Markham, then and there very well knew. And so the jurors aforesaid upon their oaths aforesaid say that said Markham did commit wilful and corrupt perjury in the manner and form as in this count aforesaid, against," etc. There was no demurrer to the indictment, nor any motion to quash either of the counts.

The defendant moved for an arrest of judgment upon the following grounds: 1st. That the count upon which he was found guilty charged no offence under the statute. 2d. That its averments did not inform the court that any offence had been committed, nor show that Loomis, the examiner, was authorized to administer the oath alleged. 3d. That the averments did not set forth the proceeding or cause in which the defendant was charged to have given his deposition or made oath to the statement alleged to be false, in such manner as to show that the deposition and the alleged false statement were material to any inquiry or matter before the Commissioner of Pensions, nor to what said inquiry related, nor show that Loomis, special examiner, had any lawful authority to swear or require the defendant to swear to the deposition or statement averred to be false, nor for what purpose, nor upon what cause, or investigation of what claim, or of any claim pending before any Department of the Government or in any court. 4th. That it did not aver facts sufficient to show the materiality of the oath or statement alleged to have been made. 5th. That the words charged to have been sworn to by defendant were not averred to have been sworn

to wilfully and corruptly. 6th. That it failed to aver what charge was under investigation.

The motion in arrest of judgment was overruled, and the accused was sentenced to make his fine to the United States by the payment of $5, and to be imprisoned at hard labor in the Indiana state prison, south, at Jeffersonville, Indiana, for the full period of two years from a day named. From that judgment the present writ of error was prosecuted.

Mr. Samuel McKee for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

The contention that the indictment was insufficient in law cannot be sustained.

By section 4744 of the Revised Statutes, as amended by the act of July 25, 1882, c. 349, it is provided: "The Commissioner of Pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, either in the presentation or in procuring the allowance of such claims; and any person so detailed shall have power to administer oaths and take affidavits and depositions in the course of such examinations, and to orally examine witnesses, and may employ a stenographer, when deemed necessary by the Commissioner of Pensions, in important cases, such stenographer to be paid by such clerk or person, and the amount so paid to be allowed in his accounts." Rev. Stat. § 4744; 22 Stat. 174, 175. And by section 3 of the act of March 3, 1891, c. 548, it was provided: "That the same power to administer oaths and take affidavits, which by virtue of section forty-seven hundred

and forty-four of the Revised Statutes is conferred upon clerks detailed by the Commissioner of Pensions from his office to investigate suspected attempts at fraud on the Government through and by virtue of the pension laws, and to aid in prosecuting any person so offending, shall be, and is hereby, extended to all special examiners or additional special examiners employed under authority of Congress to aid in the same purpose." 26 Stat. 1083.

In view of these enactments, the averment that the oath, charged to have been wilfully and corruptly taken, was taken "before G. C. Loomis, then and there a special examiner of the Pension Bureau of the United States, and then and there a competent officer, and having lawful authority to administer said oath," was sufficient in connection with the statute, to inform the accused of the official character and authority of the officer before whom the oath was taken.

It is provided by section 5392 of the Revised Statutes 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 other 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."

And by section 5396 it is declared 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."

The requirement that it shall be sufficient in an indictment for perjury to set forth the substance of the offence is not new in the statutes of the United States. It is so provided in the Crimes Act of April 30, 1790, 1 Stat. 112, 116, c. 9, § 18, and the latter act, in the particular mentioned, was the same as that of 23 Geo. II, c. 11. Referring to the English statute, and to the objects for which it was enacted, Mr. Chitty says that the substance of the charge is intended in opposition to its details. 2 Cr. Law, 307; *King* v. *Dowlin*, 5 T. R. 311, 317.

Did the fourth count set forth the substance of the offence charged? It gave the name of the officer before whom the alleged false oath was taken; averred that he was competent to administer an oath; set forth the very words of the statement alleged to have been wilfully and corruptly made by the accused; and charged that such false statement was part of a deposition given and subscribed by the accused before that officer, and was material to an inquiry then pending before, and within the jurisdiction of, the Commissioner of Pensions of the United States.

The question propounded to the accused, and to which he was alleged wilfully and corruptly to have made a false answer, manifestly pointed to an inquiry pending before the Commissioner of Pensions, in relation to himself as a former soldier in the army; that inquiry presumably related to a claim by him for a pension on account of personal injuries received by him in the service; and the general charge that the statement was made with reference to a pending inquiry before, and within the jurisdiction of, the Commissioner of Pensions, in connection with the distinct, though general, averment that such statement was material to that inquiry, was quite sufficient under the statute. Under the plea of not guilty the Government was required to show the materiality of the alleged false statement, and, in so doing, must neces-

sarily have disclosed the precise nature of the inquiry to which it related. And it may well be assumed, after verdict, that all such facts appeared in evidence, and that the accused was not ignorant of the nature of the inquiry to which his deposition related and to which the indictment referred.

It was not necessary that the indictment should set forth all the details or facts involved in the issue as to the materiality of such statement, and the authority of the Commissioner of Pensions to institute the inquiry in which the deposition of the accused was taken. In 2 Chitty's Criminal Law, 307, the author says: "It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material; the simple averment that they were so, will suffice." In *King* v. *Dowlin*, above cited, Lord Kenyon said that it had always been adjudged to be sufficient in an indictment for perjury, to allege generally that the particular question became a material question. So, in *Commonwealth* v. *Pollard*, 12 Met. 225, 229, which was a prosecution for perjury, it was said that it must be alleged in the indictment that the matter sworn to was material, *or* the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality. In *State* v. *Hayward*, 1 Nott & McCord, 546, 553, which was also a prosecution for perjury, the court, after observing that it should appear, on the face of the indictment, that the false allegations were *material* to the matter in issue, adjudged that it was not necessary "to set forth all the circumstances which render them material; the simple averment that they became and were so will be sufficient." Many other authorities are to the effect that the substance of the offence may be set forth without encumbering the indictment with a recital of its details and circumstances.

As the count in question set forth the words of the alleged false statement, and thereby made it impossible for the accused to be again prosecuted on account of that particular statement; as it charged that such statement was material to an inquiry pending before, and within the jurisdiction of, the Commissioner

of Pensions; and as the fair import of that count was that the inquiry before the Commissioner had reference to a claim made by the accused under the pension laws, on account of personal injuries received while he was a soldier, and made it necessary to ascertain whether the accused had, since the war or after his discharge from the army, received an injury to the forefinger of his right hand, we think that the fourth count, although unskilfully drawn, sufficiently informed the accused of the matter for which he was indicted, and, therefore, met the requirement that it should set forth the substance of the charge against him.

It is proper to add that § 1025 of the Revised Statutes, providing that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," is not to be interpreted as dispensing with the requirement in § 5396 that an indictment for perjury must set forth the substance of the offence charged. An indictment for perjury that does not set forth the substance of the offence will not authorize judgment upon a verdict of guilty. *Dunbar* v. *United States*, 156 U. S. 185, 192.

We perceive no error of law in the record, and the judgment is

Affirmed.

LEHIGH MINING AND MANUFACTURING COMPANY *v.* KELLY.

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

No. 617. Submitted November 11, 1895. — Decided December 16, 1895.

It is established doctrine, to which the court adheres, that the constitutional privilege of a grantee or purchaser of property, being a citizen of one of the States, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another State — the value of the matter in dispute being sufficient for the purpose — cannot be affected or impaired merely because of the motive that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving or having any right or power to compel or require a reconveyance or return to him of the property in question.

Citizens of Virginia were in possession of lands in that State, claiming title, to which also a corporation organized under the laws of Virginia had for some years laid claim. In order to transfer the corporation's title and claim to a citizen of another State, thus giving a Circuit Court of the United States jurisdiction over an action to recover the lands, the stockholders of the Virginia corporation organized themselves into a corporation under the laws of Pennsylvania, and the Virginia corporation then conveyed the lands to the Pennsylvania corporation, and the latter corporation brought this action against the citizens of Virginia to recover possession of the lands. No consideration passed for the transfer. Both corporations still exist. *Held*, that these facts took this case out of the operation of the established doctrine above stated and made of the transaction a mere device to give jurisdiction to the Circuit Court, and that it was a fraud upon that court, as well as a wrong to the defendants.

This action was brought in the Circuit Court of the United States for the Western District of Virginia by the Lehigh Mining and Manufacturing Company, as a corporation organized under the laws of the Commonwealth of Pennsylvania. Its object was to recover from the defendants, who are citizens of Virginia, the possession of certain lands within the territorial jurisdiction of that court.

The defendants pleaded not guilty of the trespass alleged, and also filed two pleas, upon which the plaintiff took issue.

The first plea was that "the Virginia Coal and Iron Company is a corporation organized and existing under the laws of Virginia; that as such it has been for the last ten years claiming title to the lands of the defendant J. J. Kelly, Jr., described in the declaration in this case, and said defendants say that, for the purpose of fraudulently imposing on the jurisdiction of this court, said Virginia Coal and Iron Company has during the year 1893 attempted to organize, form, and create under the laws of the State of Pennsylvania a corporation out of its (the Virginia Coal and Iron Company's) own members, stockholders, and officers, to whom it has fraudulently and collusively conveyed the land in the declaration mentioned for the purpose of enabling this plaintiff to institute this suit in this United States court, and said defendants say that said Lehigh Mining and Manufacturing Company is simply another name for the Virginia Coal and Iron Company, composed of the same parties and organized alone for the purpose of giving jurisdiction of this case on [to] this court; wherefore defendants say that this suit is in fraud of the jurisdiction of this court and should be abated."

The second plea was that "said plaintiff should not further have or maintain said suit against them, because they say there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit, and they say that the real and substantial plaintiff in this suit is the Virginia Coal and Iron Company, which is a corporation organized and existing under the laws of Virginia and a citizen of Virginia. And said defendants further say that said Virginia Coal and Iron Company, for the purpose and with the view of instituting and prosecuting this suit in the United States court and of conferring an apparent jurisdiction on said court, did, by prearrangement, fraud, and collusion, attempt to organize said Lehigh Mining and Manufacturing Company as a corporation of a foreign State, to take and hold the land in the declaration mentioned, for the purpose of giving this court jurisdiction of said suit; wherefore defendants say that

Statement of the Case.

the said plaintiff has wrongfully and fraudulently imposed itself on the jurisdiction of this court, has abused its process, and wrongfully impleaded these defendants in this court. Wherefore they pray judgment, etc., that this suit be abated and dismissed, as brought in fraud of this court's jurisdiction."

The cause was submitted by the parties upon the two pleas to the jurisdiction and upon a general replication to each plea, as well as upon an agreed statement of facts.

The agreed statement of facts was as follows: "1. That the land in controversy in this case was prior to March 1, 1893, claimed by the Virginia Coal and Iron Company, and had been claimed by said last-named company for some twelve years prior to said date. 2. That said Virginia Coal and Iron Company is a corporation organized and existing under the laws of the State of Virginia, and is a citizen of Virginia. 3. That on March 1, 1893, said Virginia Coal and Iron Company executed and delivered a deed of bargain and sale to said Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to said last named company in fee simple. 4. That said Lehigh Mining and Manufacturing Company is a corporation duly organized and existing under the laws of the State of Pennsylvania; that it was organized in February, 1893, prior to said conveyance, and is and was at the date of commencement of this action a citizen of the State of Pennsylvania, and that it was organized *by the individual stockholders and officers of the Virginia Coal and Iron Company.* 5. That *the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case*, but that said conveyance passed to said Lehigh Mining and Manufacturing Company all of the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatever."

It was also agreed that the two pleas should be tried by the court, without a jury, upon the above statement of facts, with the right in either party to object to any fact stated in it on the ground of irrelevancy or incompetency.

The plaintiff, by counsel, objected and excepted to the statement in the first part of the fifth clause of the foregoing statement, viz., "that the purpose of organizing the Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give to this court jurisdiction in this case," because the same was irrelevant and immaterial.

The Circuit Court, Judge Paul presiding, dismissed the action for want of jurisdiction in the Circuit Court. 64 Fed. Rep. 401.

Mr. R. A. Ayers, *Mr. R. C. Dale*, *Mr. E. M. Fulton*, *Mr. A. L. Pridemore*, *Mr. J. L. White*, and *Mr. J. F. Bullitt, Jr.*, for plaintiff in error.

Mr. F. S. Blair, and *Mr. H. S. K. Morrison* for defendants in error.

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

Some of the paragraphs of the agreed statement of facts are so drawn as to leave in doubt the precise thought intended to be expressed in them. But it is clear that the individual stockholders and officers of the Virginia corporation, in February, 1893, organized the Pennsylvania corporation; that immediately thereafter, on the 1st day of March, 1893, the lands in controversy, which the Virginia corporation had for many years claimed to own, and which, during all that period, were in the possession of and claimed by the present defendants, who are citizens of Virginia, were conveyed by it in fee simple to the Pennsylvania corporation so organized; and that the only object, for which the stockholders and officers of the Virginia corporation organized the Pennsylvania corporation, and for which the above conveyance was made, was to

create a case cognizable by the Circuit Court of the United States for the Western District of Virginia. In order to accomplish that object, the present action was commenced on the 2d day of April, 1893. Although the parties have agreed that the above conveyance passed "all of the right, title, and interest" of the Virginia corporation to the corporation organized under the laws of Pennsylvania, it is to be taken, upon the present record, and in view of what the agreed statement of facts contains, as well as of what it omits to disclose, that the conveyance was made without any valuable consideration; that when it was made, the stockholders of the two corporations were identical; that the Virginia corporation still exists with the same stockholders it had when the conveyance of March 1, 1893, was made; and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeds in obtaining judgment against the defendants, *can be required by the stockholders of the Virginia corporation*, being also its own stockholders, to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation.

Was the Circuit Court bound to take cognizance of this action as one that involved a controversy between citizens of different States within the meaning of the Constitution and the acts of Congress regulating the jurisdiction of the courts of the United States? This question can be more satisfactorily answered after we shall have adverted to the principal cases cited in argument. The importance of the question before us, to say nothing of the ingenious and novel mode devised to obtain an adjudication of the present controversy by a court of the United States, justifies a reference to those cases.

The first case is that of *Maxwell's Lessee* v. *Levy*, 2 Dall. 381, decided in the Circuit Court of the United States for the Pennsylvania District. That was an action of ejectment. The lessor of the plaintiff was a resident and citizen of Maryland, the defendant being a resident and citizen of Pennsylvania. A bill of discovery was filed against the lessor of the plaintiff, in which it was alleged that the conveyance of the premises in controversy was made by one Morris, a citizen of

Pennsylvania, for no other purpose than to give jurisdiction to the Circuit Court. The answer to that bill admitted that "the lessor of the plaintiff *had given no consideration* for the conveyance; that his name had been used *by way only of accommodation to Morris.*" Upon a rule to show cause why the action of ejectment should not be stricken from the docket, Mr. Justice Iredell held that the conveyance was "colorable and collusive; and, therefore, incapable of laying a foundation for the jurisdiction of the court." The full opinion is reported in 4 Dall. 330.

In *Hurst's Lessee* v. *McNeil*, 1 Wash. C. C. 70, 82 — which was ejectment in a Circuit Court of the United States, the parties being alleged to be citizens of different States — one of the questions was as to the jurisdiction of the Circuit Court. Mr. Justice Washington said: "By the deed of the 15th January, 1774, from Timothy Hurst, Charles, Thomas, and John became entitled to the land therein conveyed, as tenants in common. The deed from Charles Hurst to Biddle, and the reconveyance to Charles, vested the legal estate in this land in Charles, but John and Thomas, it is admitted, were not thereby divested of their rights in equity, though they might be in law. Now the deed to John Hurst was meant to be a real deed, or was merely fictitious, and intended to enable John Hurst to sue in this court. If the former, it was void; as the assent of the grantee was not given at the time, nor has it ever been since given; for though the assent of a grantee to a deed, clearly for his benefit, may be presumed; yet, if a consideration is to be paid, as in this, (£1000 is mentioned,) the assent must be proved, or nothing passes by the deed. If it was not meant as a real conveyance, then it may operate to pass to John Hurst a legal title to his own third, which had become vested in Charles, but to which John still retained an equitable title. As to anything more, the deed cannot be supported; because, as to the rights of Charles and Thomas Hurst and John Baron, they remain unaffected by the deed to John; and *being merely a fictitious thing, to give jurisdiction to this court*, it will not receive our countenance."

McDonald v. *Smalley*, 1 Pet. 620, 624, was a suit in equity

in the Circuit Court of the United States for the District of Ohio to obtain a conveyance of a tract of land situated in that State — the plaintiff McDonald being a citizen of Alabama and deriving title under one McArthur, a citizen of Ohio, and the defendants, Smalley and others, being citizens of Ohio. The Circuit Court dismissed the case for want of jurisdiction and the judgment was reversed by this court. Chief Justice Marshall, speaking for the court, said: "This testimony, which is all that was laid before the court, shows, we think, *a sale* and conveyance to the plaintiff, which was *binding* on both parties. McDonald could not have maintained an action for his debt, nor McArthur a suit for his land. His title to it was extinguished, *and the consideration was received.* The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be *a real* transaction, and the real as well as nominal parties to the suit are citizens of different States. . . . The case depends, we think, on the question, whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage."

In *Smith* v. *Kernochen*, 7 How. 198, 216, which was ejectment brought in the Circuit Court of the United States for the Southern District of Alabama, the plaintiff, a citizen of New York, was the assignee *for value* of a mortgage upon the premises executed by the owner in fee to an Alabama corporation to secure a sum of money. It was charged that the motive of the corporation in making the assignment was to obtain a decision of the Federal courts upon certain matters in dispute between it and the owner in fee of the premises. One of the questions to be determined was whether any title passed to the plaintiff which the Circuit Court could enforce, if it appeared that the transfer of the mortgage was for the purpose of giving jurisdiction to that court and to enable the

company to prosecute its claim therein, and if it also appeared that the plaintiff was privy to such purpose when he took the assignment. This court, speaking by Mr. Justice Nelson, said: "But the charge, [to the jury] we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been properly executed *and founded upon a valuable consideration*, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald* v. *Smalley*, 1 Pet. 620. The suit would be free from objection in the state courts. And the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plaintiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted. The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, *his name being used merely for the purpose of jurisdiction.* The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. 1 Pet. 625; 2 Dall. 381; 4 Dall. 330; 1 Wash. C. C. 70, 80; 2 Sumner, 251."

The next case is *Jones* v. *League*, 18 How. 76, 81. The plaintiff, League, claimed to be a citizen of Maryland. The defendants were citizens of Texas. The action, which was trespass to try title to land, was brought in the District Court of the United States for the District of Texas. This court, speaking by Mr. Justice McLean, said: "In this case jurisdiction is claimed by the citizenship of the parties. The plaintiff avers that he is a citizen of Maryland, and that the defendants are citizens of Texas. In one of the pleas, it is

averred that the plaintiff lived in Texas twelve years and upwards, and that, for the purpose of bringing this suit, he went to the State of Maryland and was absent from Texas about four months. The change of citizenship, even for the purpose of bringing a suit in the Federal court, must be with the *bona fide* intention of becoming a citizen of the State to which the party removes. Nothing short of this can give him a right to sue in the Federal courts, held in the State from whence he removed. If League was not a citizen of Maryland, his short absence in that State, without a *bona fide* intention of changing his citizenship, could give him no right to prosecute this suit. But it very clearly appears from the deed of conveyance to the plaintiff, by Power, that it was *only colorable, as the suit was to be prosecuted for the benefit of the grantor*, and the one-third of the lands to be received by the plaintiff was in consideration that he should pay one-third of the costs, and superintend the prosecution of the suit. The owner of a tract of land may convey it in order that the title may be tried in the Federal courts, but the conveyance must be made *bona fide*, so that the prosecution of the suit shall not be for his benefit. The judgment of the District Court is reversed, for want of jurisdiction in that court."

In *Barney* v. *Baltimore City*, 6 Wall. 280, 288, which was a suit in equity in the Circuit Court of the United States for Maryland for a partition of real estate and for an account of rents and profits, etc., it appeared that certain persons, citizens of the District of Columbia, conveyed their interest in the property to a citizen of Maryland. It was admitted that the conveyance was made *for the purpose of conferring jurisdiction*, was *without consideration*, and that the grantee, *on the request of the grantors, would reconvey to the latter.* Mr. Justice Miller, speaking for the court, said: "If the conveyance by the Ridgelys of the District to S. C. Ridgely of Maryland had really transferred the interest of the former to the latter, although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. *McDonald* v. *Smalley*, and several cases since, have well established this rule. But in point of

fact that conveyance did not transfer the real interest of the grantors. *It was made without consideration*, with a distinct understanding that the grantors retained all their real interest, and that the deed was to have no other effect than to give jurisdiction to the court. And it is now equally well settled, that the court will not, under such circumstances, give effect to what is a fraud upon the court, and is nothing more."

None of these cases sustain the contention of the plaintiffs. All of them concur in holding that the privilege of a grantee or purchaser of property, being a citizen of one of the States, to invoke the jurisdiction of a Circuit Court of the United States for the protection of his rights as against a citizen of another State — the value of the matter in dispute being sufficient for the purpose — cannot be affected or impaired *merely* because of the motive that induced his grantor to convey, or his vendee to sell and deliver, the property, provided such conveyance or such sale and delivery was a real transaction by which the title passed without the grantor or vendor reserving *or having* any right *or power* to compel or require a reconveyance or return to him of the property in question. We adhere to that doctrine.

In harmony with the principles announced in former cases, we hold that the Circuit Court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation — the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal and Iron Company, while the grantee represented *the same stockholders*, entitled collectively or as one body to do business under the name of the Lehigh Mining and Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania corporation. It is also true that there was no formal agreement upon the part of that corporation "as an artificial being, invisible, intangible, and existing only in contemplation of law," that the title should ever be reconveyed to the Virginia corporation. But

when the inquiry involves the jurisdiction of a Federal court — the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record, *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283, *Börs* v. *Preston*, 111 U. S. 252, 255 — we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement, namely, the right *and power* of those who are stockholders of each corporation *to compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation — the original promoters of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia — in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that Commonwealth, which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall have passed, to throw off that mask and reappear under the original form of a Virginia corporation — their right, in the meantime, to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs be correct, without any consideration passing between the two corporations.

It is not decisive of the present inquiry that under the adjudications of this court the stockholders of the Pennsylvania corporation — the question being one of jurisdiction — must be conclusively presumed to be citizens of that Common-

wealth. Nor is it material, if such be the fact, that the Pennsylvania corporation could not have been legally organized, under the laws of that Commonwealth, in February, 1893, unless *some* of the subscribers to its charter were then citizens of Pennsylvania. We cannot ignore the peculiar circumstances which distinguish the present case from all others that have been before this court. The stockholders who organized the Pennsylvania corporation were, it is agreed, the same individuals who, at the time, were the stockholders of the Virginia corporation. And under the rule of decision adverted to, the stockholders of the Virginia corporation, just before they organized the Pennsylvania corporation as well as when the Virginia corporation conveyed the legal title, were presumably citizens of Virginia. If the rule which has been invoked be regarded as controlling in the present case, the result, curiously enough, will be that *immediately prior to* February, 1893 — before the Pennsylvania corporation was organized — the stockholders of the Virginia corporation were, presumably, citizens of Virginia; that, a few days thereafter, *in* February, 1893, when they organized the Pennsylvania corporation, the same stockholders became, presumably, citizens of Pennsylvania; and that, on the 1st day of March, 1893, at the time the Virginia corporation conveyed to the Pennsylvania corporation, the same persons were presumably citizens, at the same moment of time, of both Virginia and Pennsylvania.

It is clear that the record justifies the assumption that there was no valuable consideration for the conveyance to the Pennsylvania corporation. Why should a *valuable* consideration have passed at all, when the stockholders of the grantor corporation and the stockholders of the grantee corporation were, at the time of the conveyance, the same individuals? Could it be expected that those stockholders, acting as one body, under the name of the Virginia Coal and Iron Company, would take money out of one pocket for the purpose of putting it into another pocket which they had and used only while acting under the name of the Lehigh Mining and Manufacturing Company? A valuable consideration cannot be presumed, merely because the agreed statement of facts recites that the

Virginia corporation executed and delivered a deed of "bargain and sale" conveying all its right, title, and interest to the Pennsylvania corporation. In view of the admitted facts, that recital must be taken as meaning nothing more than that the deed was, in form, one of bargain and sale, conveying the technical legal title. The deed cannot be regarded even as a deed of gift, unless we suppose that a body of stockholders, acting under one corporate name, solemnly made *a gift* of property *to themselves* acting under another corporate name. When it is remembered that the plaintiff in error stipulates that all that was done had for its sole object to *create a case cognizable in the Federal court, which would otherwise have been cognizable only in a court of Virginia*, it is not difficult to understand why the agreed statement of facts failed to state, in terms, that a valuable consideration was paid by the grantee corporation.

The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose — *and no other purpose is stated or suggested* — of creating a case for the Federal court, must be regarded as a mere device to give jurisdiction to a Circuit Court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants. Such a device cannot receive our sanction. The court below properly declined to take cognizance of the case.

This conclusion is a necessary result of the cases arising before the passage of the act of March 3, 1875, c. 137, 18 Stat. 470. The fifth section of that act provides that if, in any suit commenced in a Circuit Court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, *or* that the parties have been *improperly or collusively made* or joined, either as plaintiffs or defendants, *for the purpose of creating a case* cognizable . . . under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit." This part of the act of 1875 was not super-

seded by the act of 1887, amended in 1888. 25 Stat. 434, c. 866. Its scope and effect were determined in *Williams* v. *Nottawa*, 104 U. S. 209, 211, and *Morris* v. *Gilmer*, 129 U. S. 315. In the first of those cases the court, referring to the act of 1875, said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction."

The organization of the Pennsylvania corporation and the conveyance to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the Circuit Court of the United States is, in principle, somewhat like a removal from one State to another with a view *only* of invoking the jurisdiction of the Federal court. In *Morris* v. *Gilmer*, just cited, the court said: "Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire *a domicil or settled home* in Tennessee, and that his sole object in removing to that State was to place himself in a situation to invoke the jurisdiction of the Circuit Court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was, therefore, a mere sojourner in the former State when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler* v. *Farnsworth*, 4 Wash. C. C. 101, 103, where Mr. Justice Washington said: 'If the removal be for the purpose of committing *a fraud* upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a *bona fide* intention of changing his domicil, however frequent and public his

declarations to the contrary may have been.'" 129 U. S. 328, 329.

Other cases in this court show the object and scope of the above provision in the act of 1875. In *Farmington* v. *Pillsbury*, 114 U. S. 138, 139, 145 — which was a suit upon coupons of bonds issued in the name of Farmington, a municipal corporation of Maine, the bonds themselves being owned by citizens of that State — it appeared that the bonds were purchased and held by such citizens while a suit was pending in one of the courts of Maine to test their validity. The state court decided that they were void and inoperative. After that decision coupons of the same amount, gathered up and held by citizens of Maine, were transferred, by their agent, to Pillsbury, a citizen of Massachusetts, under an arrangement by which he gave his promissory note for $500, payable in two years from date, with interest, and agreed, "as a further consideration for said coupons," that if he succeeded in collecting the full amount thereof he would pay the agent, as soon as the money was gotten from the corporation, fifty per cent of the net amount collected above the $500. Pillsbury then brought his suit on these coupons, he being a citizen of Massachusetts, against the town of Farmington, in the Circuit Court of the United States for the District of Maine. Here was, in form, a sale and delivery of coupons for a valuable consideration. This court regarded the whole transaction as a sham, and speaking by Chief Justice Waite, said: "It is a suit for the benefit of the owners of the bonds. They are to receive from the plaintiff one half of the net proceeds of the case they have created by their transfer of the coupons gathered together for that purpose. The suit is their own in reality, though they have agreed that the plaintiff may retain one half of what he collects for the use of his name and his trouble in collecting. It is true the transaction is *called* a *purchase* in the papers that were executed, and that the plaintiff gave his note for $500, but the time for payment was put off for two years, when it was, no doubt, supposed the result of the suit would be known. *No money was paid*, and as the note was not negotiable, it is clear the *parties intended to keep the control of the whole mat-*

ter in their own hands, so that if the plaintiff failed to recover the money he could be released from his promise to pay." The court, adopting the language of Mr. Justice Field, in *Detroit* v. *Dean*, 106 U. S. 537, 541, adjudged the transfer of the coupons to be "a mere contrivance, a pretence, the result of a collusive arrangement to create" in favor of the plaintiff "a fictitious ground of Federal jurisdiction." Referring to the above provision in the act of 1875, the court, after declaring it to be a salutory one, said that "it was intended to promote the ends of justice, and is equivalent to an express enactment by Congress that the Circuit Courts shall not have jurisdiction of suits which do not really and substantially involve a dispute or controversy of which they have cognizance, *nor* of suits in which the parties have been improperly *or collusively made* or joined *for the purpose of creating a case cognizable under the act.*" p. 144.

These principles were reaffirmed in *Little* v. *Giles*, 118 U. S. 596, 603, in which Mr. Justice Bradley, speaking for the court, said that under the act of 1875, where the interest of the nominal party is "simulated and collusive, *and created for the very purpose of giving jurisdiction*, the court should not hesitate to apply the wholesome provisions of the law."

The case before us is one that Congress intended to exclude from the cognizance of a court of the United States. The Pennsylvania corporation neither paid nor assumed to pay anything for the property in dispute, and was invested with the technical legal title for the purpose only of bringing a suit in the Federal court. As we have said, that corporation may be *required* by those who are stockholders of its grantor, and who are also its own stockholders, at any time, and *without receiving therefor any consideration whatever*, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the State in which the land lies. It should be regarded as a case of an improper and collusive making of parties for the purpose of creating a case cognizable in the Circuit Court. If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the

Circuit Court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the Circuit Courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance.

The judgment is

Affirmed.

Mr. Justice Shiras, with whom concurred Mr. Justice Field and Mr. Justice Brown, dissenting.

In April, 1893, the Lehigh Mining and Manufacturing Company, asserting itself to be a corporation organized and existing under the laws of the State of Pennsylvania, and a citizen and resident of said State, brought, in the Circuit Court of the United States for the Western District of Virginia, an action of ejectment for a tract of land in Wise County, State of Virginia, and within the jurisdiction of that court, against J. J. Kelly, James C. Hubbard, and others, all of whom were averred to be citizens of the State of Virginia, and residents of the Western District thereof.

The defendants filed two special pleas which were traversed by replications. The record shows that subsequently the cause was submitted to the court on the issues thus made and with an agreed statement of facts, and that the court, on May 30, 1893, sustained the pleas, found that it had no jurisdiction of the case, and dismissed the action for want of jurisdiction, but without prejudice. Upon exceptions duly taken, this judgment was brought to this court.

It is admitted, in the agreed statement of facts, that the Lehigh Mining and Manufacturing Company was, in February, 1893, *duly organized* as a corporation of the State of Pennsylvania, and was existing as such at the time of the commencement of this action.

The constitution of Pennsylvania, of which we take judicial notice, provides in the seventh section of article third that such

a corporation cannot be created by any local or special law, and we are thus given to know that the company in question was organized under a general law of the State. On resorting to that law, being the act of April 29, 1874, (Pruden's Digest, vol. 1, page 335,) and of the contents of which we also take judicial notice, we find it provided that to become duly organized as a mining and manufacturing company the charter must be subscribed by five or more persons, three of whom at least must be citizens of Pennsylvania; that the certificate must set forth that ten per centum of the capital stock has been paid in cash to the treasurer of the intended corporation; and these facts as to citizenship and the payment of the requisite proportion of the capital in cash must be sworn to by at least three of the subscribers. Upon such proof the governor is authorized to direct letters patent to be issued, but no corporation shall go into operation without first having the name of the company, the date of the incorporation, the place of business, the amount of capital paid in, and the names of the president and treasurer registered in the office of the auditor general of the State. While, therefore, it is stated in the agreed statement of facts that the said company was organized by the individual stockholders and the officers of the Virginia Coal and Iron Company, such statement is by no means inconsistent with the other statement that the Lehigh Mining and Manufacturing Company was duly organized, and therefore included in its membership citizens of Pennsylvania.

The presumption, therefore, must be that the Lehigh Mining and Manufacturing Company was, in all respects, a corporation regularly and legally organized, and the concession of the agreed statement is that, *as matter of fact*, at least three of its corporators are citizens of the State of Pennsylvania. As matter of law, as we shall presently see, all of its corporators are to be indisputably deemed, for the purpose of jurisdiction in the Circuit Court of the United States, citizens of that State.

The record, therefore, discloses that a regularly organized body corporate of the State of Pennsylvania, seeking to assert its title to a tract of land situated in Wise County, Virginia,

as against certain citizens of Virginia in possession of said tract, and having brought an action of law in the Circuit Court of the United States, has been dismissed from that court for alleged want of jurisdiction.

Such want of jurisdiction is not apparent on the face of the record, apart from the allegations contained in the special pleas. That the Circuit Court of the United States has jurisdiction of a dispute about the title to land between a corporation of another State and citizens of the State where the land is situated is, of course, now settled beyond controversy. After a long dispute, the history of which we need not here follow, it was finally decided in *Louisville & Nashville Railroad* v. *Letson*, 2 How. 497, that "a corporation created by and transacting business in a State, is to be deemed an inhabitant of the State, capable of being treated as a citizen, for all purposes of suing and being sued, and an averment of the facts of its creation and the place of transacting business is sufficient to give the Circuit Courts jurisdiction." Accordingly, in that case, a plea to the jurisdiction, alleging that some of the corporators of the defendant company, which was a corporation of the State of South Carolina, were citizens of New York, of which latter State the plaintiff was a citizen, was on demurrer overruled. In *Ohio and Mississippi Railroad Co.* v. *Wheeler*, 1 Black, 286, 296, the court, speaking by Chief Justice Taney, said: "Where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that *no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States.* . . . After these successive decisions, the law upon this subject must be regarded as settled, and a suit by or against a corporation in its corporate name as a suit by or against citizens of the State which created it."

If these cases correctly state the law, was it competent for

the court below, upon the facts agreed upon, to disregard the corporate character of the plaintiff company, and to find that it was composed, in a jurisdictional sense, of citizens of Virginia? It is true that the defendants, in their second plea, alleged that "there was no such legally organized corporation as the plaintiff company at the date of the institution of this suit." But, as we have seen, the statement of facts, agreed upon after the pleas were filed, states that the plaintiff company was a duly organized corporation of the State of Pennsylvania, and was existing as such at the time of the bringing of the suit.

Assuming, then, as we have a right to do, that the corporate existence of the plaintiff company is conceded, and that, under the authorities, the members of the company are to be deemed citizens of the State of Pennsylvania, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the Circuit Court, were there any other facts which justified the action of the court below in dismissing the action for want of jurisdiction?

It is said that, because it is conceded in the agreed statement of facts, that the land in controversy had been claimed by the Virginia Coal and Iron Company, a corporation organized under the laws of the State of Virginia, and that said company had executed and delivered a deed of bargain and sale to the Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in and to the land in controversy to the Lehigh Mining and Manufacturing Company in fee simple, and because it is admitted that the Pennsylvania company was organized by the individual stockholders and officers of the Virginia company, and that the purpose in organizing said Lehigh Mining and Manufacturing Company and in making to it said conveyance was to give the Circuit Court jurisdiction in the case, the legal effect of such a state of facts would constitute a fraud upon the court, and would justify it in dismissing the suit.

It is difficult to see, in the first place, how this could be a case of *fraud*. The facts were conceded, not concealed, nor

falsely stated. It would be one thing to say that an acknowledged state of facts failed to confer jurisdiction; another thing to say that such acknowledged state of facts, though formally conferring jurisdiction, constituted fraud on the court, not because untrue and pretended, and intended to deprive a court of jurisdiction, but because intended to bring a legal cause of action within its jurisdiction. We have seen that, *ex necessitate* and as a matter of fact, there were citizens of Pennsylvania who had, as members of a corporation of that State, an interest in the subject-matter of the suit; and we have seen that, by a well settled proposition of law, the Pennsylvania company must, for jurisdictional purposes, be indisputably deemed to be wholly composed of citizens of the State that created it. How, then, in the absence of misstatement or suppression of facts, can it be said that the Pennsylvania company was guilty of any fraud in invoking the jurisdiction of the Federal court?

I submit that the *true* question, under the pleadings and statement of facts, was whether the transaction, whereby title to the land in dispute was granted and conveyed by the Virginia Company to the Pennsylvania company, was an actual one, was really what it purported to be. If the conveyance by the Virginia company really and intentionally conferred its title on the Pennsylvania company, so that the latter company could legally assert its title against the parties in possession in a state court, no reason existed why the same cause of action might not be asserted in a Federal court; that, if the transaction were an actual one, and the conveyance one intended to vest an absolute title, unqualified by any trust, the jurisdiction of the Circuit Court validly attached has been frequently declared, even if the *purpose* was to make a case cognizable by the Federal court.

McDonald v. *Smalley*, 1 Pet. 620, 623, was a case where a citizen of Ohio, under the apprehension that his title to lands in that State could not be maintained in the state court, and being indebted to a citizen of Alabama, offered to sell and convey to him the land in payment of the debt, stating in the letter by which the offer was made that the title would most

probably be maintained in the courts of the United States, but would fail in the courts of the State. The Alabama citizen accepted the conveyance, and afterwards gave to a third party his bond to make a quitclaim title to the land, on condition of receiving $1000. The Circuit Court of the United States for the District of Ohio, in which the grantee filed, as a citizen of Alabama, a bill in equity, held that, upon the above state of facts, the court had no jurisdiction to entertain the suit. But this court held otherwise and reversed the judgment. Chief Justice Marshall, for the court, said:

"It has not been alleged, and certainly cannot be alleged, that a citizen of one State, having title to lands in another, is disabled from suing for those lands in the courts of the United States by the fact that he derives his title from a citizen of the State in which the lands lie. Consequently, the single inquiry must be, whether the conveyance from McArthur to McDonald was real or fictitious. . . . This testimony . . . shows a sale and conveyance to the plaintiff, which was binding on both parties. . . . [McArthur's] title was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A court cannot enter into them when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit are citizens of different States. The only part of the testimony which can inspire doubt, respecting its being an absolute sale, is the admission that the plaintiff gave his bond to a third party for a quitclaim title to the land, on paying him $1100. We are not informed who this third party was, nor do we suppose it to be material. The title of McArthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist that it was for McArthur. The court cannot act upon this suspicion. But suppose the fact to be averred, what influence could it have upon the jurisdiction of the court? It would convert the conveyance, which on its face appears to be absolute, into a

mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different States, it cannot be doubted that an ejectment, or a bill to foreclose, may be brought by the mortgagee, residing in a different State, in a court of the United States. Why then may he not sustain a suit in the same court against any other person being a citizen of the same State with the mortgagor? We can perceive no reason why he should not. The case depends, we think, on the question whether the transaction between McArthur and McDonald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage."

In *Smith* v. *Kernochen*, 7 How. 198, 216, where a mortgagee, a citizen of Alabama, assigned the mortgage to a citizen of New York, both parties concurring in the motive to have the question involved passed upon by a Federal court, it was held that "*the motive imputed could not affect the validity of the conveyance.* This was so held in *McDonald* v. *Smalley*, 1 Pet. 120. The suit would be free from objection in the state courts; and the only ground upon which it can be made effectual here is that the transaction between the company and plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage. The question, therefore, is one of proper parties to give jurisdiction to the Federal courts, not of title in the plaintiff. *That* would be a question on the merits, to decide which the jurisdiction must first be admitted. The true and only ground of objection in all these cases is, that the assignor, or the grantor, as the case may be, is the *real party* in the suit, and the plaintiff on the record but nominal and colorable, his *name* being used merely for the purpose of jurisdiction."

So, in *Barney* v. *Baltimore*, 6 Wall. 280, 288, the court said: "If the conveyance by the Ridgelys of the District to S. C. Ridgely, of Maryland, had really transferred the interest of the former to the latter, *although made for the avowed purpose of enabling the court to entertain jurisdiction of the case, it would have accomplished that purpose. Mc-*

Donald v. *Smalley* (1 Pet. 620) and several cases since have well established this rule."

If, then, anything can be regarded as settled, it is that the *motive or purpose* of securing a right of action in a Federal court by a conveyance or assignment will not defeat the jurisdiction, if the conveyance or assignment be real and not fictitious.

It, therefore, follows, in the present case, that the concession in the agreed statement of facts, that the purpose was to give jurisdiction to the Circuit Court, will not defeat that jurisdiction unless it appears that the conveyance was not real but fictitious. This presents a question of fact. Stated in direct terms, the question is this: Given a Pennsylvania corporation, indisputably composed of citizens of that State, and a conveyance in fee simple to such company of a tract of land, situated in the State of Virginia, by a corporation of that State, the land being in possession of citizens of the latter State, was this apparent jurisdiction defeated by the admitted facts? It has been established, by the cases cited, that the mere purpose or intention to put the claim into an owner who would be entitled to go into a Federal court would not be objectionable if the conveyance were an actual one, and where the interest asserted belonged wholly to the plaintiff.

Hence, the only matter now to determine is, what was the character of the conveyance in the present case? It was, in form, a deed of bargain and sale, purporting to convey a fee simple. It is admitted in the agreed statement of facts that "said conveyance passed to said Lehigh Mining and Manufacturing Company *all the right, title, and interest of said Virginia Coal and Iron Company in and to said land, and that since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in that suit, and that it owns none of the stock of said Lehigh Mining and Manufacturing Company, and has no interest therein whatsoever.*"

It is contended, in the opinion of the majority, that "it appears, in view of what the agreed statement of facts contains, as well as what it omits to disclose, that the conveyance

was without any valuable consideration, and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeded in obtaining judgment against the defendants, can be required by the stockholders of the Virginia corporation, being also stockholders of the Pennsylvania corporation, to reconvey the land in controversy to the Virginia corporation."

This contention, and the fate of the case turns upon it, can be readily met. It assumes two facts, neither of which is found in the record, and both of which, if found, would be immaterial. First, it is said that the conveyance was without any valuable consideration. But it is distinctly admitted that the Virginia company "executed and delivered a deed of bargain and sale to the Lehigh Mining and Manufacturing Company, by which it conveyed all its right, title, and interest in the land in controversy in fee simple." It is not found that no consideration was given, and in the absence of such a finding the presumption would be that a deed of conveyance under seal, and granting an estate in fee simple, implies a consideration. But it is unnecessary to consider this, because it is wholly immaterial whether the grantee paid a consideration or not. The deed, even if it were a deed of gift, was executed and delivered, and an executed gift is irrevocable. Nor does it concern the defendants whether the grant by deed was or was not for a valuable consideration.

This very question came up in the case of *De Laveaga* v. *Williams*, 5 Sawyer, 573, 574, in the Circuit Court of the District of California, and where it was urged that no consideration was ever paid, and that the deed was executed to enable the suit to be brought in the Circuit Court of the United States. But the court said, by Mr. Justice Field: "There is no doubt that the sole object of the deed to the complainant was to give jurisdiction, and that the grantor has borne and still bears the expenses of the suit. But neither of these facts renders the deed inoperative to transfer the title. The defendants are not in a position to question the right of the grantor to give away the property, if he chooses so to do. And the court will not, at the suggestion of a stranger to the title, inquire into the motives which induced the grantor to

part with his interest. It is sufficient that the instrument executed is valid in law, and that the grantee is of the class entitled under the laws of Congress to proceed in the Federal courts for the protection of his rights. It is only when the conveyance is executed to give the court jurisdiction, and is accompanied with an agreement to retransfer the property at the request of the grantor upon the termination of the litigation, that the proceeding will be treated as a fraud upon the court. . . . Here there was no such agreement, and it will be optional with the complainant to retransfer or to retain the property. He is by the deed the absolute owner of the interest conveyed, and can only be deprived of it by his own will, and upon such considerations as he may choose to exact."

The only operation that could be given to the absence of proof of an actual consideration would be to create a suspicion of a secret trust. But this is negatived in the present case, by the admission that a deed in fee simple was executed and delivered, and that by it the entire title, interest, and right of the grantor company passed to the Pennsylvania corporation, and that "since said conveyance said Virginia Coal and Iron Company has had no interest in said land, and has not and never has had any interest in this suit."

It is admitted, in the opinion of the majority, that "the legal title to the lands in controversy is in the Pennsylvania corporation, and that there was no formal agreement or understanding upon its part that the title shall ever be reconveyed to the Virginia corporation." But it is said that "there exists what should be deemed an equivalent to such an agreement, namely, the right and power of those who are stockholders of each corporation to compel the one holding the legal title to convey, without a valuable consideration, that title to the other corporation." This seems to me to be a strained conjecture. Stock in a corporation is continually changing hands, and to suppose that, at the end of a pending litigation, the holders will be the identical persons who held it at the beginning is too uncertain and fanciful to form a basis for a judicial action. As was well said by Mr. Justice Grier, in *Marshall* v. *Balti-*

more & Ohio Railroad, 16 How. 314, 327: "The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued in a factitious or collective name. . . . It is not reasonable that representatives of *unknown and ever changing associates* should be permitted to allege the different citizenship of one or more of these stockholders," in order to defeat the jurisdiction of Federal courts.

Some expressions used in the opinion of the court below, and likewise in the majority opinion, seem to imply that the act of March 3, 1875, c. 137, 18 Stat. 470, has operated to change the law in respect to the jurisdiction of the Circuit Courts of the United States. I do not so understand the purpose of that enactment. I have supposed that it only operates as a rule of practice. As the law previously stood, if the face of the record disclosed a suit between citizens of different States, and thus within the jurisdiction of the Circuit Court, it was necessary to traverse the averment of citizenship by a plea in abatement, and if the defendant went to trial on a plea to the merits he could not afterwards question the truth of such averment. *Smith* v. *Kernochen*, 7 How. 198; *Barney* v. *Baltimore*, 6 Wall. 280.

But since the passage of the act of March 3, 1875, "it is competent for the court at any time, during the trial of the case, without plea and without motion, to stop all further proceedings and dismiss the suit the moment a fraud on its jurisdiction was discovered." *Hartog* v. *Memory*, 116 U. S. 588.

It is not perceived that the legal rights of owners of property are in anywise affected by this law, and it is still true, as was said in *Barry* v. *Edmunds*, 116 U. S. 550, 559, that "the order of the Circuit Court dismissing the cause for want of jurisdiction is reviewable by this court on writ of error by the express words of the act. In making such an order, therefore, the Circuit Court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law. It might happen that the judge, on the trial or hearing of a cause, would receive

impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them. Nothing less than this is meant by the statute when it provides that the failure of its jurisdiction, on this account, shall appear to the satisfaction of" the court.

As then the plaintiff company is conceded to be a duly organized and existing body corporate of the State of Pennsylvania; as the land in dispute is within the jurisdiction of the court, and the defendants in possession thereof are citizens of the State of Virginia; and as it is conceded that, by a deed of conveyance in fee simple, the Virginia company passed all its right, title, and interest in said land, and has since had "no interest in said land, or in the suit," I think the jurisdiction of the Circuit Court ought not to be defeated by the conjecture that the persons owning the stock of the corporation when the deed of conveyance was made might continue to own it years afterwards when the suit should terminate, and might choose, as such owners, to cause another transfer and conveyance of the land to be made. Such conjectures are very far from furnishing for judicial action that "legal certainty" which in *Barry* v. *Edmunds* is said to be the proper basis upon which to deprive parties of their right of access to the national tribunals.

If we are permitted to enter into the realm of supposition, it is easy to suggest that the present stockholders, so far as they are citizens of Virginia, might dispose of their stock in good faith and absolutely to citizens of Pennsylvania. Then, upon another action brought in the same court, the same pleas being interposed, it would be competent, according to the views which prevail in the present case, to meet the pleas by a replication averring that the individual stockholders are citizens of Pennsylvania, and thus the jurisdiction would be sustained. What, in such a case, would have become of the long-settled

Counsel for Defendants in Error.

rule that the status, as to citizenship, of the individual stockholders is not a matter of allegation and proof? Has the court retraced its steps, and can state corporations be turned out of the Federal courts on a plea that one or more of the stockholders is a citizen of the same State in which the litigation is pending?

Mr. Justice Field and Mr. Justice Brown concur in this dissent.

PIERCE v. UNITED STATES.

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

No. 648. Submitted November 19, 1895. — Decided January 6, 1896.

When two counts in an indictment for murder differ from each other only in stating the manner in which the murder was committed, the question whether the prosecution shall be compelled to elect under which it will proceed is a matter within the discretion of the trial court.

Certain testimony held not to prejudice the defendants, but rather tending to bear in their favor, if at all material.

Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that they are not extorted by inducements or threats.

The plaintiffs in error were indicted for the murder on January 15, 1895, in the Cherokee Nation in the Indian country, of one William Vandeveer, a white man and not an Indian. There were two counts in the indictment. The first charged the murder to have been committed with a gun, and the second charged it to have been committed "with a certain blunt instrument." The jury found both defendants guilty of murder as charged in the first count, and they were accordingly both sentenced to death.

Submitted on the record, without appearance, by plaintiffs in error.

Mr. Assistant Attorney General Whitney for defendants in error submitted on his brief.

Mr. Justice Brown delivered the opinion of the court.

This case was submitted upon the brief of the Attorney General, and upon the material parts of the record. Defendants did not appear at the hearing.

1. The first error assigned is to the refusal of the court to compel the government to elect upon which count of the indictment it would proceed. The two counts differ from each other only in stating the manner in which the murder was committed. Testimony was introduced upon the trial tending to show that deceased had been shot in the forehead, and also hit on the head with a hammer. The question whether the prosecution should be compelled to elect was a matter purely within the discretion of the court. *Pointer* v. *United States*, 151 U. S. 396.

2. As no exceptions were taken to the charge of the court, and but one to the admission of testimony, the bill of exceptions, which was very voluminous, was not printed in full; but the charge of the court and the testimony of the defendants were printed, as well as an abstract of the testimony of a single witness, Andrew Brown, who testified that on Monday evening, January 19, he saw the two defendants with another man close to his place; that they were travelling with a mule team and a covered wagon, with a gray mare and colt following; that before daylight next morning he saw the same outfit, except there was no third man with defendants; that he went for his nearest neighbor, a Mr. West, and with him searched the place where the defendants had camped, finding blood all around; that Mr. West took up a blanket, and something like a pint of blood ran out of it; he just dropped it and said: "Brown, what kind of blood is that?" The answer to this was objected to, and the objection overruled, and an exception taken. The witness answered: "I don't know what kind of blood it is; it is blood." He says: "Maybe they have killed one of my hogs." I says: "We will see." This testimony clearly did not tend to prejudice the defendants, and if it were material at all, bore rather in their favor than against them.

Syllabus.

3. The admission of certain statements made by the defendants while they were under arrest and handcuffed was also objected to. No exception was taken to the admission of this testimony, and the court properly held that the mere presence of officers is not an influence. Confessions are not rendered inadmissible by the fact that the parties are in custody, provided that such confessions are not extorted by inducements or threats. *Hopt* v. *Utah*, 110 U. S. 574, 583; *Sparf* v. *United States*, 156 U. S. 51, 55. The so called confessions show merely that the defendants acted in a somewhat suspicious manner when first arrested, saying, "If we killed him, you prove it;" "that is for us to know, and you to find out." And that they refused to tell their names. There was clearly no objection to this testimony.

No exception was taken to the charge, and after a careful reading of it, we see nothing of which the defendants were justly entitled to complain.

The judgment is therefore

Affirmed.

BARTLETT v. LOCKWOOD.

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

No. 95. Argued December 3, 4, 1895. — Decided January 6, 1896.

In an action in the state courts of New York against the collector of the port of New York, the health officer of that port, and the owners of warehouses employed for public storage, to recover damages suffered by an importer of rags by reason of their having been ordered to the warehouses by the collector and disinfected there, and detained until the charges for disinfection and storage were paid, a ruling by the highest court of the State that the direction of the collector to send the rags to the storehouses was pursuant to the requirement that they should be disinfected, and was in aid of the health officer in the execution of his official power by the observance of the regulations made by him — that the collector gave no order for their disinfection — that the health officer gave no such order — that the defendants assumed to disinfect them without authority, and hence that their charges were illegal — but that, as the collector had properly sent the goods to the warehouses for such

Statement of the Case.

action as the health authorities might see fit to take, the plaintiffs became liable for storage and lighterage, presents no Federal question for review by this court.

This was a motion to dismiss a writ of error sued out by the firm of E. B. Bartlett & Co., defendants in the court below, to review a judgment obtained against them in the Supreme Court of New York by the firm of Lockwood & McClintock, for a conspiracy to have certain cargoes of rags belonging to the plaintiffs condemned as unclean and infectious property. With the firm of E. B. Bartlett & Co. was also impleaded as defendant Dr. William M. Smith, sued as an individual, but alleged to be at the time of the transaction Health Officer of the port of New York.

The complaint alleged in substance that in May, 1885, plaintiffs imported by ship Vigilant from Japan, and by barque Battaglia from Leghorn, about three thousand bales of rags of which plaintiffs were entitled to the possession and control; that the defendant Smith, the Health Officer of the port, with intent to injure plaintiffs, conspired with the firm of Bartlett & Co. to have such rags condemned as unclean and infectious property, and to require them to be disinfected under a process used by Bartlett & Co. so that they would be entitled to charge plaintiffs therefor, and to hold such rags until such charges were paid; that Smith, under color of his office, wrongfully and unlawfully caused such rags to be taken from the vessels, and transferred to the place of business of said Bartlett & Co. for the purpose of having the same disinfected, although he, as well as Bartlett & Co., knew that the rags were clean and free from any infectious matter, were not dangerous to health, and did not require to be disinfected; that by reason of such wrongful conspiracy and acts, the rags were taken by Bartlett & Co. and kept by them from June 5 to October 1, during which time they were partially subjected to a pretended process of disinfection, which was ineffectual and worthless for any real purpose of disinfection, and which greatly damaged and injured the rags, but which process was fraudulently and collusively approved of by said Smith, with intent to give Bartlett & Co. the monopoly of the disinfection of

rags, so that they might be able to extort from plaintiffs and others large sums of money for such so called disinfection; that plaintiffs protested against such conduct, demanded possession of their rags, which defendants refused to deliver, until the charges for the transfer and disinfection were paid, by reason of which acts plaintiffs suffered large damages.

The answer of defendants, Bartlett & Co., denied the conspiracy charged in the complaint; admitted defendant Smith to be the Health Officer, but denied "that he had full charge and control over vessels and cargoes coming into the port, except as authorized by the statutes of the State of New York, and the regulations of the United States and the port of New York."

The action was tried in the Supreme Court before a jury, and a verdict rendered for the plaintiffs as against the defendant firm of Bartlett & Co. for $8000, the jury disagreeing as to the defendant Smith. Judgment having been entered upon this verdict, defendants appealed to the General Term, which, upon a hearing before three judges, directed that, upon plaintiffs stipulating to reduce the original judgment in the sum of $1675.16, the judgment as to the residue be affirmed. The stipulation was given, and the judgment reduced accordingly. Defendants appealed from this judgment to the Court of Appeals, which ordered that the judgment should be reversed, and a new trial granted unless plaintiff stipulated to reduce the recovery of damages to $3182.52. 130 N. Y. 340. The case being remitted to the Supreme Court, and the plaintiffs having given the stipulation required by the judgment of the Court of Appeals, judgment was entered in favor of the plaintiffs for $3914.05, to review which judgment defendants sued out this writ of error.

Mr. Henry W. Goodrich for plaintiffs in error.

The Federal questions presented are these:

(1) Has the Treasury Department the right, under section 4792 of the Revised Statutes, to order the disinfection of the rags in question? and

(2) Whether a specific designation of the place and manner of such disinfection is required to be given by the Health Officer of the port?

The court held as follows

"The Collector, under his authority, in view of the regulation for disinfection of the rags on the two vessels adopted by the Health Officer, was justified in directing, as he did, the *sending of the rags* to these places, and the expenses of such transfer were presumptively a lien upon the property to which they related. No specific order or direction of the Health Officer is essential for that purpose; it is sufficient that it was done pursuant to regulations within his power, made by him."

Thus, it will be seen that the question is squarely presented as to whether the collector had the right to order the disinfection, the Court of Appeals having held that the collector was justified in sending the goods for disinfection, and that the charges incurred therefor were correct charges and a lien upon the goods, but that he could not order the disinfection without the specific direction of the Health Officer, and hence, that the charges for disinfection were unlawful. The Collector, in ordering the disinfection of the goods, acted under the authority of the Treasury Department, and that authority of the Treasury Department was derived from section 4792 of the Revised Statutes, which directed the Department to aid the state officials, it being remembered that the state officials had designated Baltic Stores and Robbins' Reef as the places, and the process in this suit as the method, of disinfecting.

Mr. Charles W. Bangs for defendants in error. *Mr. Francis Lynde Stetson* was on his brief.

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

There is certainly nothing in the pleadings in this case to indicate a Federal question. It is simply an action of con-

spiracy to injure the plaintiffs, and it does not appear from the complaint that the validity of any statute of the United States, or of any authority exercised under the United States, was drawn in question. The answer of the principal defendants, Bartlett & Co., sets up no claim of privilege or immunity under any statute of the United States, or any authority exercised thereunder. Indeed, there is nothing anywhere in the record to indicate that any Federal statute or authority was specially set up or claimed in the state court.

Error, however, is assigned to the action of the court in holding that, under the statutes of the United States, neither the Treasury Department nor the Collector had a right to order the disinfection of the plaintiffs' rags, and also in holding that the rags were not disinfected under the order of such department or the Collector of Customs.

The real question is whether the acts of which plaintiffs complain were done in pursuance of Federal or state authority, or were the unauthorized acts of the defendants themselves. While, under its power to regulate foreign and interstate commerce, the authority of Congress to establish quarantine regulations, and to protect the country as respects its commerce from contagious and infectious diseases, has never in recent years been questioned, such power has been allowed to remain in abeyance; and Congress, doubtless in view of the different requirements of different climates and localities, and of the difficulty of framing a general law upon the subject, has elected to permit the several States to regulate the matter of protecting the public health as to themselves seemed best. Their power to do this was recognized by this court in *Morgan* v. *Louisiana*, 118 U. S. 455. Congress has also confirmed such power by requiring (Rev. Stat. § 4792) that "the quarantines and other restraints established by the health laws of any State, respecting any vessels arriving in, or bound to, any port or district thereof, shall be duly observed by the officers of the customs revenue, . . . and that all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws, according to their respective powers and within their respective pre-

cincts, and as they shall be directed, from time to time, by the Secretary of the Treasury."

Upon the trial it was shown that the Vigilant arrived at the New York quarantine May 30, 1885, with 2920 bales of rags belonging to the plaintiffs. The Health Officer passed her at quarantine, and gave her a permission to proceed, which stated as follows with respect to the cargo: "Cargo general (rags excepted). The vessel has permission to proceed." There was some dispute as to whether the words "rags excepted" were a limitation upon the permission of the vessel to proceed, or a qualification of the words "general cargo." The testimony of the Health Officer indicated that it meant that the vessel was to be allowed to proceed to her dock, and discharge her cargo, other than rags. Both parties evidently acted upon the theory that these words did not require an unloading of the rags at quarantine, as the vessel was allowed to proceed, and did proceed, to her dock, and on June 1, a permit was granted by the proper Health Officer of the city of New York "to land and store said rags, provided the same be not broken from the bulk in the bales they are now in." Thereupon plaintiffs went to the custom-house to enter the goods, but the Collector declined to receive the entry, and plaintiffs went with their counsel to Washington, to lay the matter before the Secretary of the Treasury.

At this time, the subject, so far as it came within the jurisdiction of the Federal authorities, was regulated by two circulars issued by the Secretary of the Treasury, the first of which bore date of November 15, 1884, and prohibited "the unlading in the United States of old rags shipped from and after the 20th instant from foreign ports, or countries now or hereafter known to be infected with contagious or epidemic diseases;" and further provided that "no old rags shall be landed at any port of the United States except upon a certificate of the United States consular officer at the port of departure that such rags were not gathered or baled at, or shipped from, any infected place, or any region contiguous thereto." The second circular, dated December 22, 1884, modified previous circulars, and directed that "no old rags,

except those afloat on or before January 1, 1885, on vessels bound directly to the United States shall be landed in the United States from any vessel, nor come into the United States by land from any foreign country, except upon disinfection, at the expense of the importers, as provided in this circular, or as may hereafter be provided." Certain processes of disinfection were specified in this circular, and other directions given for landing and storing rags for the purpose of disinfection.

A letter bearing date January 12, 1885, addressed to the Collector of Customs at New York, in reference to the landing and storage of rags to be disinfected, approved of the selection of the Baltic stores in Brooklyn, which belonged to the defendants Bartlett & Co., as a proper place for that purpose, and directed that " where rags requiring disinfection form part of a cargo, they will be placed on lighters as fast as discharged, and the lighter loads will be taken to the place above designated." It appeared from this letter that Mr. Bartlett, one of the defendants, had written a letter to the department, touching the selection of a warehouse for the storage and disinfection of old rags; that the matter had been referred to the Health Officers of New York and Brooklyn, both of whom agreed as to the propriety of designating the Baltic stores for that purpose. Two days after this letter was written, and on January 14, the Collector of the port made a general order that " on the entry of old rags shipped on and after the 1st instant, and which have not been disinfected prior to importation, the permit to land will have written on the face thereof directions to the inspector to send the rags to the Baltic stores in Brooklyn, by bonded lighters for disinfection;" and further providing that, upon evidence that the rags had been satisfactorily disinfected, an order for their delivery would be made.

These were the regulations in force at the time plaintiffs made their visit to Washington. The Secretary of the Treasury, upon examining the law upon the subject, became satisfied that there was no statute which gave him any authority, except in aid of the Health Officers of the ports, (Rev.

Stat. § 4792,) and in accordance with such conclusion, he telegraphed the Collector of Customs on June 5 that "as to rags per Vigilant, from Japan, which importers claimed were mostly on board prior to January 1st, you are directed to submit all to Health Officer Smith, and to be governed by him in the matter." On June 6 the Collector wrote to the Health Officer notifying him of the receipt of this telegram, and asking to be advised whether, in his judgment, as Health Officer of the port, the rags might, with safety to the public health, be allowed to be landed, and, without disinfection, to go into consumption. In reply to this, the Health Officer wrote upon the same day detailing the result of many medical conferences and sanitary investigations, and stating that he did not claim that it was necessary for the protection of the public health that all rags should be disinfected, although it was "impossible to determine what may and what may not be admitted with absolute assurance of safety," and concluding that it seemed advisable that for the present the rule for the disinfection of rags should be general, and that the rags on the Vigilant should not be an exception to the rule.

He did not, however, give any positive directions that the rags should be disinfected, and testified upon the stand that he gave no order that these rags should be disinfected, either at Bartlett's store or elsewhere.

Before, however, the Secretary of the Treasury had acted in the matter, and before his telegram to the Collector of June 5 had been sent, a general order was issued by the Collector on June 3, directing the inspector on the Vigilant to allow to be landed and sent "to the public store No. —, E. B. Bartlett's, South, all merchandise for which no permit or order shall have been received by him contrary to this direction," with certain exceptions, that did not include rags, in the body of the paper, although the words, "Rags, A. W. H.," were written across the face of it. On June 9, the Collector made a further order that "the inspector in charge of the ship Vigilant from Hiogo, Japan, under general order made June 3, 1885, will allow to be landed and will send on bonded lighters to Baltic stores, (E. B. Bartlett & Co.'s, South,) for

disinfection, all rags for which no permit shall have been received, and will make return thereof, as of an order or permit."

On the following day, June 10, the Secretary of the Treasury, pursuant to his conclusion that there was no statute which gave him any authority in respect to the landing and disinfecting of imported rags, except in aid of the Health Officer, issued a circular or order to all Collectors of Customs in the following terms: "Whereas it has been conclusively shown to the department that, under existing laws, no general regulation can be legally framed, whereby the disinfection of old rags can be accomplished in foreign ports to the satisfaction of the several health authorities, therefore it is ordered —

"1. That all circulars of this department concerning the disinfection of imported old rags are hereby revoked, and that all old rags hereafter imported from foreign countries shall only be admitted for entry at the custom-house upon the production of permits from the health officers at the ports of importation, duly authorizing the landing of the same.

"2. Vessels carrying old rags, arriving at any United States quarantine, will be detained by the quarantine officers, and held subject to the order of the proper health authorities at the port of destination."

On the same day, Dr. Smith, the Health Officer of New York, gave a certificate that the rags per ship Vigilant from Hiogo, Japan, "to be disinfected, are not from a cholera-infected port."

The rags were accordingly, and in pursuance of the Collector's instructions of June 9, taken to the Baltic stores and there disinfected by the defendants, who paid the lighter's charges, made out a bill for these as well as for disinfecting and storage, amounting to $4904.90, for which they claimed a lien upon the property.

The case of the Battaglia did not differ materially from that of the Vigilant. The barque arrived and was entered at the custom-house on June 6, 1885, with 150 bales of rags belonging to the plaintiffs. On June 9, a general order was made, allowing the discharge of the cargo, but "omitting rags."

On June 11, the Secretary of the Treasury wrote to the Collector at New York, stating that the consignees desired to be covered by the circular of June 10, which placed the control of the disinfection with the Health Officer, and that the department had no objection to this. On June 13, the Collector enclosed a copy of this letter to the Health Officer, inquiring of him whether he would designate the place and process appropriate. From a letter written by the Collector to the Secretary of the Treasury, June 19, 1885, it would appear that the Brooklyn Commissioner of Health refused to allow the unloading of the rags in Brooklyn unless they were approved by the Health Officer, and that he therefore ordered, under Rev. Stat. § 2880, the unloading of the rags and their transfer by bonded lighter to Robbins' Reef, for disinfection, provided the health officials of New York city would permit such transfer from the Battaglia to the bonded lighter. On June 17, the Health Officer certified that the rags were "to be disinfected at Robbins' Reef, if Health Commissioner of Brooklyn will not give permit for Baltic stores." The charge for the lighterage of these rags and for their disinfection and storage amounted to $409.25, for which amount defendants claimed a lien upon them.

As we have observed already, there is nothing in the record from which a Federal question can be raised in this case. If we look beyond the record, to the opinions of the court, we find that the General Term held —

1. That the Revised Statutes did not authorize the Collector to take possession of these rags as unclaimed goods, and store them in a private bonded warehouse, such as the Baltic stores.

2. That the acts of the Collector could not be justified by sections 4792 and 4793, requiring him to aid in executing the health laws of the State.

3. That the Health Officer did not directly order the seizure of these rags, their conveyance to the Baltic stores in the one case and to Robbins' Reef in the other, and their disinfection by the disinfecting company, the defendants.

4. That the Collector, having no power to send any but

unclaimed goods to the public stores, could not refuse a permit for these goods to land, and cause them to be sent to the public stores to be disinfected at the expense of the owner, and if he did so, he, as well as all other persons who detained the goods because of non-payment of these unauthorized charges, became liable in damages for such unauthorized detention.

5. That the act of the Collector, being without authority, could confer no authority upon defendants to hold the goods, until the charges incurred because of the unauthorized acts of the Collector were paid.

Had the matter rested here it might perhaps have been claimed that the state court had ruled adversely to an authority exercised under the United States, but on appeal to the Court of Appeals the judgment of the General Term was varied to the extent of holding that the defendants were liable only for detaining the goods until the charges for disinfection were paid. That court held in substance:

1. That the direction of the Collector that the rags be sent to the Baltic stores and Robbins' Reef was pursuant to the requirement that they should be disinfected, and pursuant to the direction of the Secretary of the Treasury, and in aid of the Health Officer in the execution of his official power.

2. That the work of disinfection was not conducted under the supervision or control of the Health Officer, nor pursuant to his employment of the defendants, and that the Health Officer had testified that he never gave any order for the disinfection of the rags, and that the defendants assumed to do this work without any direction of the Health Officer, and without approval by him of the efficiency of the work or the charges resulting from it.

3. That this objection was not applicable to the charges for lighterage and storage, and that the Collector was justified in directing, as he did, the sending of the rags to these places, and the expense of such transfer was a lien upon the property.

4. That the charges for lighterage paid by the defendants, according to the custom in such cases, and for the storage for

the time the rags properly remained with them, were a lien upon the property.

5. That, so far as defendants required payment for the further claim for disinfection, as a condition of the delivery, they were chargeable with duress of property, and that the plaintiffs were entitled to recover this amount from them.

The result, then, of this summary of the case is briefly this:

The defendants claimed as a Federal question that they had set up as a defence to this action an authority exercised under the United States, viz., an authority given by the Collector of Customs to disinfect these rags.

In relation to this, the General Term held that the Revised Statutes gave no authority to the Collector to take possession of these goods, and retain possession of them, and that his seizure of the goods, and causing them to be sent to the Baltic stores, was an unauthorized act, and if he caused them to be disinfected, he became liable in damages.

The Court of Appeals, however, held that the direction of the Collector that the rags should be sent to the places where they were taken, was pursuant to the requirement that they should be disinfected, and in aid of the health officer in the execution of his official power, by the observance of the regulations made by him; that *the Collector gave no order for their disinfection;* that the Health Officer gave no such order; and that the defendants assumed to disinfect them without authority, and hence their charges therefor were illegal; but that, as the Collector had properly sent them the goods for such action as the health authorities might see fit to take, the plaintiffs became liable for storage and lighterage.

It follows then that, as the Court of Appeals ruled, as matter of fact, that the Collector never ordered the rags to be disinfected, (a ruling which is not reviewable here, *Dower* v. *Richards*, 151 U. S. 658; *In re Buchanan*, 158 U. S. 31; *Israel* v. *Arthur*, 152 U. S. 355,) and as matter of law, that he had the right to send them to the proper warehouse for disinfection, it appears that the ruling was in favor of and not against the validity of the authority set up and claimed under

the laws of the United States. We may add in this connection that, as it clearly appears that the collector had no authority to order the goods to be disinfected, we think the Court of Appeals was correct in holding that his somewhat ambiguous order of June 9, directing that the goods should be sent to the Baltic stores for disinfection, should be considered as an order to send the goods for disinfection, in case such disinfection were ordered by the health officer. The disinfection, if ordered at all, was ordered by the health officer, and the charges for this are all for which the defendants were held liable. Whether such order was ever given by the health officer was a question solely within the jurisdiction of the state court.

The writ of error must, therefore, be

Dismissed.

VAN WAGENEN *v.* SEWALL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

No. 140. Argued and submitted December 20, 1895. — Decided January 6, 1896.

As this appeal was taken long after the act establishing the Circuit Courts of Appeals went into effect, and as there is an entire absence of a certificate of a question of jurisdiction, the appeal is dismissed for want of jurisdiction. *In re Lehigh Mining Co.*, 156 U. S. 322, and *Shields* v. *Coleman*, 157 U. S. 628, distinguished from this case.

Even if an examination of the record would have disclosed a question of jurisdiction, which is very doubtful, this court cannot be required to search the record for it; as it was the object of the fifth section of the act of 1891 to have the question of jurisdiction plainly and distinctly certified, or at least to have it appear so clearly in the decree of the court below that no other question was involved, that no further examination of the record would be necessary.

THIS was a petition by Sarah Van Wagenen and others for the review and reversal of certain proceedings in the case of *John M. Hanson* v. *The United States*, and of a decree

rendered therein, ordering a survey of the Hanson or Miles grant, made by the Surveyor General upon the petition of one Greeley, assignee in bankruptcy of Hanson, which said survey had been approved by a decree of the District Court of April 13, 1889.

The petition set forth that the petitioners were the owners in fee of an undivided one third interest in this grant, which contained sixteen thousand or more acres, situate in the county of Dade, which undivided interest originally belonged to one Hedrick, one of the original petitioners in the case of *Hanson* v. *United States;* and that petitioners were also the owners in fee of the whole grant by purchase from the State of Florida; that such grant was originally made by the Spanish government to one Samuel Miles on July 19, 1813, was surveyed and set off to him in 1815, and in 1840 was confirmed to Hanson, Segui, and Hedrick; that upon appeal to the Supreme Court of the United States, the title of the claimants, and the decree of the court below were affirmed (16 Pet. 196); but that the Supreme Court set aside the survey as irregular, and ordered the Surveyor General of the Territory to make a new survey, and remanded the case to the Superior Court of East Florida for that purpose; that in accordance with such mandate and decree of the Supreme Court a new survey was made, returned to the land office of the Territory, and the grant then platted from said survey; that such survey was subsequently confirmed and approved of by the said Superior Court, whose decree in that regard has never been reversed, appealed from, or set aside, but still remains in force; and that, by such action and decree, that court exhausted all its jurisdiction under the acts of Congress, and could neither do nor perform any other matter or thing relative thereto.

The petitioners further averred that, in 1885, one Greeley, claiming to be assignee in bankruptcy of Hanson, and one Agatha O'Brien, claiming to be the administratrix of Bernardo Segui, also claiming an undivided one third interest in the grant, did by petition in the said cause of *Hanson* v. *United States*, to the District Court for the Northern District of Florida, allege, as well as in the petition of Rufus K. Sewall,

Statement of the Case.

who was made a party thereto, that said grant had never been surveyed, nor had any survey ever been confirmed or approved, as directed by the Supreme Court and the Superior Court of the Territory; and did pray that the survey might be had in accordance with the decree of such courts; and that, in pursuance of such petition, the District Court, in 1885, ordered the then Surveyor General to make such survey, which was in fact made, returned to the court in accordance with this order, and in 1889 was confirmed — all without notice to the petitioners — and as they averred, beyond the jurisdiction and power of the court; that the same was invalid, by reason of the fact that the court had no jurisdiction in the premises, having exhausted all jurisdiction and powers it possessed under its previous decree confirming the survey made in 1851; that the allegations contained in the petition of Greeley were untrue, in averring that no survey had been made; that neither the representatives of Segui, nor Greeley, as assignee of Hanson, had any right in the grant; that the new survey was unjust to the petitioners, in that it greatly changed the lines of the original survey, and reduced largely the area of the grant, and in other respects affected the just rights of the petitioners.

Wherefore petitioners prayed that all of such proceedings for the new survey be vacated and set aside as absolutely null and void, and for further relief, etc.

On January 6, 1892, Sewall appeared by his solicitors, and demurred to the petition upon two grounds: first, that the record and proceedings attached to and made a part of the petition showed that a proper and final decree had been made in the cause, adjudicating fully all the issues made therein; and, second, that the court had no power or jurisdiction to grant the petitioners the relief prayed for therein.

This demurrer having been sustained by the court, the petitioner Sarah Van Wagenen prayed for a rehearing, upon the ground that the final decree made in 1851 fully and finally disposed of the cause, and exhausted the jurisdiction of the court, etc.; and that the court had no power, by proceedings taken in 1885, to order a resurvey.

This petition for a rehearing having been denied, petitioner appealed to this court.

Mr. H. H. Buckman for appellants.

Mr. Rufus K. Sewall, appellee, in person submitted on his brief.

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

As this appeal was taken long after the act of March 3, 1891, establishing the Court of Appeals, went into effect, it should have been taken to the Court of Appeals of the Fifth Circuit, unless the case be one within the fifth section of the act, wherein the jurisdiction of the court is in issue. In such cases, however, "the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." There is an entire absence of such certificate in this case — an absence which was held to be fatal to the appeal in *Maynard* v. *Hecht*, 151 U. S. 324; *Moran* v. *Hagerman*, 151 U. S. 329; *Colvin* v. *Jacksonville*, 157 U. S. 368; and *Davis & Rankin Building Company* v. *Barber*, 157 U. S. 673. It is true that in *In re Lehigh Min. and Mfg. Co.*, 156 U. S. 322, we held that the certificate was not necessary, inasmuch as it appeared in the decree that the question involved was only a question of jurisdiction, and the judgment not only recited that the court considered it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction, but the District Judge certified in the bill of exceptions that it was "held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed," and, in the order allowing the writ of error, certified in effect that it was allowed "upon the question of jurisdiction." So, also, in *Shields* v. *Coleman*, 157 U. S. 168, where the court below, granting the appeal, said, "this appeal is granted solely upon the question of jurisdiction," and made further provisions for determining what part of the record should be certified to this court under the

appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act.

In this case, however, the only question of jurisdiction is raised by the demurrer of Sewall to the petition, which is upon two grounds; first, that a proper and final decree had been made adjudicating all the issues in the cause; and second, that the court had no power or jurisdiction to grant the petitioners relief. This, however, is in substance only a general demurrer to the bill for the want of equity.

In the petition of Sarah Van Wagenen for a rehearing it is alleged that a final decree was rendered in 1851, fully and finally disposing of the cause, which exhausted all the jurisdiction of the court, and that it was beyond its power and jurisdiction to vacate the survey ordered by such decree by the subsequent proceedings taken in 1885. It is very doubtful whether the question thus raised by her, of the authority to vacate and set aside a previous decree of the court, did not involve a power to exercise a jurisdiction already vested rather than a question of jurisdiction itself, within the meaning of the act of March 3, 1891. *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, 180.

In any event, however, we cannot be required to search the record to ascertain whether the petition was dismissed for the want of equity, or for some other reason. *Shields* v. *Coleman*, 157 U. S. 168, 177. Indeed, it appears to have been the very object of the fifth section of the act of 1891 to have the question of jurisdiction plainly and distinctly certified to us, or at least to have it appear so clearly in the decree of the court below, that no other question was involved, that no further examination of the record would be necessary.

The appeal is accordingly

Dismissed.

UNION MUTUAL LIFE INSURANCE COMPANY *v.* KIRCHOFF.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 132. Argued December 19, 1895. — Decided January 6, 1896.

The decree, to review which this writ of error was sued out, was not a final decree, and this court cannot take jurisdiction.

The rule is well nigh universal that, if a case be remanded by an appellate court to the court below for further judicial proceedings, in conformity with the opinion of the appellate court, the decree is not final.

This was a bill in equity originally filed by Elizabeth Kirchoff, June 12, 1882, in the circuit court of Cook County, Illinois, against the appellant, to enforce the specific performance of a certain agreement for the conveyance to her of two lots of land in the city of Chicago. The prayer of the bill was subsequently amended by the addition of a clause praying that the plaintiff might be allowed to redeem the premises according to the terms of said agreement.

The controversy between these parties has been the constant subject of litigation since July, 1878, and in one form or another has been twice to the appellate court of Illinois, and three times to the Supreme Court of the State. The facts are somewhat complicated, but so far as necessary to the disposition of this case may be summarized as follows:

On May 8, 1871, Julius Kirchoff, being engaged in the distillery business in Chicago, borrowed $60,000 of the Union Mutual Life Insurance Company, and to secure the payment thereof, executed, together with his wife Elizabeth, and her mother Angela Diversey, a joint judgment note for $60,000, and a trust deed covering certain real estate in Chicago belonging to Kirchoff and his wife, and certain other property, including a farm in Cook County, owned by Mrs. Diversey. The money received from the loan was put in the bank to the credit of the firm of Kirchoff Bros. & Co., which soon after failed.

Statement of the Case.

In 1876, default having been made in the payment of interest and taxes, judgment was taken against Mrs. Diversey on the note, after certain unsuccessful negotiations towards funding the indebtedness into a new loan at a lower rate of interest, and on July 11, 1878, proceedings were commenced in the Circuit Court of the United States to foreclose the trust deed. The bill in addition sought to cure a misdescription of the property belonging to Mrs. Diversey, who filed an answer denying the right of the company to cure the misdescription, and averring that the notes and mortgage were procured from her by misrepresentation.

From this time the relation of the parties seems to have remained unchanged until June, 1879, when an agreement was reached by which the company released to Mrs. Diversey its claim upon forty acres of the land belonging to her, and she executed to it a warranty deed for the remainder of the premises. About the same time, Mrs. Kirchoff and her husband executed a quitclaim deed of all the property belonging to them, and included in the mortgage. The deed from Mrs. Diversey was immediately placed on record, but the deed from the Kirchoffs was withheld by the agent and attorney of the insurance company.

It was claimed by Mrs. Kirchoff that, during the negotiations which culminated in the execution of the above deeds, it was agreed that the insurance company should reconvey to her two lots included in her deed, one of which was then occupied as a homestead, the other cornering upon it, but facing the other way; that the price at which the reconveyance should take place was their valuation at a previous appraisement made by one Rees, viz., $7500 and $2500 respectively, and that Mrs. Kirchoff was to execute in payment therefor her notes for $10,000, extending over a period of ten years, bearing interest at six per cent, and secured by a mortgage upon the two lots. It seems there were certain intervening claims on one of the lots, growing out of a sheriff's deed, executed pursuant to a sale on a judgment against Mrs. Kirchoff, rendered subsequently to the original trust deed, but prior to the deed from Kirchoff and wife to the company,

which rendered necessary a further prosecution of the foreclosure proceedings, in order that the company might obtain a good title to the premises, so as to convey a clear title to Mrs. Kirchoff and take from her a mortgage which would be a first lien thereon. It is claimed that this matter was explained to Mr. Kirchoff, her husband and agent, and he was assured that the prosecution of the foreclosure proceedings would not in any manner affect the agreement which had been made, but that, as soon as the company got a deed from the master in chancery, it would carry out its part of the contract by conveying to Mrs. Kirchoff the premises in question, and would then take the mortgage from her. She alleged that, relying upon this agreement, no defence was made to the foreclosure proceedings by her, and the same were prosecuted to a decree, and the master's deed issued thereon to the insurance company January 21, 1882. The object of the bill in this case was to insist upon this right of redemption in accordance with its terms.

The insurance company, on the other hand, contended that an inspection of the record showed that no such agreement was ever concluded, and that the state court was bound by the decree of the Federal court foreclosing the mortgage, and had no jurisdiction to review it. It was not disputed that propositions similar to the so called agreement were discussed between the Kirchoffs and the agents of the insurance company, or that assurances were given by the latter of the probable willingness of the insurance company to sell the land on the terms named; but it is claimed that when the insurance company was advised of the proposition, it was instantly and unequivocally declined, and this action of the company communicated to Mrs. Kirchoff in time to prevent any injury to her from the quitclaim deed. That, after having been thus fully advised, she elected to deliver the deed, and in that manner get the benefit of the release from her indebtedness.

A demurrer was filed to the bill which was overruled, when defendant answered, denying the agreement for redemption set forth in the bill, and also setting up the statute of frauds as a defence. The case coming on for a hearing upon pleadings

and proofs, the bill was dismissed for want of equity. An appeal was taken to the state Supreme Court, which was dismissed upon the ground that the case should have gone to the appellate court. 128 Illinois, 199. Whereupon the complainant sued out a writ of error from the appellate court of the first district of Illinois to the circuit court of Cook County, and upon a hearing in the appellate court the decree of the circuit court was reversed, with directions to enter a decree in accordance with the opinion of the appellate court. 33 Illinois App. 607. This opinion was not sent up with the record in this case. From the decree of the appellate court, the insurance company prosecuted an appeal to the Supreme Court of the State, which affirmed the decree to the appellate court. 133 Illinois, 368. To reverse that decision, this writ of error was sued out.

Mr. E. Parmalee Prentice for plaintiff in error. *Mr. Frank L. Wean* and *Mr. J. H. Drummond* were on his brief.

Mr. George R. Daley for defendant in error. *Mr. Ira W. Buell* and *Mr. William S. Harbert* were on his brief.

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

From the briefs of counsel and the reports of the case in the Illinois reports, we are informed that, upon the affirmance by the Supreme Court of the decree of the appellate court, the case was remanded to the circuit court of Cook County, where an accounting was taken, and a decree entered in accordance with the opinion of the appellate court. From that decree the company is said to have appealed to the appellate court of the first district, which affirmed the decree of the circuit court. 51 Illinois App. 67. Whereupon the insurance company again appealed to the Supreme Court of the State, which again affirmed the decision of the appellate court. 149 Illinois, 536. But as the writ of error from this court was not taken to reverse that decree, but to reverse the first decree

of the Supreme Court, affirming the decree of the appellate court, we are concerned only with the questions arising upon that decree, and more particularly with its finality. It will be observed that it simply affirms the decree of the appellate court, but upon reference to that decree, we find that it reverses the decree of the circuit court of Cook County, "with directions to that court to enter an order and decree in conformity with the opinion filed herein." As this opinion was not sent up with the record, we have no means of knowing judicially what it was, though we are informed by the briefs of counsel that an accounting was ordered and taken in the circuit court.

Obviously the decree, to review which this writ of error was sued out, was not a final decree. The finality of decrees is a subject which has been so much discussed in the decisions of this court that it is useless to do more than to cite the cases of *Lodge* v. *Twell*, 135 U. S. 232, and *McGourkey* v. *Toledo & Ohio Central Railway*, 146 U. S. 536, wherein most of the prior cases are reviewed.

This case is not one for nice distinctions, since the rule is well nigh universal that, if the case be remanded by the appellate court to the court below for further judicial proceedings, in conformity with the opinion of the appellate court, the decree is not final. Especially is this the case when the opinion, to which the new decree is required to conform, does not appear. *Brown* v. *Baxter*, 146 U. S. 619; *Houston* v. *Moore*, 3 Wheat. 433; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Johnson* v. *Keith*, 117 U. S. 199; *Rice* v. *Sanger*, 144 U. S. 197; *Meagher* v. *Minnesota Thresher Mfg. Co.*, 145 U. S. 608; *Hume* v. *Bowie*, 148 U. S. 245; *Werner* v. *Charleston*, 151 U. S. 360.

The writ of error is, therefore,

Dismissed.

KIRBY *v.* TALLMADGE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 96. Argued December 5, 1895. — Decided January 6, 1896.

When one party to an action has in his exclusive possession a knowledge of facts which would tend, if disclosed, to throw light upon the transactions which form the subject of controversy, his failure to offer them in evidence may afford presumptions against him.

Where land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, a person proposing to purchase is bound to make some inquiry as to their title.

The possession of real estate in the District of Columbia, under apparent claim of ownership, is notice to purchasers of the interest the person in possession has in the fee, whether legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry.

This principle applies with peculiar cogency to a case like the present, where the slightest inquiry would have revealed the facts, and where the purchaser deliberately turned his back upon every source of information; and a purchase made under such circumstances does not clothe the vendee with the rights of a *bona fide* purchaser without notice.

This was a bill in equity filed by Maria E. Tallmadge against the appellants, to set aside and remove, as a cloud upon her title, a deed made by the appellants Richard H. Miller, Elizabeth Houchens, and Ella A. Goudy, claiming to be heirs at law of one John L. Miller, deceased, dated August 30, 1888, and purporting to convey to the appellant Kirby the property therein described. The bill further prayed for the cancellation of a trust deed executed by the appellant Kirby and his wife to the defendants Willoughby and Williamson, and for an injunction against all the defendants except Kirby, restraining them from negotiating certain notes given by Kirby for the purchase of said lots, etc.

The facts disclosed by the testimony show that, in 1882, Mrs. Tallmadge, the appellee, purchased of one Bates, for a home, lots Nos. 77 and 78, in square 239, in the city of Washington, with the improvements thereon, for the sum of ten thousand dollars, five thousand of which were paid in cash, the residue to be paid in five instalments of one thousand dollars

each. Instead of taking the title to the property in herself, she furnished the money to John L. Miller, a friend of the family, who paid the $5000 cash, with the money thus furnished, and at her request took the title in his own name, and executed notes for the deferred payments, which he secured by a deed of trust upon the property. Subsequently, and in June, 1883, Miller also purchased with the funds of Mrs. Tallmadge the adjoining lot No. 76, taking title in his own name, and executing a deed of trust for the deferred payments, amounting to $1266.

Mrs. Tallmadge took immediate possession of the premises, and had occupied them as her own from that day to the time the bill was filed, paying taxes, improvements, and interest on incumbrances, reducing the principal $2266, and holding open and notorious possession under her claim of title.

Mr. Miller, who claimed no title or right to the premises in himself, on December 27, 1883, by a deed signed by himself and wife, conveyed the legal title to Mrs. Tallmadge, but this deed, through inadvertence or otherwise, was not recorded until October 4, 1888. Mr. Miller died in February, 1888, and by his will, which was dated December 1, 1880, devised his estate to his widow.

On June 16, 1888, defendants Miller, Houchens, and Goudy, collateral heirs of John L. Miller, who had made a contract with the defendants Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill in the Supreme Court of the District against the widow and executor of Miller, the holders of the notes given by him, and the trustees in one of the deeds of trust, praying for a partition or sale of the property, the admeasurement of the widow's dower, and for a charge upon the personal estate of Miller for the unpaid purchase money of the property.

To this bill the widow of John L. Miller made answer that her husband never had any interest in the property in question; that the title was taken in his name for Mrs. Tallmadge; and that long before his death he had by deed duly conveyed it to her, and that neither she nor his estate had or had ever

Counsel for Parties.

had any interest in the property. In August, 1888, the pendency of this suit coming to the knowledge of Mrs. Tallmadge, she sent the original deed from Miller to her, then unrecorded, by Mr. Tallmadge to Willoughby and Williamson, solicitors for Miller's heirs, who examined and made minutes from it.

On August 30, 1888, Houchens, Goudy, and Miller, who had filed the bill for partition, executed a deed conveying the property to the appellant Kirby, subject to the dower rights of Mrs. Miller, for a consideration of $12,000, $3000 of which were said to have been paid in cash and $9000 by notes secured by a mortgage or trust deed upon the property, to Willoughby and Williamson as trustees. Kirby thereupon claimed the property as an innocent purchaser without notice of the prior deed. He at once gave notice to Mr. Tallmadge that he would demand rent for the property at the rate of $1000 per annum.

On receipt of this notice Mrs. Tallmadge filed this bill to cancel and set aside the deed and deed of trust. Answers were filed by the defendants and testimony taken by the plaintiff, tending to show the facts alleged in her bill. Neither of the appellants took proof, nor did they or either of them offer themselves as witnesses, but stood upon their answers.

Upon final hearing, the court below, in special term, rendered a decree in accordance with the prayer of the bill, setting aside the deed and deed of trust as fraudulent and void, from which decree defendants appealed to the General Term, which affirmed the decree of the court below, and further directed that Miller, on the demand of Kirby, return to him the $3000 which Kirby claimed to have paid, and which Miller admitted to have received.

From this decree defendants appealed to this court.

Mr. John T. Morgan for all the appellants.

Mr. W. Willoughby for himself and Elizabeth M. Houchens, appellants. *Mr. L. Cabell Williamson* was on his brief as counsel for himself, Ellen A. Goudy, and Richard H. Miller.

Mr. John C. Fay for appellee.

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

The controversy in this case arises from the fact that the deed from John L. Miller to Mrs. Tallmadge, which was given December 27, 1883, was not put upon record until October 4, 1888. In the meantime, and in February, 1888, Miller, in whose name the property had been taken for the benefit of Mrs. Tallmadge, died; and on August 30, 1888, Houchens, Goudy, and Richard Henry Miller, collateral heirs of John L. Miller, executed a deed of the property, subject to the dower rights of Miller's widow, to defendant Kirby for an expressed consideration of $12,000, of which $3000 are said to have been paid down in cash, and $9000 in notes, payable to Willoughby and Williamson. Kirby now claims to be an innocent purchaser of the property, without notice of the prior deed from John L. Miller to Mrs. Tallmadge.

There are several circumstances in this case which tend to arouse a suspicion that Kirby's purchase of the property was not made in good faith. Within three months after the probate of the will of John L. Miller, his collateral heirs, Houchens, Goudy, and Richard H. Miller, who had made a contract with Willoughby and Williamson to give them one quarter of whatever they could get for them out of the estate of Miller, filed a bill for the partition of real estate, and to set off the widow's dower. His widow, Lola, answered, admitted that her husband did not purchase the lands described in the bill, and alleged that he had conveyed them away in his lifetime.

Mrs. Tallmadge, hearing of this suit, instead of appearing formally therein, submitted her deed from Miller to the solicitors for the complainants in the partition suit, who did not amend their bill or make her a party, but apparently allowed the suit to drop; inasmuch as the complainants, being heirs of John L. Miller, took only his actual interest in the land, of which, owing to his deed to Mrs. Tallmadge in his lifetime, nothing remained at his death. Shortly thereafter, the com-

plainants in that suit, who must have been well aware that they had no title to the property, executed a deed to Kirby of all their interest in the land for a consideration of $12,000, subject to the dower right of Mrs. Miller, the debts of John L. Miller, and so much of the notes of $5000 as were unpaid, after applying his personal estate. Kirby alleges in his answer that he examined the premises twice and approached the house, but never seems to have entered it, and apparently took up with the first proposition made to him to buy it, without any of the bargaining that usually precedes the consummation of a sale of property of that value. While he avers in his answer, and Miller admits, the payment of $3000 in cash, defendants introduced no testimony whatever in support of their case, but relied solely upon their answers. As they had it in their power to explain the suspicious circumstances connected with the transaction, we regard their failure to do so as a proper subject of comment. "All evidence," said Lord Mansfield in *Blatch* v. *Archer*, (Cowper, 63, 65,) "is to be weighed according to the proof which it was in the power of one side to have produced and in the power of the other side to have contradicted." It would certainly have been much more satisfactory if the defendants, who must have been acquainted with all the facts and circumstances attending this somewhat singular transaction, had gone upon the stand and given their version of the facts. *McDonough* v. *O'Niel*, 113 Mass. 92; *Commonwealth* v. *Webster*, 5 Cush. 295, 316. It is said by Mr. Starkie, in his work on Evidence, vol. 1, p. 54: "The conduct of the party in omitting to produce that evidence in elucidation of the subject-matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice."

But the decisive answer to the case of *bona fide* purchase made by the defendant Kirby is, that Mrs. Tallmadge had, ever since the original purchase of the land by Miller in 1882, been in the open, notorious, and continued possession of the property, occupying it as a home. The law is perfectly well

settled, both in England and in this country, except perhaps in some of the New England States, that such possession, under apparent claim of ownership, is notice to purchasers of whatever interest the person actually in possession has in the fee, whether such interest be legal or equitable in its nature, and of all facts which the proposed purchaser might have learned by due inquiry. 2 Pomeroy's Eq. Juris. § 614; Wade on Notice, § 273. The same principle was adopted by this court in *Landes* v. *Brandt*, 10 How. 348, 375, in which it was held that "open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that the purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that he, the subsequent purchaser, was bound by that title, aside from all other evidence of such possession and holding." The principle has been steadily adhered to in subsequent decisions. *Lea* v. *Polk County Copper Co.*, 21 How. 493, 498; *Hughes* v. *United States*, 4 Wall. 232, 236; *Noyes* v. *Hall*, 97 U. S. 34; *McLean* v. *Clapp*, 141 U. S. 429, 436; *Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417.

Defendants' reply to this proposition is that the occupancy in this case, being that of a husband and wife, is by law referable to the husband alone as the head of the family; that the purchaser was not bound by any notice, except such as arose from the possession of the husband, and that, as he had no title to the property, Kirby was not bound to ascertain whether other members of the family had title or not. There are undoubtedly cases holding that occupation by some other person than the one holding the unrecorded deed, is no notice of title in such third person, and that the apparent possession of premises by the head of a family is no notice of a title in a mere boarder, lodger, or subordinate member of such family, or of a secret agreement between the head of a family and another person. As was said by this court in *Townsend* v. *Little*, 109 U. S. 504, 511: "Where possession is relied upon as giving constructive notice it must be open and unambiguous, and not liable to be misunderstood or miscon-

strued. It must be sufficiently distinct and unequivocal, so as to put the purchaser on his guard." In this case one James Townsend bought and took possession of a public house in Salt Lake City, and lived in it with his lawful wife and a plural or polygamous wife, the latter, who was the appellant, taking an active part in conducting the business of the hotel. He subsequently ceased to maintain relations with the appellant as his polygamous wife, but, being desirous of having the benefit of her services, both concealed this fact. He made a secret agreement with her that if she would thus remain, she should have a half interest in the property. He afterwards acquired his legal title to the property without a disclosure of the secret agreement. His interest therein having subsequently passed into the hands of innocent third parties for value without notice of appellant's claim under the secret agreement, it was held that the joint occupation of the premises by herself and Townsend, under the circumstances, was not a constructive notice of her claim, and that she had no rights in the premises as against a *bona fide* purchaser without notice. There were evidently two substantial reasons why appellant's possession was not notice of her rights. First, James Townsend took the legal title to himself in 1873 and held it until 1878, when the purchase was made; and, second, his agreement with the appellant was not one with his lawful but his polygamous wife, and was also a secret one. The case is obviously not one of a joint occupation by a husband and his lawful wife, neither of them having any title thereto.

In the case of *Thomas* v. *Kennedy*, 24 Iowa, 397, it was held that, where real estate is ostensibly as much in the possession of the husband as the wife, there is no such actual possession by the wife as will impart notice of an equitable interest possessed by her in the land, to a purchaser at execution sale *under a judgment against her husband*, in whom the legal title apparently was at the time of the rendition of the judgment. This case is also a mere application of the rule that, if there be any title to the land in one who is in possession of it, the possession will be referred to that title, or, as

said in 2 Pomeroy's Eq. Juris. § 616: "Where *a* title under which the occupant holds has been put on record, and his possession is consistent with what thus appears of record, it shall not be a constructive notice of any additional or different title or interest to a purchaser who has relied upon the record, but has had no actual notice beyond what is thereby disclosed." That the court did not intend to hold that a joint occupation by a husband and wife is in no case notice of more than the occupation of the husband, is evident from the subsequent case of the *Iowa Loan & Trust Co.* v. *King*, 58 Iowa, 598, in which the court said: "It cannot, we think, be doubted that possession of real property by a husband and wife together, will impart notice of the wife's equities as against all persons other than those claiming under the husband, their possession being regarded as joint by reason of the family relation." In this case the occupation was by a husband and wife, and it was held that such possession was notice of a title in the wife to a life estate in the property as against the holder of a mortgage given by a son, who was a member of the family as a boarder, lodging a part of the time in his mother's house, and a part of the time elsewhere — the legal title being in the son.

In the case of *Lindley* v. *Martindale*, 78 Iowa, 379, the title to the lands was in a son of the plaintiff, who resided on a portion of them, while plaintiff and her husband resided on another portion. The lands had for a long time been cared for either by the husband or the son, and it was held that one who, upon being told that the title was in the son, took a mortgage from him to secure a loan, which was used for the most part to pay off prior incumbrances placed on the land by the son, was not charged with the alleged equities of plaintiff by reason of her claimed possession of the land, the court holding that her possession was not such as the law requires to impart notice. The case is not entirely reconcilable with the last.

In *Harris* v. *McIntyre*, 118 Illinois, 275, a widow furnished her bachelor brother money with which to buy a farm for their joint use, the title to be taken to each in proportion to

the sums advanced by them, respectively. He, however, took a conveyance of the entire estate to himself, and they both moved upon the place, he managing the land, and she attending to the household duties. The deed was recorded, and he borrowed money, mortgaged the land to secure the loan, and appeared to the world as the owner for a period of over ten years, during which time the sister took no steps to have her equitable rights enforced or asserted. It was held that her possession, under such circumstances, was not such as would charge a subsequent purchaser from her brother with notice of her equitable rights. Here, too, the record title was strictly consistent with the possession.

In *Rankin* v. *Coar*, 46 N. J. Eq. 566, 572, a widow, who occupied part of a house in which she was entitled to dower, while her son, the sole heir at law, occupied the rest of the house, released her dower therein to her son by deed duly recorded. It was held that her continued occupation thereafter would not give notice to one who took a mortgage from the son, of a title in her to a part of the house occupied by her, acquired by an unrecorded deed to her from her son contemporaneous with her release of dower. "Possession," said the court, "to give notice or to make inquiry a duty, must be open, notorious, and unequivocal. There must be such an occupation of the premises as a man of ordinary prudence, treating for the acquisition of some interest therein, would observe, and, observing would perceive to be inconsistent with the right of him with whom he was treating, and so be led to inquiry."

So in *Atwood* v. *Bearss*, 47 Mich. 72, the title to property upon the record appeared to be in the wife. Her husband's previous occupation had been under her ownership, and in right of the marital relation, and nothing had transpired to suggest that she had made the property over to him. She had, however, given him a deed, which was not put upon record. It was held that his continuance in possession was no notice of this deed, since it was obviously consistent with the previous title in herself.

Indeed, there can be no doubt whatever of the proposition

that, where the land is occupied by two persons, as for instance, by husband and wife, and there is a recorded title in one of them, such joint occupation is not notice of an unrecorded title in the other. In such case, the purchaser finding title in one, would be thrown off his guard with respect to the title of the other. The rule is universal that if the possession be consistent with the record title, it is no notice of an unrecorded title. But, where the land is used for the purpose of a home, and is jointly occupied by husband and wife, neither of whom has title by record, we think that in view of the frequency with which homestead property is taken in the name of the wife, the proposed purchaser is bound to make some inquiry as to their title.

The case of *Phelan* v. *Brady*, 119 N. Y. 587, is an instance of this. In this case a suit was brought to foreclose a mortgage upon certain premises, given by one Murphy, who held an apparently perfect record title to the property. It appeared, however, that before the execution of the mortgage, Murphy had conveyed the premises to one Margaret Brady, who was in possession, and with her husband occupied two rooms in the building on the premises. She also kept a liquor store in a part thereof. The other rooms she leased to various tenants, claiming to be the owner and collecting the rents. Her deed was not recorded until after the giving of the mortgage. It was held that her actual possession under her deed, although unrecorded and its existence unknown to plaintiff, was sufficient notice to him of her rights to defeat any claim under the mortgage. This case goes much farther than is necessary to justify the court in holding that Mrs. Tallmadge's possession was notice in the case under consideration, as the actual occupation of the wife was only of two rooms in a tenement house containing forty-three apartments.

If there be any force at all in the general rule that the possession of another than the grantor, puts the purchaser upon inquiry as to the nature of such possession, it applies with peculiar cogency to a case like the present, where the slightest inquiry, either of the husband or wife, would have revealed the actual facts. Instead of making such inquiry, Kirby turns

his back upon every source of information, does not even enter the house, makes no examination as to whether the property was in litigation, and buys it of collateral heirs of Miller, subject to his widow's dower if he had had the title, to an unpaid mortgage, and to the chances of the property being required for the payment of Miller's debts. It is clear that a purchase made under such circumstances does not clothe the vendee with the rights of a *bona fide* purchaser without notice.

We see no reason for impeaching the original purchase of the land by Mrs. Tallmadge. Her account of the transaction is supported by the testimony of all the witnesses, as well as by the receipts and other documentary evidence. Her failure to cause the deed to be recorded is not an unusual piece of carelessness, nor is it an infrequent cause of litigation. Under the circumstances of the case, it raises no presumption of fraud. What motives she may have had for taking the title to the property in the name of Mr. Miller is entirely immaterial to the present controversy, although it appears from her testimony that she was possessed of money in her own right, and took this method of investing it.

The decree of the court below is, therefore,

Affirmed.

IOWA CENTRAL RAILWAY COMPANY *v.* IOWA.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 128. Submitted December 18, 1895. — Decided January 6, 1896.

The Fourteenth Amendment to the Constitution in no way undertakes to control the power of a State to determine by what process legal rights may be asserted, or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard, before the issues are decided.

Whether the court of last resort of a State has properly construed its own constitution and laws in determining that a summary process under those laws was applicable to the matter which it adjudged, is purely the decision of a question of state law, binding upon this court.

Statement of the Case.

This court has no power to review a decision of a state court that the averments of an answer in a pending case set forth no defence to the plaintiff's claim.

It is no denial of a right protected by the Constitution of the United States to refuse a jury trial in a civil cause pending in a state court, even though it be clearly erroneous to construe the laws of the State as justifying the refusal.

In 1880, the Central Iowa Railway Company, which had become the owner, through foreclosure proceedings, of the railroad of the Central Railway Company of Iowa, leased to the Burlington, Cedar Rapids and Northern Company about eleven miles of said road, which lay between Manly Junction and Northwood, the northern terminus of the Central company's road. The Burlington company took exclusive possession of the leased premises. In 1881 the citizens of Northwood made application to the state railroad commissioners for an order requiring the Central Iowa Railway Company to operate such leased portion of its road, and after due notice a hearing was had before the commissioners, and, in 1883, the order prayed for was granted. As the company failed to obey, an action was brought, pursuant to chapter 133, Iowa laws of 1884, to compel compliance with the order of the commissioners. The state district court rendered a decree against the railroad company, and on appeal, after a hearing and overruling of a motion for rehearing, the Supreme Court of the State, in October, 1887, entered a decree, ordering, adjudging, and decreeing that the Central Iowa Railway Company operate such leased portion of its line, and enjoining the Burlington company from interference therewith. The opinion of the Supreme Court is reported in 71 Iowa, 410.

During the pendency of this litigation, however, foreclosure proceedings were instituted in the Circuit Court of the United States for the Southern District of Iowa, against the Central Iowa Railway Company, and, while the cause was pending in the Supreme Court of Iowa, on the appeal of the company a receiver of its property was appointed. A decree of foreclosure was entered, and, in September, 1887, the road was sold. Subsequently, the purchaser assigned his purchase to

the Iowa Railway Company, a corporation of Iowa, which company thereafter made conveyance to plaintiff in error herein, an Illinois corporation, and the receiver surrendered possession to it on May 30, 1889.

In August, 1889, the Attorney General of the State of Iowa filed a petition in the Supreme Court of the State, in the name of the State as plaintiff, against the Iowa Central Railway Company, alleging the entry of the decree of October, 1887, above referred to; that thereafter the Iowa Railway Company had become the successor, assignee, and grantee of the Central Iowa Railway Company, and was operating and running its line contrary to the terms and provisions of the decree and in violation thereof. A mandatory injunction was prayed to compel the defendant to obey the command and order contained in said decree.

A copy of said petition with notice of an intention to apply for an order to show cause why the order and decree referred to should not be obeyed, was served upon the railway company. That company filed its answer and amendments thereto, which, in substance, set forth that it was not a party to the suit in which the decree was rendered; that the Central Iowa Railway Company at the time of the entering of the decree was dead to all intents and purposes, by reason of the fact that a receiver had theretofore been appointed and the road of the company sold under foreclosure; that defendant was not the successor, assignee, or grantee of said Central Iowa Railway Company and had not been adjudged so to be; that no demand had been made upon it to perform the decree, and that a mandatory writ ought not to be issued until it had an opportunity of testing in a regular manner the right of the State to require the performance of the decree in question. The defendant also filed a demand for a jury trial. Thereupon a motion was made on behalf of the State to enter the order prayed for in the petition, upon the ground that the defendant in its answer had not shown cause why such order should not be made, and for the further reason that from the record and pleadings in the proceeding it appeared that the plaintiff was entitled to such order. Plaintiff's motion for

judgment was granted, and on October 26, 1891, an entry was made in the cause in the words and figures following: "In this cause the court, being fully advised in the premises, file their written decision and find that plaintiff is entitled to an order for the operation of the road by defendant as prayed for, and that a writ issue accordingly. It is further considered by the court that the defendant pay the costs of this court, taxed at $22.75, and that execution issue therefor."

The cause was then brought to this court by writ of error.

Mr. Anthony C. Daly for plaintiff in error.

Mr. Milton Remley, Attorney General of the State of Iowa, for defendant in error.

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

The contention of the plaintiff in error is that the proceeding instituted against it in the Supreme Court of Iowa was an action for mandamus, and that no such action could lawfully be brought to compel it to operate the leased portion of its road until its legal duty to do so had been previously determined by the verdict of a jury. There was no assertion that the court below had no jurisdiction over the subject-matter. Nowhere in the answer or in the amendments to the answer filed on behalf of the company was it claimed that the proceeding was violative of the Constitution of the United States, or assailed any right, title, privilege, or immunity specially set up or claimed under that Constitution. Indeed, there was no mention of any right thereunder until the filing of a brief for defendant entitled "Defendant's Resistance and Objection to Plaintiff's Motion to Enter Order Prayed for in the Petition," in the ninth paragraph whereof it was claimed that it would be a violation of the Fourteenth Amendment of the Constitution of the United States to grant the order prayed for upon the motion in question. It is apparent that this defence merely asserted that the rights of the corporation as a

citizen of the United States would be impaired by enforcing the claim urged against it on the motion, instead of by another and less summary form of action. But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the state court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words. Whether the court of last resort of the State of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law, binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the State empowered by the laws of the State to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the Constitution of the United States or upon any act of Congress. *Ludeling* v. *Chaffe*, 143 U. S. 301, 305.

As said by this court, speaking through Mr. Chief Justice Fuller, in *Leeper* v. *Texas*, 139 U. S. 462, 468: "Law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied." There was a "regular course of administration" in the case at bar, as that term was employed in the case cited.

It is manifest that it was never contemplated by the framers of the Constitution that this court should sit in review, as an

appellate court, of such a question as that presented by the record in the case at bar, viz., whether or not the highest court of a State erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defence to the claim of the plaintiff.

It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial, even though it were clearly erroneous to construe the laws of the State as justifying the refusal. *Brooks* v. *Missouri*, 124 U. S. 394; *Spies* v. *Illinois*, 123 U. S. 131, 166.

Writ of error dismissed for want of jurisdiction.

SPALDING *v.* CHANDLER.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 86. Argued December 2, 1895. — Decided January 6, 1896.

The Indian reservation at Sault Ste. Marie, under the treaty of June 26, 1820, with the Chippewas, continued until extinguished by the treaty of August 2, 1855; and upon the extinguishment of the Indian title at that time the land included in the reservation was made, by § 10 of the act of September 4, 1841, not subject to preëmption.

The plaintiff in error claimed the land in dispute in this controversy under an alleged preëmption entry. The claim of the defendant in error rested upon a patent from the United States. The case is stated in the opinion of the court.

Mr. John C. Donnelly and *Mr. A. C. Raymond* for plaintiff in error.

Mr. John H. Goff for defendant in error.

Mr. Justice White delivered the opinion of the court.

Plaintiff in error by a bill in equity filed in the Circuit Court of the county of Chippewa, State of Michigan, sought

to have a trust declared in his favor in certain lands at Sault Ste. Marie, Michigan, at one time a part of what was known as the "Indian Reserve," which land had been patented by the United States to the defendant, and to have the defendant ordered to execute a conveyance of the legal title.

The facts in the case, as developed upon the trial, were as follows: On June 26, 1820, 7 Stat. 206, the Chippeway tribe of Indians ceded to the United States sixteen square miles of land. The tract ceded commenced at the Sault and extended two miles up and the same distance down the river with a depth of four miles, including a portage, the site of the village of Sault Ste. Marie, and the old French fort. Schoolcraft's American Lakes, p. 140. One of the objects of the expedition which effected the signing of the treaty was to prepare the way for an American garrison at the Sault. Ib. p. 135. At the time of the signing of the treaty there were about forty lodges of Chippewa Indians, containing a population of about two hundred souls, resident at the Sault, who subsisted wholly upon the whitefish which were very abundant at the foot of the Falls near by the village. Ib. p. 133. The village settlement of the whites consisted of about fifteen or twenty buildings. Ib. p. 132. By the third article of the treaty it was provided that "the United States will secure to the Indians a perpetual right of fishing at the Falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing ground, which place shall not interfere with the defences of any military work which may be erected, nor with any private rights." The military post of Fort Brady was established on a part of the tract within a few years following the execution of the treaty.

On March 24, 1836, 7 Stat. 491, the Ottawa and Chippewa Nations ceded to the United States a large tract of territory, including in its general limits the sixteen square miles above mentioned. By article third of this treaty the right of fishing and encampment was preserved to the Indians in the following words: "It is understood that the reservation for

a place of fishing and encampment, made under the treaty of St. Mary's, of the 16th of June, 1820, remains unaffected by this treaty." In 1845, under the directions of the surveyor general for the Northwest Territory a survey was made at Sault Ste. Marie, and upon the map of said survey was noted the territory occupied by the military, as shown by the stockade or high posts around such occupation, and also the ground then in the occupation of the Indians under the treaty of 1820, and each of said reservations was respectively noted upon the map as the "Military Reserve" and the "Indian Reserve." At the time of the making of the survey of 1845 there was no occupation of the Indian reserve other than by Indians, and a raceway bounded the reserve on the south.

By an act approved March 1, 1847, c. 32, 9 Stat. 146, Congress established the Lake Superior land district in Michigan, embracing therein, among other land, the territory ceded by the Chippewas under the treaty of 1820, and provision was made for a geological survey and examination of the lands therein. It was provided in the closing sentence of section 2 that all non-mineral lands within said district should "be sold in the same manner as other lands under the laws now in force for the sale of the public lands, excepting and reserving from such sales section sixteen in each township for the use of schools, and such reservations as the President shall deem necessary for public uses."

On April 3, 1847, pursuant to the recommendation of the Secretary of the Treasury, based upon a communication from the Commissioner of the General Land Office, acting on the suggestion of the Fifth Auditor of the Treasury, the President ordered that certain described lands in the northern peninsula of Michigan, or so much thereof as might be found necessary, should be reserved for public uses, and in said described land was included the north fractional half of fractional township 47 north, of range 1 east, which embraced the Indian reserve in question as also the site of Fort Brady.

On August 25, 1847, as the result of a report of Brigadier General Brady, commanding the Fourth Military Department, the acting Secretary of War made application to the Commis-

sioner of the General Land Office "to cause to be reserved from sale the sections colored in red on the enclosed plat, embracing sections 4, 5, and 6 of township 47, range 1 east, and an additional tract adjoining the last-named section on the west not designated by number on the plat." On August 27, 1847, the Commissioner wrote to the Secretary of the Treasury, calling his attention to the fact that sections 4, 5, and 6 of township 47 north, range 1 east, had been reserved for public uses by the President on April 3, 1847, and requested that the Secretary make application "to the President for an order for the reservation of fractional sections 1 and 2, township 47 north, range 1 west, under the same act, for the use of Fort Brady." On August 30, 1847, this communication was transmitted to the President by the Secretary of the Treasury, together with a diagram exhibiting the location of the lands, and the President was asked to give his sanction to the proposed reservation. The request was complied with. Sections 1 and 2, township 47 north, range 1 west, lay to the westward of the Indian reserve, and the military post as then occupied was east of the Indian encampment.

The report of General Brady above referred to accompanied a plat prepared under his direction by Lieutenant Westcott, commandant at Fort Brady, of land which had been surveyed for military purposes. General Brady stated in his report —

"In making this reserve, I kept in view the probability that some day the government might build there a permanent work.

"As you have in your letter of instructions to me on this subject desired me to give my views in relation to that post, I shall merely observe that I believe that the best interests of the government and that of the community at large would be benefited by the government not offering for sale any of the lots fronting on the line of the canal from the reserve to the head of the rapids, believing, as I most assuredly do, that the day is not far distant when a canal will be made there, if not by the general government, by Michigan and the adjoining States. The quantity of the land that it will require to receive the rocks and other materials that will be taken out of

a ship canal there no one can know, and until the canal is made those lots had better remain with the present owner. Should they go into the hands of individuals before the canal is completed, great would be the expense to get back the land necessary for the completion of this important work."

The village of Sault Ste. Marie was incorporated by the legislature of Michigan April 2, 1849, (Laws of Michigan, 1849, No. 255, pp. 336, 337,) and included within its boundaries the military reserve of Fort Brady and the Indian reserve.

This act of incorporation was repealed in 1851, but while in force, to wit, on September 26, 1850, c. 71, an act was approved, 9 Stat. 469, which provided for the examination and settlement of claims for land at the Sault Ste. Marie in Michigan. By section 2 of the act, the Commissioner of the General Land Office was authorized to cause the register and receiver of the land office at Sault Ste. Marie to be furnished with a map, on a large scale, of the lines of the public surveys at the Sault Ste. Marie. And it was further provided in said section that: "It shall be the duty of the Secretary of War to direct the proper military officer, on the application of the register and receiver, to designate or cause to be designated upon the map aforesaid the position and the extent of lots necessary for military purposes, as also the position and the extent of any other lot or lots which may be required for other public purposes, and also the position and the extent of the Indian agency tract and of the Indian reserve." Specific directions with regard to the survey and map in question were also given in the seventh section of the act.

On February 15, 1853, the Commissioner of the General Land Office acknowledged receipt of a communication from the register and receiver at Sault Ste. Marie, of date 24th of September, 1852, wherein it had been suggested that a modification be made of the western boundary of the military reservation, so as to obviate a conflict with town and town lot claims, and the Commissioner advised the register and receiver that the Secretary of War had approved of the Westcott survey as the true limits of the military reservation. In their report of April 4, 1853, on the settlement of land claims at Sault Ste.

Marie, the register and receiver, under the head of "Reservations," say: "In accordance with the second section of said act, (September 26, 1850,) and the instructions, the military reservation of Fort Brady, according to 'Westcott's survey,' so called, the Indian reserve, the Indian agency reserve and the Ste. Marie's canal reservation, of four hundred feet in width, as located by Capt. Canfield on the 14th of October, 1852, acting under authority from the governor of Michigan, have been designated on the plat of the public survey of said village accompanying our abstracts, and our adjudications have been confined strictly to claims outside of said reservation, and in no instance have we confirmed claims, or any portion of the same, within said reservations."

The survey under the act of 1850 is known as the Whelpley survey. As the map of survey indicates, the limits of the military reserve shown by the survey embraced simply the land required for the then use and occupation of the fort, and not the land reserved in 1847 by the orders of the President. The military reserve noted on the Whelpley map lay outside of and to the east of the Indian reserve. Pending the settlement of the claims of settlers on the lands at Sault Ste. Marie, under this act of 1850, an act of Congress was approved August 26, 1852, c. 92, 10 Stat. 35, granting to the State of Michigan the right of way and a donation of public lands for the construction of a ship canal round the Falls of St. Mary. The work of constructing this canal was begun in 1852, and it was completed in the year 1855, and, as authorized and constructed, extended entirely across the Indian reserve as delineated on the 1845 and Whelpley maps of surveys, cutting the reservation into three parts, two of which lay north of the canal and one south of the canal.

August 2, 1855, the Chippewa Indians released to the United States, 11 Stat. 631, the privileges retained by them under the treaty of 1820. The language employed was: "The said Chippewa Indians surrender to the United States the right of fishing at the Falls of St. Mary's, and of encampment convenient to the fishing grounds, secured to them by the treaty of June 16, 1820."

On September 10, 1859, one Byron D. Adsitt built a small house on one of the tracts north of the canal, went into possession of the same, fenced a portion of the land, and planted a small garden. A month thereafter he paid $45.63 to the register of the land office at Marquette, Michigan, and entered for preëmption "the lot designated on the maps of the United States survey in the land office at Marquette, Michigan, as Indian reserve, (subject to all the provisions, requirements, and conditions of the act of Congress, entitled 'An act granting to the State of Michigan the right of way and a donation of public land for the construction of a ship canal around the Falls of Ste. Mary's in said State,') in section six (6), township 47 north of range 1 east." The described land was said to contain 36.50 acres of land, be the same more or less. The papers in the case were forwarded to the Commissioner of the General Land Office at Washington, who replied on April 9, 1860, that the claim was cancelled, because the land claimed was not subject to preëmption, and the register was directed to note the cancellation on his books and plats, and to notify Adsitt to make application for a refunding of his payment. The Commissioner called the attention of the register to a previous letter of June 9, 1853, by which two claims were cancelled, because within the "reservation for Fort Brady," as made by the President's order of September 2, 1847, heretofore referred to.

The evidence introduced at the trial was to the effect that this tract called the Indian reserve was occupied by the Indians to the knowledge of witnesses from 1845 to 1885, the Indians living at first in wigwams and latterly in log houses, and about the time of Adsitt's attempted preëmption the Indians had at least a half dozen houses on the reserve north of the canal, those located there being employed at fishing in the rapids, or in carrying people over the rapids, and selling their catch of fish to the post, villagers and those passing through the canal in boats. They were not known to raise any crops from the land. The ground was rocky and not suitable for agricultural purposes.

On August 7, 1860, Adsitt, for the expressed consideration

of one dollar, conveyed, by quitclaim deed, all his right and title in the lands in question to plaintiff in error. Spalding, however, testified that the actual consideration paid by him was not less than one hundred dollars. He did not occupy the property.

On May 17, 1881, the defendant located what was known as Porterfield scrip on the particular tract in the reserve, upon which Adsitt had erected the house. Upon learning of the application for a patent, complainant recorded the deed from Adsitt, and mailed a written protest against the issuance of a patent to the land department at Washington. The Commissioner of the General Land Office replied to Spalding, by letter of date January 18, 1882, informing him that Adsitt's entry had been cancelled April 9, 1860, and directed him to apply for a refunding of the purchase money, enclosing blanks therefor. On December 15, 1883, a patent for the land (9.10$\frac{3}{4}$ acres) was issued to defendant in error. Between the fall of 1887 and the spring of 1888 a canal was dug to furnish power, and an electric light plant was constructed upon the tract. The aggregate cost of the plant, with the machinery therein, was in the neighborhood of fifty thousand dollars. Spalding knew of the improvements as they progressed, but took no steps to assert his alleged rights until the filing of the bill in this action, November, 1888. The testimony for the defence tended to show that the land was of no value except for the purpose of water power.

Upon the hearing of the cause in the Chippewa Circuit Court, a decree was entered for the defendant, and, on appeal, the judgment was affirmed by the Supreme Court of the State. The cause was then brought into this court by writ of error.

While we are strongly inclined to the opinion that the circumstances of this case are not such as should call into active exercise the powers of a court of equity on behalf of the complainant, even though his grantor upon his attempted entry of the Indian reserve was entitled to a patent upon the certificate issued to him by the receiver of the land office at Marquette, we have concluded to dispose of the case on the ground

upon which the Supreme Court of the State based their affirmance of the judgment of the trial court, to wit, that the land sought to be preëmpted was land which had been an Indian reservation, the Indian title to which had been extinguished while the preëmption act of September 4, 1841, c. 16, 5 Stat. 453, was in force. By the tenth section of that act it was provided that no "Indian reservation to which the title has been or may be extinguished by the United States at any time during the operation of this act . . . shall be liable to entry under and by virtue of the provisions of this act."

The reasons for the exemption from preëmption of land which had been used as an Indian reservation are clearly set forth in the opinion of the court, speaking through Mr. Justice Miller, announced in *Roots* v. *Shields*, 1 Woolworth, 340. He said (p. 362): "Whenever a town springs up upon the public lands, adjoining lands appreciate in value. The reasons are obvious, and the fact is well known. So, too, when a railroad is built through a section of country, the same result follows. So, too, in respect of lands which have been reserved for the use of an Indian tribe, when the Indian title is extinguished, the same may be said. While such lands are held as reserve, population flows up to their boundaries and is there staid; it of course constantly grows more and more dense, so that when the reserve is vacated the lands have increased in value, and are always eagerly sought after. The other classes of lands mentioned in the exception, as, for instance, those on which are situated any known salines or mines, have some intrinsic value above others. Now all these classes of lands are excepted from the operation of the act, and for one common and obvious reason, that being of special value, the government desires to retain the advantage of their appreciation, and is unwilling that any individual, because of a priority of settlement, which certainly can be of but brief duration, should, to the exclusion of others equally meritorious, reap benefits which he did not sow."

It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation

of this government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

By the treaty of June 16, 1820, the Indians ceded to the United States a tract of land lying between the Big Rock and Little Rapid in the river St. Mary's, and running back from the river so as to include sixteen square miles of land, but by the third article of the treaty it was provided that the "United States will secure to the Indians a perpetual right of fishing at the Falls of St. Mary's, and also a place of encampment upon the tract hereby ceded, convenient to the fishing grounds, which place shall not interfere with the defences of any military work which may be erected, nor with any private rights." It is not necessary to determine how the reservation of the particular tract subsequently known as the "Indian Reserve" came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. This view is confirmed by the provisions of the second article of the treaty of August 2, 1855, 11 Stat. 631, by which treaty, in the first article thereof, "the Indians surrendered to the United States the right of fishing at the Falls of St. Mary's, and of encampment convenient to the fishing grounds, secured to them by the treaty of June 16, 1820." By said second article it was provided that: "The United States will appoint a commissioner who shall, within six months after the ratification of this treaty, personally visit and examine the said fishery and place of encampment, and determine the value of the interest of the Indians therein as the same originally existed."

But whether the Indians simply continued to encamp where

they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. The clear duty rested upon the government to see that a tract was reserved for the purposes designated in the treaty. *United States* v. *Carpenter*, 111 U. S. 347, 349. If a survey was necessary for that purpose, it was the duty of the government to cause such survey to be made (Ib.), and it appears from the evidence that in 1845, in a survey made by the authority of the government, the exterior boundaries of the Indian reservation were delineated upon the map of the survey then made, and such boundaries were subsequently adopted in the survey under the act of 1850. The fact, therefore, is undisputed that the thirty-nine-acre tract attempted to be preëmpted by Adsitt was accepted by both parties to the treaty of 1820 as a place of encampment, in conformity to the treaty of 1820, convenient to the fishing grounds, and a place which did not interfere with the defences of any military work then or thereafter contemplated to be erected, nor with any private rights. If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

It is fairly to be implied from the language employed in the third article of the treaty of 1820 that an encampment location retained, selected, or assigned, as the case might be, reserved for the use specified in the treaty of 1820, should not thereafter be appropriated by the government for other uses than the defences of any military work. Private rights could not, without the authority of Congress, be acquired in the

tract during the occupancy of the reservation under the treaty, for the lands in question lost their character as public lands in being set apart or occupied under the treaty, and became exempt from sale and preëmption. *Missouri, Kansas & Texas Railway* v. *Roberts*, 152 U. S. 114, 116, 118.

On the trial below there was no attempt to prove that Congress ever made provision for the erection of military works which rendered necessary an intrusion upon the fishing encampment. The land actually appropriated for the then use of Fort Brady was located considerably to the east of the Indian reserve, and private settlements were made upon the intervening lands. The general grant of authority conferred upon the President by the act of March 1, 1847, c. 32, 9 Stat. 146, to set apart such portion of lands within the land district then created as were necessary for public uses, cannot be considered as empowering him to interfere with reservations existing by force of a treaty. The land was appropriated in a sense which exempted it from a reservation made in such general terms, at least so long as the Indian right of user remained unextinguished.

In the absence of express authority to set apart for public uses lands already reserved and appropriated for a particular use, we cannot infer an intention in the grant of power contained in the act of 1847 to authorize interference with the Indian reservation, particularly when such appropriation, as the record shows, was not made for then existing public necessities, but, as the letter of General Brady set out in the statement of facts shows, was merely a provision contemplated for the possibilities of the future, both with reference to a canal and the enlargement of military works, neither of which projects had then been sanctioned by Congress. The purposes of the treaty could not be defeated by the action of executive officers of the government. *United States* v. *Carpenter*, *supra*. As a matter of fact, therefore, the Indian reserve continued to exist and to be used for the purposes for which it came into existence long after the President's orders of 1847. As stated, the reserve was not extinguished or the rights of the Indians to the use of the tract destroyed or curtailed by those orders,

and if the reservation for public uses and for the purposes of Fort Brady made by the President's orders was valid, the operation of those orders so far as the Indian reserve was concerned was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the government, a cessation or abandonment of the use or the arbitrary exercise by Congress of its power to appropriate the same. The existence of the reserve, however, was expressly recognized by Congress in the act of September 26, 1850, authorizing the ascertainment and settlement of claims to lands at Sault Ste. Marie. The map of the survey ordered to be made of the village was required to have noted upon it the boundaries not only of the military reserve, but of the Indian reserve. We conclude, therefore, that, until the treaty of August 2, 1855, this Indian reservation was not extinguished. It is true that the act of August 26, 1852, c. 92, 10 Stat. 35, which granted to the State of Michigan the right of locating a canal through the public lands, known as the military reservation at the Falls at St. Mary's River in said State, authorized by such description the location of the canal mainly across and through the Indian reserve. It seems probable that the bill in question was drafted after consultation and with the approval of the War Department, the officials of which department had in 1847 sought the reservation by the President of lands at Sault Ste. Marie, in the belief that a canal was not a far distant possibility, and the designation of the land in question as the military reservation may properly be ascribed to that source. There is nowhere contained in the act, however, an allusion to the treaty of 1820, or an express declaration of an intention to interfere with the Indian reserve or the rights of the Indians in any portion of the reserve. And the express recognition by Congress of the existence of the reserve contained in the act of 1850, under which proceedings were being had at the time of the passage of the act of 1852 for a survey of the village and a map of the same, with the notation thereon of the various reservations, forbids the assumption that Congress no longer regarded the Indian reserve as in existence. Whatever the reason, however, for

the omission to make mention of the Indian reserve, the power existed in Congress to invade the sanctity of the reservation and disregard the guarantee contained in the treaty of 1820, even against the consent of the Indians, party to that treaty, and as the requirement of the grant necessarily demanded the possession of the portion of the reserve through which the canal was to pass, the effect of that act was to extinguish so much of the Indian reserve as was embraced in the grant to the State for canal purposes. *Missouri, Kansas & Texas Railway* v. *Roberts*, *supra*, 116–117.

As to the remaining portions of the reserve, however, the use and the right of use by the Indians continued, and, until they surrendered that right by the treaty of 1855, the reserve continued to exist. If the reservations made by the orders of 1847 were not then operative, it is clear that upon the extinguishment of the Indian title to possess and occupy the reserve the land stood simply in the category of lands included within an Indian reservation, the title to which had been extinguished by the United States during the operation of the act of September 4, 1841, c. 16, and, consequently, by the tenth section of that act, 5 Stat. 456, the land was not subject to preëmption. It follows that the attempted preëmption by Adsitt in 1859 was illegal, the Commissioner of the General Land Office properly ordered the cancellation of the entry certificate, the plaintiff in error acquired no right to the land in question by the quitclaim deed of Adsitt, and hence his bill was properly dismissed. The judgment of the Supreme Court of the State of Michigan is, therefore,

Affirmed.

Syllabus.

HICKORY *v.* UNITED STATES.

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

No. 491. Submitted March 5, 1895. — Decided January 6, 1896.

An assignment of error which indicates the subject-matter in the charge to which the exceptions relate with sufficient clearness to enable the court, from a mere inspection of the charge, to ascertain the particular matter referred to, is sufficient.

Acts of concealment by an accused are competent to go to the jury as tending to establish guilt, but they are not to be considered as alone conclusive, or as creating a legal presumption of guilt, but only as circumstances to be considered and weighed in connection with other proof with the same caution and circumspection which their inconclusiveness, when standing alone, requires.

The presumption of guilt arising from the flight of the accused is a presumption of fact — not of law — and is merely a circumstance tending to increase the probability of the defendant's being the guilty person, which is to be weighed by the jury like any other evidentiary circumstance.

A statement in a charge to the jury that no one who was conscious of innocence would resort to concealment is substantially an instruction that all men who do so are necessarily guilty, and magnifies and distorts the power of the facts on the subject of the concealment.

The court below charged the jury as to the probative weight which should be attached to the flight of the accused, as follows: "And not only this, but the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." *Held*, that this was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as axiomatic truth, and as such that it was error.

On these points the charge of the court was neither calm, nor impartial, but put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect; and in so doing it deprived the jury of the light requisite to the safe use of these facts for the ascertainment of truth.

The plaintiff in error being indicted for the murder of one Wilson, became a witness on his own behalf on his trial. The court charged the jury: "Bearing in mind that he stands before you as an interested witness,

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while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party; the party who has in this case the largest interest a man can have in any case upon earth." *Held*, that such a charge crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily called into play.

THE case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE WHITE delivered the opinion of the court.

Sam Downing, alias Sam Hickory, and Thomas Shade were indicted in October, 1891, for the murder in the Indian Territory of a white man by the name of Joseph Wilson. Downing, who was at the time of the alleged killing nineteen years old, was tried and convicted, and the case was brought by error here. The verdict and judgment were reversed and the case was remanded for a new trial. *Hickory* v. *United States*, 151 U. S. 303. On the trial, the defendant was again found guilty of murder, and the case for the second time comes here by error. The assignments of error are twelve in number, and all relate to errors alleged to have been committed by the trial court in the charge given to the jury. The charge covers twenty pages of the printed record. To correctly understand the merits of the various assignments of error it is necessary to briefly refer to the testimony which is stated in a condensed form in the bill of exceptions.

The testimony for the prosecution tended to show that Wilson, the deceased, was a deputy marshal and had a warrant for the arrest of the accused upon the charge of taking whiskey into the Indian country. With this warrant he started to a house where he expected to find Hickory, being

accompanied by John Carey. Wilson and Carey proceeded together until just before reaching this house. Carey then informed Wilson that he would go no further with him, as he did not wish to be known in the neighborhood in connection with the arrest. It was then arranged between them that Carey should remain in the woods while Wilson should continue on to the house and make the arrest. Wilson had with him "a large white handle pistol," and told Carey that if he found the accused he would fire off his pistol after arresting him, in which case Carey would meet him, "close to Brown's on the prairie." Wilson then proceeded on his way and Carey remained in the woods awaiting the signal agreed upon. In about half an hour Carey heard the firing of "a gun," then "two guns" went off together, then there were several shots "which sounded as if they were fired by one man, and as if he was taking his time to fire." Carey waited for Wilson until sundown, and as he did not then come he (Carey) went to the house of Squirrel Carey and "told him about hearing the shooting and that Wilson was to fire his pistol, but he did not say how many times." The government also introduced proof showing that some days afterwards the body of Wilson was found in a gulch or ravine, and there was a gunshot wound straight through the body; that the skull was fractured, and that there was a contused wound or bruise at the base of the brain. The person of the deceased had not been rifled, and on it was found his watch and papers, among the latter the warrant for the arrest of Hickory.

Further testimony was introduced tending to show that an examination of the house where Wilson had gone to arrest the accused disclosed spots of blood on the porch, in the house, on the door, and in the yard at several places, and on a wagon standing in the yard, and that efforts had been made to conceal these spots of blood. There was also testimony showing bullet marks in the house; that "certainly one and probably two shots were fired from a southeasterly direction where the marshal likely was at the commencement of the shooting, towards the front door, one striking a corner

post and the other the wall near the door. Two shots had been fired from the inside of the house through the front door, as shown by the holes. One shot had been fired from the large front room, glancing the middle door shutter, which was open, and going into the wall of the rear room, and another had gone into the wall of said rear room opposite the centre of the middle door."

Testimony was further offered tending to show that Wilson's horse was found dead some distance from the house, and the witnesses could not tell whether "its throat had been cut or eaten by wild animals, as they had been working on it." It was also shown that when Wilson went to the house he had a pistol, a bridle, and a saddle, on which a coat was strapped, and these things were not found. The government then further introduced testimony tending to show that the accused had told three or more witnesses "that he shot the deceased, and hit him the first shot, but did not kill him, and that Tom Shade, who was there with defendant, knocked the deceased in the head with an axe; that after the killing an attempt had been made to destroy the blood spots in the house and yard." It further introduced testimony tending to show that after the killing the accused was "'scouting,' that is, avoiding arrest." Upon this proof the case for the prosecution was rested. The accused, after introducing testimony tending to rebut the alleged confession by showing that he was not in the place named at the time it was stated the confession had been made, then testified in his own behalf, admitting the killing of Wilson, and giving substantially the following account of the occurrence: He was in the yard hitching up a team of horses for the purpose of hauling a load of posts, when Wilson came into the yard and asked him his name, which he gave him, and thereupon Wilson put him under arrest and read the warrant to him; that he replied, "All right," and unharnessed the horses and turned them loose; that Wilson asked him whether he was going to ride one of the horses, and he replied, "No, that they did not belong to him;" that thereupon Wilson asked him who was the owner of the horses, and he said the owner was not there,

but lived in the neighborhood. Wilson told him to take one of the horses and they would ride to the owner's house, and if he would not consent to Hickory riding away on it, it could be returned. He again said all right, and put the bridle on the horse, Wilson telling him to hurry up and get his saddle; that he started to go into the house after his saddle, and when he was about three steps from the porch he heard the fire of a gun, and turning around saw Wilson with a revolver in his hand and smoke coming from it; that he did not run after the first shot, but walked on towards the house, when a second shot was fired just as he was about to enter the front door. That he went into the house and shut the front door, intending to go out through a side room door and run off. When he had gotten about as far as the middle door of the side room he discovered Wilson coming in through the outside door of the side room with his pistol raised at him (indicating the pointing of a pistol); that he then ran to the east side of the front room, got his gun, and went to the front door. The marshal then appeared at the middle door of the side room, exposing himself just enough to shoot, which he did, and that he (the accused) returned the fire, which was followed by further firing between them. The marshal then disappeared from the door and went into the yard and fell down close by the wagon. He (the accused) ran off and remained a half an hour, and on coming back found the marshal dead; he became frightened and did not know what to do, and, indeed, did not know all that he did do; he put the body of the marshal on the wagon, and hauled it about a mile and a half from the house, and then threw it out at the head of the gulch. When he returned after doing this he found the marshal's horse wounded in the knee. He took off the saddle and bridle and hid them, and also the coat which was tied to the saddle and the marshal's pistol and belt. The accused also introduced a witness to the killing, a woman by the name of Ollie Williams, his mistress. She testified to the marshal's coming up to the place where the accused was standing in the yard with the wagon and horses; to the accused starting towards the house. She said that the marshal who was right

by a tree then shot at him; that she did not see how the marshal held his pistol the first time he shot; that the accused was going into the door when the two shots were fired; that the marshal came around to the outside room door with a pistol in his hand, and told her to get out of the way; that she went a quarter of a mile off, and had nothing to do with the moving of the body of the deceased. The accused, moreover, introduced the testimony of a physician who had examined the body of the deceased, and who contradicted the statement that there was a fracture in the skull of the deceased, and said there were two scalp wounds, one on the top of the head and the other in the back; "they had the appearance of some blunt substance striking the head, or the head striking the substance."

The opinion formed by us as to three of the assignments of error will render an examination of the others unnecessary. The three which we will consider are as follows:

"4th. Because the court in commenting on the inculpatory testimony as to the acts of the defendant with reference to the body of the deceased, the alleged killing of the horse, in reference to what is charitable or brutal conduct, gives undue prominence to the inculpatory facts, without summing up all the testimony, as well for as against the defendant in reference to this branch of the case."

"7th. Because the court, a second time in the charge in going over the alleged conduct of the defendant subsequent to the killing, and his conduct in flight, gives undue prominence to the inculpatory facts, and gives them in a way that have the effect of an argument against the defendant, and are not a proper, full summing up of the facts upon this branch of the case."

"11th. Because the court bears upon and gives undue prominence to the flight of defendant, and treats it absolutely as true that defendant concealed the blood, killed the horse, and destroyed the evidence of the alleged killing."

It is contended by the defendant in error that of these assignments the fourth and seventh are not sufficiently specific to merit consideration, because they do not point out the exact

words in the charge of the court complained of. The assignments are in exactly the same language as were the exceptions taken during the trial and which the record declares "the defendant presented at the time." Whilst it is true that the assignments do not in terms state the precise language used by the court, they yet indicate the subject-matter in the charge to which the exceptions relate with sufficient clearness to enable us from a mere inspection of the charge to ascertain the particular matter referred to. In considering, when this case was previously before us, a similar objection to the adequacy of an exception, we said: "The rule in relation to exceptions to instructions is that the matter excepted to shall be so brought to the attention of the court, before the retirement of the jury, as to enable the judge to correct error, if there be any, in his instructions to them, and this is also requisite in order that the appellate tribunal may pass upon the precise question raised, without being compelled to read the record to ascertain it." It is here unquestionable on the very face of the bill of exceptions that the objections were reserved before the retirement of the jury, and that the trial court was fully aware of their import and had the opportunity to make such corrections, if any, as its judgment may have deemed necessary to prevent the charge from being misunderstood by the jury. This is made clear not only by the language of the bill of exceptions, but also by the charge itself, which contains a statement by the court, entirely inconsistent with a possibility of there having been any surprise or misconception. The court said:

"There is a little bit of history on that, and I apprehend the gentlemen won't take any exception to reading from this book" (the Bible). "There are a great many exceptions filed here to almost everything said by the court, but I hope they won't take any exception to this."

The first comments of the court upon the facts in reference to concealment (covered by the fourth assignment) and its instruction as to the weight to be given the proof on the subject of the flight of the accused (covered by the eleventh assignment) are so connected in the charge as to cause the examina-

tion of the one to necessarily involve the other. We shall, therefore, examine at the same time the errors complained of in these two assignments.

First. Errors complained of in the fourth and eleventh assignments.

The language of the charge to which these assignments relate immediately follows the reference made by the court to the number of exceptions reserved, and is in these words:

"And there is another fact that is so common that I have but to remind you of it, because that which makes up your common knowledge you can use in the investigation of these cases, and it is this: There is no man who has arrived at the years of discretion who has not been so created that he has that in his mind and heart which makes him conscious of an act that is innocent upon his part, and his conduct when connected with an act of that character will be entirely different from the conduct of a man who is conscious of wrong and guilt. In the one case he has nothing to conceal; in the one case his interest and self-protection, his self-security, prompts him to seek investigation, to see to it that it is investigated as soon as possible. This is no new principle. I say it is as old as the days of the first murder. There is a little bit of history on that, and I apprehend the gentlemen won't take any exceptions to reading from this book. There are a great many exceptions filed here, to almost everything said by the court, but I hope they won't take any exceptions to this. There is a little bit of history illustrative of the conduct of men:

"'And Cain talked with Abel, his brother; and it came to pass, when they were in the field, that Cain rose up against Abel, his brother, and slew him.

"'And the Lord said unto Cain, where is Abel, thy brother? And he said, I know not. Am I my brother's keeper?

"'And He said, what hast thou done? the voice of thy brother's blood crieth unto Me from the ground.'

"'Am I my brother's keeper?' From that day to the time when Professor Webster murdered his associate and concealed his remains, this concealment of the evidence of crime has been regarded by the law as a proper fact to be taken into consid-

eration as evidence of guilt, as going to show guilt, as going to show that he who does an act is consciously guilty, has conscious knowledge that he is doing wrong, and he, therefore, undertakes to cover up his crime.

"Now, there may be exceptions to the general rule. General as it is, it may have its exceptions, but the question for you to pass upon is whether or not in the first place there were acts upon the part of this defendant, either while acting alone or in concert with others assisting him, that looked towards concealing this act of the killing of Wilson; what these acts were; if they were cruel, if they were unnatural, if they were barbarous, if they were brutal, you still have a right, and it is your duty to take them into consideration. If they were of that character you are to bring to bear your observation in life that men who are conscious of innocence do not usually characterize their conduct after a killing by that sort of acts. You are to see what the acts were. You are to take into account the concealment of this body, the concealment of this horse, the killing of the horse, and the concealing of everything that pertained to that man, the effort to wipe out the blood stains left there where they might be evidences of killing, where they might be discovered afterwards as evidences of the killing. All these things are facts that you must take into account, and not only that, but the law recognizes another proposition as true, and it is, that 'The wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it in this case. Therefore, the law says that if after a man kills another that he undertakes to fly, if he becomes a fugitive from justice, either by hiding in the jurisdiction, watching out to keep out of the way of the officers, or of going into the Osage country out of the jurisdiction, that you have a right to take that fact into consideration, because it is a fact that does not usually characterize an innocent act."

It is undoubted that acts of concealment by an accused are competent to go to the jury as tending to establish guilt, yet they are not to be considered as alone conclusive, or as creat-

ing a legal presumption of guilt; they are mere circumstances to be considered and weighed in connection with other proof with that caution and circumspection which their inconclusiveness when standing alone require. The rule, on the subject, has had nowhere a clearer and more concise expression than that given by Chief Justice Shaw in the *Webster case*, to which the trial court adverted. *Commonwealth* v. *Webster*, 5 Cush. 295, 316. The learned Chief Justice said: "To the same head may be referred all attempts on the part of the accused to suppress evidence, to suggest false and deceptive explanations, and to cast suspicion without just cause on other persons; all or any of which tend somewhat to prove consciousness of guilt, and when proved exert an influence against the accused. But this consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs. Such was the case often mentioned in the books and cited here yesterday, of a man convicted of the murder of his niece, who had suddenly disappeared under circumstances which created a strong suspicion that she was murdered. He attempted to impose on the court by presenting another girl as the niece. The deception was discovered and naturally operated against him, though the actual appearance of the niece alive afterwards proved conclusively that he was not guilty of the murder."

In *Ryan* v. *The People*, 79 N. Y. 593, considering an objection that the trial court erred in admitting evidence of an attempt to escape from the sheriff, the court said: "There are so many reasons for such conduct, consistent with innocence, that it scarcely comes up to the standard of evidence tending to establish guilt, but this and similar evidence has been allowed upon the theory that the jury will give it such weight as it deserves, depending upon the surrounding circumstances. It was not error to admit it." See also *People* v. *Stanley*, 47 California, 113; *People* v. *Forsythe*, 65 California, 101; *State* v. *Gee*, 85 Missouri, 647; *State* v. *Brooks*, 92 Missouri, 542; *Swan* v. *People*, 98 Illinois, 610; *Anderson* v. *State*,

104 Indiana, 467, 472; *Jamison* v. *The People*, 145 Illinois, 357.

The cases which illustrate the rule in various phases are too numerous to review. They are collected in the text-books, and will be found in a note at the foot of c. 14, § 750, of Wharton's Criminal Evidence, 9th ed. The modern English law on the subject is referred to in Wills on Circumstantial Evidence, p. 70, citing the opinion of Mr. Baron Gourney in *Regina* v. *Belaney*, which is thus recapitulated: "By the common law, flight was considered so strong a presumption of guilt, that in cases of treason and felony it carried the forfeiture of the party's goods, whether he were found guilty or acquitted; and the officer always, until the abolition of the practice by statute, called upon the jury, after verdict of acquittal, to state whether the party had fled on account of the charge. These several acts in all their modifications are indications of fear; but it would be harsh and unreasonable invariably to interpret them as indications of moral consciousness, and greater weight has sometimes been attached to them than they have fairly warranted. Doubtless the manly carriage of integrity always commands the respect of mankind, and all tribunals do homage to the great principles from which consistency springs; but it does not follow, because the moral courage and consistency which generally accompany the consciousness of uprightness raise a presumption of innocence, that the converse is always true. Men are differently constituted as respects both animal and moral courage, and fear may spring from causes very different from that of conscious guilt, and every man is therefore entitled to a candid construction of his words and actions, particularly if placed in circumstances of great and unexpected difficulty."

And the same author at p. 80 quotes the observation of Mr. Justice Abbott on a trial for murder where evidence was given proving flight: "A person however conscious of innocence might not have courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight. It may be," added the learned judge, "a conscious anticipation of punishment for guilt, as the guilty will always anticipate the

consequences, but at the same time it may possibly be according to the frame of mind, merely an inclination to consult his safety by flight rather than stand his trial on a charge so heinous and scandalous as this."

So, again, at p. 88, the same writer says: "So also is the concealment of death by the destruction or attempted destruction of human remains, (a presumption of guilt,) but in this case the presumption of criminality results from the act of concealment rather than from the nature of the means employed, however revolting, which must be regarded only as incidental to the fact of concealment, and not as aggravating the character and tendency of the act itself. Where a prisoner tried for murder admitted that he had cut off the head and legs from the trunk of a female, and concealed the remains in several places, but alleged that her death had taken place by accident while she was in his company, and that in the alarm of the moment, and to prevent suspicion, he had determined to conceal the death, Lord Chief Justice Tindal told the jury that the concealment of death under such circumstance had always been considered to be a point of the greatest suspicion, but that this evidence must be received with a certain degree of modification, and especially in a case where the feelings might be excited by the singular means of concealment adopted by the prisoner; that this point of evidence was, therefore, for the consideration of the jury, and it was for them to show how far it was proof of the prisoner's guilt, but the mere general fact of concealment, added the learned judge, is to be considered, and not the circumstances under which it took place."

The text-writers generally state the principle in accordance with the foregoing.

"Few things," says Best on Presumption, p. 323, "distinguish an enlightened system of judicature from a rude and barbarous one more than the manner in which they deal with evidence. The former weighs testimony, whilst the latter, conscious perhaps of its inability to do so or careless of the consequences of error, at times rejects whole portions *en masse*, and at others converts pieces of evidence into rules of

law by investing with conclusive effect some whose probative force has been found to be in general considerable. If any proof of this were wanted it would be amply supplied by our law with reference to the species of evidence under consideration. Our ancestors, observing that guilty persons usually fled from justice, adopted the hasty conclusion that it was only the guilty who did so, according to the maxim '*fatetur facinus qui fugit judicium*,' so that under the old law, a man who fled to avoid being tried for felony forfeited all his goods even though he were acquitted; and the jury were always charged to inquire not only whether the prisoner were guilty of the offence, but also whether he fled for it, and, if so, what goods and chattels he had." This practice was not formally abolished until the Stats. 7 and 8 Geo. IV, c. 28, sec. 5. "In modern times more correct views have prevailed, and the evasion of or flight from justice seems now nearly reduced to its true place in the administration of the criminal law, namely, that of a circumstance — a fact which it is always of importance to take into consideration, and combined with others may afford strong evidence of guilt, but which, like any other piece of presumptive evidence, it is equally absurd and dangerous to invest with infallibility." And this is quoted with approval in Burrill on Circumstantial Evidence, p. 473. See also Roscoe's Criminal Evidence, 8th American ed. p. 30. Mr. Wharton, in his Criminal Evidence, after referring in a note to the American authorities, states the rule in accordance with the foregoing, and concludes: "The question, it cannot be too often repeated, is simply one of inductive probable reasoning from certain established facts. All the courts can do when such inference is invoked is to say that escape, disguise, and similar acts afford, in connection with other proof, the basis from which guilt may be inferred, but this should be qualified by a general statement of the countervailing conditions, incidental to a comprehensive view of the question."

In a foot note at p. 645 this author collects several marked and peculiar instances where a person had fled who was undoubtedly innocent. One of these instances is this: "Dr.

Thomas Fuller gives the following quaint excuse for running away from London when charged with treason: And if any tax me, as Laban taxed Jacob, 'Wherefore didst thou flee away secretly without taking solemn leave?' I say with Jacob to Laban, 'Because I was afraid.' And that plain dealing patriarch, who could not be accused for purloining a shoe latchet of other men's goods, confessed himself guilty of that awful felony that he 'stole away' for his own safety; seeing truth may sometimes seek corners, not as fearing her cause, but as suspecting her judge."

Thompson on Trials, Tit. 6, c. 69, § 2543, makes this statement: "It is often inaccurately said that the flight of the accused creates a presumption of his guilt, and this presumption is sometimes inadvertently dealt with as though it was a presumption of law. But it belongs to that class of presumptions which are generally classified as presumptions of fact. If it were a presumption of law, the jury would be bound to draw it in every case of flight, and the court might so instruct them; whereas it is merely a *circumstance* tending to increase the probability of the defendant's being the guilty person, which on sound principle is to be weighed by the jury like any other evidentiary circumstance."

Measuring the correctness of the charge now considered by these principles and authorities, it is at once demonstrated to have been plainly erroneous. It magnified and distorted the proving power of the facts on the subject of the concealment; it made the weight of the evidence depend not so much on the concealment itself as on the manner in which it was done. Considering the entire context of the charge, it practically instructed that the facts were, under both divine and human law, conclusive proof of guilt. The statement that no one who was conscious of innocence would resort to concealment was substantially an instruction that all men who did so were necessarily guilty, thus ignoring the fundamental truth, evolved from the experience of mankind, that the innocent do often conceal through fear or other emotion. The legal influence which this language must have exerted on the jury was increased by the subsequent instruction that it was as old

as the first murder for the conduct of an innocent person to be different from that of a guilty one. Putting this language, in connection with the epithets applied to the acts of concealment and the vituperation which the charge contains, it is justly to be deduced that its effect was to instruct that the defendant was a murderer, and, therefore, the only province of the jury was to return a verdict of guilty. It is true that a subsequent portion of the charge refers to the evidence on the subject of concealment as "proper to be taken into consideration, as evidence of guilt," as going to show guilt. But these qualified remarks did not recall the undue weight which the previous language had affixed to the facts to be considered by the jury. The instruction as to the probative weight which the jury should attach to the fact of flight was equally erroneous. It was as follows: "And not only this, but the law recognizes another proposition as true, and it is that, 'the wicked flee, when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." This instruction was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and so conclusive, that it was the duty of the jury to act on it as an axiomatic truth. On this subject, also, it is true, the charge thus given was apparently afterwards qualified by the statement that the jury had a right to take the fact of flight into consideration, but these words did not correct the illegal charge already given. Indeed, taking the instruction that flight created a legal presumption of guilt with the qualifying words subsequently used, they were both equivalent to saying to the jury that they were, in considering the facts, to give them the weight which, as a matter of law, the court declared they were entitled to have, that is, as creating a legal presumption so well settled as to amount virtually to a conclusive proof of guilt. In *Starr* v. *United States*, 153 U. S. 614, 626, in considering the power of a Federal court to comment in charging a jury on the evidence, we quoted with approval the language of the Supreme Court of Pennsylvania, *Burke* v. *Maxwell*, 81

Penn. St. 139, 153, saying: "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided." The charge given in this case violates every rule thus announced. It was neither calm nor was it impartial. It put every deduction which could be drawn against the accused from the proof of concealment and flight, and omitted or obscured the converse aspect. In so doing it deprived the jury of the light requisite to safely use these facts as means to the ascertainment of truth. Nor can it be considered that the language subsequently used corrected the error. "Now (says the charge) there may be exceptions to the general rule. General as it is, it may have its exceptions." But none of the exceptions thus referred to were called to the attention of the jury. Indeed, taking the language of the charge which follows the foregoing words, it must have conveyed, by the strongest possible intimation, the impression to the jury that the case before them was controlled by the general rule previously stated to them by the court, although other cases might be an exception to such rule. For these reasons the judgment must be reversed. In this state of the case it would ordinarily be unnecessary to consider the other assignments. As, however, the case is before us for the second time, and must be remanded for a new trial, the ends of justice will best be subserved by passing on the remaining assignment, that is to say, the eleventh assignment. The portion of the charge to which this assignment is addressed is as follows:

"And then, again, there stands before you a witness who was there, a positive witness, who saw this killing. That witness is the defendant. Bear in mind when you are passing upon this case that the other witness to it cannot appear before you, he cannot speak to you, except as he speaks by his body as it was found, having been denied even the right of decent burial, by the dead body of his horse, by the concealed weapons

and the concealed saddle, by the blood stains that were obliterated. He stands before you, although he is in his grave, speaking by the aid of the power and the might of these circumstances in this case. You are to see whether they harmonize with this statement of this transaction as given by the defendant, bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party; the party who has in this case the largest interest a man can have in any case upon earth. While you are not to disbelieve his evidence because of that alone, if you are to do justice, if you are, in the language of counsel, not to be cruel to the country, and to the people of the country who are entitled to legal protection, you are to weigh these facts and see whether they harmonize with his statement when viewed by the light of your intelligence, and when this case is illuminated by such facts, whether it is in harmony with the statements of this interested witness or in contradiction of them."

It is apparent that this part of the charge is replete with the errors which we have already found to exist in the matter which we have already considered. But the instruction contains an additional error of so grave a nature that we call attention to it in order to prevent its recurrence. The manner of contrasting the testimony of the accused with the circumstances connected with the concealment was clearly illegal. The language in which this was done is: "Bearing in mind that he stands before you as an interested witness, while these circumstances are of a character that they cannot be bribed, that cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, speaking for Joseph Wilson and justice, in opposition to and confronting this defendant, who stands before you as an interested party; the party who has in this case the largest interest a man can have in any case upon earth." This

contrast thus made could have conveyed but one meaning to the jury, that is, a warning that the testimony of the accused was to be considered by them as of little or no weight because he could be bribed, he could be dragged or seduced into perjury. Such denunciation of the testimony of an accused is without legal warrant. *Allison* v. *United States*, 160 U. S. 203. Indeed, this instruction, besides giving rise to this error, was also, if possible, more markedly wrong from the implications which it conveyed to the jury. It substantially said to them the circumstances as to the killing and concealment cannot be bribed, but the defendant can be; therefore you must consider that these circumstances outweigh his testimony, and it is hence your duty to convict him. In *Starr* v. *United States*, *ubi supra*, speaking through Mr. Chief Justice Fuller, this court called attention to the fact that there were limitations on the power of a Federal court, in commenting on the facts of a case, when instructing a jury, limitations inherent in and implied from the very nature of the judicial office. In *Reynolds* v. *United States*, 98 U. S. 145, 168, speaking through Mr. Chief Justice Waite, this court also said on the same subject: ". . . every appeal by the court to the passions or prejudices of the jury should be promptly rebuked, and . . . it is the imperative duty of the reviewing court to take care that wrong is not done in this way. . . ." Admonished by the duty resting on us in this regard, we feel obliged to say that the charge which we have considered crosses the line which separates the impartial exercise of the judicial function from the region of partisanship where reason is disturbed, passions excited, and prejudices are necessarily called into play.

The judgment is reversed, and the case remanded with directions to grant a new trial.

GILL *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 85. Argued November 21, 22, 1895. — Decided January 6, 1896.

An employé, paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, cannot entitle himself, by taking out a patent for such invention, to recover a royalty or other compensation for such use.

A person looking on and assenting to that which he has power to prevent is precluded from afterwards maintaining an action for damages.

Solomons v. *United States*, 137 U. S. 342, affirmed and applied to this case.

THIS was a suit by Gill to recover of the United States the sum of $94,693.04 upon an implied contract for the use of certain machines covered by letters patent issued to the claimant.

The petition alleged in substance that from March, 1864, to March, 1881, the claimant was employed as machinist, foreman, and draftsman at the Frankford Arsenal in the State of Pennsylvania, and since March, 1881, as master armorer at such arsenal, receiving during the term of his employment a *per diem* compensation for his services. His engagement required him to perform manual labor and to exercise his mechanical skill in the service of the government, but did not require the exercise of his inventive genius in such service, nor secure to the government the right to use any of his inventions without compensation.

That at sundry times from 1869 to 1882, six patents were granted to him for a cartridge-loading machine, a weighing machine, a gauging machine, a cartridge anvil, a heading machine, and a priming tool for reloading; that at different times he assigned to individuals or corporations all these inventions, but reserved to the government the right to use them.

The petition further alleged that the reasonable value of such use by the government amounted to the sum of

$94,693.04, no part of which had ever been paid; that no action upon the claim had been had in any department of the government beyond repeated acknowledgments, by the Ordnance Department, of claimant's right to compensation for the use of the inventions.

The government made a general denial of the allegations of the petition, and submitted the case to the Court of Claims, which made a finding of facts, the material portions of which are printed in the margin,[1] and entered a judgment dismissing

[1] (1) During the period of time within which the claimant invented the devices hereafter mentioned he was in the defendants' employment, and received wages, or a salary, for his services. The terms of his employment required him to exercise his mechanical skill in the service of the defendants, but did not require the exercise of his inventive genius in such service, nor secure to the defendants the right to use any inventions of the claimant without compensation therefor.

Letters patent of the United States were granted to the claimant, while in the service of the defendants, as follows: No. 97,904, dated December 14, 1869, for a cartridge-loading machine; No. 185,858, dated January 2, 1877, for a cartridge-weighing machine; No. 208,903, dated October 15, 1878, for a cartridge-gauging machine; No. 220,472, dated October 14, 1879, for a cartridge anvil; No. 241,962, dated May 24, 1881, for a cartridge-heading machine; No. 257,860, dated May 16, 1882, for a priming tool for reloading.

(2) The manner in which the inventions above referred to originated and came into the use of the government was as follows:

In 1867 the claimant, being a machinist or skilled mechanic in the Frankford Arsenal and getting as compensation $4 a day, came to General Benét, the commanding officer, and suggested that an improvement could be made in the method of loading cartridges, and exhibited to the commanding officer then or subsequently his device for an improvement which is now embodied in patent No. 97,904.

General Benét, after due examination and consideration, authorized the construction of such a machine. The machine was built at a cost of $500 by the United States according to the design of the claimant. On its completion it proved to be thoroughly satisfactory to the commanding officer, who authorized the construction of a second machine. The construction of both took place under the immediate supervision of the claimant, and such supervision was a part of his ordinary duty and employment. Subsequently successive commanding officers ordered from time to time six other machines to be constructed, which in like manner were built under the immediate supervision of the claimant, and all of these eight machines were completed prior to the claimant filing his application for a patent.

After his patent had been issued a ninth machine was also ordered, and

the claim upon the ground that where an employé of the government takes advantage of his connection with it to introduce an unpatented device into the public service, giving no intimation, at the time, that he regards it as property or that he intends to protect it by letters patent, but allows the government to test the invention at its own exclusive cost and risk by constructing machinery and bringing it into practical use before he applies for a patent, the law will not imply a contract; and that a contract will not be implied in favor of an employé who has thus placed a patented device in the public service as to machines constructed and used after his patent has been obtained.

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in like manner constructed under the immediate supervision of the claimant. These machines have been used by the government at the Frankford Arsenal in the manufacture of cartridges, and continue in use to the present time.

(3) At no time did the claimant ever bring his invention before a commanding officer or other agent of the government as a subject of purchase and sale; nor did he ever raise an objection to the use of the invention as set forth in the preceding finding; nor did he ever enter into an express agreement, written or oral, whereby a license was granted or intended to be granted to the government to operate and use the machine described in the preceding finding, or whereby the claimant waived or intended to waive his legal or equitable right, if any, to compensation; nor did any commanding officer ever undertake or assume to incur a legal or pecuniary obligation on the part of the government for the use of the invention or the right to manufacture thereunder.

The claimant was not employed to make inventions nor assigned to that duty, and his invention, until it was reduced to paper in the form of an intelligible drawing, was made out of the hours of labor at the arsenal and during the time which was properly his own, and the thought and time which he devoted to it were voluntarily given, as a good and earnest servant of the government, intent on rendering more effective the work and machinery of the arsenal with which he was connected, and the work of so devising a machine was not an obligation imposed upon him by the authorities of the arsenal.

(4) The other inventions of the claimant, set forth in the patents enumerated in finding I, except that of the heading machine, which was fabricated and used by the defendants under the supervision of the claimant, were also brought to the attention of the various commanding officers by suggestions from the claimant for making the means and appliances at the arsenal more efficient than they were; and in like manner the cost of preparing patterns for the iron and steel castings and of preparing working

From this decree the claimant appealed to this court.

Mr. Halbert E. Paine for appellant.

Mr. Assistant Attorney General Dickinson for appellees.

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

This case raises the question, which has been several times presented to this court, whether an employé paid by salary or wages, who devises an improved method of doing his work, using the property or labor of his employer to put his invention into practical form, and assenting to the use of such improvements by his employer, may, by taking out a patent

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drawings and of constructing working machines was borne exclusively by the government; but the claimant did not use any property of the defendants, or the services of any employé of the defendants, in making or developing or perfecting the inventions themselves. In each case one or more machines, or articles of manufacture embodying the invention, had been constructed and was in operation or use in the arsenal with the claimant's knowledge and assent before he filed an application for a patent.

(5) In 1867, when the claimant made his first invention described in the patents hereinbefore enumerated, he was a machinist rated as a skilled laborer in the Frankford Arsenal, but acting and doing the duty of a master armorer, on wages of $4 a day. From time to time his wages were advanced until they became, in 1881, $6 a day, and he was in 1881 appointed master armorer, the duties of which are a general supervision of the shops. This increase of pay and advancement of position came through and by authority of the commanding officers of the arsenal, and the consideration or reason therefor was that the claimant was a faithful, intelligent, and capable employé, whose services were of great value to the government.

It was never stipulated by any commanding officer, nor understood or agreed to by the claimant, that the advance of wages was to be a consideration for the use of his inventions, though the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate upon the minds of the officers in estimating the claimant's services and ordering his advancement.

(6) The claimant has sold the right to use his inventions, reserving the right to the government as set forth in finding VII, to various persons for sums amounting in the aggregate to $5380. But the use of the inventions by private manufacturers is not nearly so large as the use by the government, the inventions being specially adapted to military purposes and appliances.

upon such invention, recover a royalty or other compensation for such use. In a series of cases, to which fuller reference will be made hereafter, we have held that this could not be done.

The principle is really an application or outgrowth of the law of estoppel *in pais*, by which a person looking on and assenting to that which he has power to prevent, is held to be precluded ever afterwards from maintaining an action for damages. A familiar instance is that of one who stands by, while a sale is being made of property in which he has an interest, and makes no claim thereto, in which case he is held to be estopped from setting up such claim. The same principle is applied to an inventor who makes his discovery public, looks on and permits others to use it without objection or assertion of a claim for a royalty. In such case he is held to abandon his inchoate right to the exclusive use of his invention, to which a patent would have entitled him, had it been applied for before such use. As was said by Mr. Justice Story in *Pennock* v. *Dialogue*, 2 Pet. 1, 16: "This inchoate right, thus once gone, cannot afterwards be resumed at his pleasure, for where gifts are once made to the public in this way they become absolute." "It is possible," said the trial court, in charging the jury, "that the inventor may not have intended to give the benefit of his discovery to the public; and may have supposed that by giving permission to a particular individual to construct for others the thing patented he could not be presumed to have done so. But it is not a question of intention which is involved in the principle we have laid down, but of legal inference, resulting from the conduct of the inventor, and affecting the interests of the public. It is for the jury to say whether the evidence brings this case within the principle which has been stated." This language was quoted with approval in *Grant* v. *Raymond*, 6 Pet. 218. So, also, in *Shaw* v. *Cooper*, 7 Pet. 292, 323, it was held directly that "whatever may be the intention of the inventor, if he suffers his invention to go into public use, through any means whatsoever, without the immediate assertion of his right, he is not entitled to a patent."

The application of this principle to a single individual whom the patentee has permitted to make use of his invention without claiming compensation therefor, first arose in *McClurg* v. *Kingsland*, 1 How. 202. In this case the patentee Harley was employed by the defendants at their foundry upon weekly wages. While so employed, he invented the patented improvements, making experiments in the defendants' foundry, and wholly at their expense. The result proving useful, his wages were increased. He continued in their employment, during all of which time he made rollers for them, spoke about procuring a patent, and finally made an application, which was granted. He assigned the patent to the plaintiffs, after the defendants had declined his proposition that they should take out a patent, and purchase his right. He made no demand upon them for compensation for using his improvement, and gave them no notice not to use it, until a misunderstanding had arisen, when he left their employment, and made an agreement with plaintiffs to assign his right to them. The defendants continuing to make the rollers on his plan, the action was brought by the plaintiffs, without any previous notice by them. It was held that the facts above stated justified the presumption of a license to use the invention, and that the charge of the court, that the defendants might continue to use it without liability to the plaintiffs, was correct.

In the case of *Solomons* v. *United States*, 137 U. S. 342, one Clark, who was in the employ of the government as Chief of the Bureau of Engraving and Printing, conceived the idea of a self-cancelling stamp, and prepared a die or plate therefor, making use of the services of the employés of the Bureau and the property of the government. While his application for a patent was pending, he assigned his rights to the appellant Solomons, in payment of an account between them. On taking out the patent, the appellant notified the Commissioner of Internal Revenue that he was the owner of the patent, and demanded compensation for the use of the stamp on whisky barrels. It further appeared that Mr. Clark, as Chief of the Bureau, had been assigned the duty of devising a stamp for this purpose, and it was not understood or intimated that the

stamp which he was to devise should be patented, or become his personal property. Indeed, before the final adoption of the stamp, he said that the design was his own, but he should make no charge to the government therefor, as he was employed on a salary by the government, and had used its machinery and other property in the perfection of the stamp. It was held that, having been employed and paid to devise a new stamp, the invention, when accomplished, became the property of the government, and that the patentee had practically sold in advance whatever he might be able to accomplish in that direction.

A similar case was that of the *Lane & Bodley Company* v. *Locke*, 150 U. S. 193, in which an engineer and draftsman at a fixed salary, in the employ of the defendants, and using their tools and patterns, invented a stop-valve, which the firm used with his knowledge in certain elevators constructed by them until its dissolution, and after that, a corporation organized by the firm used it in the same way and with the like knowledge. It was held that the patentee, having made no claim for remuneration for the use of the patent, saying that he did not desire to disturb his friendly relations with the firm, might be presumed to have recognized an obligation to permit them to use the invention.

In *McAleer* v. *United States*, 150 U. S. 424, there was an express license by an employé in the Treasury Department, to such department and its bureaus, of a right to make and use machines containing the improvements of the patentee to the end of the patented term, and it was held that this agreement could not be varied by parol evidence that it was to terminate upon the discharge of the patentee from the employment of the government.

In *Keyes* v. *Eureka Mining Co.*, 158 U. S. 150, a person in the employ of a smelting company invented a new method of withdrawing molten metal from a furnace, took out a patent for it, and permitted his employer to use it without charge so long as he remained in its employ, which was about ten years. It was held that there was at least an implied license to use the improvement without payment of royalties during

the continuance of his employment, and also a license to use the invention upon the same terms and royalties fixed for other parties, from the time the patentee left the defendant's employment.

An attempt is made to differentiate the case under consideration from those above cited in the fact, stated in the third finding, that the invention in this case, until it was reduced to paper, in the form of an intelligible drawing, was made out of the hours of labor at the arsenal, and during the time which properly belonged to the patentee, and that, by finding four, "the claimant did not use any property of the defendants or the services of any of the employés of the defendants in making, or developing, or perfecting the inventions themselves." This, however, must be taken in connection with the further finding that "the cost of preparing patterns for the iron and steel castings, and of preparing working drawings, and of constructing machines was borne exclusively by the government," and that in each case, one or more machines or articles of manufacture embodying the invention, had been constructed and was in operation or use in the arsenal with the claimant's knowledge and consent before he filed an application for a patent. The inference to be deduced from the findings is, in substance, that, while the claimant used neither the property of the government, nor the services of its employés in conceiving, developing, or perfecting the inventions themselves, the cost of preparing the patterns and working drawings of the machines, as well as the cost of constructing the machines themselves that were made in putting the inventions into practical use was borne by the government, the work being also done under the immediate supervision of the claimant.

There is an assumption by the claimant in this connection that, if he did not make use of the time or property of the government in conceiving and developing his ideas, the fact is an important one as distinguishing this case from those above cited. In view of the finding that he did make use of the property and labor of the government in preparing patterns and working drawings and constructing his working

machines, the distinction is a very narrow one — too narrow we think to create a difference in principle, or to prevent the application of the rule announced in those cases. In *Solomons case* the finding was that, while employed as Chief of the Bureau of Engraving and Printing, Clark conceived the idea of a self-cancelling stamp, and under his direction the employés of that bureau, using government property, prepared a die or plate, and put into being the conception of Mr. Clark.

In every case, the idea conceived is the invention. Sometimes, as in the case of *McClurg* v. *Kingsland*, a series of experiments is necessary to develop and perfect the invention. At other times, as in the case under consideration, and apparently in the *Solomons case*, the invention may be reduced to paper in the form of an intelligible drawing, when nothing more is necessary than the preparing of patterns and working drawings, and the embodiment of the original idea in a machine constructed accordingly. Now, whether the property of the government and the services of its employés be used in the experiments necessary to develop the invention, or in the preparation of patterns and working drawings, and the construction of the completed machines, is of no importance. We do not care, in this connection, to dwell upon the niceties of the several definitions of the word "develop" as applied to an invention. The material fact is that, in both this and the *Solomons case*, the patentee made use of the labor and property of the government in putting his invention into the form of an operative machine, and whether such employment was in the preliminary stage of elaborating and experimenting upon the original idea, putting that idea into definite shape by patterns or working drawings, or finally embodying it in a completed machine, is of no consequence. In neither case did the patentee risk anything but the loss of his personal exertions in conceiving the invention. In both cases, there was a question whether machines made after his idea would be successful or not, and if such machines had proven to be impracticable, the loss would have fallen upon the government.

In this connection, too, it should be borne in mind that the

fact, upon which so much stress has been laid by both sides, that the patentee made use of the property and labor of the government in putting his conceptions into practical shape, is important only as furnishing an item of evidence tending to show that the patentee consented to and encouraged the government in making use of his devices. The ultimate fact to be proved is the estoppel, arising from the consent given by the patentee to the use of his inventions by the government, without demand for compensation. The most conclusive evidence of such consent is an express agreement or license, such as appeared in the *McAleer case;* but it may also be shown by parol testimony, or by conduct on the part of the patentee proving acquiescence on his part in the use of his invention. The fact that he made use of the time and tools of his employer, put at his service for the purpose, raises either an inference that the work was done for the benefit of such employer, or an implication of bad faith on the patentee's part in claiming the fruits of labor which technically he had no right to enlist in his service.

There is no doubt whatever of the proposition laid down in *Solomons case*, that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected, and obtaining patents therefor, as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property, than any other proprietor would have. On the other hand, it is equally clear that, if the patentee be employed to invent or devise such improvements his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do. Indeed, the *Solomons case* might have been decided wholly upon that ground, irrespective of the question of estoppel, since the finding was that Clark had been assigned the duty of devising a stamp, and it was understood by everybody that the scheme would proceed upon the assumption that the best stamp which he could devise would be adopted and made a part of the revised scheme. In these consultations it was understood that he was acting in

his official capacity as Chief of the Bureau of Engraving and Printing, but it was not understood or intimated that the stamp he was to devise would be patented or become his personal property. In fact, he was employed and paid to do the very thing which he did, viz., to devise an improved stamp; and, having been employed for that purpose, the fruits of his inventive skill belonged as much to his employer as would the fruits of his mechanical skill. So, if the inventions of a patentee be made in the course of his employment, and he knowingly assents to the use of such inventions by his employer, he cannot claim compensation therefor, especially if his experiments have been conducted or his machines have been made at the expense of such employer.

The following remarks of the court in the *Solomons case* (page 346) are pertinent in this connection: "So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practical form his invention, and expressly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from the use of the property and the assistance of the coemployés of his employer, as to have given to such employer an irrevocable license to use such invention."

The acquiescence of the claimant in this case in the use of his invention by the government is fully shown by the fact that he was in its employ; that the adoption of his inventions by the commanding officer was procured at his suggestion; that the patterns and working drawings were prepared at the cost of the government; that the machines embodying his inventions were also built at the expense of the government; that he never brought his inventions before any agent of the government as the subject of purchase and sale; that he raised no objection to the use of his inventions by the government; and that the commanding officer never undertook to incur a legal or pecuniary obligation on the part of the gov-

ernment for the use of the inventions or the right to manufacture thereunder. It further appeared that from time to time his wages were advanced from four to six dollars a day, and while it was never stipulated by the commanding officer, or understood by the claimant, that the advance of wages was a consideration for the use of the inventions, the practical ability of the claimant as an inventor, and the value of his inventions to the government, did operate on the minds of the officers in estimating the claimant's services and ordering his advancement.

Clearly, a patentee has no right, either in law or morals, to persuade or encourage officers of the government to adopt his inventions, and look on while they are being made use of year after year without objection or claim for compensation, and then to set up a large demand, upon the ground that the government had impliedly promised to pay for their use. A patentee is bound to deal fairly with the government, and if he has a claim against it, to make such claim known openly and frankly, and not endeavor silently to raise up a demand in his favor by entrapping its officers to make use of his inventions. While no criticism is made of the claimant, who was a simple mechanic, and, as found by the Court of Claims, "a faithful, intelligent, and capable employé, whose services were of great value to the government," and whose conduct was "fair, honest, and irreproachable," and while the government appears to have profited largely by his inventive skill, we are of opinion, for the reasons above stated, that the appeal in his behalf should be addressed to the generosity of the legislative, rather than to the justice of the judicial department.

It may be added, in this connection, that the inventions which the claimant suggested to the commanding officer to adopt were mere undeveloped conceptions of his own, that had never been embodied in a machine; that it was uncertain at this time whether he could or would obtain patents for them. If he did not obtain patents, their use was open to anybody. Under such circumstances, it is impossible to say that an officer of the government, conceiving that he had full authority

to make use of them, agreed by their adoption to pay for the value of the use of such machines under patents that might be applied for and granted in the future.

We are clearly of opinion that the case is covered by our former decisions, and that the judgment of the court below must be

Affirmed.

SOUTHERN PACIFIC COMPANY *v.* POOL.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 21. Argued January 15, 16, 1895. — Decided January 6, 1896.

In an action against a railroad company brought by one of its employés to recover damages for injuries inflicted while on duty, where the evidence is conflicting it is the province of the jury to pass upon the questions of negligence; but where the facts are undisputed or clearly preponderant, they are questions of law, for the court.

In this case, after a review of the undisputed facts, it is held that there can be no doubt that the injury which formed the ground for this action was the result of the inexcusable negligence of the company's servant.

THE case is stated in the opinion.

Mr. Maxwell Evarts for plaintiff in error.

Mr. Samuel Shellabarger, (with whom was *Mr. Jeremiah M. Wilson* on the brief,) for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The action was brought below to recover damages from the defendant (plaintiff in error here) upon the ground that it had negligently, on September 12, 1888, caused an injury, which resulted in the death of Pool, the plaintiff's intestate. The cause was tried by a jury. At the close of the evidence for the plaintiff, defendant moved for a nonsuit on the grounds (1) that no negligence had been shown on its part; (2) that the evidence established contributory negligence on the part

of the deceased. These motions were overruled, and exceptions reserved. The defendant thereupon rested. Exceptions were also taken to the action of the court as to the following: (*a*) an instruction of the court that if the jury found that Pool, the deceased, was a car repairer and in a different line of service from that of the negligent servant (if any such there was), and Pool's death was caused thereby, then defendant was liable; (*b*) to an instruction that the trainmen or yardmen of the defendant company were not fellow-servants of the deceased, who was a car repairer; (*c*) to the action of the court in submitting to the jury for their determination as a fact, whether Pool, the deceased, was a fellow-servant with the switchman Kilpatrick, by whose negligence it was claimed the injury resulted; and (*d*) to an instruction that, in ascertaining the quantum of damages, the jury should consider the number of the family left by the deceased, and the ages of his children.

Before the case went to the jury the defendant renewed its request for a peremptory instruction in its favor, which, being refused, exception was taken. The court in its general charge to the jury, gave as the law of the case what is usually denominated the "departmental theory" of the law of fellow-servant, that is to say, it substantially instructed that the criterion by which they were to determine whether the relation of fellow-servant existed, was by ascertaining whether the servants were employed in the same department of service, and if not so employed, they were not fellow-servants. Two questions were submitted by the court to the jury to be answered by them. They were: First, "What of the employés of the defendant, if any, were negligent in the discharge of their duty, and by which the deceased was injured?" Second, "Did the deceased use such care and precaution to avoid the injury as a prudent man, in the exercise of due diligence, should have used?" The jury returned a verdict in favor of the plaintiff, answering the first question, "Kilpatrick," and the second, "Yes." After a denial of a motion for new trial, an appeal was taken to the Supreme Court of the Territory, in which court the judgment was affirmed. The grounds

upon which this affirmance was based were that there had been no negligence on the part of the deceased, and that the switchman Kilpatrick was not a fellow-servant with the car repairer, because they were employed in different departments of service. One of the judges dissented on the ground that the deceased had been guilty of contributory negligence. 7 Utah, 303. The case was then brought by error here.

The questions which the record presents are: First, was the accident which caused the death of Pool the result of his own negligence, hence giving rise to no cause of action on behalf of his representatives? Second, and if the accident was occasioned by the negligence of Kilpatrick, the switchman, can the representatives of the deceased recover damages resulting from such fact? or to put the proposition in another form, Were Pool and Kilpatrick fellow-servants? We will primarily consider the first of the foregoing enquiries, because it is manifest if the injury was brought about by the negligence of Pool, the question of fellow-servant becomes wholly immaterial.

Was the accident caused by the negligence of Pool?

To answer this question involves an analysis of the evidence, (which the record fully sets out,) not for the purpose of weighing the testimony, or of ascertaining the preponderating balance thereof, but in order to arrive at the undoubted proof, from which the legal consequence, negligence, results. There can be no doubt where evidence is conflicting that it is the province of the jury to determine, from such evidence, the proof which constitutes negligence. There is also no doubt, where the facts are undisputed or clearly preponderant, that the question of negligence is one of law. *Union Pacific Railway Company* v. *McDonald*, 152 U. S. 262, 283. The rule is thus announced in that case: "Upon the question of negligence . . . the court may withdraw a case from the jury altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Del-*

aware, Lackawanna &c. Railroad v. *Converse*, 139 U. S. 469, 472, and authorities there cited; *Elliott* v. *Chicago, Milwaukee & St. Paul Railway*, 150 U. S. 245; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241."

The undisputed facts which the record here shows are as follows: Pool, the deceased, at the time he received the injury, was in the employ of the company as a car repairer, and had been so employed in its shops at Ogden City, Utah, for three or more years prior to his death. His duty was not only to do repair work on cars which were brought into the shop for that purpose, but also on cars outside of the shops and standing on the railway track. On the day the accident occurred, about half an hour before the usual hour for quitting their work, Pool and another car repairer, named Fowers, were ordered by the foreman of the car shops to repair the last car of a train of eighteen or twenty cars due to leave in a short time for the West. The train was standing on one of the six or seven tracks composing a railway yard, and on these various tracks there was a frequent moving to and fro of trains and a constant switching of cars backward and forward.

The work to be done consisted in attaching what was called a carrying strap (made of iron and used to hold up what was known as a Miller hook) underneath the platform, about level with the main front of the car, in advance of and outside the wheels. In addition to this work, which Pool and Fowers were sent to do, Rice, who was also a car repairer working in the shop but doing a higher grade of work, was sent from the shop to "adjust the air on the train." These three employés found that in order to do the work of repairing the strap required the moving of the car a short distance from the others in the train, and this was accordingly done by the three, Pool, Fowers, and Rice. The work "on the air," which Rice was to do, could not be executed until the repairs to be made by Pool and Fowers had been completed and the car had been recoupled to the train. The end of the car which required repair faced north towards the train from which it had just been detached, and Pool and Fowers went under the car in order to do the work assigned them, Pool on the west and

Fowers on the east side of the track. Rice waited in the neighborhood of the car on the east side thereof, so that when they had finished their work the car might be recoupled, thus enabling him to do the duty assigned him of "adjusting the air." The two men in going under the car placed no flag or other signal to warn of their presence there, and thereby protect themselves from the peril to which they were necessarily subjected. Their reason for not taking this precaution is stated in the testimony of Fowers:

"Q. Mr. Fowers, couldn't you and Mr. Pool have put up a red flag out there that would have notified — put up a red flag or some other flag that would have notified the engineer of danger?

"A. Yes, sir.

"Q. Why didn't you put up a flag?

"A. Because it was too big a work.

"Q. Because it was too much work?

"A. Yes, sir.

"Q. You thought it would take only a few minutes before you got through?

"A. Yes, sir. We also knew that we had a man stationed there to watch for us, and considered ourselves safe.

"Q. Who was the man you had stationed there to watch for you?

"A. Mr. Rice — Mr. George Rice.

"Q. And you considered you were all right with Mr. Rice to watch for you?

"A. Yes, sir.

"Q. Who was Mr. Rice?

"A. He was a car laborer from the shop.

"Q. Was he one of your car repairers?

"A. Yes, sir."

Shortly after the men went under the car a switch engine with a caboose and car moved from a track called the "caboose track" towards a switch connecting with the track on which the car was being repaired, and backed down for the purpose of coupling the caboose to the south end of this car, such end being the opposite one to that which was being repaired.

The two men under the car could not be seen by the engineer or by those on the backwardly moving caboose. As the engine and caboose came back slowly toward the car, both the men under it heard the noise caused by its movement. However, owing to a curve in the track, Fowers, who was on the east side of the car, could not see the engine and caboose approaching, but, hearing them, spoke to Pool, and said, "I believe they are coming in here." Pool, who was on the west side, leaned back and saw the switch engine and caboose coming down upon them. As he did so, a switchman by the name of Taylor, who was on the west side, was visible to and in hailing distance of Pool. The movement of Pool is thus related by Fowers: "From his position he could lean back this way and could see the cars, see the engine and caboose coming from the south to couple on. He says, 'Yes, they are coming in here.'" Thereupon Pool made a movement to get from under the car, but did not entirely do so. Fowers jumped out on the east side. As he did so he spoke to Rice, who was standing near at hand, and told him to stop the switch engine from backing, and to say that men were under the car repairing, and not to strike or couple to it, as it could not go out until repairs were finished. Rice walked to the south end of the car, and as the caboose slowly backed down, called out, when it was about twenty or thirty feet away, to Kilpatrick, a switchman, who was standing on the west side of the caboose, not to make the coupling as men were at work under the car. The caboose continued to slowly back towards the car, and when it arrived within about six feet stopped for a brief moment. Kilpatrick, on its so stopping, at once gave the signal to the engineer to back down, which signal was obeyed, the caboose striking the car with considerable force. In the meanwhile, either on the going forward of Rice or on the stoppage of the caboose, Fowers returned quickly to his work, as did also Pool. As the former stepped under the car, being uneasy lest the caboose should couple, he looked out and caught sight of a portion of Kilpatrick's body, and saw his arm wave the signal to back down. He cried out to Pool and threw himself from under the car, and was thus saved. Pool was not so alert, and

was caught between the car on which he was working and the one in front thereof, receiving a mortal injury. Whilst it is certain that Rice gave a warning call to Kilpatrick, and told him that the men were under the car and not to couple the caboose to it, there is no evidence whatever that Kilpatrick heard and understood the purport of what Rice said to him when he called to him; there is no proof that he conveyed any signal to Rice which could have produced upon Rice's mind, or upon the mind of any one, the impression that he understood that the men were under the car. There is no proof that Kilpatrick, after the warning given by Rice, transmitted any signal to the engineer to stop the train, and, therefore, there is no proof that the stop which the caboose made in its backward movement was the result of any communication, by signal or otherwise, between Kilpatrick and the engineer; nor, indeed, is there any proof that the stop was the result of anything but the caution of the engineer in backing down, under the impression that he had backed far enough to make the coupling which it was his purpose to make.

These being the undisputed facts, there can be no doubt that the fatal injury which Pool received was the result of his own inexcusable negligence. He went under the car which was standing on the track with a train in front of it, and with a certainty that a caboose was to be attached to the rear, without putting out a flag or other signal warning of his being under the car in order to protect himself from the peril which was obvious and of which he must have been aware, having been for a period of three years engaged in doing work of a like nature. This original act of negligence was continued by his subsequent conduct. As the caboose backed slowly down it was both heard and seen by him in ample time to have enabled him to get from under the car. There was also abundant opportunity for him to step out and give warning to the engineer in charge of the switch engine, and to Taylor the switchman, who was on the west side of the moving car, thus insuring absolute safety. He did neither. Nor can these acts of negligence be legally excused by conceding that Pool's conduct, whether of commission or of omission, was caused by

the reliance placed by him on the warning which he expected would be given by Rice, the car repairer, who remained on the side of the track. Either Rice was the agent of Pool or of the corporation. If he was the agent of the former, of course Pool cannot recover for an injury suffered by him in consequence of the negligence of his own agent. If Rice, in giving the warning, was the servant of the corporation, his negligence gave rise to no cause of action on behalf of Pool, since in any and every view of the law of fellow-servant, Rice and Pool were such servants. The negligence of Pool, established by the undisputed testimony, was not denied by the court below, but was treated as immaterial, in consequence of what the court considered to be proof of neglect on the part of Kilpatrick, the switchman. Such neglect on his part was treated as having been the proximate and, therefore, sole legal cause of the accident. This conclusion is thus stated in the opinion of the Supreme Court of the Territory:

"Nor can there be any question made but that Kilpatrick heard the signal from Rice to stop the engine, and that he acted upon such signal and did stop the engine about six feet from the car in question, under which the deceased was working at the time. The signal was understood by the switchman Kilpatrick, and obeyed by him. The verbal communication to Kilpatrick to stop the engine was a notice and warning as certain, positive, and safe as if there had been a red flag signal used in such case. In any event, Kilpatrick received it, understood it, and replied to it, and complied with it at the time, and he would have done no more had there been a red flag signal placed by the car."

We have already said that the record, which contains all the testimony, discloses no proof whatever either that Kilpatrick understood the call of Rice, that he gave any indication to Rice of his so understanding, or that, in consequence of Rice's warning, he signalled the stoppage of the engine, or that he did any of the things which the court below concluded the undisputed proof established that he did do. The case then, on this question, resolves itself to this, that we find no proof whatever of facts which the court below considered

to be undisputedly established. The only testimony which refers to what took place at the time the warning was given by Rice is that of Rice and Fowers, Kilpatrick not having been examined. The following excerpts from the testimony of Rice contain every word said by him which can in any way throw light on the subject:

"Q. What, if any, conversation did you have with Mr. Kilpatrick?

"A. I had no conversation with Mr. Taylor, if that is his name; I do not know him. There were two switchmen; I didn't know the names. I had no conversation with Mr. Taylor. I had no conversation any further than to tell Mr. Kilpatrick not to come up to touch the cars, there were men working under the car.

"Q. How far was he from you at that time?

"A. Well, it was twenty or thirty feet at the time I told him this.

"Q. Where was he at that time?

"A. He was on the west of the caboose.

"Q. Now, then, you told him that; what did you see, if anything, him do?

"A. Well, I saw him do nothing more until the engine and caboose stopped within six feet of this freight car that they were working on, when it stopped still; the next signal was Mr. Kilpatrick gave a motion.

"Q. What was that?

"A. For it to come back, and it came back with great force; and at that time I heard Mr. Fowers holler 'Pull up!' I run back to where Mr. Fowers was. He was at the other end of the car where he was at work previous to my going up and notifying him not to come down, and I saw Mr. Pool in between the cars, and we yelled for help. . . .

"Q. How long after you told Mr. Kilpatrick that there were men under the cars was it that you saw Mr. Kilpatrick go and make the signal?

"A. How?

"Q. How long after you told Mr. Kilpatrick that there were men under the car?

"A. How long after that? oh, it was very short.

"Q. And then what, if anything, did the engineer, on the car, on the engine that he was working, do in response to that signal; what did the engineer do with his engine in response to that?

"A. Why, he backed up.

"Q. How did he back up?

"A. He came back with great force to this car."

This testimony, it is apparent, does not even tend to show that the switchman Kilpatrick understood the warning given by Rice, or that he acted upon it by transmitting a signal to the engineer to stop the train, and then signalled to continue. The mere presence of Rice, if owing to the noise of the moving train or from other reasons his warning either did not reach or was misunderstood by Kilpatrick, was not sufficient to convey the fact that men were working under the car, and therefore it should not be coupled. Rice was an air adjuster. His work could not be done without the coupling of the car. His mere presence, therefore, if his voice was not heard and his words understood, would have naturally suggested that he desired the coupling to be done in order that his work might be accomplished. Nor can it be considered, without any evidence tending to that end, that Kilpatrick understood the warning, knew the men were under the car, signalled to stop the backward movement of the caboose, and then suddenly, without any change in the situation, give the signal to back up. Such conduct on his part would have been murder, and is certainly not to be presumed without proof, on bare suspicion. The testimony of Fowers, full excerpts therefrom being in the margin, whilst more contradictory than that of Rice, likewise fails to show that Kilpatrick actually understood Rice or acted on the warning by him given.[1]

[1] "Mr. Rice was standing outside of the car, and I says to him, says I, You go and stop him, and don't let them hit this car at all, and told him that it could not get out on the train until it was repaired. Of course, they could not make up the train until that car was repaired, and says I, Don't let them hit the car at all, and we will have it done in five minutes. Says he, All right; and stepped down to the other end of the car, and I saw him

An examination of this testimony at once demonstrates that the only matter therein which seemingly tends to show that Kilpatrick understood Rice is the statement of Fowers, that he heard Kilpatrick make some reply, although the witness could not give the nature of the reply. But the question is, not whether Kilpatrick heard the voice of Rice, but whether he understood his meaning; therefore the mere fact that the witness testifies some reply was made, without giving the reply,

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signal for the engineer to stop, making the regular signal with his arms to them coming up."

"Q. What, if anything, did he say at that time?

"A. He didn't say anything at that time — he stood and signalled. I was standing right at the end of the car, still looking down, and saw Mr. Pool leaning back over the rail this way — about in that position — looking back at the engine coming. They came up very slow within about six feet of the car that he was working under, and then came to a stop. I heard Mr. Rice tell somebody not to hit the car; that they were working there. As soon as I heard him say that I just went right to work, and jumped right under the car again with Mr. Pool, and he turned his attention right to the work, and we went to work again. I felt a little uneasy myself, thinking they might try to couple the caboose on to the car that we were working under. They can do that very easily sometimes, you know, without moving it. So I leaned over the rail — I was kind of on my knees — and I turned my head, and leaned over the rail to the east, and looked right out, and there I saw one of the yardmen giving a signal to back up. I could see the motion of his arm and part of his body, and says I, Look out, Joe, they are right on us; and threw myself head first out over the rail."

On cross-examination he said:

"Q. Did you advise those switchmen to notify the engineer you were in there?

"A. No, sir; I told Mr. Rice to tell the switchmen that we were in there repairing a car.

"Q. And you relied on the switchman to attend to notifying the engineer? You expected him to notify the engineer?

"A. Yes, sir.

"Q. To protect you both — Mr. Pool was in the same condition or position, did he expect that, too?

"A. Sir?

"Q. Mr. Pool and yourself both relied on the switchman to notify the engineer, and you thought the switchman would attend to it?

"A. Yes, sir.

"Q. That he would notify them. Could the engineer see you from where he was, out on the engine? Could he see you were in there with the caboose and car between you?

in no way shows that Rice's warning was comprehended. Indeed, the entire context of the testimony shows that Fowers himself was uncertain whether the warning given by Rice was received and understood by Kilpatrick, for when asked in the first instance, whether Kilpatrick in giving the signal to back did so after he had been warned by Rice, answered, "Well, I suppose," a mere conjecture; and again, when asked if the engineer had stopped the engine in consequence of a signal

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"A. No, sir."

After stating the presence of Rice beside the car, he was asked:

"Q. And you requested him to notify the engineer?

"A. Yes, sir. Understand, of course, that they could not use the air on that train until we had done these repairs, because they could not make the coupling with the rest; they were waiting for these repairs.

"Q. Sir?

"A. They were waiting for these repairs.

"Q. While he was standing there you just requested him to notify the engineer not to back back?

"A. Not the engineer but the switchman.

"Q. Not the engineer, but the switchman, not to back back the engine?

"A. Yes, sir.

"Q. You don't know whether he notified them or not?

"A. I heard him tell them not to hit the car, and that was satisfactory to me.

"Q. You supposed it would not be struck?

"A. I supposed it would not be struck; yes, sir.

"Q. Did you see the switchman yourself?

"A. I saw one of them — a part of one of them — I could see his arm and part of his body.

"Q. Well, was it the switchman that Mr. Rice spoke to that beckoned the engine to back back?

"A. Yes, sir; I heard Mr. Rice talking to that switchman, and I suppose it was that switchman.

"Q. Well, what switchman was that; who was it?

"A. I think it was Ben. Kilpatrick; I would not be positive which one it was.

"Q. But do you think it was Ben. Kilpatrick who signalled the engineer to back back?

"A. Yes, sir.

"Q. And struck this car?

"A. Yes, sir.

"Q. And he did that after he had been warned by Mr. Rice?

"A. Well, I suppose ——

"Q. Well, after you heard Mr. Rice tell him?

from Kilpatrick, his reply was, "Yes, sir; it must have been," a mere opinion. On cross-examination, in answering a question asking, "Who then signalled the engineer not to back back?" Fowers answered, "Yes, sir." But the whole context of his testimony shows that the word "not" in the question was misunderstood by the witness, for he was testifying solely as to the signal given to back after he (the witness) was under the car. Indeed, this is the only signal which Fowers testifies he saw given by Kilpatrick. To construe this question and answer as relating to a presumed signal not to back given by Kilpatrick to the engineer in consequence of Rice's warning, would contradict the whole of Fowers' testimony, since it clearly shows that no such signal was seen by him, and that the only signal which he noticed was the one given to make the coupling which led to the death of Pool.

"A. Yes, sir.

"Q. He done that after he had been told by Mr. Rice not to hit the car?

"A. Yes, sir.

"Q. Who then signalled the engineer not to back back?

"A. Yes, sir.

"Q. It was the switchman?

"A. It was the switchman, yes, sir. . . .

"Q. I think you got back under the car, as I understand you, and commenced to fix this bolt?

"A. Not until they come to a stop.

"Q. Not until they come to a stop?

"A. Yes, sir.

"Q. Well, after they came to a stop, did you know that there was any signal, and who was it made the signal to back back farther?

"A. At the time that I saw the signal I was under the car, but leaning out over the rail, and I saw the signal for to back up; that was after they had stopped, and after I had got under the car again, and at that time I leaned over and saw, I think it was, Kilpatrick, giving a signal to back up.

"Q. You saw Kilpatrick give a signal to back up, and immediately after that signal they backed up and you sprung out?

"A. Yes, sir.

"Q. And that is the time that Pool was caught?

"A. Yes, sir."

On his redirect examination he said:

"Q. Where were you when you saw Rice communicate, do you know, to Kilpatrick?

"A. I was standing at the north end of this car.

Finding no proof, whatever, that the switchman actually understood the warning given by Rice and acted upon it, there is nothing in the record to support the conclusion below that, as the warning was actually given and understood, Pool was thereby relieved from the legal consequence of his negligence in having gone under the car without placing the usual and customary signal, of having remained there in the presence of an impending danger, and, when there was ample opportunity to avoid it, of having failed himself to give a warning as the car moved down, which the proof shows he could have done, thus rendering his position absolutely safe.

The judgment is reversed, and the case remanded with directions to grant a new trial.

"Q. Standing there?

"A. Yes, sir.

"Q. Where was Kilpatrick; on which side of the train?

"A. He was right in front of the caboose, I think.

"Q. Where was that caboose from where you were?

"A. Well, it might have been twenty feet at that time.

"Q. I understand you to say it was about twenty feet to where Kilpatrick was?

"A. Yes, sir; when Mr. Rice spoke to him.

"Q. Did you see Kilpatrick when he spoke to him?

"A. Yes, sir.

"Q. Well, did he hear him; are you able to say that he heard him?

"A. Well, I heard Mr. Kilpatrick make some reply, but I don't know what it was.

"Q. He replied, did he, when Rice spoke?

"A. Yes, sir.

"Q. This was the time the engine was standing still?

"A. No, sir; she was moving then, and came up within about six feet and then stopped. She was stopped at the time ——

"Q. I know; but after Rice spoke to Kilpatrick the engineer stopped the engine.

"A. Yes, sir.

"Q. Was that in response to signal from Kilpatrick?

"A. Yes, sir; it must have been.

"Q. What did Kilpatrick (of course meaning Rice) say when he communicated to Kilpatrick; did he refer to your being under the car?

"A. I would not be right positive as to that. He told him not to hit the car, and I think he said we were working there."

ELDRIDGE *v.* TREZEVANT.

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

No. 62. Submitted October 17, 1895. — Decided January 6, 1896.

In Louisiana the constitution and laws of the State, as interpreted by its highest court, permit the taking, without compensation, of land for the construction of a public levee on the Mississippi River, on the ground that the State has, under French laws existing before its transfer to the United States, a servitude on such lands for such a purpose; and they subject a citizen of another State owning such land therein, the title to which was derived from the United States, to the operation of the state law as so interpreted. *Held*, that there was no error in this so long as the citizen of another State receives the same measure of right as that awarded to citizens of Louisiana in regard to their property similarly situated.

The provisions of the Fourteenth Amendment to the Constitution do not override public rights, existing in the form of servitudes or easements, which are held by the courts of a State to be valid under its Constitution and laws.

WILLIAM B. Eldridge, a citizen of the State of Mississippi, filed in the Circuit Court of the United States for the Western District of Louisiana a bill of complaint against Henry B. Richardson, Chief of the Board of Engineers of the State of Louisiana, and Peter J. Trezevant, citizens of Louisiana, whereby he sought to have the defendants enjoined from the construction of a certain public levee through a plantation belonging to the complainant, and situated in Carroll township, State of Louisiana.

An answer was filed admitting that the State Board of Engineers had projected and laid out a public levee through the complainant's plantation, and that a contract to construct said levee had been awarded to Peter J. Trezevant, but claiming that such proceedings were in pursuance of an act of the general assembly of the State of Louisiana, approved February 14, 1879, and were therefore lawful.

The case was heard upon the issues presented by the bill and answer, supplemented with an admission that none of the

acts complained of in the bill were wanton, malicious, or arbitrary.

On June 20, 1891, a decree was rendered adjudging the sufficiency of the answer and dismissing the bill, from which decree an appeal was taken to this court.

Mr. Wade R. Young for appellant.

Article 156 of the constitution of Louisiana, adopted July 23, 1879, provides that private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid.

In construing this prohibition in *Ruch* v. *New Orleans*, 43 La. Ann. 275, the state Supreme Court said that the city was authorized to take the plaintiff's property, to the extent the same might be required for public use, in the enlargement of the public roadway immediately in front of it, in virtue of the right of appropriation vested in it by the police power of the State. The right of appropriation, which is recognized in the code, was held to be coexistent with the right of expropriation, as provided for in Rev. Civil Code. All of those provisions preëxisted in the constitution, with the 155th and 156th articles of which the right of appropriation is said to conflict. This, of itself, the court said, leads to the supposition of their entire compatibility. But the two principles are of well recognized and ancient origin, — one being an exercise of the police power, any loss sustained thereby entitling the injured party to no recompense, the same being *damnum absque injuria;* the other being the exercise of the right of eminent domain, the damages entailed being compensable. *Bass* v. *State*, 34 La. Ann. 494; *Chaffe* v. *Trezevant*, 38 La. Ann. 746.

In ordinary cases this interpretation would be binding on this court, but in determining whether the laws of a State are in conflict with the prohibitions of the Federal Constitution, this court must decide for itself, and if the decision requires a construction of state constitutions and laws, it is not necessarily governed by previous decisions of the state courts. *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665.

The prohibition against the taking of private property for public use is to be found in the Federal Constitution, and in the constitutions of most, if not all of the States, and has received a uniform interpretation, which has become a part of the jurisprudence of the country.

It was alluded to by this court in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, as a provision of constitutional law always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, and this court quoted the language of Dayton, J., in *Sinnickson* v. *Johnson*, 2 Harrison, (5 N. J. Law,) 129, "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as part of one and the same principle."

The state court seems to have appreciated this difficulty, and to have disposed of it by giving the thing another name, and justifying the taking as an exercise of the police power, entirely compatible with the right of expropriation, and provided by the statute for the making and repairing of levees, roads, and other public or common works.

It becomes necessary, then, to inquire into the origin and history of the servitude. The article was taken from articles 649, 650, of the Code Napoleon: "Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility have for object the towpaths along the navigable or floatable rivers, the construction or repairing of roads and other public or communal works. All that concerns this kind of servitude is determined by laws or particular regulations."

The laws which formerly regulated this servitude have been

long repealed, as the necessity therefor ceased to exist, and nothing remains of the legislation except the principle embodied in the article of the Code. But the principle of indemnity for damage so inflicted was early recognized by legislation, which, though local in its character, was a legislative recognition of the right to full compensation, and an abandonment of the principle of servitude, and received the support of the courts. *Zenor* v. *Concordia Parish*, 7 La. Ann. 150; *Dubose* v. *Levee Commissioners*, 11 La. Ann. 165; *Mithoff* v. *Carrollton*, 12 La. Ann. 185; *Inge* v. *Police Jury*, 14 La. Ann. 117.

After the war the former laws were repealed, and a new and different system adopted, by which the State undertook the duty of making and repairing levees. *Police Jury* v. *Tardos*, 22 La. Ann. 58; *Surgi* v. *Matthews*, 24 La. Ann. 613. The constitution of 1868, article 110, contained the same provision that "vested rights should not be divested, unless for purposes of public utility and for adequate compensation made."

The case of *Bass* v. *State*, 34 La. Ann. 494, arose and was decided under that constitution, and the court held that private property could be taken for public use, in the exercise of the general police powers of the State, without making compensation therefor. In 1879 the people adopted a new constitution, and in that appears for the first time the provision in the words of the Fifth Amendment to the Constitution of the United States, and of so many of the States, that "private property shall not be taken for public purposes without just compensation."

This provision had at that time been construed by this court and by the courts of many of the States, and it had come to be understood that the exercise of the police power, as distinguished from the right of eminent domain, was a matter of public law, rather than a matter of legislative or judicial discretion. The constitution of Mississippi contained the provision that private property shall not be taken for public use without just compensation being first made. In the case of *Penrice* v. *Wallis*, 37 Mississippi, 172, the same argument was

used, that the Levee Commissioners could take private property for the purpose of making public levees, without compensation. The court said: "In cases of public emergencies, such as the calamities of fire, flood, war, pestilence, and famine, private property may be taken and applied to public use without just compensation being made therefor, upon the principle of imperative necessity for the public protection; but in order to justify such appropriation, the necessity must be apparently present, and the apprehended danger must be so imminent and impending, as not to admit of the delay incident to legal proceedings for the condemnation of the property."

The constitution of Wisconsin provided that "the property of no person shall be taken for public use without just compensation therefor." In construing this provision in *Pumpelly* v. *Green Bay Co.*, *supra*, this court said: "We are not unaware of the numerous cases in the state courts in which the doctrine has been successfully invoked, that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other state constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not without sound principle."

It would naturally appear that the framers of the Louisiana

constitution of 1879, in adopting the provision in words which had received a settled construction, adopted the existing interpretation, rather than one founded on a principle of the Spanish and French laws, which had been in part abandoned for the parish of Concordia as early as 1829, and altogether abandoned for the parish of Tensas in 1848, and which is in conflict with the spirit of our institutions.

Moreover, although it is not directly at issue in this cause, the court can take judicial notice of the fact that the public levees of the State, on the shores of the Mississippi River, are now a part of a system of public works undertaken by the United States for the improvement of the navigation of the river, and incidentally in coöperation with the State, for the protection of the country from overflow, by confining the waters of the river, and that such levees, whether made by the United States or by the State, are parts of one and the same system, and are planned and executed for both purposes.

The judges of the United States Circuit Court, in *Hollingsworth* v. *Parish of Tensas*, 4 Woods, 280, considered that the exercise of the police powers of the State, and the right of eminent domain, were questions of general jurisprudence, and not of local law, and held that according to the principles of general jurisprudence, private property could not be taken or damaged for public use without compensation, either by authority of the police powers of the State, or under the right of eminent domain.

This opinion remained the law of the Federal court until the decree in this case, but the state court adhered to its doctrine that property can be taken, damaged, and destroyed without compensation, for the purpose of making and repairing public levees, in the exercise of the police power.

If any doubt could ever have existed that the distinction between the police power and the right of eminent domain is a question of general jurisprudence, and not of local law, such doubt has been solved by the prohibition of the Fourteenth Amendment, that no State shall deprive any person of property without due process of law. The words "due process of law," as used in the Federal constitution, do not mean the law and

jurisprudence of the State by which the wrong is worked. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would say to the States, you shall not deprive any person of property without due process of law, but you shall be the judges of what is due process of law; in other words, you shall not do the wrong unless you choose to do it. Due process of law in each particular case means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.

It was in recognition of this principle that, in *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9, this court said that, by providing for an assessment of full compensation to the owners of lands flowed, it avoids the difficulty which arose in the case of *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. Being a constitutional exercise of legislative power, and providing a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to the land of the plaintiff in error, it has not deprived him of his property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

To determine under what circumstances property can be taken in the exercise of the police power, as distinguished from the right of eminent domain, this court does not look to the jurisprudence of the State, but to the settled maxims of law, always understood to have been adopted for protection and security to the rights of the individual as against the government. The maxim, "*Sic utere tuo ut alienum non lædas*," is that which lies at the foundation of the power, and it is distinct from the right of eminent domain.

These police powers rest upon the maxim "*salus populi est suprema lex.*" This power to restrain a private injurious use of property is very different from the right of eminent domain. It is not taking private property from the owner, but a salutary restraint on the noxious use by the owner contrary to the maxim "*Sic utere tuo ut alienum non lædas.*"

Argument for Appellant.

The prohibition of the Fourteenth Amendment is directed to the States, and if the State, by its legislature, or by its courts, or other agency, can evade the prohibition by deciding for itself that such imperative necessity exists, and there is to be no appeal from its decision, the restriction would be rendered nugatory, and this part of the Constitution turned into mere nonsense.

Whether such imperative necessity exists as to justify the State in taking, damaging, and destroying private property for public purposes without compensation, in the exercise of the police power, is a question of Federal law, depending upon the facts of each case, which this court must determine for itself, and without regard to the decisions of the courts of the State.

It would be no answer to the complaint that the State was depriving a person of life, liberty, or property, to say that the State has decided that a condition of things exists to justify such violation of the prohibition, or has decided that it has not deprived the person of life, liberty, or property without due process of law.

As said by the court in *Penrice* v. *Wallis*, *ubi sup.*, the answer does not present such a plea. It does not pretend to set up such overwhelming necessity, in the face of the facts stated in the bill.

The only contention of the defendants, admitting all the facts stated in the bill, is that plaintiff holds his property subject to a servitude imposed by the laws of Louisiana, and that the construction of public levees is a matter within the police power of the State.

If such be the law of Louisiana, that the lands of plaintiff, being adjacent to the Mississippi River, are subject to a servitude or easement, in the exercise of which the State can take, damage, and destroy his property for the purpose of making and repairing levees, roads, and other public or common works, without compensation, such a law is repugnant to and in conflict with the prohibition of the Fourteenth Amendment of the Constitution of the United States, unless it be pleaded and shown that there exists such imperative necessity as to justify the exercise of the police power of the State.

Argument for Appellant.

The restriction imposed by the Federal constitution upon the power of the State to deprive persons of life, liberty, or property, cannot be subordinated to the customs of France and of Spain, embodied in the statute laws of the State, nor can the Constitution of the United States be so interpreted that the State can decide for itself in each case what constitutes depriving a person of life, liberty, or property without due process of law, and such decision be binding on the courts of the United States.

Unless the statutes relied on by defendants provide a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury, they are null and void, and the defendants were made trespassers, without warrant or authority of law.

If, on the other hand, the general provision, embodied in article 156 of the state constitution, and in article 497 of the civil code, provide a suitable remedy, by trial in the regular course of justice, to recover compensation for the injury to plaintiff's property, the compensation should have been first paid, and the defendants were proceeding to take, damage, and destroy the property of the plaintiff, in violation of the constitution and laws of the State.

In either case the plaintiff had a plain right to the equitable remedy by injunction, and the more so, because he would have had no remedy at all against the State, for the torts of its officers and agents.

The District Judge, with too much regard for the public interest, and too little regard for private right, allowed the defendants to proceed to construct the levee, by an *ex parte* order, upon their furnishing bond and security in the sum of only four thousand dollars.

This was manifest error, as just and equitable compensation had not been first made, and the plaintiff is left without a remedy, except by an action at law on the bond, and a personal action against the defendants for the balance.

It is therefore respectfully submitted that the judgment appealed from should be reversed, and the injunction reinstated, and the right of plaintiff to recover his compensation

for the injury by an action on the bond, and by a personal action against the defendants, be recognized and reserved, and the cause remanded for further proceedings.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, and *Mr. T. M. Miller* for appellees.

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

By an act of the general assembly of the State of Louisiana, approved February 14, 1879, there was created a board of state engineers, whose duty it was to make a survey of the water-courses, public works, and levees of the State. They were to report to the governor of the State the improvements which they should deem necessary, and the construction of such levees as were of prime importance to the State at large and were beyond the means of the parochial authorities. They were also, in said report, to furnish estimates and specifications of work necessary to be done. It was thereupon made the duty of the governor to advertise for proposals to make such improvements and construct such levees as were recommended, and to award the contracts to the lowest responsible bidder, under proper and sufficient bonds for the faithful performance of their contracts; and upon completion of said works it was made the duty of the board of engineers to examine and measure the work and to certify to its correctness; and, upon approval by the governor, the auditor of public accounts of the State was to draw his warrant therefor, payable out of the general engineer fund, or such fund as should be provided by law.

In the exercise of the powers thus conferred, the board of engineers reported to the governor that it was necessary to construct a levee across complainant's plantation; that such levee was of prime importance to the State at large; would have to be of large size; that the river front was a dangerous and constantly caving bank, and that necessarily the levee had to be located some distance from the river; and they

furnished estimates and specifications of the work necessary to be done. Subsequently, after advertising for proposals, the governor awarded the contract for constructing the levees proposed to the defendant, Peter J. Trezevant, as the lowest responsible bidder, who was, at the time of filing of the bill, proceeding with the work.

The plaintiff expressly admits, in his bill, that, although the constitution of the State of Louisiana contains a provision that private property shall not be taken or damaged without adequate and just compensation being first paid, the laws of the State, as interpreted by the Supreme Court of the State, provide no remedy for cases of proceedings under the levee laws, and that the Supreme Court of the State has decided that such taking, damage, and destruction of property for the purpose of building a public levee is an exercise of the police power of the State, and *damnum absque injuria* because the State has a right of servitude or easement over the lands on the shores of navigable rivers for the making and repairing of levees, roads, and other public works. But he contends that, as he cannot sue the State for compensation, and as an action at law, if such would lie, would not furnish that just and adequate compensation first paid, contemplated by the provision of the state constitution, he has a right, as a citizen of another State, to invoke, in the Circuit Court of the United States, the protection of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws.

The concession distinctly made by the complainant, in his bill, that the state courts refuse to recognize that owners of lands abutting on the Mississippi River and the bayous running to and from the same, where levees are necessary to confine the waters and to protect the inhabitants against inundation, are entitled, when a public levee is located upon such lands, to invoke the application of that provision of the state constitution which provides that "private property shall not be taken nor damaged for public use without just and adequate com-

pensation first paid," and repeated in the brief filed on his behalf in this court, relieves us from an extended examination of the origin and history of the state enactments, constitutional and legislative, and of the decisions of the state courts on this subject.

It is important, however, to observe the ground upon which the state legislative and judicial authorities base their action. That ground is found in the doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation. This doctrine is said to have been derived from the Code Napoleon, whose 649th and 650th articles were as follows:

"Servitudes established by law have for object the public or communal utility, or the utility of private persons. Those established for the public or communal utility have for object the towpaths along the navigable or floatable rivers, the construction or repairing of roads and other public or communal works. All that concerns this kind of servitude is determined by laws or particular regulations."

But whether the servitude in question was derived from French or Spanish sources, or from local and natural causes, we need not inquire, because it is explicitly asserted in the Civil Code of Louisiana, article 661, in the following terms:

"Servitudes imposed for the public or common utility relate to the space which is to be left for public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads, and other public or common

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[1] 649 — Les servitudes établies par la loi ont pour objet l'utilité publique ou communale, ou l'utilité des particuliers.

650 — Celles établies pour l'utilité publique ou communale ont pour objet le marchepied le long des rivières navigables ou flottables, la construction ou réparation des chemins et autres ouvrages publics ou communaux.

Tout ce qui concerne cette espèce de servitude, est déterminé par des lois ou des règlements particuliers.

works. All that relates to this kind of servitude is determined by laws or particular regulations."

In the case of *Zenor* v. *Parish of Concordia*, 7 La. Ann. 150, where the legislature had enacted that the police jury of a parish exposed to inundation should have plenary power to locate and construct levees, and where such police jury, in pursuance of these powers, had placed and built a levee on the lands of the complainant, greatly to his detriment, it was held that the enactment was valid, and that no liability for damages was caused by a *bona fide* proceeding under it. The court said:

"In this State, so much exposed to ruinous inundations, the public have the undoubted right, on the shores of the Mississippi River, to the use of the space of ground necessary for the making and repairing of the public levees and roads. C. C. Art. 661. It was the condition of the ancient grants of land on the Mississippi River, and sufficient depth was always given to each tract, to prevent the exercise of the public rights from proving ruinous to the individual.

"Speculation and other motives have, in later times, caused the division and sale of some tracts, and entries of others, with large fronts and little depth, in opposition to the general policy of the country. Thus, in the present case, the plaintiff has scarcely any depth, with a large front, in a deep bend, with a caving bank. The policy of the country and the laws of the land, made for the general safety, cannot yield to cases of individual hardship. Those who purchase and own the front on the Mississippi River gain all that is made by alluvion, and lose all that is carried away by abrasion. And those who choose to purchase tracks with little depth, in caving bends, expose themselves, knowingly, to total loss, and must suffer the consequences when they occur. They suffer *damnum absque injuria*."

In *Dubose* v. *Levee Commissioners*, 11 La. Ann. 165, the plaintiff sued for damages occasioned to his land by the acts of the commissioners in changing the line of the public levee, but the court, citing the provisions of the code, article 661, held that "the law concerning the expropriation of private property for public use does not apply to such lands upon the

banks of navigable rivers as may be found necessary for levee purposes. The quantity of land to be taken for such purposes presents a question of policy or administration to be decided by the local authorities, whose decisions should not be revised by this tribunal, except for the most cogent reasons, and where there has been manifest oppression or injustice."

In the case of *Bass* v. *State of Louisiana*, 34 La. Ann. 494, the Supreme Court again held that an owner of land abutting on the Mississippi River could not recover for damages inflicted upon his property by the State Board of Engineers and contractors in locating and constructing a public levee, but put the immunity of the State mainly upon the proposition that such public works are done in the exercise of the police power, and did not advert to the doctrine of servitude, upon which the previous decision had placed such immunity.

But we do not understand that the Supreme Court of the State intended thereby to repudiate the doctrine of a servitude, explicitly declared in the code, and recognized, through a long period, by many decisions. If, to approve the judgment in that case, it were necessary to hold that the State and its agents can take private property, wherever situated, and apply it to any public purpose, and escape from the duty of compensation by terming such action an exercise of the police power, it is difficult to see how such a conclusion could be reached by the courts of a State in whose constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made. But, as we have said, it is not necessary to so read the decision in question, nor to consider whether, even in such a case, a remedy could be found in any provision of the Federal Constitution.

This, we think, clearly appears by the later case of *Ruch* v. *New Orleans*, 43 La. Ann. 275, where the Supreme Court reviewed the law and the cases, and again put the immunity of the city from liability for damages occasioned to the front of the plaintiff's property by a public work upon the long established doctrine of a servitude, and declared that "the riparian owner enjoys his property *sub modo*, *i.e.* subject to

the right of the public to reserve space enough for levees, public works, and the like; that over this space the front proprietor never acquires complete dominion. It never passes free of this reservation to a purchaser."

With the admission that, under the state constitution and laws, as construed by the highest court of the State, the plaintiff below was not entitled to the remedies he sought, we are requested to hold that he can obtain relief by invoking, in a Circuit Court of the United States, the protection of the Fourteenth Amendment of the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The first contention of the plaintiff in error is that, as it is admitted that he owns the land in fee through title derived by patent from the United States, without reservation, whatever may have been the conditions of the ancient grants, no such condition attaches to his ownership, and the lands, although bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other property. In other words, the claim is that the servitude, under which are held lands whose titles are derived by grant from Spain or France, or from the State, does not attach to lands whose titles are derived from the United States.

Previous decisions of this court furnish a ready answer to this contention.

In *Barney* v. *Keokuk*, 94 U. S. 324, 337, where the dispute was as to the nature of the title to the river front and as to new ground formed by filling in upon the bed of the river, and where some conflict was shown to exist between the common law rules as to such ownership and those asserted by the State of Iowa in her legislation and the decisions of her courts, Mr. Justice Bradley, speaking for the court, said:

"It is generally conceded that the riparian title attaches to subsequent accretions to the land affected by the gradual and imperceptible operation of natural causes. But whether it attaches to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual

floods, *is a question which each State decides for itself.* . . . The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and, under the like influence, it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, *is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in the sovereign capacity, it is not for others to raise objections."

In *Packer* v. *Bird*, 137 U. S. 661, 669, where a similar question arose, and where it was claimed that the fact that the title was derived by a grant from the United States afforded a reason for decision, Mr. Justice Field stated the question as follows:

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream."

The language of *Barney* v. *Keokuk* was cited with approval, and the conclusion reached was that the law of the State, as construed by its Supreme Court, was decisive of the controversy.

The question was again presented in *Hardin* v. *Jordan*, 140 U. S. 372, 384, and, after a review of the cases, Mr. Justice Bradley stated the conclusion as follows:

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the State in which the lands lie."

In *Shively* v. *Bowlby*, 152 U. S. 1, 58, this court had to deal with a conflict as to the title in certain lands below high water mark in the Columbia River in the State of Oregon, between parties claiming respectively under the United States and under the State of Oregon. The entire subject was thoroughly examined, involving a review of all the cases, both state and Federal, and one of the conclusions reached was thus stated by Mr. Justice Gray:

"Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future State when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution of the United States."

These decisions not only dispose of the proposition that lands, situated within a State, but whose title is derived from the United States, are entitled to be exempted from local regulations admitted to be applicable to lands held by grant from the State, but also of the other proposition that the provisions of the Fourteenth Amendment extend to and override public rights, existing in the form of servitudes or easements, held by the courts of a State to be valid under the constitution and laws of such State.

The subject-matter of such rights and regulations falls within the control of the States, and the provisions of the Fourteenth Amendment of the Constitution of the United States are satisfied if, in cases like the present one, the state law, with its benefits and its obligations, is impartially adminis-

tered. *Walker* v. *Sauvinet*, 92 U. S. 90 ; *Davidson* v. *New Orleans*, 96 U. S. 97 ; *Missouri* v. *Lewis*, 101 U. S. 22 · *Hallinger* v. *Davis*, 146 U. S. 314.

The plaintiff in error is, indeed, not a citizen of Louisiana, but he concedes that, as respects his property in that State, he has received the same measure of right as that awarded to its citizens, and we are unable to see, in the light of the Federal Constitution, that he has been deprived of his property without due process of law, or been denied the equal protection of the laws.

The decree of the court below is

Affirmed.

Mr. Justice Brewer dissented.

DAVIS *v.* UNITED STATES.

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

No. 593. Submitted October 30, 1895. — Decided December 16, 1895.

If it appears, on the trial of a person accused of committing the crime of murder, that the deceased was killed by the accused under circumstances which — nothing else appearing — made a case of murder, the jury cannot properly return a verdict of guilty of the offence charged if, upon the whole evidence, from whichever side it comes, they have a reasonable doubt whether, at the time of killing, the accused was mentally competent to distinguish between right and wrong, or to understand the nature of the act he was committing.

No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

The plaintiff in error was indicted for murder, tried in the court below, and convicted. In the opinion of this court the issue brought here for decision is stated as follows. "The

court below instructed the jury that the defence of insanity could not avail the accused unless it appeared affirmatively, to the reasonable satisfaction of the jury, that he was not criminally responsible for his acts. The fact of killing being clearly proved, the legal presumption, based upon the common experience of mankind, that every man is sane, was sufficient, the court in effect said, to authorize a verdict of guilty, although the jury might entertain a reasonable doubt upon the evidence, whether the accused, by reason of his mental condition, was criminally responsible for the killing in question. In other words, if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there were an entire absence of proof that he was insane."

No appearance for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

There is much conflict of authority on the proposition as to whether the judge should charge the jury that they must acquit if the whole evidence raises a reasonable doubt in their minds as to whether the defendant is sane or not.

The doctrine in England is well settled that the burden is on the defendant to establish his insanity to the reasonable satisfaction of the jury. Russell on Crimes, 9th ed. 525; Roscoe on Criminal Evidence, 7th ed. 975; Foster's Crown Law, 225.

In *McNaghten's case*, 10 Cl. & Finn. 200, the question of insanity as a defence in criminal cases having been made the subject of debate in the House of Lords, the opinion of the judges on the law governing such cases was taken, and on the point here involved the answer was that "the jurors ought to be told that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction."

The law so declared has been acquiesced in in England.

In this country there are two lines of authorities. The following hold the doctrine that the burden of proof is on the defendant to establish insanity to the reasonable satisfaction of the jury, some of the cases using the language that it must be established by a preponderance of the evidence. These authorities will all be cited together as adverse to the contention that only a reasonable doubt must be raised: Rice's Criminal Evidence, vol. 3, §§ 398, 399; Wharton on Homicide, § 668; Wharton on Criminal Evidence, § 340; Wharton on Criminal Law, 7th ed. § 54; Greenleaf on Evidence, vol. 2, § 373; vol. 3, § 5. Alabama: *Boswell* v. *State*, 63 Alabama, 307; *Parsons* v. *State*, 81 Alabama, 577; *Gunter* v. *State*, 83 Alabama, 96; *Maxwell* v. *State*, 89 Alabama, 150. Arkansas: *Coates* v. *State*, 50 Arkansas, 330; *Bolling* v. *State*, 54 Arkansas, 588. California: *People* v. *McDonell*, 47 California, 134; *People* v. *Bawden*, 90 California, 195; *People* v. *Travers*, 88 California, 233; *People* v. *Bemmerly*, 98 California, 299. Georgia: *Fogarty* v. *State*, 80 Georgia, 450, 455. Iowa: *State* v. *Bruce*, 48 Iowa, 530; *State* v. *Trout*, 74 Iowa, 545. Kentucky: *Kriel* v. *Commonwealth*, 5 Bush, 362; *Moore* v. *Commonwealth*, 18 S. W. Rep. 833. Louisiana: *State* v. *Coleman*, 27 La. Ann. 691; *State* v. *Burns*, 25 La. Ann. 302; *State* v. *De Rancé*, 34 La. Ann. 186. Maine: *State* v. *Lawrence*, 57 Maine, 574. Massachusetts: *Commonwealth* v. *Rogers*, 7 Met. 500; *Commonwealth* v. *Eddy*, 7 Gray, 583. Minnesota: *State* v. *Hanley*, 34 Minnesota, 430. Missouri: *State* v. *McCoy*, 34 Missouri, 531; *State* v. *Redemeier*, 71 Missouri, 173; *State* v. *Pagels*, 92 Missouri, 300; *State* v. *Shaefer*, 22 S. W. Rep. 447. Nevada: *State* v. *Lewis*, 20 Nevada, 333. New Jersey: *State* v. *Spencer*, 1 Zabriskie, 196. North Carolina: *State* v. *Starling*, 6 Jones, 366; *State* v. *Vann*, 82 N. C. 631; *State* v. *Davis*, 109 N. C. 780. Ohio: *Loeffner* v. *State*, 10 Ohio St. 598; *Bond* v. *State*, 23 Ohio St. 349. Pennsylvania: *Commonwealth* v. *Moler*, 4 Penn. St. 264; *Ortwein* v. *Commonwealth*, 76 Penn. St. 414; *Pannell* v. *Commonwealth*, 86 Penn. St. 260; *Commonwealth* v. *Gerade*, 145 Penn. St. 289. South Carolina: *State* v. *Bundy*, 24 S. C. 439; *State* v. *Alexander*,

30 S. C. 74. Texas: *Webb* v. *State*, 9 Tex. App. 490; *Leache* v. *State*, 22 Tex. App. 279. Utah: *People* v. *Dillon*, 8 Utah, 92. Virginia: *Baccigalupo* v. *Commonwealth*, 33 Gratt. 807. West Virginia: *State* v. *Strauder*, 11 W. Va. 747.

The following hold that if the evidence raises a reasonable doubt of sanity the jury must acquit: Thompson on Trials, § 2524; 2 Bishop's Criminal Procedure, §§ 669, 673. United States Courts: *United States* v. *Guiteau*, 10 Fed. Rep. 161; *United States* v. *Ridgeway*, 31 Fed. Rep. 144; *United States* v. *Faulkner*, 35 Fed. Rep. 730; *United States* v. *McClure*, 7 Law Rep. (N. S.) 439; *United States* v. *Lancaster*, 7 Bissell, 440. Connecticut: *State* v. *Johnson*, 40 Conn. 136. Florida: *Hodge* v. *State*, 26 Florida, 11. Illinois: *Hopps* v. *People*, 31 Illinois, 385; *Chase* v. *People*, 40 Illinois, 352; *Dunn* v. *People*, 109 Illinois, 635; *Langdon* v. *People*, 133 Illinois, 382. Indiana: *Bradley* v. *State*, 31 Indiana, 492; *Guetig* v. *State*, 66 Indiana, 94; *Grubb* v. *State*, 117 Indiana, 277; *Plake* v. *State*, 151 Indiana, 433. Iowa: *State* v. *Jones*, 64 Iowa, 349. Kansas: *State* v. *Crawford*, 11 Kansas, 32; *State* v. *Mahn*, 25 Kansas, 182; *State* v. *Nixon*, 32 Kansas, 205. Kentucky: *Smith* v. *Commonwealth*, 1 Duval, 224. Michigan: *People* v. *Garbutt*, 17 Michigan, 9; *Underwood* v. *People*, 32 Michigan, 1. Mississippi: *Cunningham* v. *State*, 56 Mississippi, 269. Nebraska: *Wright* v. *People*, 4 Nebraska, 407. New Hampshire: *State* v. *Bartlett*, 43 N. H. 224; *State* v. *Jones*, 50 N. H. 369; *State* v. *Pike*, 49 N. H. 399. New Mexico; *Falkner* v. *Territory*, 30 Pac. Rep. 905. New York: *Brotherton* v. *People*, 75 N. Y. 159; *O'Connell* v. *People*, 87 N. Y. 377; *Walker* v. *People*, 88 N. Y. 81. Tennessee: *Dove* v. *State*, 3 Heiskell, 348; *King* v. *State*, 91 Tennessee, 617. Wisconsin: *Revoir* v. *State*, 82 Wisconsin, 295; *State* v. *Reidell*, 14 Atl. Rep. 550.

Thus it appears that the preponderance of authority is against the contention that it is only necessary to raise a reasonable doubt.

It is urged by those authorities holding the contrary doctrine that every element necessary for conviction must be established beyond a reasonable doubt; that while there is a presumption of sanity, this only goes to the extent of reliev-

ing the State of the burden of proving sanity, and without any proof on the subject the presumption is conclusive, but that when proof is introduced, inasmuch as malice and will could not exist in the mind of a person insane, evidence establishing a reasonable doubt as to the sanity of the defendant in effect establishes a reasonable doubt as to whether there were malice and the operation of the will.

Nowhere has this doctrine been stated with more force than by Chief Justice Nicholson in *Dove* v. *The State*, 3 Heiskell, 366, 374.

The reasoning upon which the opposite conclusion is based is that sanity is the normal condition and that there is a presumption that every person is sane, and this presumption stands until it is overthrown, and that evidence which merely raises a reasonable doubt of sanity does not overthrow this presumption.

There is a difference, growing out of the well established rules of law based on public policy, between the doubt of guilt and the doubt of insanity. Malice is presumed from certain facts and persons are held responsible for the consequences of their acts upon the principle of presumption. These presumptions are fixed rules established by public policy and not by the reasoning upon each particular case. The rule, which has been enforced, that drunkenness is not an excuse for crime grows out of public policy. Fixed rules of law, established by public policy like this, are not to be subjected to the refinements of reasoning growing out of the facts of particular cases.

It has been said that statistics show that a majority of the persons acquitted on the ground of insanity were not insane, and this even in England, where the strongest rule against the defendant prevails. The probability of a jury finding an insane man guilty, under the rule that insanity must be established to their reasonable satisfaction, is very slight as compared with the evil that results to society from the application of the doctrine that a reasonable doubt as to whether the defendant is sane or insane must be followed by acquittal.

It is urged, with great force of logic, which overlooks pub-

lic policy and applies to the question of insanity the same reasoning which has been accepted in establishing the doctrine of reasonable doubt in respect of the affirmative facts necessary to be proven by the State to establish crime, that sanity when put in issue by any evidence must be established beyond a reasonable doubt. It is submitted that a substantial ground for differentiation exists. This has been presented by Attorney General Heiskell in the *Dove case*, as follows:

"Doubt of insanity and doubt of guilt do not stand on the same footing. Rules of law are not matters of simple logical consistency. Policy influences them. Every man is presumed to know the law; to contemplate the consequences of his acts; malice is presumed from the use of a deadly weapon or from the fact of killing; not because courts suppose these things that they are universally true in fact, but that policy demands their adoption. Policy, not logic, is the foundation of the rule as to drunkenness, that it shall not excuse crime. The legal reason for it is, logically, nonsense; practically, wise. The same policy demands that we shall adhere to the English rule as to proof of insanity, not make a new one, as the courts of other States have done.

"The defendant cannot be sent to an insane asylum on a doubt as to his insanity. He must, therefore, in all doubtful cases, be turned loose upon the country."

The question is one that has not been passed upon by this court. The nisi prius Federal courts have held to the doctrine of reasonable doubt.

Mr. Justice Harlan delivered the opinion of the court.

Dennis Davis was indicted for the crime of having, on the 18th day of September, 1894, at the Creek Nation, in the Indian Territory, within the Western District of Arkansas, feloniously, wilfully, and of his malice aforethought, killed and murdered one Sol Blackwell.

He was found guilty of the charge in the indictment. A motion for a new trial having been overruled, and the court having adjudged that the accused was guilty of the crime of

murder, as charged, he was sentenced to suffer the penalty of death by hanging.

At the trial below the government introduced evidence which, if alone considered, made it the duty of the jury to return a verdict of guilty of the crime charged.

But there was evidence tending to show that at the time of the killing the accused, by reason of unsoundness or weakness of mind, was not criminally responsible for his acts. In addition to the evidence of a practising physician of many years standing, and who, for the time, was physician at the jail in which the accused was confined previous to his trial, "other witnesses," the bill of exceptions states, "testified that they had been intimately acquainted with the defendant for a number of years, lived near him, and had been frequently with him, knew his mental condition, and that he was weak-minded, and regarded by his neighbors and people as being what they called half crazy. Other witnesses who had known the defendant for ten to twenty years, witnesses who had worked with him and had been thrown in constant contact with him, said he had always been called half crazy, weak-minded; and in the opinion of the witnesses defendant was not of sound mind."

The issue, therefore, was as to the responsibility of the accused for the killing alleged and clearly proved.

In its elaborate charge the court instructed the jury as to the rules by which they were to be guided in determining whether the accused took the life of the deceased feloniously, wilfully, and with malice aforethought. "Where," the court said, "a man has been shot to death, where the facts, as claimed by the government here, show a lying in wait, show previous preparation, show the selection of a deadly weapon, and show concealment to get an opportunity to do the act, where that state of case exists, if there is a mental condition of the kind that renders a man accountable — why, there is crime, and that crime is murder."

Referring to the evidence adduced to show that the accused was incompetent in law to commit crime, the court observed: "Now when a man premeditates a wicked design that pro-

duces death, and executes that design, *if* he is a sane being, *if* he is what the law calls a sane man, not that he may be partially insane, not that he may be eccentric, and not that he may be unable to control his will power if he is in a passion or rage because of some real or imaginary grievance he may have received — I say, if you find him in that condition and you find these other things attending the act, you would necessarily find the existence of the attributes of the crime of murder known as 'wilfulness' and malice aforethought." But, the court said, the law "presumes every man is sane, and the burden of showing it is not true is upon the party who asserts it. The responsibility of overturning that presumption, that the law recognizes as one that is universal, is with the party who sets it up as a defence. The government is not required to show it. The law presumes that we are all sane; therefore the government does not have to furnish any evidence to show that this defendant is sane. It comes in here with the fact established in legal contemplation until it is overthrown. The government takes and keeps that attitude until the evidence brought in the case overthrows this presumption of sanity. Now, let us see what the nature of this defence is. The defendant interposes the plea of insanity, and he says by this plea that he did the killing, but the act is not one for which he can be held responsible. In other words, that the act was and is excusable in the law, because he was insane at the time of its commission. Now, I say to you in this connection, and it is a fact admitted in argument by the counsel, that under the evidence there is nothing that justifies the act of the killing; nor was it such an act that the law upholds it or mitigates it, or reduces it to a grade lower than murder. If it was committed by the defendant while he was actually insane it is excusable."

Again: "Now, I will undertake or endeavor to tell you, and I bespeak your most earnest attention especially upon this proposition of 'insanity.' The term 'insanity,' as used in this defence, means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at

the time of the nature of the act he is committing; or where, though conscious of the nature of the act and able to distinguish between right and wrong, and know that the act is wrong, yet his will, by which I mean the governing power of his mind, has been, otherwise than voluntarily, so completely destroyed that his actions are not subject to it, but are beyond his control. Such insanity, if proved to your reasonable satisfaction to have existed at the time of the commission of the act — that is the test — at the time of its commission, is in the law an excuse for it, however brutal or atrocious it may have been. For a person to be excused from criminal responsibility it is not necessary that he be a raving maniac, but ordinarily it requires something more than mere eccentricity of a natural character. Such insanity does not excuse."

Later in the charge the court recurred to the defence of insanity and said: "Now, as I have already told you, the law presumes every person who has reached the years of discretion to be of sane mind, and this presumption continues until the contrary is shown. So that when, as in this case, insanity is interposed as a defence, the fact of the existence of such insanity at the time of the commission of the offence charged, must be established by the evidence to the reasonable satisfaction of a jury, and the burden of proof of the insanity rests with the defendant. Although you may believe and find from the evidence that the defendant did commit the act charged against him, yet, if you further find that at the time he did so he was in such an insane condition of mind that he did not and could not understand and comprehend the nature of the act; or that thus knowing and understanding it, he was so far deprived of his will, not by his own passion conceived for the purpose of spurring him on to commit the violence, not by his own passion of mind engendered by some real or fancied grievance; but that he was so far deprived of his will by disease or other cause over which he had no control, as to render him unable to control his actions, then such killing was not a malicious killing, and you will acquit him of the crime charged against him."

In concluding its charge the court thus summarized the

principles by which the jury were to be guided in their deliberations:

"Now, gentlemen, the propositions are few in this case. First, inquire whether there was a killing; then whether the act of killing was done by the defendant, and what was his condition of mind under the law at that time, as I have given it to you. See what his mental condition was at that time under the law as I have given it to you, and if he is to be held responsible for his actions. If so, you are then to take a step further and see whether these attributes of the crime of murder existed as I have defined them to you; that is, that the killing was done wilfully and with malice aforethought.

"Gentlemen, I have given you the law in the case, and you are to take it as the law and by this law and the testimony you are to make up your verdict. You are to be satisfied beyond a reasonable doubt of the guilt of this defendant before you convict. When you start into a trial of a case, as I have already told you, you start in with the presumption of sanity. Then comes in the responsibility resting upon the defendant to show his condition; to show his irresponsibility under the law. He is required to show that — to your reasonable satisfaction, I say, to your reasonable satisfaction — that it is a state of case where he is excusable for the act."

These extracts from the charge of the court present this important question: If it appears that the deceased was killed by the accused under circumstances which — nothing else appearing — made a case of murder, can the jury properly return a verdict of guilty of the offence charged if upon the whole evidence from whatever side it comes they have a reasonable doubt whether at the time of killing the accused was mentally competent to distinguish between right and wrong or to understand the nature of the act he was committing? If this question be answered in the negative the judgment must be reversed; for the court below instructed the jury that the defence of insanity could not avail the accused unless it appeared affirmatively, to the reasonable satisfaction of the jury, that he was not criminally responsible for his acts. The fact of killing being clearly proved, the legal presumption,

based upon the common experience of mankind, that every man is sane, was sufficient, the court in effect said, to authorize a verdict of guilty, although the jury might entertain a reasonable doubt upon the evidence, whether the accused, by reason of his mental condition, was criminally responsible for the killing in question. In other words, if the evidence was *in equilibrio* as to the accused being sane, that is, capable of comprehending the nature and effect of his acts, he was to be treated just as he would be if there were no defence of insanity or if there were an entire absence of proof that he was insane.

This exposition of criminal law is not without support by adjudications in England and in this country. In *Regina* v. *Stokes*, 3 Car. & K. 185, 188, a case of murder, Baron Rolfe said: "If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be satisfied that he actually was insane. If the matter is left in doubt, it will be their duty to convict him; for every man must be presumed to be responsible for his acts until the contrary is clearly shown." The same judge, in *Regina* v. *Layton*, 4 Cox C. C. 149, 155, which was also a case of murder and the defence insanity, after observing that in cases of that description it was a cardinal rule "that the burden of proving innocence rested on the party accused," said that the question for the jury was "not whether the person was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind."

But the most deliberate and careful statement of the doctrine in the English courts is to be found in *McNaghten's case*, 10 Cl. & Fin. 200, 203, 210, decided in 1843. The accused having been found not guilty, on the ground of insanity, his trial became the subject of discussion in the House of Lords, and much was said about insane delusions and partial insanity, as giving or not giving immunity for acts which, being committed by sane persons, were punishable criminally. The judges were summoned to give their opinion on that question,

although there was no case pending before the House. Hansard's Parliamentary Debates, vol. 67, 3d series, 714 to 743. Among the questions propounded to the judges were these: "What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusions respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence? In what terms ought the question to be left to the jury, as to the person's state of mind at the time when the act was committed?" Mr. Justice Maule delivered a separate opinion, in which he expressed great difficulty in answering the questions put to the judges, because they did not appear to arise out of, and were not propounded with reference to, a particular case, or for a particular purpose, which might explain or limit the generality of these terms, and also, because he had heard no argument, at the bar or elsewhere, on the subject referred to in the questions. He expressed fear that any answers made would embarrass the administration of justice in criminal cases. He, nevertheless, said that "to render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong;" and that the judge, in the particular case on trial, should employ such terms in his instructions as, in his discretion, would be proper to assist the jury in coming to a right conclusion as to the guilt of the accused. Lord Chief Justice Tindal, speaking for himself and the other judges, said, in response to the questions propounded, that the jurors ought to be told in all cases where insanity is set up as a defence that "every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."

In *Commonwealth* v. *Rogers*, 7 Met. (Mass.) 500, 504, 506, (1844) it was said by Chief Justice Shaw, in his charge to the jury, that "the ordinary presumption is, that a person is of sound mind, until the contrary appears; and in order to shield one from criminal responsibility, the presumption must be rebutted by proof of the contrary, satisfactory to the jury. Such proof may arise, either out of the evidence offered by the prosecutor to establish the case against the accused, or from distinct evidence offered on his part; in either case it must be sufficient to establish the fact of insanity; otherwise the presumption will stand." The jury, after being in consultation for several hours, came into court and asked whether they must be satisfied beyond a doubt of the insanity of the prisoner to entitle him to an acquittal. The court responded that if the preponderance of the evidence was in favor of the insanity of the prisoner, the jury would be authorized to find him insane. A verdict was returned of not guilty, by reason of insanity. In *Commonwealth* v. *York*, 9 Met. (Mass.) (1845) 93, 116, the charge was murder, and the defence provocation or mutual combat, making the offence, at most, only manslaughter. The court held that the guilt of malicious homicide was established beyond reasonable doubt, by proof, beyond reasonable doubt, of the fact of voluntary killing, without excuse or justification apparent upon the evidence introduced in behalf of the prosecution; that, in such case, the proof must preponderate in favor of the fact of sudden and mutual combat, in order to justify a finding in favor of the prisoner in respect to the fact, it not being sufficient to raise a doubt, even though it be a reasonable doubt, of the fact of extenuation. In that case Mr. Justice Wilde dissented in an able opinion, holding that "the burden of proof, in every criminal case, is on the Commonwealth to prove all the material allegations in the indictment; and if, on the whole evidence, the jury have a reasonable doubt whether the defendant is guilty of the crime charged, they are bound to acquit him." p. 134. In *Commonwealth* v. *Eddy*, 7 Gray, (1856) 583, in which the crime charged was murder and the defence insanity, Mr. Justice Metcalf, speaking for himself and Justices Bigelow

and Merrick, said: "The burden is on the Commonwealth to prove all that is necessary to constitute the crime of murder. And as that crime can be committed only by a reasonable being — a person of sane mind — the burden is on the Commonwealth to prove that the defendant was of sane mind when he committed the act of killing. But it is a presumption of law that all men are of sane mind; and that presumption of law sustains the burden of proof, unless it is rebutted and overcome by satisfactory evidence to the contrary. In order to overcome the presumption of law and shield the defendant from legal responsibility, the burden is on him to prove, to the satisfaction of the jury, by a preponderance of the whole evidence in the case, that, at the time of committing the homicide, he was not of sane mind."

It would seem that later cases in Massachusetts do not go to the extent indicated by the above cases. In *Commonwealth* v. *Heath etc.*, 11 Gray, 303, which was tried before Justices Dewey, Metcalf, and Thomas, the charge was murder, and one question was whether the defendants were of sufficient intelligence to be responsible for a homicide. Upon this point, and as to the burden of proof, the court said: "The law presumes men and women of the age of the prisoners to be sane, to be responsible agents. Where therefore a homicide is proved to have been committed in such way and under such circumstances as, when done by a person of sane mind, would constitute murder, the presumption of law, as of common sense and general experience, supplies that link. It presumes men to be sane till the contrary is shown. The presumption of law stands until it is met and overcome by the evidence in the case. This evidence may come, of course, as well from the witnesses for the Government as the witnesses for the defence; and when the evidence is all in, the jury must be satisfied, in order to convict the prisoner, not only of the doing of the acts which constitute murder, but that they proceeded from a responsible agent, one capable of committing the offence. This is the rule to be applied to a case where the defence is idiocy, an original defect and want of capacity. Whether the rule is modified where the defence relied upon is insanity, disease

of the mind or delusion, it is not necessary now to inquire." In respect to that case we observe that, upon principle, the rule as to the burden of proof in criminal cases cannot be materially different, where the defence is insanity, disease of the mind or delusion, from the rule obtaining when the defence is an original defect and want of capacity. In *Commonwealth* v. *Pomeroy*, (reported in Wharton on Homicide, 2d ed. 753, Appendix,) which was tried in 1874 before Mr. Justice Gray (then Chief Justice of the Supreme Judicial Court of Massachusetts) and Mr. Justice Morton, afterwards Chief Justice of the same court, it was contended by the prosecution that the question of sanity, raised by the defendant, was to be determined by the preponderance of proof; that the Commonwealth was not bound to prove the sanity of the accused beyond a reasonable doubt. But the court said: "The burden is upon the government to prove everything essential beyond reasonable doubt; and that burden, so far as the matter of sanity is concerned, is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind and understands the nature of his acts. But when the circumstances are all in, on the one side and on the other; on the one side going to show a want of adequate capacity, on the other side going to show usual intelligence; when the whole is in, the burden rests where it was in the beginning — upon the government to prove the case beyond a reasonable doubt."

In *State* v. *Spencer*, 1 Zabriskie, 196, 202, 212 (1846), which was a case of murder tried before Chief Justice Hornblower, it was said that "when the evidence of sanity on the one side, and of insanity on the other, leaves the scale in equal balance, or so nearly poised that the jury have a reasonable doubt of his sanity, then a man is to be considered sane and responsible for what he does;" and that the "proof of insanity at the time of committing the act, ought to be as clear and satisfactory, in order to acquit him on the ground of insanity, as the proof of committing the act ought to be, in order to find a sane man guilty." Again, in the same case: "If, in your opinion, it is clearly proved that the prisoner at the bar, at the time of the homicide, was unconscious that what he did was

wrong, and that he ought not to do it, you must acquit him on the ground of insanity; but if in your opinion this is not clearly established beyond a reasonable doubt, then you must find him guilty of the act and proceed to investigate the nature of the homicide." There are other cases to the same general effect, some of them holding that the presumption of sanity will prevail, and that the jury may properly convict, unless the defence of insanity is established beyond a reasonable doubt; others, that it is the duty of the jury to convict unless it appears by a preponderance of evidence that the accused was insane when the killing occurred.

We are unable to assent to the doctrine that in a prosecution for murder, the defence being insanity, and the fact of the killing with a deadly weapon being clearly established, it is the duty of the jury to convict where the evidence is equally balanced on the issue as to the sanity of the accused at the time of the killing. On the contrary, he is entitled to an acquittal of the specific crime charged if upon all the evidence there is reasonable doubt whether he was capable in law of committing crime.

No one, we assume, would wish either the courts or juries when trying a case of murder to disregard the humane principle, existing at common law and recognized in all the cases tending to support the charge of the court below, that, "to make a complete crime cognizable by human laws, there must be both a will and an act;" and "as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will." 4 Bl. Com. 21. All this is implied in the accepted definition of murder; for it is of the very essence of that heinous crime that it be committed by a person of "sound memory and discretion," and with "malice aforethought," either express or implied. 4 Bl. Com. 195; 3 Inst. 47; 2 Chitty's Cr. Law, 476. Such was the view of the court below which took care in its charge to say that the crime of murder could only be committed by a sane being,

although it instructed the jury that a reasonable doubt as to the sanity of the accused would not alone protect him against a verdict of guilty.

One who takes human life cannot be said to be actuated by malice aforethought, or to have deliberately intended to take life, or to have "a wicked, depraved, and malignant heart," or a heart "regardless of society duty and fatally bent on mischief," unless at the time he had sufficient mind to comprehend the criminality or the right and wrong of such an act. Although the killing of one human being by another human being with a deadly weapon is presumed to be malicious until the contrary appears, yet, "in order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." *Commonwealth* v. *Rogers*, 7 Met. (Mass.) 500. Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. All admit that the crime of murder necessarily involves the possession by the accused of such mental capacity as will render him criminally responsible for his acts.

Upon whom then must rest the burden of proving that the accused, whose life it is sought to take under the forms of law, belongs to a class capable of committing crime? On principle, it must rest upon those who affirm that he has committed the crime for which he is indicted. That burden is not fully discharged, nor is there any legal right to take the life of the accused, until guilt is made to appear from all the evidence in the case. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defence by a preponderance of evidence. It is not in confession and avoidance, for it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused

may stand, shielded by the presumption of his innocence, until it appears that he is guilty; and his guilt cannot in the very nature of things be regarded as proved, if the jury entertain a reasonable doubt from all the evidence whether he was legally capable of committing crime.

This view is not at all inconsistent with the presumption which the law, justified by the general experience of mankind as well as by considerations of public safety, indulges in favor of sanity. If that presumption were not indulged the government would always be under the necessity of adducing affirmative evidence of the sanity of an accused. But a requirement of that character would seriously delay and embarrass the enforcement of the laws against crime, and in most cases be unnecessary. Consequently the law presumes that every one charged with crime is sane, and thus supplies in the first instance the required proof of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by opposing proof. It is a disputable or, as it is often designated, a rebuttable presumption resulting from the connection ordinarily existing between certain facts — such connection not being "so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case, all evidence to the contrary being rejected; but yet it is so general, and so nearly universal, that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence." 1 Greenl. Ev. § 38. It is therefore a presumption that is liable to be overcome or to be so far impaired in a particular case that it cannot be safely or properly made the basis of action in that case, especially if the inquiry involves human life. In a certain sense it may be true that where the defence is insanity, and where the case made by the prosecution discloses nothing whatever in excuse or extenuation of the crime charged, the accused is bound to produce some evidence that will impair or weaken the force of the legal presumption

in favor of sanity. But to hold that such presumption must absolutely control the jury until it is overthrown or impaired by evidence sufficient to establish the fact of insanity beyond all reasonable doubt or to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime charged.

In considering the distinction between the presumption of innocence and reasonable doubt, this court, in *Coffin* v. *United States*, upon full consideration, said: "The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." Reasonable doubt it was also said was "the result of the proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof, going to bring about the proof, from which reasonable doubt arises; thus one is a cause, the other an effect. To say that the one is the equivalent of the other is, therefore, to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them." *Coffin* v. *United States*, 156 U. S. 432, 459, 460.

Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defence is insanity, the

benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offence charged. His guilt cannot be said to have been proved beyond a reasonable doubt — his will and his acts cannot be held to have joined in perpetrating the murder charged — if the jury, upon all the evidence, have a reasonable doubt whether he was legally capable of committing crime, or (which is the same thing) whether he wilfully, deliberately, unlawfully, and of malice aforethought took the life of the deceased. As the crime of murder involves sufficient capacity to distinguish between right and wrong, the legal interpretation of every verdict of guilty as charged is that the jury believed from all the evidence beyond a reasonable doubt that the accused was guilty, and was therefore responsible, criminally, for his acts. How then upon principle or consistently with humanity can a verdict of guilty be properly returned, if the jury entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit that crime?

The views we have expressed are supported by many adjudications that are entitled to high respect. If such were not the fact, we might have felt obliged to accept the general doctrine announced in some of the above cases; for it is desirable that there be uniformity of rule in the administration of the criminal law in governments whose constitutions equally recognize the fundamental principles that are deemed essential for the protection of life and liberty.

In *People* v. *McCann*, 16 N. Y. 58, a case of murder, the jury were instructed that if any reasonable doubt existed as to the proof of the deed itself the prisoner should be acquitted; "but as sanity is the natural state, there is no presumption of insanity, and the defence must be proved beyond a reasonable

doubt." This instruction was held to be erroneous by the unanimous judgment of the Court of Appeals of New York, of which, at the time, Judges Denio, Johnson, Comstock, and Selden were members. The judges who delivered opinions concurred in the view that, while there was no presumption of insanity, and while the law presumes a sufficient understanding and will to do the act, the fact of the killing by the accused being established by proof, the burden was upon the prosecution to show from all the evidence the existence of the requisites or elements constituting the crime, one of which was the sanity of the prisoner. In that case Mr. Justice Brown said: "If there be a doubt about the act of killing, all will concede that the prisoner is entitled to the benefit of it; and if there be any doubt about the will, the faculty of the prisoner to discern between right and wrong, why should he be deprived of the benefit of it, when both the act and the will are necessary to make out the crime?" And, "If he is entitled to the benefit of the doubt in regard to the malicious intent, shall he not be entitled to the same benefit upon the question of his sanity, his understanding? For, if he was without reason and understanding at the time, the act was not his, and he is no more responsible for it than he would be for the act of another man." pp. 67, 68. So in *Brotherton* v. *People*, 75 N. Y. 159, 162, Chief Justice Church, speaking for the court, after observing that crimes can only be committed by human beings in a condition to be responsible for their acts, and that the burden of overthrowing the presumption of sanity and of showing insanity is upon the person who alleges it, says: "If evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal." To the same effect are *O'Connell* v. *People*, 87 N. Y. 377, 380, and *Walker* v. *People*, 88 N. Y. 81, 88.

In *Chase* v. *People*, 40 Illinois, 352, 358, reaffirming the rule announced in the case of *Hopps* v. *People*, 31 Illinois, 385, 392, the court, speaking by Chief Justice Breese, said: "Sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of insanity, the prisoner is entitled to the benefit of the doubt. We wish to be understood as saying, as in that case, that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defence may be. If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demands that the accused shall have the benefit of the doubt."

The same principle is recognized in New Hampshire. Bellows, J., speaking for the court, after observing that a plea of not guilty, in a criminal cause, puts in issue all the allegations of the indictment, said: "A system of rules, therefore, by which the burthen is shifted upon the accused of showing that any of the substantial allegations are untrue, or, in other words, to prove a negative is purely artificial and formal, and utterly at war with the humane principle which, *in favorem vitæ*, requires the guilt of the prisoner to be established beyond reasonable doubt." Again, in the same case, after saying that to justify a conviction, all the elements of the crime charged must be shown to exist, and to a moral certainty, including the facts of a sound memory, an unlawful killing and malice, he proceeded: "As to the first, the natural presumption of sanity is *prima facie* proof of a sound memory, and that must stand unless there is other evidence tending to prove the contrary; and then whether it come from the one side or the other in weighing it, the defendant is entitled to the benefit of all reasonable doubt, just the same as upon the point of an unlawful killing or malice. Indeed, the want of sound memory repels the proof of malice in the same way as proof that the killing was accidental, in self-defence, or in heat of blood; and there can be no solid distinction founded upon the

fact that the law presumes the existence of a sound memory. So the law infers malice from the killing when that is shown, and nothing else; but in both cases the inference is one of fact, and it is for the jury to say whether, on all the evidence before them, the malice or the sanity is proved or not. Indeed, we regard these inferences of fact as not designed to interfere in any way with the obligation of the prosecutor to remove all reasonable doubt of guilt; but they are applied as the suggestions of experience, and with a view to the convenience and expedition of trials, leaving the evidence, when adduced, to be weighed without regard to the fact whether it comes from the one side or the other." "The criminal intent must be proved as much as the overt act, and without a sound mind such intent could not exist; and the burthen of proof must always remain with the prosecutor to prove both the act and criminal intent." *State* v. *Bartlett*, 43 N. H. 224, 231.

So in *People* v. *Garbutt*, 17 Michigan, 9, 22, the court, speaking by Chief Justice Cooley, after observing that the prosecution may rest upon the presumption of sanity until that presumption is overthrown by the defendant's evidence, said: "Nevertheless, it is a part of the case for the government; the fact which it supports must necessarily be established before any conviction can be had; and when the jury come to consider the whole case upon the evidence delivered to them, they must do so upon the basis that on each and every portion of it they are to be reasonably satisfied before they are at liberty to find the defendant guilty."

In *Cunningham* v. *State*, 56 Mississippi, 269, the question was carefully examined and the rule was stated by Chalmers, J., to be, that whenever the condition of the prisoner's mind is put in issue by such facts proved on either side as create a reasonable doubt of his sanity, it devolves upon the State to remove it and to establish the sanity of the prisoner to the satisfaction of the jury beyond all reasonable doubt arising out of all the evidence in the case.

In *Dove* v. *State*, 3 Heiskell, 348, 371, Chief Justice Nicholson, delivering the unanimous opinion of the Supreme Court of Tennessee, thus stated its view of the question: "When the

proof of insanity makes an equipoise, the presumption of sanity is neutralized — it is overturned, it ceases to weigh, and the jury are in reasonable doubt. How, then, can a presumption, which has been neutralized by countervailing proof, be resorted to to turn the scale? The absurdity to which this doctrine leads will be more obvious by supposing that the jury should return a special verdict. It would be as follows: 'We find the defendant guilty of the killing charged, but the proof leaves our minds in doubt whether he was of such soundness of memory and discretion as to have done the killing wilfully, deliberately, maliciously, and premeditatedly.' Upon such a verdict no judge could pronounce the judgment of death upon the defendant." So, in *Plake* v. *State*, 121 Indiana, 433, 435, Judge Elliott, speaking for the Supreme Court of Indiana, said: "If the evidence is of such a character as to create a reasonable doubt whether the accused was of unsound mind at the time the crime was committed, he is entitled to a verdict of acquittal. *Polk* v. *State*, 19 Indiana, 170; *Bradley* v. *State*, 31 Indiana, 492; *McDougal* v. *State*, 88 Indiana, 24." To the same effect are many other American cases cited in argument. The principle is accurately stated by Mr. Justice Cox of the Supreme Court of the District of Columbia as follows: "The crime, then, involves three elements, viz., the killing, malice, and a responsible mind in the murderer. But after all the evidence is in, if the jury, while bearing in mind both these presumptions that I have mentioned — *i.e.* that the defendant is innocent until he is proved guilty, and that he is and was sane, unless evidence to the contrary appears — and considering the whole evidence in the case, still entertain what is called a reasonable doubt, on any ground, (either as to the killing or the responsible condition of mind,) whether he is guilty of the crime of murder, as it has been explained and defined, then the rule is that the defendant is entitled to the benefit of that doubt and to an acquittal." *Guiteau's case*, 10 Fed. Rep. 161, 163.

It seems to us that undue stress is placed in some of the cases upon the fact that, in prosecutions for murder the defence of insanity is frequently resorted to and is sustained by the

evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged.

For the reason stated, and without alluding to other matters in respect to which error is assigned, the judgment is reversed and the cause remanded with directions to grant a new trial, and for further proceedings consistent with this opinion.

Reversed.

UNITED STATES *v.* SAYWARD.

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

No. 75. Submitted November 19, 1895. — Decided December 23, 1895.

Circuit Courts of the United States have jurisdiction of actions in which the United States are plaintiffs, without regard to the value of the matter in dispute.

THE case is stated in the opinion.

Mr. Solicitor General for plaintiffs in error.

No appearance for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the United States against the defendants in error in the Circuit Court of the United States for the District of Washington, Northern Division, to recover the sum of $1470 as damages alleged to have been sustained by the government in consequence of the unlawful conversion by the defendants of timber made from fir trees on certain unoccupied lands of the United States.

One of the defendants demurred upon the ground that, as the matter in dispute did not exceed the sum or value of $2000, the court was without jurisdiction.

The demurrer was sustained and the cause was dismissed, the Circuit Court holding upon the authority of *United States* v. *Huffmaster*, 38 Fed. Rep. 81, 83, that the acts of Congress defining the jurisdiction of the Circuit Courts of the United States deprive those courts of jurisdiction in civil suits where the amount involved was less than $2000, exclusive of interest and costs, even in cases in which the United States were plaintiffs or petitioners.

In accordance with the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, the court below certified the above question of jurisdiction as the only question to be determined upon the present writ of error.

By the judiciary act of 1789 it was provided that "the Circuit Courts 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 the United States are plaintiffs or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought and a citizen of another State." 1 Stat. 78, c. 20, § 11.

The Revised Statutes, which went into effect in 1873, specified the suits and proceedings of which the Circuit Courts of the United States should have original jurisdiction, and, among them, were many in which the government would ordinarily be the plaintiff, namely, suits in equity where the matter in dispute, exclusive of costs, exceeded the sum or value of $500, and the United States were petitioners; suits at common law

where the United States, or any officer thereof suing under the authority of an act of Congress, were plaintiffs; suits at law or in equity arising under an act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; suits arising under a law providing internal revenue, and of all causes arising under the postal laws; suits and proceedings for the enforcement of penalties provided by laws regulating the carriage of passengers in merchant vessels; proceedings for the condemnation of property taken as a prize, in pursuance of section 5308, Title, Insurrection; suits arising under the laws relating to the slave trade; and suits by the assignee of a debenture for drawback of duties, issued under a law for the collection of duties against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture. § 629.

In reference to the jurisdiction of the District Courts of the United States, as defined by the Revised Statutes, it is only necessary to say that as to actions or suits in which ordinarily the United States would be petitioners or plaintiffs, such jurisdiction was not made to depend upon the amount in dispute. § 563.

The first section of the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from state courts, provided that "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, 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, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State

and foreign States, citizens, or subjects; and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable therein." 18 Stat. 470, c. 137, § 1.

The first section of the judiciary act of March 3, 1887, 24 Stat. 552, c. 373, corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, amends the first section of the act of 1875, and provides that "the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand 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 controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable by them."

It cannot be doubted that the judiciary act of 1789 made the value of the matter in dispute jurisdictional, even in suits of a civil nature brought by the United States in the Circuit Courts of the United States. But under the Revised Statutes the amount in dispute was not made jurisdictional in civil actions or proceedings instituted by the United States, except that in suits in equity the matter in dispute, exclusive of costs, must have exceeded the sum of $500; and no restriction as

to amount was imposed in respect of suits at common law where the United States were plaintiffs.

Then came the act of 1875 which prescribed the limit of $500, exclusive of costs, for all civil suits, at common law or in equity, of the several classes therein specified, including suits in which the United States were plaintiffs or petitioners. It is to be observed that the section of that act which defines the original jurisdiction of the Circuit Courts places the jurisdictional amount in advance of the enumeration, in the same section, of the different cases of which those courts could take cognizance, and there is no repetition, in that section, of such amount. In each of those cases the amount named was jurisdictional under the act of 1875.

In the particulars last mentioned, the act of 1887, as corrected in 1888, is unlike any previous statute. The jurisdictional amount, prescribed by the first section of that act, is fixed at $2000, and that amount is afterwards, in the same section, twice referred to by the words "the sum or value aforesaid." If Congress intended that the Circuit Court should not have original cognizance of *any* case mentioned in the first section of the act of 1887, unless the value of the matter in dispute exceeded $2000, it would not have taken pains to refer to the value of the matter in dispute in immediate connection with particular cases, and made no such distinct reference in connection with other cases placed within the original cognizance of the Circuit Court. It is clear that a Circuit Court cannot, under that statute, take original cognizance of a case arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or of a controversy between citizens of different States, or of a controversy between citizens of a State, and foreign States, citizens or subjects, unless the sum in dispute, exclusive of interest and costs, exceeds $2000, because in immediate connection with the enumeration of each of such cases will be found expressed a limitation of that character in respect of the sum or value necessary to give jurisdiction. But that cannot be said of the reference in the statute to a controversy in which the United States are plaintiffs or

petitioners, or to one between citizens of the same State claiming lands under grants of different States. The clause referring to cases or controversies of the two kinds last mentioned was placed between clauses that specifically refer to the value of the matter in dispute; so that it may be reasonably inferred that Congress intended a Circuit Court should take cognizance of a controversy in which the United States are plaintiffs or petitioners, or of a controversy between citizens of the same State claiming lands under grants of different States, without regard to the amount involved.

This interpretation of the statute is made quite clear if the first section is subdivided as was the section of the Revised Statutes defining the original jurisdiction of the Circuit Court. With a slight transposition or change of words, having due regard to substance, the first section of the act of 1888, if subdivided, would read as follows:

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 — First. Where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2000, and the suit is one arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority. Second. Of any controversy in which the United States are plaintiffs or petitioners. Third. Of any controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. Fourth. Of any controversy between citizens of the same State claiming lands under grants of different States. Fifth. Of any controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid.

The United States being plaintiffs in this action, the Circuit Court had jurisdiction without regard to the value of the matter in dispute.

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

CHAPPELL *v.* UNITED STATES.

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

No. 91. Submitted December 3, 1895. — Decided January 6, 1896.

If a defendant, among other defences, in various forms, and upon several grounds, objects to the jurisdiction of the court, and final judgment is rendered for the plaintiff, and, upon a petition referring to all the proceedings in detail, and asking for a review of all the rulings of the court upon the question of jurisdiction raised in the papers on file, a writ of error is allowed generally, without formally certifying or otherwise specifying a definite question of jurisdiction, no question of jurisdiction is sufficiently certified to this court under the act of March 3, 1891, c. 517, § 5.

Upon a writ of error under the act of March 3, 1891, c. 517, § 5, in a case in which the constitutionality of a law of the United States was drawn in question, this court has power to dispose of the whole case, including all questions, whether of jurisdiction or of merits.

The act of August 1, 1888, c. 728, authorizing the Secretary of the Treasury, whenever in his opinion it will be necessary or advantageous to the United States, to acquire lands for a light-house by condemnation under judicial proceedings in a court of the United States for the district in which the land is situated, is constitutional.

A petition for the condemnation of land for a light-house, filed by the Attorney General upon the application of the Secretary of the Treasury, under the act of August 1, 1888, c. 728, should be in the name of the United States.

The only trial by jury required in proceedings in a court of the United States for the condemnation of land under the act of August 1, 1888, c. 728, is a trial at the bar of the court upon the question of damages to the owner of the land.

This was a petition, filed March 21, 1890, in the District Court of the United States for the District of Maryland, for the condemnation, under the act of Congress of August 1, 1888, c. 728,[1] of a perpetual easement in a strip of fast land

[1] An act to authorize condemnation of land for sites of public buildings and for other purposes.

Sec. 1. In every case in which the Secretary of the Treasury or any other officer of the government has been, or hereafter shall be, authorized to pro-

on Hawkins Point in Anne Arundel County in the State of Maryland — described by metes and bounds and courses and distances, and as owned by Thomas C. Chappell — for the purpose of transmitting rays of lights, without obstruction, both by day and by night, between two beacon lights, known as Hawkins Point Light and Leading Point Light, theretofore constructed and put in operation by the United States as range lights of the Brewerton channel of the Patapsco River in the State of Maryland.

The petition was in the name of "William Windom, Secretary of the Treasury of the United States and *ex officio* president of the Light-house Board of the United States;" and alleged that under the provisions of section 4658 of the Revised Statutes of the United States the Light-house Board is required to perform all administrative duties relating to the construction, illumination, inspection and superintendence of light-houses, light-vessels, beacons, buoys, and sea-marks and their appendages; that Congress appropriates annually a sum of money for repairs and incidental expenses of light-houses, which is available to pay for the easement aforesaid; and that in the opinion of the petitioner it was necessary and advantageous to the United States to acquire this easement by condemnation under judicial proceedings. The petition was signed by the United States District Attorney, "who

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cure real estate for the erection of a public building, or for other public uses, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so; and the United States Circuit or District Courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation; and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

SEC. 2. The practice, pleadings, forms and modes of proceeding, in causes arising under the provisions of this act, shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding. 25 Stat. 357.

appears for the Secretary of the Treasury, the petitioner, by direction of the Attorney General of the United States."

Upon the filing of the petition, the court made an order that a copy be served on Chappell on or before March 24, 1890, and that he show cause on or before April 10, 1890, why the prayer of the petition should not be granted.

On April 9, 1890, Chappell, "saving and reserving all advantages and exceptions whatsoever, prays leave to except to the order" aforesaid; and demurred to the petition, and for cause of demurrer assigned "that there is no authority of law for this proceeding; and also that it is not shown that the Congress of the United States has appropriated or will appropriate more than five thousand dollars to pay for said easement, and that said easement is of a value greatly exceeding five thousand dollars, and whether Congress annually or has ever appropriated a sum of money for repairs and incidental expenses of the light-house, sufficient to pay for said easement, which is applicable therefor; and also that there is no party plaintiff made in said declaration and petition; and also that the laws of the State of Maryland require said proceeding, if the right to any such has accrued, to be conducted in the circuit court for the county where said land is situated, and by the laws of the United States the said laws of the State form the rule of decision in the courts of the United States in this matter; and also that the United States of America has passed no general law or special law, authorizing the petitioner or the Attorney General of the said United States, nor any other person whatsoever, to institute this proceeding, and said proceeding is instituted *ultra vires*, and the said United States cannot be made a party to said suit except by the direction and with the consent of the law-making power, and said power has neither directed the same nor consented thereto."

On May 12, 1890, after argument on the demurrer, the court, by an order reciting that it appeared that the Secretary of the Treasury, and *ex officio* president of the Light-house Board of the United States, had been authorized to acquire this easement for the use of the board, and was of opinion that

it was necessary and advantageous to the United States to acquire this easement by condemnation under judicial proceedings, and had made application to the Attorney General to cause such proceedings to be commenced, overruled the demurrer; and, being of opinion that condemnation of this easement ought to be had by the United States, and that the question of the damages which Chappell would sustain thereby ought to be submitted to a jury, ordered "that, upon a day to be fixed by this court, upon notice to said parties, a jury of this court be empanelled, who shall be duly sworn to justly and impartially value and assess the damages which the said Chappell, as the owner of said land, will sustain by the acquisition by the United States of the easement aforesaid; and that the said jury be empanelled from twenty jurors regularly drawn to serve in this court, from whom each party may strike four jurors, or, if either party refuse to so strike, the court shall strike for him, and the remaining twelve jurors shall be the said jury of inquest to assess said damages. And the said proceeding shall be in such form as that the United States of America and the said Thomas C. Chappell shall be the parties thereto."

On October 28, 1890, in accordance with this order, a jury was duly empanelled in the cause, and was sworn "to truly and impartially value and assess the damages for the condemnation of the said easement over the land at Hawkins Point, in said petition mentioned, and a true inquisition make according to the evidence;" and upon a trial before the court, and after hearing evidence on behalf of the United States, and on behalf of Chappell, and the charge of the court, returned, on November 3, 1890, an "inquisition and award," signed and sealed by the twelve jurors, assessing to Chappell damages in the sum of $3500 for the enjoyment by the United States in perpetuity of the easement aforesaid.

On November 10, 1890, Chappell filed a plea "that the court here ought not to take cognizance of or sustain the action aforesaid, because he says that the cause of action aforesaid, if any accrued to the said plaintiff, accrued to him at Annapolis, within the jurisdiction of the circuit court for

Statement of the Case.

Anne Arundel County, State of Maryland, and not within the jurisdiction of this court."

On November 17, 1890, Chappell filed the following exceptions to the inquisition:

"1st. That the statute under which this proceeding is sought to be maintained is unconstitutional, and this court has no jurisdiction of the subject-matter of this suit.

"2d. That the law-making power of the United States has not authorized any officer to make said United States a party to this suit or proceeding, and this court has no jurisdiction of the subject-matter of this suit, there being a want of power to condemn this property described in this inquisition.

"3d. That the laws of the United States have not been complied with.

"4th. That the damages allowed are inadequate."

On December 18, 1890, the District Court overruled these exceptions, and confirmed the inquisition and award.

On December 27, 1890, Chappell prayed for, and on February 24, 1891, was allowed, under section 633 of the Revised Statutes, a writ of error from the Circuit Court of the United States for the District of Maryland; but never gave bond to prosecute that writ of error.

On December 15, 1891, Chappell presented to the District Judge a petition for a writ of error, under the act of March 3, 1891, c. 517, § 5, in which he mentions all the previous proceedings in the case, (above stated,) and, "in order that said rulings, judgments and orders may be reviewed and re-examined by the Supreme Court of the United States upon the question of jurisdiction raised in said exceptions, pleas and demurrers, and the other papers on file in this cause, and either reversed or affirmed, now prays for the allowance of a writ of error to the Supreme Court of the United States and such other process as may cause said rulings, orders and judgments to be corrected, instead of to the Circuit Court of the United States for the District of Maryland."

A writ of error was thereupon "allowed," in the usual and general form, by the District Judge, and was entered in this court February 27, 1892.

Argument for Plaintiff in Error.

On December 2, 1895, the day before the case was called for argument in this court, the plaintiff in error moved for a writ of *certiorari*, suggesting a diminution of the record in omitting to state that on July 15, 1890, he filed in the District Court a petition for the allowance of a writ of error from the Circuit Court of the United States.

Mr. Thomas C. Chappell, plaintiff in error, in person.

The State of Maryland by an act of the General Assembly of Maryland, Acts of 1874, chapter 395, has expressly given its consent to the condemnation of land for light-house purposes, by the United States. Section 10 provides: "Jurisdiction is hereby ceded to the United States over such lands as shall be condemned, as aforesaid, for their use for public purposes, *as soon as the same shall be condemned*, under the sanction of the General Assembly of this State, hereinbefore given to said condemnation."

It must be acknowledged that all the powers of the United States originate in the several States; that the States delegated certain rights and reserved certain rights, and that by the Tenth Amendment, those not delegated are reserved. One of these rights reserved was the right to prevent the United States from exercising exclusive jurisdiction in any places, except in the District of Columbia, and in such places as the State might consent to being acquired by purchase. If the State does not see fit to consent, it cannot be compelled to do so; if it sees fit to consent that jurisdiction shall be transferred "as soon as the same shall be condemned," that is not a consent to such jurisdiction before said condemnation, and the State cannot be compelled to consent, except on its own terms.

The mode of procedure prescribed by the law of the State and the act of Congress itself has not been followed; a special jury of inquest has been convened, a statutory jury of inquiry. In the case of *Kohl* v. *United States*, 91 U. S. 367, this court laid down the rule, that a condemnation proceeding is an action at common law. Being an action at common law, the

plaintiff in error is entitled to a trial by a common law jury, and he has not been afforded that trial. A special jury of inquest of damages is a body of men in the nature of commissioners, misnamed a jury. They cannot exercise any of the powers of a common law jury.

The result of this distinction between a special body of assessors of damages, by whatever name they may be called, a jury, commissioners or assessors, and a jury at common law is this, that on appeal from the action of said commissioners or special jury, the party is entitled to a trial *de novo* by a common law jury before the appellate tribunal. *Steuart* v. *Baltimore*, 7 Maryland, 500.

The result of this reasoning is that the plaintiff in error is entitled to such a trial before the appellate tribunal, under the decision of *Steuart* v. *Baltimore*, *supra*, by jury.

According to the rule laid down in *Tide Water Canal Co.* v. *Arch*, 9 Gill & Johns. 511, the appellate tribunal tries the case *de novo*, the laws of the States being the rule of decision in the courts of the United States, except where repugnant to the Constitution of the United States, this plaintiff in error is entitled to a trial by jury in this court, of the questions of fact raised in the record, according to the course of the common law under the Seventh Amendment to the Constitution of the United States.

This is the result of conferring jurisdiction upon the courts of the United States in this proceeding, which is held in *Kohl* v. *United States*, 91 U. S. 367, by this court, to be an action at common law.

These cases fully establish the principle that where a law secures a trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground that the party, if he thinks proper, can have his case decided by a jury before it is finally settled. *Steuart* v. *Baltimore*, *ubi supra.*

The modes in which this power is exercised vary according to circumstances. Sometimes it is initiated by summoning a jury upon warrant, in the nature of an inquest *ad quod dam-*

num; at others, boards of assessors are appointed to appraise dues and benefits; with the right of appeal to a court of record, *and* of review by a jury. *Maryland* v. *Graves*, 19 Maryland, 351.

In *Cruger* v. *Hudson River Railroad*, 12 N. Y. 190, it was held that the word "jury" had been used in a number of statutes to describe a body of men who are in fact commissioners or assessors.

The plaintiff in error being entitled to a trial by a common law jury, under Article VII of the Constitution of the United States, has not been afforded that right, because he was not brought into the lower court according to the course of the common law.

The case of *Tidewater Canal Co.* v. *Archer*, *ubi sup.*, demonstrates that a statutory jury of view is not a common law jury, and also lays down the rule that the party is entitled to have a trial before the appellate tribunal by a common law jury, and to try the case *de novo*.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

The motion for a writ of *certiorari* for diminution of the record, in not stating that on July 15, 1890, the plaintiff in error filed a petition for the allowance of a writ of error from the Circuit Court of the United States to the District Court in which the proceedings were pending, must be denied, for several reasons: 1st. The motion was not made at the first term, as required by Rule 14 of this court, and no satisfactory cause is shown for the delay. 2d. The copy of docket entries, submitted with the motion, while it shows that a petition for a writ of error was filed on that day, does not show that a writ of error was then allowed or sued out; and the plaintiff in error afterwards obtained the allowance of a writ of error from the Circuit Court to the District Court, which he abandoned, and,

instead thereof, applied for and obtained the present writ of error from this court. 3d. The order overruling the demurrer to the petition, and directing a jury to be empanelled, was not a final judgment upon which a writ of error would lie. *Luxton* v. *North River Bridge Co.*, 147 U. S. 337.

The writ of error now before us was sued out from this court to the District Court of the United States for the District of Maryland, under the Judiciary Act of March 3, 1891, c. 517, § 5, which provides that "appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following [among other] cases:"

First. "In any case in which the jurisdiction of the court is in issue; in such cases, the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Fifth. "In any case in which the constitutionality of any law of the United States" "is drawn in question." 26 Stat. 827, 828.

In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction under this clause of the statute. *Maynard* v. *Hecht*, 151 U. S. 324; *Moran* v. *Hagerman*, 151 U. S. 329; *Colvin* v. *Jacksonville*, 157 U. S. 368; *Davis & Rankin Co.* v. *Barber*, 157 U. S. 673; *The Bayonne*, 159 U. S. 687; *Van Wagenen* v. *Sewall*, *ante*, 369.

If, indeed, the writ of error is allowed upon the petition of the original plaintiff, asking for a review of a judgment dismissing the action for want of jurisdiction, and the only question tried and decided in the court below was a question of jurisdiction, that question is sufficiently certified to this court. *Lehigh Co.*, *petitioner*, 156 U. S. 322; *Interior Construction Co.* v. *Gibney*, *ante*, 217. And if an appeal from a decree

of the Circuit Court appointing a receiver is allowed by that court "solely upon the question of jurisdiction," and on a petition praying an appeal from the decree as "taking and exercising jurisdiction," the question of jurisdiction is sufficiently certified. *Shields* v. *Coleman*, 157 U. S. 168.

But in the case, just cited, of *Shields* v. *Coleman*, the essential requisite of the appellate jurisdiction of this court in this class of cases was defined as follows: "It is not necessary that the word 'certify' be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search, nor follow counsel in their search of the record, to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction." 157 U. S. 176, 177.

The record in the present case falls far short of satisfying any such test. The defendant, among many other defences, and in various forms, objected to the jurisdiction of the District Court, because the act of Congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the State of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the "rulings, judgments and orders" of the court "upon the question of jurisdiction raised in said exceptions, pleas and demurrers, and the other papers on file in this cause," without defining or indicating any spe-

cific question of jurisdiction. Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction, as will supply the want of a formal certificate under the first clause of the statute.

But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute, above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits. *Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Horner* v. *United States*, 143 U. S. 570, 577; *United States* v. *Jahn*, 155 U. S. 109, 112, 113.

In support of the position that the act of Congress was unconstitutional, reliance was placed on art. 1, sect. 8, cl. 17, of the Constitution of the United States, which provides that Congress shall have exclusive power of legislation "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;" and on the statute of Maryland, by which a method is provided for the condemnation, for the use and benefit of the United States, of lands wanted for the erection of light-houses or other public buildings, and jurisdiction is ceded to the United States over such lands "as soon as the same shall be condemned" under this statute. Maryland Stat. 1874, c. 395, §§ 1–13; 2 Public General Laws of 1888, art. 96, §§ 5–17. It was argued that the act of Congress was unconstitutional, because it undertook to confer exclusive jurisdiction on the courts of the United States before purchase or condemnation of the lands in question.

But in the case at bar the question is not of jurisdiction for purposes of legislation, but of acquiring title by judicial proceedings. It is now well settled that whenever, in the execution of the powers granted to the United States by the

Constitution, lands in any State are needed by the United States, for a fort, magazine, dock-yard, light-house, custom-house, court-house, post office, or any other public purpose, and cannot be acquired by agreement with the owners, the Congress of the United States, exercising the right of eminent domain, and making just compensation to the owners, may authorize such lands to be taken, either by proceedings in the courts of the State with its consent, or by proceedings in the courts of the United States, with or without any consent or concurrent act of the State, as Congress may direct or permit. *Harris* v. *Elliott*, 10 Pet. 25; *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Jones*, 109 U. S. 513; *Fort Leavenworth Railroad* v. *Lowe*, 114 U. S. 525, 531, 532; *Cherokee Nation* v. *Kansas Railway*, 135 U. S. 641, 656; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312; *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, and 153 U. S. 525; *Burt* v. *Merchants' Ins. Co.*, 106 Mass. 356; *United States, petitioners*, 96 N. Y. 227.

Nor is it necessary that Congress should itself select the particular land to be taken. In *Kohl* v. *United States*, above cited, it was decided that an act of Congress, authorizing the Secretary of the Treasury to acquire by purchase at private sale, or by condemnation, a site in the city of Cincinnati, "for the accommodation of the United States courts, custom-house, United States depository, post office, internal revenue and pension offices," was constitutional; and authorized the proceedings for condemnation to be had in the name of the United States in the Circuit Court of the United States under its general jurisdiction of actions at law in which the United States, or any officer thereof suing under the authority of an act of Congress, were plaintiffs.

By the Revised Statutes of the United States, the Light-house Board, under the direction of the Secretary of the Treasury, is entrusted with the discharge of all administrative duties relating to the construction, illumination, inspection and superintendence of light-houses, light-vessels, beacons, buoys, sea-marks, and their appendages; and is authorized to purchase for the purpose, within appropriations made by Con-

gress, land which does not belong to the United States. Rev. Stat. §§ 4658, 4660. And the act of August 1, 1888, c. 728, under which this proceeding was instituted, authorizes the Secretary of the Treasury, whenever in his opinion it is necessary or advantageous to the United States, to acquire land for the purpose of a light-house by condemnation under judicial process in a court of the United States in the district in which the land is situated. 25 Stat. 357. This act is a constitutional exercise of the power of Congress, according to the decisions of this court, above cited.

The statute of Maryland, above cited, provides that whenever the United States are desirous of procuring the title to any land within the State, "for the purpose of erecting thereon any light-house, beacon-light, range-light, light-keeper's dwelling, forts, magazines, arsenals, dock-yards, buoys, public piers, or necessary public buildings, or improvements connected therewith," and cannot obtain the same by purchase, the United States, by any agent authorized under the hand and seal of any member of the President's Cabinet, may, by petition to the circuit court for the county where the land lies, have the land condemned for the use and benefit of the United States. That statute further provides that the petition shall state the bounds and quantity of the land, the purpose for which the United States desire to obtain title, and the names of the owners, and shall be verified by an affidavit of the agent of the United States; that, after notice to the owner, the court shall hear and determine upon the petition and any objections filed to the proposed condemnation, and, if it shall declare that the condemnation ought to be had, shall issue a warrant to the sheriff to summon twenty jurors, "and from them each party or his agent, or, if either be not present in person or by his agent, the sheriff for said party, may strike four jurors, and the remaining jurors shall act as the jury of inquest of damages;" that the sheriff, before the jury proceed to act, shall "administer to each of them an oath that he will justly and impartially value the damages which the owner will sustain by the use or permanent occupation of the land required by the United States;" that "the jury shall summon such wit-

nesses as the parties may require," and examine them on oath in relation to the value of the land, and reduce the testimony to writing, and ascertain and determine the compensation which ought to be made by the United States to the party owning or being interested in the land to be condemned; and that the jury shall reduce their inquisition to writing, and sign and seal it, and it shall then be returned by the sheriff, together with the testimony, to the clerk of the circuit court for the county; that the inquisition shall be confirmed by the court, if no sufficient cause be shown by the fourth day of the ensuing term, and, when confirmed, shall be recorded; that, if the inquisition be set aside, the court may direct another inquisition in the manner before prescribed; that the inquisition shall describe the land condemned, and state the valuation thereof; and that such valuation, when paid or tendered to the owner, shall entitle the United States to the land, for the use and purposes set forth in the petition.

The only position, other than the denial of the constitutionality of the act of Congress, argued by the plaintiff in error in this court, was that by the statutes and decisions of Maryland the jury which returned the inquisition was but a body of assessors of damages, in the nature of a special jury of inquest, or board of commissioners, and that he was entitled to have the whole case tried anew by an ordinary jury. In support of this position were cited the following cases, decided under different statutes of Maryland: *Tide Water Canal Co.* v. *Archer*, 9 Gill & Johns. 479; *Steuart* v. *Baltimore*, 7 Maryland, 500; *State* v. *Graves*, 19 Maryland, 351. But, however that may be under the statutes of the State, it is not so under the act of Congress.

The direction, in the act of Congress, that the practice, pleadings, forms and modes of proceeding, in cases arising under it, "shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State," must, as was said by this court in an analogous case, following the decisions under the corresponding provision of section 914 of the Re-

vised Statutes, "give way, whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress." *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 338.

This proceeding for the condemnation of an interest in land, for the use and benefit of the United States for lighthouse purposes, was instituted in the District Court of the United States by the Secretary of the Treasury, acting through the Attorney General of the United States, as authorized by the act of Congress. Having been commenced in the name of the Secretary of the Treasury, it was rightly ordered to be amended so as to make the United States the formal, as they were the real petitioners. *Kohl* v. *United States*, 91 U. S. 367; *United States* v. *Jahn*, 155 U. S. 109, 111; *United States* v. *Hopewell*, 5 U. S. App. 137. The proceeding was conducted in substantial accordance with the provisions of the statute of Maryland upon the same subject, except so far as controlled by the act of Congress under which it was instituted, or by other laws of the United States.

The provision of the Maryland statute, that a petition in the county court shall be verified by affidavit of the agent of the United States, is inapplicable to a petition presented to a court of the United States by the officer designated in the act of Congress. And the provision requiring a sheriff's jury to reduce to writing, and to return to the clerk of the court, the testimony taken before them, has no application to a trial had and evidence taken before the court itself.

The proceeding, instituted and concluded in a court of the United States, was, in substance and effect, an action at law. *Kohl* v. *United States*, 91 U. S. 367, 376; *Upshur County* v. *Rich*, 135 U. S. 467, 476. The general rule, as expressed in the Revised Statutes of the United States, is that the trial of issues of fact in actions at law, both in the District Court and in the Circuit Court, "shall be by jury," by which is evidently meant a trial by an ordinary jury at the bar of the court. Rev. Stat. §§ 566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of lands for public uses. The direction in the act

of 1888, c. 728, § 2, that such proceedings shall conform, "as near as may be," to those "in the courts of record of the State," is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way either of preliminary, or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. Such a construction would unnecessarily and unwisely encumber the administration of justice in the courts of the United States. *Indianapolis & St. Louis Railroad* v. *Horst*, 93 U. S. 291, 301; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 209; *Mexican Central Railway* v. *Pinkney*, 149 U. S. 194, 206, 207. This plaintiff in error had the benefit of a trial by an ordinary jury at the bar of the District Court on the question of the damages sustained by him; and he was not entitled to a second trial by jury, except at the discretion of that court, or upon a reversal of its judgment for error in law.

To prevent any possible misconception, it is fit to observe that this case concerns only the taking by the United States, on making compensation to the owner, of an interest in fast land above high water mark; and does not touch the question, argued but not decided in two recent cases, of the right of the United States to take, without compensation, for the purpose of a light-house, land under tide waters. *Hill* v. *United States*, 149 U. S. 593; *Chappell* v. *Waterworth*, 155 U. S. 102.

Judgment affirmed.

JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY *v.* HOOPER.

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

No. 80. Submitted November 21, 1895. — Decided January 13, 1896.

Whether an instrument is under seal or not is a question for the court upon inspection; but whether a mark or character shall be held to be a seal, depends upon the intention of the executant, as shown by the paper.

When no legislative prohibition is shown, it is within the chartered powers

Statement of the Case.

of a railroad company to lease and maintain a summer hotel at its seaside terminus, and such power is conferred on railroads in Florida.

The authority of the president of such company to execute in the name of the company a lease to acquire such hotel may be inferred from the facts of his signing, sealing, and delivering the instrument, and of the company's entering into possession under the lease and exercising acts of ownership and control over the demised premises, even if the minutes of the company fail to disclose such authority expressly given.

The court adheres to the rule laid down in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, that a contract of a corporation which is *ultra vires* in the proper sense is not voidable only, but wholly void and of no legal effect; but it further holds that a corporation may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold, under the act by which it is created.

Impossibility of performing a contract, arising after the making of it, although without any fault on the part of the covenantor, does not discharge him from his liability under it.

A lessee of a building who contracts in his lease to keep the leased building insured for the benefit of the lessor during the term at an agreed sum, and fails to do so, is liable to the lessor for that amount, if the building is destroyed by fire during the term.

There is no error in an instruction to the jury, where the evidence is conflicting, that in coming to a conclusion they should consider the testimony in the light of their own experience and knowledge.

In the Circuit Court of the United States for the Northern District of Florida, on the 4th day of December, 1889, Mary J. Hooper, Henry H. Hooper, her husband, and William F. Porter, for the use of said Mary J. Hooper, citizens of the State of Ohio, brought an action against the Jacksonville, Mayport, Pablo Railway and Navigation Company, a corporation of the State of Florida. The plaintiffs' amended declaration set up causes of action arising out of the covenants contained in a certain indenture of lease between the parties. This lease, dated July 10, 1888, purported to grant, for a term of two years, certain lots of land situated at a place called "Burnside," in Duval County, Florida, whereon was erected a hotel known as the "San Diego Hotel." In consideration of this grant the railroad company agreed to pay in monthly instalments a yearly rent of $800, and to keep the premises insured in the sum of $6000.

It was alleged that on November 28, 1889, during said term, and while the railway company was in possession, the hotel and other buildings were wholly destroyed by fire; that the defendant had failed and neglected to have the same insured, and that there was an arrearage of rent due amounting to the sum of $106.67. For the amount of the loss occasioned by the absence of insurance and for the back rent the action was brought.

The defendant denied that the railway company had duly executed the instrument sued on; denied that Alexander Wallace, the president of the company, and who had executed the lease as such president, had any authority from the company so to do. The defendant also alleged that such a lease, even if formally executed, was *ultra vires;* also that the covenant to insure was an impossible covenant, as shown by ineffectual efforts to secure such insurance.

The case was tried in April, 1891, and resulted in a verdict and judgment against the defendants in the sum of $6798.70. On errors assigned to certain rulings of the court and in the charge to the jury the case was brought to this court.

Mr. J. C. Cooper for plaintiff in error.

Mr. James R. Challen for defendants in error.

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

The nineteen assignments of error may be classified as follows: Those which raise questions as to the sufficiency of the proof of the due execution by the defendant of the contract sued on; those which deny the competency of the railroad company to enter into such a contract; those which deal with the question whether the defendant was relieved from liability on its covenant to insure by reason of alleged impossibility to comply therewith; finally, those alleging error in the admission of evidence, and in certain portions of the charge — particularly in respect to the measure of damages.

Opinion of the Court.

We shall discuss these alleged errors in the order thus mentioned.

The declaration was in covenant, and contained, as an attached exhibit, what was alleged to be a certified copy of the contract sued on, the final clause whereof was as follows:

"In witness whereof the parties hereto have hereunto set their hands and seals this the day and year above written.

"JACKSONVILLE, MAYPORT, PABLO RAILWAY AND NAVIGATION COMPANY, [Seal.]
"By ALEX. WALLACE, *President.*
"WM. F. PORTER, [Seal.]
"By H. H. HOOPER, JR., *Att'y in fact.*
"H. H. HOOPER. [Seal.]
"MARY J. HOOPER. [Seal.]"

The attesting clause was as follows:

"Signed, sealed, and delivered in the presence of us.
"H. H. BURKMAN,
"H. H. BOWNE,
As to R. R. Co., H. H. Cooper, and W. F. Porter.
"JOHN MULHOLLAND,
"SAM'L E. DUFFY,
As to Mary J. Hooper."

The defendant demurred on several grounds, one of which was as follows:

"That attached to the said declaration is a paper purporting to be the contract which is the basis of this suit, which paper is alleged to be a lease between the defendant company and the plaintiffs, and which paper is referred to in each and every count of said declaration, and asked and prayed and made a part of said declaration; that each and every count of same declares in covenant, and yet the same contains on the face thereof and the face of the paper made part thereof that the said cause of action will not lie because the said paper is

not under seal; that there is no seal of the defendant company to said paper."

The theory of this demurrer appears to be that there should have been an averment on the face of the instrument that the seal attached, on behalf the company, was its common or corporate seal. However, there was an averment that the parties had set their hands and seals to the paper, and the attesting clause alleged that the railroad company had signed, sealed, and delivered in the presence of two witnesses, who signed their names thereto. On demurrer this was plainly sufficient.

But it is urged in the third and fourth assignments that it was error to permit to be put in evidence the certified copy of the lease, as likewise the duplicate lease, because they were not shown to be under the seal of the company, but appeared to be under the private seal of Alexander Wallace, the president of the company. But, in the absence of evidence to the contrary, the scroll or rectangle containing the word "seal" will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure.

In *Pillow* v. *Roberts*, 13 How. 472, 474, this court said, through Mr. Justice Grier, when discussing an objection that an instrument read was improperly admitted in evidence because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper and not "on wax, wafer, or any other adhesive or tenacious substance," said: "It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err in overruling the objections to the deed offered by the plaintiff." *Price* v. *Indseth*, 106 U. S. 546, is to the same effect.

Opinion of the Court.

Whether an instrument is under seal or not is a question for the court upon inspection; whether a mark or character shall be held to be a seal depends upon the intention of the executant, as shown by the paper. *Hacker's Appeal*, 121 Penn. St. 192; *Pillow* v. *Roberts*, *sub. supra.*

The defendant did not produce the original in order that it might be compared in the particular objected to with the copy and duplicate offered. The defendant's attorney, Mr. Buckman, was called, and testified that he was one of the attesting witnesses to the instrument offered, and that he, as a notary public, took the acknowledgment thereto of Alexander Wallace, that he executed the same for and in behalf of the company, and that the said lease was the act and deed of the defendant company for the uses and purposes therein expressed.

Whether, therefore, the instrument put in evidence was merely a copy, in which event it would not be expected that a wax or stamped seal of the company would appear upon it, but merely a scroll, representing the original seal, or whether the so-called copy was really the original paper, as certified by one of defendant's witnesses, would not, in our opinion, be material. The presumption would be, if the paper were a copy, that the original was duly sealed, or, if it were the original, that the scroll was adopted and used by the company as its seal, for the purpose of executing the contract in question.

As respects those portions of the objections that raised the question as to the authority of the president to execute the contract in question, there was, besides the presumption that would arise out of the signing, sealing, and delivering of the instrument, evidence that the company exercised acts of ownership and control over the demised premises, took charge of them by their superintendent, took an inventory of the property, rented the hotel portion to a third party, received money rent therefor, gave a receipt therefor under the seal of the company, opened a hotel account on their cash book, which showed receipts of rent from the tenant, and expenditures for moving the hotel and for making improvements therein, and

there was evidence adduced by the defendant itself of efforts to get the property insured in pursuance of their contract.

An exception was taken by the defendant to the action of the court in permitting Mrs. Roberts, the company's tenant, to testify to statements made to her by Alexander Wallace, the president of the company, the ground of objection being that Wallace was dead at the time of the trial. Statements made by the president, if relevant to the controversy, would be competent to affect the company, even if he were dead at the time of the trial. In the present case, it was relevant to show that the witness, when about to rent the hotel, was told by the president to go to Mr. Warriner, the secretary of the company, to whom she paid one month's rent, and who gave her a receipt therefor, with the corporate seal attached. The witness was not a party to nor interested in the suit, nor was the president or his executor or administrator. The admissions made by the president, subsequently, in a casual conversation, as to his ineffectual efforts to get the hotel insured, could scarcely be regarded as relevant and competent to affect the company. But the error, if such it were, in permitting such statements to be received, was rendered immaterial by the action of the company, in adducing affirmative evidence, in its own behalf, to the very same effect, namely, the efforts made by the company and its officers to procure insurance.

Complaint is made of the action of the court in rejecting the offer of the defendant's by-laws for the purpose of showing want of authority to make the lease sued on without the consent of the stockholders or board of directors, and the accompanying offer of the minutes, which did not disclose that any such authority had been granted.

In considering what weight should be given to the error assigned to the rejection of the by-laws, we have a right to advert to the copy of them contained in the bill of exceptions. There we learn that the powers conferred upon the president were in the following terms:

"The president shall preside at all meetings of the board of directors and of the company (of which he shall be president), and shall have the general management and supervision of the

operation of the lines of road of said company and the general business thereof; subject, however, at all times to the control of the board of directors. He shall, when so directed and empowered by the board of directors, execute and sign for and on behalf of said company all documents and writings authorized to be made and executed for and on its behalf. He shall draw and issue all warrants for the payment of moneys on the treasurer of said company when so ordered by the board, and sign the same. He shall make an annual report to said company of the condition thereof, with such suggestions and recommendations as he may deem proper, and to said board of directors whenever required by them; and shall do and perform such other duties as are consistent with said office, and others of a like nature pertaining thereto."

This by-law appears to describe the powers and duties usually possessed by presidents of railroad companies, and we are, therefore, relieved from considering what would have been the effect of an unusual restriction on the powers of such an officer, and whether those dealing with a railroad company would be obliged to take notice of such unusual restriction.

The question, therefore, we have to consider is whether the admission in evidence of the by-law would have affected the result reached by the court and jury in the case.

Assuming, for the present purposes of the discussion, that the subject-matter of the contract in question was within the legitimate scope of the company's powers, we think the facts and circumstances shown by the evidence disclose a case in which the company would be bound, notwithstanding there was no proof that the president was expressly authorized to make the contract by a previous resolution of the board. The evidence was undisputed that, after the execution of the lease, the company took possession of the demised premises, rented to a third party the hotel portion thereof, and received and receipted for rent of the hotel.

The case, in this particular, resembles and falls within the principle of *Eureka Co.* v. *Bailey Co.*, 11 Wall. 488, 491, where the binding force of a contract was denied for alleged want of

authority of an agent to make the same, and this court, through Mr. Justice Miller, held:

"We are satisfied that the agreements set up in the bill are the valid contracts of the defendant. Though the plaintiff was unable to produce any resolution or order in writing by the trustees or board of directors of the defendant corporation, and though the seal used was the private seal of one of its officers, instead of the corporate seal, neither of these is essential to the validity of the contract. We entertain no doubt that Rindge, the agent and one of the directors and treasurer of the Eureka company, was authorized to execute the agreement, and, if any doubt existed on that point, the report and payment for five hundred machines, the first month's use of the patent under the agreement, would remove the doubt. If it did not, it would very clearly amount to a ratification."

In *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 83, it was held that where a cashier was appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it was not necessary that his official bond should be accepted as satisfactory by the directors, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the nonperformance of their duties; that the charter and the by-laws are to be considered, in this respect, as *directory* to the board, and not as *conditions precedent;* and Mr. Justice Story, in discussing the subject, said: "A board may accept a contract, or approve a security, by a vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof by parol evidence than if reduced in writing. But this is, surely, not a sufficient reason for declaring that the vote or assent is inoperative." See also *Pittsburgh & Cincinnati Railway* v. *Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 138.

As, then, the contract in question was, upon our present assumption, within the legitimate scope of the powers of the company, was executed by that officer of the company who by the by-laws was the proper agent to perform such function, and as the company went into possession of and received the rents and profits of the hotel, we conclude that the com-

pany was bound thereby, even if the minutes of the company fail to disclose authority expressly given to the president to execute the contract.

It is, however, further claimed that the contract sued on was not within the legitimate powers of the company.

This is not a case in which, either by its charter, or by some statute binding upon it, the company is forbidden to make such a contract. Indeed, the public laws of Florida, referring to the powers of railroad companies, provide that every such corporation shall be empowered "to purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of its road and canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease, or buy any land or real estate not necessary for its use." McClell. Digest of the Laws of Florida, p. 276, sec. 10. They are likewise authorized "to erect and maintain all convenient buildings, wharves, docks, stations, fixtures, and machinery for the accommodation and use of their passengers and freight business."

Although the contract power of railroad companies is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport.

Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain a summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited, whereby a railroad company is authorized "to sell, lease, or buy any land or real estate not necessary for its use," and to "erect and maintain all

convenient buildings . . . for the accommodation and use of their passengers."

Courts may well be astute in dealing with efforts of corporations to usurp powers not granted them, or to stretch their lawful franchises against the interests of the public. Nor would we be understood to hold that, in a clear case of the exercise of a power forbidden by its charter, or contrary to public policy, a railroad company would be estopped to decline to be bound by its own act, even when fulfilled by the other contracting party. *Davis* v. *Old Colony Railroad Co.*, 131 Mass. 258; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24. So, too, it must be regarded as well settled, on the soundest principles of public policy, that a contract, by which a railroad company seeks to render itself incapable of performing its duties to the public, or attempts to absolve itself from its obligation without the consent of the State, is void and cannot be rendered enforceable by the doctrines of estoppel. *The New York & Maryland Railroad Co.* v. *Winans*, 17 How. 30; *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24.

We do not seek to relax but rather to affirm the rule laid down by this court, in *Central Transportation Co.* v. *Pullman's Car Company*, (above cited,) that "a contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect — the objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. Such a contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." 139 U. S. 59, 60.

But we think the present case falls within the language of Lord Chancellor Selborne, in *Attorney General* v. *Great Eastern Railway*, 5 App. Cas. 473, 478, where, while declaring

his sense of the importance of the doctrine of *ultra vires*, he said: "This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*." In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case. As was said by Romilly, M. R., in *Lyde* v. *Eastern Bengal Railway*, 36 Beav. 10, where was in question the validity of a contract by a railway company to work a coal mine: "The answer to this argument appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the accidental additional profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the court drew from the evidence."

The principle upon which we may safely rule the present question is within the case of *Brown* v. *Winnisimmet Company*, 11 Allen, 326, 334. There a contract, made by the treasurer of a ferry company, to lease one of the company's boats for a certain money consideration, was alleged to be void for want of antecedent authority given by the company to the treasurer, and also because such a contract was not made in the legitimate exercise of the company's powers. On the first point it was ruled that, from evidence showing ratification by the company, it was proper for the jury to infer that the treasurer had been duly authorized to make the contract, and, disposing of the second question, the court, through Chief Justice Bigelow, said: "We know of no rule or principle by which an act, creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or trans-

actions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created." See also *Davis* v. *Old Colony Railroad*, 131 Mass. 258, 272.

The contract between the parties hereto was for leasing a hotel at the terminus of the railroad, situated at a beach, distant from any town. If not fairly within the authority granted by the statute of Florida "to erect and maintain all convenient buildings . . . for the accommodation and use of their passengers," it certainly cannot be said to have been forbidden by such laws. Nor can it be said to have been, in its nature, contrary to public policy.

To maintain cheap hotels or eating houses, at stated points on a long line of railroad through a wilderness, as in the case of the Pacific railroads, or at the end of a railroad on a barren, unsettled beach, as in the present case, not for the purpose of making money out of such business, but to furnish reasonable and necessary accommodations to its passengers and employés, would not be so plainly an act outside of the powers of a railroad company as to compel a court to sustain the defence of *ultra vires*, as against the other party to such a contract.

But even if the railroad company might be answerable for the rent of the premises, it is contended that the covenant to procure insurance was so far outside of the company's powers as not to be enforceable.

No one could deny that it would not be competent for a railroad company, without the authority of the legislature, to carry on an insurance business. But this covenant to keep the premises insured is correlative to the obligation of the lessors to rebuild in case the hotel should be destroyed by fire, and to the provision that, in such an event, the rents should cease until the hotel should be put in habitable condition and repair

by the lessors. Such mutual covenants are quite usual in leases of this kind, and are merely incidental to the principal purpose of the contract.

Suppose the contract proven and the defence of *ultra vires* deemed inadmissible, it is claimed by the railroad company that it is not liable in damages for its failure to procure the insurance, because it was unable to get the insurance; that its contract, in that particular, was impossible of performance.

There is such a defence known to the law as an impossibility of performance. Instances of such a defence are found in cases where the subject-matter of the contract had ceased to exist, as where there was a contract of sale of a cargo of grain supposed by the parties to be on its voyage to England, but which, having become heated on the voyage, had been unloaded and sold, and where it was held that the contract was void, inasmuch "as it plainly imputed that there was something which was to be sold and purchased at the time of the contract," whereas the object of the sale had ceased to exist. *Courtrier* v. *Hastle*, 5 H. L. Cas. 673; *Allen* v. *Hammond*, 11 Pet. 63.

So, also, where a person purchased an annuity which, at the time of the purchase, had ceased to exist owing to the death of the annuitant, it was held that he could recover the price which he had paid for it. *Strickland* v. *Turner*, 7 Exch. 208.

So where there is obvious physical impossibility, or legal impossibility, which is apparent on the face of the contract, the latter is void.

But the present case does not fall within either of these classes, but is a case of impossibility of performance arising subsequently to the making of the contract.

Here, the general rule is that such impossibility, even though it arises without any fault on the part of the covenantor, does not discharge him from his liability under the contract. "The principle deducible from the authorities is that if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail the defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this

will excuse performance. The answer to the objection of hardship in all such cases is that it might have been guarded against by a proper stipulation. It is in the province of courts to enforce contracts — not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function." *The Harriman*, 9 Wall. 161, 172. Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility. But where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident, or other contingency, although it was not foreseen by the party, nor within his control." *Jones* v. *United States*, 96 U. S. 24, 29.

It appears that there was some evidence to the effect that, prior to the making of the lease, the owners of the hotel had some conversation with one or more insurance agents, who refused to insure the hotel building, and upon this evidence the defendant asked the court to charge the jury that if the plaintiffs knew that the property, at the time of the making of the contract, was not insurable, or, if knowing that they had tried to get insurance and failed, they did not so notify the defendant, then the plaintiffs acted in bad faith, and should not be permitted to recover. The court refused to so charge and very properly. The evidence disclosed by the record, even if believed by the jury, would not have justified a verdict that the plaintiffs acted in bad faith. It is not shown that they made any false representations on the subject, and the very fact that they demanded a covenant to procure insurance from the defendant put the latter on inquiry as to its ability to procure it.

Error is alleged in the refusal of the court to charge that "if the jury believed from the evidence that insurance on the property in question was sought to be obtained at the usual places where such insurance would be applied for, and such agencies applied to, representing companies insuring property in all parts of the United States, refused to insure the property, on the ground that such property was not insurable, and in-

surance companies would not insure such classes of property, then the agreement to insure was impossible of performance, and plaintiffs could not recover."

We are not furnished in this record, by any bill of exceptions or by a certificate of the judge, with all the evidence on which this request to charge was based, but assuming that the evidence contained in the bill of exceptions was all that there was, it would have been error in the court to have given the instruction prayed for. That evidence is very far from disclosing the state of facts assumed in the request. Two or three insurance agents, resident in the city of Jacksonville, testified that on one or two occasions, whose dates they could not fix, there had been inquiries made by some one representing the defendant about insurance. Giving the utmost effect to the testimony, it altogether failed to show such a case of impossibility as would, under the authorities, have discharged the defendant from the obligation of its contract; and we think the court would not have erred in so charging the jury. However, the court left the question as one of fact to the jury, and we perceive no misdirection in his remarks.

It remains to consider the question of the measure of damages and some objections made to the charge of the court on that subject.

If the defendant subjected itself, by a valid contract, to keep the premises insured in the sum of six thousand dollars during the term of the lease, and, without sufficient cause, failed to do so, and if the hotel was worth the sum mentioned, and was wholly destroyed by fire, the extent of the defendant's liability would obviously be the amount of the plaintiffs' damages, namely, six thousand dollars.

It is argued that the defendant received no consideration for agreeing to insure the property; that it contracted to pay the costs of insurance as part of the rental, and the cost of the premium of insurance was the proper measure of recovery. The obligation of the lessors to rebuild and repair in case of fire, and the suspension of the rent so long as the premises remained uninhabitable, formed the consideration of the defendant's agreement to insure; and we cannot accept the

proposition that the plaintiffs' damages arising out of the breach of the contract are to be measured by what it would have cost the defendant to secure the stipulated insurance.

Complaint is made of the observations made by the judge when instructing the jury as to the weight which they should give to the testimony in relation to the value of the property. The testimony was somewhat conflicting, and the remark chiefly criticised was to the effect that, in coming to a conclusion, the jury should consider the testimony in the light of their own experience and knowledge. We do not regard such a caution as objectionable.

In deciding disputes between litigant parties, where witnesses are naturally apt to state facts strongly in favor of their respective principals, the jury well may, and, in fact, must, use their own knowledge and experience in the ordinary affairs of life to enable them to see where is the truth. This is particularly true where, as in the present case, the conflict was in matter of opinion as to the value of a building no longer in existence.

The plaintiffs conceded that all the rent had been paid except $106.67, which in the declaration was demanded. The defendant gave no evidence on the subject, and in such a state of the record and of the evidence we think no error was committed by the court in charging the jury that they could find for the plaintiffs the amount of rent demanded unless the defendant showed that it had been paid.

These views cover all the assignments of error which we deem worthy of notice, and the judgment of the court below is

Affirmed.

LAING *v.* RIGNEY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

No. 79. Argued and submitted November 21, 1895. — Decided January 13, 1896.

In 1883 R. had his legal residence in New Jersey, but actually lived in New York. His wife resided in New Jersey, and filed a bill in the Court of Chancery of that State against him for divorce on the ground of adultery. The defendant appeared and answered, denying the allegations in the bill. In 1886 the plaintiff filed a supplemental bill charging other acts of adultery subsequent to the filing of the bill. The court made an order, reciting the appearance and answer of the defendant to the original bill, directing him to appear on a day named and plead to the supplemental bill, and ordering a copy of this order, with a certified copy of the supplemental bill, to be served on him personally, which was done in the city of New York. The defendant did not so appear and answer, and the further proceedings in the case resulted in a decree finding the defendant guilty of the acts of adultery charged "in the said bill of complaint and the supplemental bill thereto," granting the divorce prayed for, and awarding the plaintiff alimony. The plaintiff commenced an action in a court of the State of New York to recover alimony on this decree, whereupon the defendant, by the solicitor who had appeared for him and filed his answer to the original bill, applied for and obtained from the chancellor in New Jersey an amendment to the decree so as to make it read that the defendant had been guilty of the crime of adultery charged against him in said supplemental bill. The complaint in the New York case set forth the proceedings and decree in the New Jersey case, and alleged that the defendant had accepted the proceedings as valid, and had, after the decree of divorce, married another wife. The defendant answered, denying that the Court of Chancery in New Jersey had any jurisdiction to enter the decree on the supplemental bill, and admitting his second marriage. On the trial of the New York case, the evidence of an attorney and counsellor of the Supreme Court of New Jersey, as an expert, was offered and received to the effect that in his opinion the chancellor erred in taking jurisdiction and proceeding to judgment on the supplemental bill, without service of a new subpœna in the State, or the voluntary appearance of defendant after the filing of the supplemental bill, and that the law of New Jersey did not warrant him in so doing. The trial resulted in a judgment for defendant, which was sustained by the Court of Appeals upon the ground that the law of New Jersey and the practice of its Court of Chancery had been shown by undisputed evidence to be as stated by the expert. *Held*,

(1) That, in the absence of statutory direction or reported decision to

Statement of the Case.

the contrary, this court must find the law of New Jersey applicable to this case in the decree of the chancellor, and that the remedy of the defendant, if he felt himself aggrieved, was by appeal;

(2) That the *opinion* of the expert could not control the *judgment* of the Court in this respect;

(3) That the New York courts, in dismissing the plaintiff's complaint, did not give due effect to the provisions of Article IV of the Constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State.

This was an action brought on August 4, 1887, in the Supreme Court of the State of New York against Thomas G. Rigney, on a final decree of the Court of Chancery of the State of New Jersey, whereby had been awarded to Ella L. Rigney, now Ella L. Laing, certain costs, counsel fees, and alimony, as well as a decree of divorce.

The action was tried at a special term of the Supreme Court, before a judge without a jury, and resulted in a judgment dismissing the complaint. An appeal was taken to the general term of the Supreme Court, and there the judgment of the special term was reversed. From the judgment of the general term an appeal was taken to the Court of Appeals of the State of New York, which court reversed the judgment of the general term, and affirmed that of the special term. 127 N. Y. 408. This decision of the Court of Appeals was duly remitted to the Supreme Court, and a judgment in accordance therewith was entered November 4, 1891, which, by a writ of error, has been brought to this court.

It appears that these parties were married in the State of New York on February 12, 1873, and continued to reside in that State until January, 1877, when they removed to the city of Elizabeth, in the State of New Jersey. They had two children, a girl and a boy, who were fourteen and eleven years old respectively at the time of the trial. In January, 1883, the defendant ceased to support his family, and subsequently abandoned his family.

On April 23, 1883, she, then being a resident of the State of New Jersey, filed a bill against the defendant in the Court of Chancery of that State, wherein she alleged that the defend-

ant, whose legal residence was still in the city of Elizabeth, had committed adultery with several persons on different occasions in the city of New York, and prayed for an absolute divorce and for alimony. On August 4, 1883, the defendant appeared in the suit, by his solicitors and counsel, and filed an answer denying the allegations of adultery in the bill.

On May 18, 1886, the plaintiff filed a supplemental bill in the divorce suit, wherein she alleged that the defendant had committed adultery with a person named, in the city of New York, at various times, since the commencement of the suit, and prayed that she might have the same relief against the defendant "as she might have had if the facts stated and charged by way of supplement had been stated in the original bill," and that the marriage be dissolved, and a suitable allowance made to her as alimony.

On April 29, 1887, an order was made by the chancellor of New Jersey, reciting the appearance and answer of the defendant to the original bill, the filing of the supplemental bill, the issuing of a subpœna thereon, and that the defendant, residing out of the State of New Jersey, process could not be served upon him, and directing that the defendant appear and plead, demur or answer, to the supplemental bill on or before May 18, 1887, or that in default thereof such decree be made against him as the chancellor should deem equitable and just, and further directing that a copy of the order, with a certified copy of the supplemental bill, should, within five days thereafter, be served upon the defendant personally, or, in default of such service, that notice of the order be published as therein directed. On May 4, 1887, a copy of this order and of the supplemental bill were served on the defendant personally in the city of New York.

On May 19, 1887, an order was made by the chancellor, reciting that due notice of the order of the court of April 29, directing the defendant to appear and answer the said bill on or before May 18, had been duly served, with a copy of the supplemental bill, "as in said order and by the rules of this court directed and prescribed," and that the defendant had not answered the same within the time limited by law

and said order, and referring the case to a special master to ascertain and report on evidence as to the truth of the allegation of the said bill and his opinion thereon.

On June 10, 1887, the special master reported to the court that all material facts charged in the bill and supplemental bill were true, and that a decree of divorce should be granted as prayed for.

On June 11, 1887, a final decree was rendered by the chancellor, confirming the report, granting a divorce, and awarding costs, counsel fees, and alimony. The decree found "that the said defendant has been guilty of the crime of adultery charged against him in the said bill of complaint and the supplemental bill thereto," and it was "ordered, adjudged, and decreed that the said complainant, Ella L. Rigney, and the said defendant, Thomas G. Rigney, be divorced from the bond of matrimony for the cause aforesaid, and the marriage between them is hereby dissolved accordingly, and the said parties are hereby freed and discharged from the obligations thereof." It was further adjudged and decreed that the custody of the children be awarded to the plaintiff, and that the defendant pay alimony *pendente lite* at the rate of $100 per month "from the filing of the bill up to the date of this order," and thereafter at the rate of $45 per week, together with the costs of the suit, and the sum of $150 for counsel fees.

It appears, by the record, that in January, 1888, shortly before the trial of the present case, which occurred in April, 1888, the defendant by the solicitor who had appeared for him and filed his answer to the original bill in the divorce suit, applied for and obtained from the chancellor an amendment of the decree of June 11, 1887, by striking out from the recitals thereof the words "*bill of complaint and the*," and "*thereto*," so as to make the recital read "and that the said defendant has been guilty of the crime of adultery charged against him in said supplemental bill." In other respects the amended decree was precisely the same as the original, and as amended was enrolled by the procurement and at the cost of the defendant.

Counsel for Plaintiff in Error.

As already stated, on August 4, 1887, Mrs. Rigney brought this action in the Supreme Court of New York upon the final decree of the Court of Chancery of New Jersey, to recover the amount awarded by the decree for alimony and costs, no part of which had been paid. The complaint, served December 3, 1887, set forth the proceedings and final decree of June 11, 1887, as they are above stated; and it further alleged that the defendant, accepting the force of the decree of the New Jersey court, had on September 18, 1887, married one Abbie Ahern. The complaint also alleged that on or about May 4, 1887, a copy of the said supplemental bill and a copy of the order for publication thereof were duly served upon the defendant, in the city of New York, by the delivery thereof to him personally.

The defendant, in his answer, admitted "the making of the order of May 2, 1887, and the service thereof and of the supplemental bill upon him," but alleged that as said service was made in the State of New York, and not in the State of New Jersey, the Court of Chancery of New Jersey, by such service, obtained no jurisdiction to make any personal decree against him on the supplemental bill. The terms of the answer, in this particular, were as follows:

"This defendant denies that said Court of Chancery of New Jersey ever obtained jurisdiction of the person of this defendant under said supplemental bill or had any power to enter a personal decree against him, and he denies that such decree, so far as it is a personal decree against this defendant, is of any validity or effect, but he admits that said decree was effectual to dissolve the marriage status existing between him and the plaintiff."

The answer admitted the truth of the allegations of the complaint that the defendant, acting on the assumption of the validity of the decree of divorce, had, on September 18, 1887, married another woman, and that said marriage had been solemnized in the State of New Jersey and also in the State of New York.

Mr. J. Hubley Ashton for plaintiff in error.

Argument for Defendant in Error.

Mr. Hamilton Wallis, for defendant in error, submitted on his brief.

I. This court must accept and cannot review findings of fact of the trial court. *St. Louis* v. *Rutz*, 138 U. S. 226; *Runkle* v. *Burnham*, 153 U. S. 216.

The trial court has found as matter of fact as follows: "That the above-named defendant was never served with a process in New Jersey under said supplemental bill, and never appeared therein or answered thereto, and the decree of the Court of Chancery of New Jersey, which was based entirely upon charges of adultery contained in said supplemental bill, did not, under the laws of that State, become binding upon said defendant personally."

The provisions of Article IV of the Constitution, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State, only require that each State shall give to the judicial proceedings of a sister State the same force and effect that would be given to them in that State. Rev. Stat. § 905. It being the fact, then, that this judgment of the Court of Chancery of New Jersey was not binding upon the defendant therein personally in that State, no such force could be given to it in the State of New York.

II. The decree of the New Jersey court, so far as it sought to charge the defendant therein personally with alimony, costs, and counsel fees, was of no force or validity either in New Jersey or elsewhere, and was not a judgment protected by the provisions of the Constitution of the United States.

The case, as disclosed by the record, can be looked at in two aspects, in either of which this decision of the Court of Appeals is right:

(1) That the Court of Chancery of New Jersey had no jurisdiction over the person of the defendant that would enable it to render a valid personal judgment for a sum of money against him.

This is predicated upon the finding of the trial court: (*a*) That the decree of the New Jersey court was based entirely upon charges contained in the supplemental bill, and did not,

under the laws of that State, become binding upon the defendant personally, which fact, as the Court of Appeals has stated, was found upon uncontradicted evidence; and, also (*b*), upon the thoroughly well established principle that a personal judgment rendered by a state court in an action for money against a non-resident of the State, upon whom no personal service of process within the State was made, and who did not appear, is without validity and is not entitled to the protection of that provision of the Constitution which declares that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. *Pennoyer* v. *Neff*, 95 U. S. 714; *Freeman* v. *Alderson*, 119 U. S. 185; *Sugg* v. *Thornton*, 132 U. S. 524; *Wilson* v. *Seligman*, 144 U. S. 41; *Scott* v. *McNeal*, 154 U. S. 34.

That the finding of the trial court in this respect, and the ruling of the Court of Appeals is correct, is fully supported by the proceedings of the New Jersey court. The taking of the bill *pro confesso;* the subsequent proceedings before the master without notice to the defendant and without his presence, and the failure to serve notice of the proceedings upon the defendant's solicitors who represented him under the original bill, can only be explained or supported upon the theory of the findings, that the supplemental bill was to all intents and purposes a new and independent proceeding. And the failure to bring to trial the issues raised by the original pleadings, or to attempt to establish any of the allegations contained in the original bill, conclusively establishes the fact that those allegations were not susceptible of proof, and that no decree whatever could be entered against the defendant based upon them, and that the decree, as it itself recites, was one wholly dependent for its validity upon the allegations of the supplemental bill.

(2) But if this position is not well taken, if the appearance of the defendant to the original bill can be held in any sense to be a general appearance in the suit, so as to give the Court of Chancery jurisdiction to enter and enforce a personal decree against him therein, whether under the original or the

supplemental bill; then, too, the judgment sought to be enforced in this action is invalid.

The Constitution of the United States provides, Fourteenth Amendment: "Nor shall any State deprive any person of life, liberty or property without due process of law."

Due process of law means not only the service of a subpœna or other original process, but the right of a defendant to be heard in his own defence. It would certainly be a perversion of justice if, after a defendant had been brought into court by process and had interposed a pleading which raised an issue of fact, the plaintiff could proceed with the hearing of the cause in the absence of the defendant, without notice to him of such hearing, and without giving him an opportunity to controvert the evidence on the part of the plaintiff. Any such procedure would clearly not be the due process of law required by the Constitution. As was said by the New York Court of Appeals in *Stuart* v. *Palmer*, 74 N. Y. 183, 191, "It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights. *A hearing or opportunity to be heard is absolutely essential.* We cannot conceive of due process of law without this." See also the cases there cited, and, to the same effect, *Scott* v. *McNeal*, 154 U. S. 34.

But in the case under consideration this opportunity was denied to the defendant. Notwithstanding his appearance and answer — if both bills can be held to be parts of one proceeding — the Court of Chancery expressly directed that the bill should be taken *as confessed*, and that the complainant should proceed with his cause *ex parte*. So that, by the express direction of the court, the defendant was deprived of his right to be heard in his own behalf. But this provision of the Constitution is a restraint equally upon the executive, legislative, and judicial branches of the government. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272; *Scott* v. *McNeal*, 154 U. S. 34; and therefore the judgment of the court, having been rendered without such due process of law, was and is a nullity.

Opinion of the Court.

So that in whichever way we view this case — whether we consider the supplemental bill as an independent proceeding or as part of the original suit — the judgment sought to be enforced was rendered without that due process of law which is necessary to give it validity.

III. The defendant was in no way estopped or precluded from interposing this defence in this action.

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

The Federal question presented by this record is whether the judgment of the New York courts, in dismissing plaintiff's complaint, which sought to enforce a final decree of the Court of Chancery of New Jersey, gave due effect to the provisions of Article IV of the Constitution of the United States, which require that full faith and credit shall be given in each State to the judicial proceedings of every other State.

The record discloses, and it is conceded, that, upon its face, the decree of the Court of Chancery of New Jersey purports to be a final decree, granting the divorce, and adjudging the payment of the costs and alimony to recover which this suit was brought.

But the defendant seeks to avail himself of the well settled doctrine, that it is competent for a defendant, when sued in the court of his domicil on a judgment obtained against him in another State, to show that the court of such other State had not jurisdiction to render the judgment against him. To sustain this position in this court the defendant relies upon the sixth finding of the trial court, which was as follows: "That the above named defendant was never served with process in New Jersey under said supplemental bill, and never appeared therein or answered thereto, and the decree of the Court of Chancery of New Jersey, which was based entirely upon charges of adultery contained in said supplemental bill, did not, under the laws of that State, become binding upon said defendant personally."

It is undoubtedly true, as claimed by the defendant in error,

that if the judgment of the Court of Chancery of New Jersey was not binding upon the defendant therein personally in that State, no such force could be given to it in the State of New York; and it is contended that, as by the sixth finding, above recited, it is found that the decree was not binding personally on the defendant, under the laws of New Jersey, the Court of Appeals of the State of New York and this court must accept and cannot review such finding. And upon that finding the Court of Appeals said:

"The trial court found upon undisputed evidence that, under the law of New Jersey and the practice of its Court of Chancery, jurisdiction to render a judgment for alimony and costs on the supplemental bill, enforceable in that State against the defendant, could not be acquired without service of a new subpœna in the State, or by his appearance in the action subsequent to the filing of the supplemental bill. . . . Service within the State was found to be, under the law and practice of the Court of Chancery of New Jersey, an indispensable prerequisite to the rendition of a personal judgment." *Rigney* v. *Rigney*, 127 N. Y. 408, 415.

The plaintiff duly excepted to the findings and conclusions, and it is well settled that exceptions to alleged findings of facts because unsupported by evidence present questions of law reviewable in courts of error.

The only evidence adduced by the defendant to sustain his side of the issue as to the law in the State of New Jersey was the testimony of Daniel M. Dickenson, an attorney and counsellor at law of the Supreme Court of the State of New Jersey, and who had been employed for some years as chief clerk in the chancellor's office. This witness testified that, under the law and practice of New Jersey, a supplemental bill was, as to the matter not alleged in the original bill, an independent proceeding, and that, if there were no service of the subpœna issued under the supplementary bill and no appearance, the defendant would, as to the new matter contained in the supplementary bill, not be in court; but the same witness testified that there was no statute of New Jersey in terms requiring the issuing of a subpœna on any supplemental bill, nor was

he able to specify any New Jersey statute which, in his opinion, required such process to be issued on a supplemental bill in any suit in the Court of Chancery of that State, nor could he cite any judicial decision in that State holding such process to be necessary. He also testified that "by the practice in New Jersey, if the decree contains the fact that he was served, *prima facie* he was; if it does not, why, then there is no decree binding him personally; but so long as the decree stands against him in our State, why, of course, it is a good decree." He also stated that the statute conferring jurisdiction upon the Court of Chancery is in the revision of the New Jersey laws under the head of "Chancery Acts."

The plaintiff put in evidence so much of the revision as related to the Court of Chancery, and which disclosed no provision whatever requiring a new subpœna to be issued on any supplementary bill filed in the Court of Chancery, but it does contain provisions whereby orders directing absent defendants, whether within or without the State, to respond to the bill, and, on proof of personal service of such order, the chancellor may proceed to take evidence to substantiate the bill, and to render such decree as the chancellor shall think equitable and just, and that any defendant upon whom such notice is served shall be bound by the decree in such cause as if he were served with process within the State. New Jersey Rev. Stat. 1877.

As the defendant's only expert witness testified that the rules and regulations of the Chancery Court were to be found in the statutes, it would seem at least questionable whether his opinion, upon the question as to how and when that court acquires jurisdiction over a defendant in an original or supplemental bill, was competent evidence in the case. At all events, we do not read his testimony as alleging that where the court has already acquired jurisdiction over a defendant by personal service within the State, and then, after appearance by counsel, absents himself from the State, and when a supplemental bill is filed in the suit, service on him of a new subpœna within the State is an indispensable prerequisite to the rendition of a personal decree on such supplemental bill.

And when asked directly by defendant's counsel whether such a decree would be effectual in New Jersey to bind the defendant personally, he answered, "I have never known any case decided in New Jersey upon that point."

In the absence of any statutory direction on the subject and of any reported decision of the Supreme Court of that State, we are justified in finding the law to be as declared in the very case in hand, where the chancellor of the Chancery Court of New Jersey has entered a final decree based upon an original bill, the process under which was served upon the defendant within the State, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the State. So long as this decree stands it must be deemed to express the law of the State. If the defendant deemed himself aggrieved thereby his remedy was by an appeal.

In *Cornett* v. *Williams*, 20 Wall. 226, 249, where, in a Circuit Court of the United States, an attempt was made to destroy the effect of a judgment rendered by a county court by alleging error, this court said: "The power to review and reverse the decision so made is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding directly had for that purpose. It cannot and ought not to be done by another court, in another case, where the subject is presented incidentally, and a reversal sought in such collateral proceeding. The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischiefs would ensue if the rule were otherwise. These remarks apply to the order of sale here in question. The county court had power to make it, and did make it. It is presumed to have been properly made, and the question of its

propriety was not open to examination upon the trial in the Circuit Court. These propositions are sustained by a long and unbroken line of adjudications in this court. The last one was the case of *McNitt* v. *Turner*, 16 Wall. 366."

The principle was very clearly expressed by Mr. Justice Baldwin in *Voorhees* v. *Bank of United States*, 10 Pet. 449, 474: "The line which separates error in judgment from the usurpation of power is very definite; and it is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case it is a record importing absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings, which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution."

This rule is recognized in the State of New York. In *Kinnier* v. *Kinnier*, 45 N. Y. 535, 542, it was said: "A judgment of a sister State cannot be impeached by showing irregularities in the form of proceedings or a non-compliance with some law of the State where the judgment was rendered relating thereto, or that the decision was erroneous. Jurisdiction confers power to render the judgment, and it will be regarded as valid and binding until set aside in the court in which it was rendered."

Even if, therefore, it was the *opinion* of Mr. Dickenson, the defendant's expert witness, that the chancellor of New Jersey erred in thinking that jurisdiction over the defendant personally was conferred by the service on him within the State of the subpœna under the original bill, and by the service on him, without the State, of a copy of the supplemental bill and of a rule to plead, such opinion does not support the finding of the trial court that, under the laws of the State of New Jersey, the decree sued on and offered in evidence was not binding upon the defendant personally. The opinion of the chancellor differed from that of the witness, and, what is more im-

portant, his *judgment* was that, under the laws and practice of the State of New Jersey, the defendant was in his court, subject to its jurisdiction and bound by its decree.

It is contended on behalf of the plaintiff in error that, even if the defendant could not have been personally bound by a decree based on the supplemental bill because a subpœna thereunder had not been served upon him within the State of New Jersey, yet that, as the defendant, after the entry of such a decree against him, appeared in the New Jersey court by counsel, and procured a modification of the decree, he thereby subjected himself to the decree as amended.

It is also claimed that, as he admits that he acquiesced in and ratified the decree, by accepting that portion thereof which relieved him from the contract of marriage, he cannot be heard to impeach the decree in dealing with the change thus caused in his marital relations by subjecting him to the payment of costs and alimony.

The fact that the defendant appeared and procured an amendment of the decree and its enrolment in its final form, took place after the bringing of the present suit, and, to form the basis for the contention that he thereby subjected himself to the decree as amended, such fact ought, perhaps, to have been made to appear by an amended or supplemental petition. But as the amended decree was put in evidence by the defendant himself, and was treated by the New York courts as the final decree, whose effect they were considering, we shall regard the amended decree as the real ground of the plaintiff's action.

As the appearance of the defendant was not for the purpose of objecting to the jurisdiction of the court, but was rather in the nature of an appeal to its jurisdiction, and as the objection successfully made to the decree as originally enrolled was restricted to one of its recitals, and did not attack the decree in the respect that it adjudged that he should pay the costs and alimony, there is force in the view that he thereby waived any right to further object to the decree. At all events, he could not successfully attack the decree collaterally in a court of different jurisdiction, but his remedy, if any he had, would be by way of appeal.

It is claimed by the defendant in error that to hold him personally bound by the decree for the payment of money would, in the circumstances of the present case, deprive him of his property without due process of law. This claim is based upon the assumption that the defendant had no hearing or opportunity to be heard.

As this record discloses that the defendant was served with process under the original bill, and appeared by counsel, and made answer, and was personally served with a copy of the supplemental bill and with an order to plead, and, after permitting himself to be defaulted, did appear by counsel and procured the vacation of the original decree and the enrolment of the decree amended in accordance with his own motion, it may fairly be said that he both had an opportunity to be heard and was heard. His appearance by counsel under the supplementary proceedings was not to object to the jurisdiction of the court, but to effect a change in the recitals of the decree on non-jurisdictional grounds. As before stated, we do not deem it necessary to consider the contention on behalf of the plaintiff in error that by such appearance the defendant estopped himself from alleging error in the decree when thus amended, but we think he certainly precluded himself from now contending that he has been deprived of his property within the meaning of the Federal Constitution.

As, then, the evidence of the defendant did not avail to show want of jurisdiction on the part of the Chancery Court of New Jersey to render the decree in question, and as it was admitted that the decree remained wholly unpaid, the plaintiff below was entitled to judgment.

The judgment of the Supreme Court is hereby reversed, and the case is remanded to the Supreme Court for further proceedings not inconsistent with the opinion of this court.

JOHNSON *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 325. Argued November 14, 1895. — Decided January 13, 1896.

The act of March 3, 1891, c. 538, concerning Indian depredations, confers, by § 1, clause 1, no jurisdiction upon the Court of Claims to adjudicate upon such a claim, made by a person who was not a citizen of the United States at the time when the injury was suffered, although he subsequently became so; nor by § 1, clause 2, unless the claim was one which, on March 3, 1885, had either been examined and allowed by the Department of the Interior, or was pending therein for examination.

On March 3, 1891, Congress passed an act, 26 Stat. 851, c. 538, vesting certain jurisdiction in the Court of Claims, the material portion of which is found in the first section, and reads as follows:

"That in addition to the jurisdiction, which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely:

"First. All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for.

"Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

The act of March 3, 1885, c. 341, referred to in this second clause, is found in 23 Stat. 362 and following, and the clause providing for examination is on page 376, and is as follows:

"For the investigation of certain Indian depredation claims, ten thousand dollars; and in expending said sum the Secretary of the Interior shall cause a complete list of all claims heretofore filed in the Interior Department and which have been approved in whole or in part and now remain unpaid, and also all such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed, chargeable against any tribe of Indians by reason of any treaty between such tribe and the United States, including the name and address of the claimants, the date of the alleged depredations, by what tribe committed, the date of examination and approval, with a reference to the date and clause of the treaty creating the obligation for payment, to be made and presented to Congress at its next regular session; and the Secretary is authorized and empowered, before making such report, to cause such additional investigation to be made and such further testimony to be taken as he may deem necessary to enable him to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid, and by what tribe such depredations were committed; and his report shall include his determination upon each claim, together with the names and residences of witnesses and the testimony of each, and also what funds are now existing or to be derived by reason of treaty or other obligation out of which the same should be paid."

The subsequent acts (May 15, 1886, c. 333, 24 Stat. 29, 44; March 2, 1887, c. 320, 24 Stat. 449, 464; June 29, 1888, c. 503, 25 Stat. 217, 234; March 2, 1889, c. 412, 25 Stat. 980, 998; August 19, 1890, 26 Stat. 336, 356) simply make additional appropriations for the examination of the same claims.

On June 20, 1891, claimant filed his petition in the Court of Claims to recover for property taken from him on June 10, 1866, by the Ute Indians. Subsequently, and on November 17, 1893, he filed an amended petition, containing these allegations:

"Your petitioner, Benjamin H. Johnson, a resident of Scipio, Millard County, in the Territory of Utah, and a citizen of the United States, respectfully shows:

"That he was not a citizen of the United States on or about the 10th day of June, 1866, the date of the loss hereinafter described, not having taken out his final citizenship papers until 1873.

"That he moved to the United States in 1848, when he was 13 years old, and has resided here ever since, and was a citizen of the United States at the date of the passage of the Indian depredation law of March 3, 1891. 26 Statutes, chapter 538, p. 851.

"That it is admitted in allowing claims for Indian depredations under the act of March 3, 1885, chapter 341, (1 Sup. R. S. 2d ed. p. 913, note,) it has been the practice of the Interior Department to interpret the words 'citizens of the United States,' therein used, as meaning only those who were citizens or had declared their intention to become citizens at the time the depredations were committed, and such citizenship was found when neither alleged nor testified to where the contrary did not appear.

* * * * *

"That this claim was never presented to the Commissioner of Indian Affairs nor to Congress, nor any agent nor department of the government."

Whereupon the defendants moved to dismiss on the ground that "the claimant was not a citizen of the United States at the time of the depredation alleged to have been committed," which motion was sustained, and on December 4, 1893, a judgment entered dismissing the case for want of jurisdiction. 29 C. Cl. 1.

Mr. John Wharton Clark for appellant.

Mr. Assistant Attorney General Howry for appellees.

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

Opinion of the Court.

The principal question turns on the matter of citizenship. Claimant was a citizen at the time of the passage of the act of 1891, but not when the wrongs complained of were committed. Had the Court of Claims jurisdiction?

That court has no general jurisdiction over claims against the United States. It can take cognizance of only those matters which by the terms of some act of Congress are committed to it. *Schillinger* v. *United States*, 155 U. S. 163.

Congress did not by the act of 1891 assume in behalf of the United States responsibility for all acts of depredation by Indians, nor grant to the Court of Claims authority "to inquire into and finally adjudicate" all claims therefor. It carefully specified those which might be considered by that court.

By the first clause jurisdiction is given of "claims for property of citizens of the United States taken or destroyed." But claimant has no such claim. It is for property of an alien, taken and destroyed. True, he is now a citizen, and was at the time of the passage of the act. But the language is not "claims of citizens for property," which might include his case. The definition is of the character of the claim and not of the status of the claimant; if the property was not when taken or destroyed the property of a citizen, a claim therefor was at that time clearly outside the statute; and while the status of the claimant may have changed, the nature of the claim has not. Suppose the property taken or destroyed had at the time belonged to a citizen, and an alien had succeeded by inheritance to the right to recover compensation for its loss or destruction, is it not clear that such alien would have a claim within the very terms of the act for property of a citizen taken and destroyed, and upon what construction of its language could the court have refused to take jurisdiction.

Further, the property must have been taken or destroyed by Indians "in amity with the United States." Clearly that refers to the status of the Indians at the time of the depredation. Any other construction would lead to manifest absurdities. The certainty of this date renders equally certain the date at which citizenship must exist in the owner of the property taken or destroyed.

Much was said in argument and many authorities are cited in the briefs in respect to the difference between retrospective and prospective statutes, but we fail to see the pertinency of this discussion. Obviously the act is prospective in its operation, in that it grants to the Court of Claims a jurisdiction it did not theretofore possess, and authorizes it in the future to hear and determine certain claims. But as to the claims thus committed to its consideration the statute is expressly retrospective. The last proviso in section 2 reads: "*And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof." The only question for determination in this case is whether the claim presented is within either of the classes of past wrongs which are submitted by the act to the jurisdiction of the court. And, for the reasons given, we are clear that it does not come within the first clause defining such jurisdiction.

Is it within the second clause? By that, jurisdiction is extended to "cases which have been examined and allowed by the Interior Department, and also to such cases as were authorized to be examined under the act of Congress" of March 3, 1885, and subsequent acts. As the claimant alleges in his petition that his claim was never presented to the Commissioner of Indian Affairs, nor to Congress, nor any agent, nor department of the government, it was not a case which had been examined or allowed by the Interior Department, and does not come under the first of the two classes named. We turn, therefore, to the act of March 3, 1885, to see what cases were authorized to be examined under it.

It appropriates ten thousand dollars for the investigation of certain Indian depredation claims, and in describing them it mentions such claims as had been theretofore filed in the Interior Department and approved in whole or in part, and adds "also all such claims as are pending but not yet examined, on behalf of citizens of the United States on account of depredations committed." In order to come within the second class, the claim must be one on behalf of a citizen of the United States, and also one pending but not yet examined.

If it be assumed that claimant was on March 3, 1885, a citizen, as may be inferred from the language of the petition, although not explicitly averred, the question arises whether the different phraseology of that act would include a claim in his favor, although he was not a citizen at the time of the depredation. But passing that question, the claim must be one then "pending but not yet examined," and this language, taken in connection with the words descriptive of the prior class, manifestly refers to such claims as had been presented for examination, and so, in a technical sense of the term, were pending, and does not embrace all cases of depredations, whether claims therefor had been presented or not.

We are aware of the fact that the Interior Department, acting under an opinion of its chief law clerk, of August 23, 1886, has construed the authority given by the second clause of this act to reach to all claims existing and not barred, whether at the date of the act on file or not in the Interior Department. We quote from that opinion, approved by the Assistant Secretary, as follows:

"I am of the opinion, however, that all claims that were not barred March 3, 1885, are included within the claims to be investigated, although filed after the passage of either the act of 1885 or 1886, because the act of May 29, 1872, and the rules and regulations made in pursuance thereof, require the Secretary of the Interior to investigate such claims and make report thereof to Congress in the same manner as provided for by the act of March 3, 1885. This act and the rules and regulations adopted by the Secretary, as provided for by said act, are not repugnant to any provision of section 2156, but provide for the enforcement and execution of that section. As no statutory bar attaches to any claim for depredations committed since the adoption of the Revised Statutes, such claims may be filed at any time."

We are unable to concur in the views thus expressed. Without stopping to inquire whether § 2156, Rev. Stat., may or may not be repealed by this act of March 3, 1885, and conceding for the purposes of this case that such section remains in full force and effect, we are of the opinion that the act of

March 3, 1885, is special and limited in its scope. It purports to be limited, for it is for the investigation of "certain Indian depredation claims." Not only is it by these words restricted, but the meagreness of the appropriation, $10,000, indicates the narrowness of the investigation intended, and the limited number of claims which were designed to be examined. The claims to be reported are defined. First, those which "have been approved." This necessarily limits, so far as this portion of the section is concerned, the report to those claims presented, considered, and acted upon by the Interior Department. It refers to what has been and not to what may be. It defines and includes not claims which might thereafter be presented and investigated, but those which at the date of the act had been finally passed upon and determined by the Interior Department. There is no possibility of construction which would open this clause to include any claims other than those already considered and determined by the department. The other clause of the section describes "such claims as are pending, but not yet examined." That either means such claims as have been already presented and are before the department for consideration, or it includes all unallowed claims then existing and not barred. If the latter was the thought of Congress in this enactment, there was no need of a division into classes, for the one description of claims existing would include all, both those allowed and those not yet examined and allowed; those filed and those not filed. The obvious intent was not to reach all Indian claims, but to call from the Interior Department a statement of the claims then before the department, and upon such presentation to determine its future action. And the purpose of the second clause in the act of March 3, 1891, was to take the cases which on March 3, 1885, were pending in the department and transfer them in bulk to the Court of Claims.

It follows, therefore, that this claim having never been filed in the department, does not come within the category of claims provided for in the second clause of the act conferring jurisdiction upon the court.

It was further insisted in the argument that the claimant

had taken out his first papers at the time of the depredation, and therefore that when he took out his final papers citizenship related back, and he was entitled, for all the benefits of this act, to claim the privileges of citizenship from the date of his first papers. But there is nothing in his petition to show when he took them out, and therefore the contention, if it had any foundation in law, has none in fact. It is true, mention is made in the opinion of the Court of Claims of the time of taking out his first papers, but we cannot act upon any such statement, but must be governed by the averments of the petition.

We see nothing else in the record which requires comment. The judgment of the Court of Claims was correct, and it is

Affirmed.

CARVER *v.* UNITED STATES.

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

No. 721. Submitted November 20, 1895. — Decided January 13, 1896.

The plaintiff in error was indicted, tried, and convicted of murder by shooting. Among the evidence for the prosecution, admitted under objections and excepted to, were: (1) A declaration in writing by the murdered person, made after the shooting, and, as claimed, under a sense of impending death. This was offered in chief. (2) The statement of a witness, offered in rebuttal, that, on a later day and before her death the murdered person said that her former statement was true. *Held,*

(1) That it was satisfactorily established that the written statement of the victim was made under the impression of almost immediate dissolution, and that it was therefore properly admitted;

(2) That, as it did not appear whether at the time when the later statement was made she spoke under the admonition of her approaching end, or anticipated recovery, it was improperly admitted;

(3) That the evidence so offered in rebuttal was not legitimate rebutting testimony.

Frank Carver was convicted of the murder of Anna Maledon in the Circuit Court of the United States for the Western

District of Arkansas, and sentenced to be hanged, whereupon he sued out this writ of error.

The fatal wound was inflicted by the discharge of a pistol on the night of March 25, 1895, at Muscogee, Creek Nation, in the Indian country, but the death occurred at Fort Smith, Arkansas, May 19, 1895.

In addition to other evidence, there was testimony tending to show that Carver and the deceased were attached to each other; that he was very drunk on the night of the homicide, and that he was in the habit of carrying a pistol, which he was flourishing at that time. A declaration in writing in respect of the circumstances attendant upon the commission of the act, made by the deceased March 27, 1895, was admitted in evidence against objection as made under a sense of impending death.

The testimony of the clerk of the court, Wheeler, to the effect that the deceased, after she was brought to Fort Smith, which was April 14, 1895, said that her former statement was true, was admitted subject to an exception because no proper foundation was laid for its admission.

Exceptions were also taken to certain parts of the charge.

Mr. William M. Cravens for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

While in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution, we think that the evidence of the state of mind of Anna Maledon, in that particular, when the declaration of March 27, 1895, was made, and which we need not recapitulate, was sufficient to justify the Circuit Court in admitting

it. *Mattox* v. *United States*, 146 U. S. 140, 151. But the testimony of Wheeler stands on different ground and we are of opinion should not have been admitted.

In answer to leading questions, the witness said that he saw Anna Maledon after she was brought to Fort Smith; that he asked her whether the declaration of March 27, 1895, was true; and that she replied "it was, in every particular."

The deceased received the fatal wound March 25, and her statement of March 27, 1895, was admitted as a dying declaration. The interview with Wheeler was on or after April 14, 1895, and whether she then spoke under the admonition of her approaching end or anticipated recovery does not appear.

It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, *Reg.* v. *Steele*, 12 Cox C. C. 168, or if made when the person is without hope, though afterwards he regains confidence. *State* v. *Tilghman*, 11 Ired. Law, 513; *Swisher* v. *Commonwealth*, 26 Grattan, 963; 1 Greenl. Ev. (15th ed.) § 158, note *a*. But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained. Nor can we perceive that this is otherwise, because the record states that Wheeler was sworn "in rebuttal." Rebutting evidence is evidence in denial of some affirmative case or fact which defendant has attempted to prove. Our attention has been called to no attempt on behalf of defendant below to prove that Anna Maledon made on her deathbed, after her declaration of March 27, any retraction thereof, or any statement inconsistent with it, if evidence to that effect would have justified the introduction of this testimony as tending to rebut it.

It is true that counsel for plaintiff in error rested their objection on the ground that no foundation for the admission of the testimony was laid. But while the omission to challenge the evidence as not properly in rebuttal may have waived the mere order of proof, this did not concede that the want of foundation could be excused for any reason. The contention was that the foundation must be laid, and that covered suf-

ficiently every suggestion that the evidence was admissible without it. And as this was not legitimate rebutting testimony, it could not be admitted without the proper foundation although the order of proof was waived.

As we understand the record, a sharp controversy was raised over what deceased had said at the time of the homicide, and the evidence of Wheeler may have had so important a bearing that its admission must be regarded as prejudicial error.

Whether the homicide was committed under such circumstances as to reduce the grade of the crime from murder to manslaughter, or as to permit an acquittal on the ground of misadventure, were questions raised in the case on behalf of plaintiff in error; and it is urged that the exception should be sustained to the statement in the charge that "if a man does not exercise the highest possible care that he can exercise under the circumstances, when handling firearms, his act passes out of that classification known as an accident." But we do not feel called upon to consider this question or any of the other errors assigned, as they may not arise on a new trial in the form in which they are now presented.

Judgment reversed, and cause remanded with a direction to set aside the verdict and grant a new trial.

MISSOURI PACIFIC RAILWAY COMPANY *v.* FITZGERALD.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 627. Submitted December 9, 1895. — Decided January 13, 1896.

The decision of the Supreme Court of Nebraska that the Missouri Pacific company could not maintain its claim for damages because its possession had not been disturbed or its title questioned, involved no Federal question; and where a decision of a state court thus rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court, without considering any Federal question that may also have been presented.

Statement of the Case.

In deciding adversely to the claim of the plaintiff in error that by reason of the process of garnishment in attachment against the Missouri Pacific company, in the action removed to the Circuit Court from the state court, the Circuit Court acquired exclusive jurisdiction over the moneys due the Construction company from the Pacific company, the Supreme Court of Nebraska did not so pass upon a Federal question as to furnish ground for the interposition of this court.

In appointing a receiver of the Construction company to collect the amount of the decree against the Missouri Pacific company, the Supreme Court of Nebraska denied no Federal right of the Missouri Pacific company.

When a party to an action in a state court moves there for its removal to the Circuit Court of the United States, and the motion is denied, and the party nevertheless files the record in the Circuit Court, and the Circuit Court proceeds to final hearing, (the state court meanwhile suspending all action,) and remands the case to the state court, the order refusing the removal worked no prejudice, and the error, in that regard, if any, was immaterial.

An order of the Circuit Court remanding a cause cannot be reviewed in this court by any direct proceeding for that purpose.

If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment under Rev. Stat. § 709.

If a case be removed to the Circuit Court and a motion to remand be made and denied, then after final judgment the action of the Circuit Court in refusing to remand may be reviewed here on error or appeal.

If the Circuit Court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode.

If the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment.

A state court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the state court, which has denied its possession.

This was a petition filed December 24, 1888, in the District Court for Lancaster County, Nebraska, by John Fitzgerald, suing on behalf of himself and all other stockholders of the Fitzgerald and Mallory Construction Company against that company and the Missouri Pacific Railway Company, a corporation organized under the laws of Missouri, Kansas, and Nebraska. The petition was based on two contracts, (copies of which were annexed,) one bearing date April 28, 1886, between the Fitzgerald and Mallory Construction Company and the Denver, Memphis and Atlantic Railway Company, a corpora-

tion organized under the laws of the State of Kansas. By this contract the Construction company agreed to build a railroad in Kansas from the east to the west line of that State; to furnish all materials and money; to equip the same with at least one thousand dollars of rolling stock per mile; to grade the line according to the engineer's surveys; to furnish oak ties on curves not less than 2600 to the mile, and steel rails not less than twenty-six pounds to the yard; to build such depot and stations as the Denver company should require, and all necessary sidings or turnouts, and, generally, to construct the road equal to railroads then being built in Southern Kansas. The Denver company agreed to pay $16,000 per mile of its full paid capital stock for every mile of completed road constructed, and $16,000 in its first mortgage bonds per mile of single track of the road, which bonds were each to be for one thousand dollars, or such other denomination as the parties should agree upon; draw interest at six per cent; be dated July 1, 1886; run thirty years from date; and be secured by a trust deed on the line and branches. They were to be delivered as the Construction company required them. The Denver company was also to deliver to the Construction company all municipal and county bonds voted and to be voted in aid of the railroad, and all donations thereto, and procure the right of way in advance of the work, so as not to delay the construction, but the Construction company was to pay for the right of way.

The other contract, dated May 4, 1886, was between the Missouri Pacific Railway Company and the Construction company. It recited the contract of April 28, and also that the Missouri Pacific company desired to obtain control of the railway. The Construction company agreed to sell to the Missouri Pacific company all the securities which it should receive under the first contract, for which the Missouri Pacific company was to deliver to it five per cent bonds at the rate of $12,000 per mile of completed road. The Missouri Pacific company also agreed to transport at cost the men and material of the Construction company while it was carrying on the work.

The petition alleged that the Construction company was a

corporation of Iowa, having a capital of a million and a half, divided into shares of one hundred dollars each, of which Fitzgerald held fifteen hundred, S. H. Mallory fifteen hundred, and Gould and other citizens of New York something over ten thousand; that the holders of over eight thousand shares were officers and directors of the Missouri Pacific company; and that the bankers of the latter company held two thousand shares. It was further alleged that shortly after the execution of the two contracts, all the directors of the Denver company, except Fitzgerald and Mallory, resigned, and their places were filled by officers and directors of the Missouri Pacific company; that the directory of the Construction company was changed so that of its five directors three were connected with the Missouri Pacific company, Fitzgerald and Mallory being the other two. The work in the field was carried on by Fitzgerald and Mallory, and the financial dealings of the Denver and the Construction companies were in the hands of the New York directors. Fitzgerald complained of many transactions of the New York directors of the Construction company which were prejudicial to himself and other creditors and stockholders and in the interest of the Missouri Pacific company.

The road was built by the Construction company, and Fitzgerald alleged that, after that was accomplished, he made efforts to secure an accounting between the Missouri Pacific and the Construction companies, which were unsuccessful, and he brought the suit as a stockholder for the purpose of settling the dealings between the two companies.

The petition also averred that the Denver company failed to comply with the provisions of the contract in reference to procuring the right of way to the damage of the Construction company, for which it charged that the Missouri Pacific company was liable.

It was also alleged that the Construction company not only owed Fitzgerald individually a large amount of money, but for money expended in the bringing of this as well as other suits, for attorneys' fees, and other like matters, for which he asked reimbursement.

The prayer of the petition was that an accounting be had between the Missouri Pacific company and the Construction company; that certain action of the board of directors and arrangements between the Missouri Pacific company and the Construction company be declared null and void; that the Missouri Pacific company be compelled to account in relation to certain enumerated matters and generally, and pay over all moneys found due to the Construction company; also that complainant "be reimbursed for all expenses and attorneys' fees in other suits that he has been forced by the action of said directors to commence, as well as in this case;" and for general relief.

The answer of the Missouri Pacific company was filed January 19, 1889, and admitted that defendant was a corporation duly organized under the laws of Missouri, Kansas, and Nebraska; but averred that the liability proceeded on, if any, was a liability of the company incorporated under the laws of the State of Kansas. It charged that while the contract between the Denver and Construction companies required the Denver company to acquire the right of way, the Construction company undertook to procure it, and became responsible to the Missouri Pacific company for a good title; that some fifteen or more miles of the railroad were built over the public lands without complying with the act of Congress of March 3, 1875, granting to railroads the right of way through the public lands, so that for that distance of road the Missouri Pacific company did not acquire such title as it was entitled to, and it claimed that if there should be an accounting between the Construction company and itself, it should not be required to pay or account for any portion of the line where the lawful right of way had not been secured, and that a deduction of twelve thousand dollars per mile of railroad so situated should be made. The answer further alleged that Fitzgerald had theretofore commenced suit in the District Court of Lancaster County, Nebraska, against the Construction company to recover a sum exceeding fifty thousand dollars and caused garnishee proceedings to be instituted against the Missouri Pacific company, upon which it was required to an-

swer as to all moneys in its hands or under its control belonging to the Construction company or due from the Missouri Pacific company thereto, but that it had no interest in Fitzgerald's individual claim or knowledge concerning the merits thereof. Various other admissions, denials, and averments were made in the answer upon the merits, which it is unnecessary to set forth. The Construction company filed a demurrer to the petition.

On the same day, January 19, 1889, the Missouri Pacific company filed its petition to remove the cause to the Circuit Court of the United States for the District of Nebraska on two grounds, diverse citizenship and the question raised by the claim of the Missouri Pacific company in respect of part of the road constructed over the public lands. It appeared from the pleadings that Fitzgerald was a citizen of Nebraska, and that the Construction company was a corporation of Iowa; that the Missouri Pacific company was a corporation organized under the laws of Kansas, Missouri, and Nebraska; but in its answer, as already stated, the Missouri Pacific company claimed that it was not the corporation referred to in the petition, and that the liabilities arising under the contract were liabilities of the company organized and existing under the laws of Kansas. The Construction company also filed a petition for removal.

The District Court denied the petitions and refused to accept the bonds. The Missouri Pacific company, however, filed the record in the Circuit Court of the United States and Fitzgerald filed a motion to remand and a plea to the jurisdiction, which motion was denied and the plea overruled, and the cause was referred to a special master to take proofs.

May 6, 1891, the cause came on to be heard upon the pleadings, proofs, and the report of the master, and the Circuit Court held that the cause had been improperly removed from the state court, and ordered it remanded at the costs of the Missouri Pacific company. The reasons for this conclusion are given in an opinion reported 45 Fed. Rep. 812. The cause having been returned to the District Court of the State, the parties entered into a stipulation that the action be con-

tinued to the next September term then to be tried, and that the depositions taken in the Circuit Court might be read as if taken in the state court. An amended petition and an amended and supplemental answer were filed. Trial was had as agreed in the District Court of Lancaster County, which made a finding of facts, and rendered judgment against the Missouri Pacific company.

The forty-seventh finding of fact was as follows: "(47) That about fifteen miles of railroad was laid out over government land; that no maps were filed with the Secretary of the Interior showing the lines of way over said government land in the State of Kansas, but maps were filed with the local land officers of the United States at Wa Keeney, Kansas, duly certified to, showing said right of way."

Both parties appealed to the Supreme Court of the State, and that court rendered a judgment against the Missouri Pacific company. 41 Nebraska, 374. The Missouri Pacific company made application for a rehearing, pending which Fitzgerald died, and Mary Fitzgerald, as his administratrix, filed her petition for revivor and for a receiver of the Construction company to collect the judgment. In support of the application for a receiver, it was alleged that about the time Fitzgerald recovered judgment, the Missouri Pacific company caused a suit to be brought against the Construction company in the name of the Kansas and Colorado Pacific Railway Company, which was owned by the Missouri Pacific company, and it was charged on various grounds that the action was collusive and contrived to deprive the Supreme Court of the State of its jurisdiction, and Fitzgerald of the fruits of its judgment, and that a receiver had been procured to be appointed by the Circuit Court in that action in furtherance of that object.

The Missouri Pacific company filed an answer and plea to this petition, denying collusion and urging objections to the application for a receiver in this case, which, so far as necessary, are hereafter stated. A reply was filed by Mrs. Fitzgerald to this answer and plea. The Supreme Court, having granted a rehearing, entered an order of revivor, rendered judgment

against the Missouri Pacific company, and appointed a receiver. 62 N. W. Rep. 899. The pending writ of error was then sued out, and a motion to dismiss the writ for want of jurisdiction or to affirm the judgment was made.

The following are the errors assigned:

"1. The court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause forasmuch as it appeared by the record that the defendant, the Missouri Pacific Railway Company, duly and seasonably and as within the time provided by the act of Congress, filed and presented its petition and bond for removal of said cause to the United States Circuit Court for the proper district, to wit, the United States Circuit Court for the District of Nebraska, on the ground that in said suit there was a controversy wholly between citizens of different States, removable under said act to said United States Circuit Court for the District of Nebraska, which said bond was refused, and which said petition was denied, the defendant at the time duly excepting to such refusal and denial.

"2. The said court erred in taking or assuming any jurisdiction and in holding that it had any jurisdiction of this cause, forasmuch as in and by its said petition for removal of this cause to the United States Circuit Court for the District of Nebraska, the said Missouri Pacific Railway Company set up and claimed a right, claim, privilege, immunity and authority under an act of Congress approved March 3, 1875, entitled 'An act granting the railroads the right of way through public lands of the United States,' and by reason of said act of Congress claimed that said cause arose under the laws of the United States, which said claim and petition of said defendant were erroneously overruled by said District Court of Lancaster County, Nebraska, and by said Supreme Court of Nebraska.

"3. The said Supreme Court of the State of Nebraska erred in taking or assuming jurisdiction or in holding that it had jurisdiction of this cause, forasmuch as it appeared by the record in said cause that the defendant, the Missouri Pacific Railway Company, was, at the time when said cause was com-

menced, a citizen, resident, and inhabitant, of the State of Missouri, within the meaning of the acts of Congress of the United States relating to the jurisdiction of the Federal courts, and the plaintiff, John Fitzgerald, was a citizen, resident, and inhabitant, of the State of Nebraska, but his said action was to enforce a cause of action as a stockholder of and for the benefit of the defendant, the Fitzgerald and Mallory Construction Company, which was at said time a citizen, resident, and inhabitant, of the State of Iowa, within the meaning of said acts of Congress, and the controversy was therefore a controversy between citizens of different States within the meaning of the said acts of Congress relating to removal of causes. It further appeared from the record that the matter in dispute in said cause exceeded, exclusive of interest and costs, the sum or value of $2000.00. It further appeared from the record that the defendant, the Missouri Pacific Railway Company, upon the grounds aforesaid, including the ground of such diversity of citizenship and jurisdictional amount, duly and seasonably made and filed its petition in this cause in said court, to wit, the District Court of Lancaster County, Nebraska, at the time, or at a time before the said defendant was required by the laws of said State of Nebraska or by the rule of said state court in which such suit was brought, to answer or plead to the declaration or complaint or petition of the plaintiff, for the removal of such suit into the said Circuit Court of the United States to be held in the district where such suit was pending, to wit, the Circuit Court of the United States in and for the District of Nebraska, and said defendant made and filed therewith, to wit, with its said petition, a bond with good and sufficient surety for its entering in such Circuit Court on the first day of its then next session a copy of the record in said suit and for paying all costs that might be awarded by the said Circuit Court if said Circuit Court should hold that such suit was wrongfully and improperly removed thereto, which said petition was erroneously denied and which said bond was erroneously refused by said state court, to which denial and refusal the said Missouri Pacific Railway Company then and there duly excepted.

"4. The said Supreme Court of the State of Nebraska erred in taking or assuming or in undertaking to exercise jurisdiction of this cause and of the parties thereto by reason of the proceedings for the removal thereof hereinbefore recited, and in denying the right and authority so set up and undertaken to be exercised by the said defendant, the Missouri Pacific Railway Company, under the statute and laws of the United States relating to the removal of causes of civil nature from the state to the Federal courts.

"5. The said Supreme Court of the State of Nebraska erred in taking or assuming to exercise jurisdiction in this cause and to hear and determine the same and to pronounce final judgment therein forasmuch as it was made to appear to said court, and did appear, by the record in this cause, that the Circuit Court of the United States, in and for the District of Nebraska, had duly taken and undertaken to exercise jurisdiction of said cause and of the parties thereto and had by due judgment and order overruled and denied application of the plaintiff herein to remand said cause to said state court, to wit, the District Court of Lancaster County, Nebraska, and had by due order and judgment overruled a plea in abatement interposed by the said plaintiff to the jurisdiction of the said Federal court, all of which orders and judgments of said Federal court then remained in full force and effect, unappealed from and unreversed.

"6. The Supreme Court of the State of Nebraska erred in denying and overruling the plea in abatement to its jurisdiction interposed by the said defendant, the Missouri Pacific Railway Company, in answer and reply to the petition of Mary Fitzgerald, administratrix, to revive this action and cause in her name, as the successor of John Fitzgerald, the original plaintiff, then deceased.

"7. The said Supreme Court of the State of Nebraska erred in denying the claim set up and claimed by the said defendant, the Missouri Pacific Railway Company, to immunity from any recovery for or in respect of seventeen miles of railroad constructed over the public domain by the said Fitzgerald and Mallory Construction Company in the name of the Denver,

Memphis and Atlantic Railway Company, without compliance with an act of Congress of the United States, approved March 3, 1875, entitled 'An act granting to railroads the right of way through lands of the United States,' specifically referred to and set forth in the answer of the said defendant, the Missouri Pacific Railway Company, in this cause.

"8. Said Supreme Court of Nebraska erred in denying and overruling the plea in abatement of the defendant, the Missouri Pacific Railway Company, to the jurisdiction of said court wherein and whereby it appeared that on the 24th day of December, 1888, John Fitzgerald, the original plaintiff herein, instituted an action in his own name against the Fitzgerald and Mallory Construction Company to recover from said company an amount alleged to be due from said company, and thereby by due proceedings caused an attachment to issue and garnishment notice to be served upon the Missouri Pacific Railway Company charging it as garnishee, and thereby placing whatever fund or moneys might be due from it to said Construction company in the custody of the law, and whereby it further appeared that by due proceedings had, said action so instituted by said John Fitzgerald was in due time properly removed from the District Court of Lancaster County, Nebraska, in which it was instituted, to the Circuit Court of the United States in and for the District of Nebraska, and under and by virtue of section 4 of the removal act of Congress, March 3, 1875, the said attachment and garnishment proceedings were wholly removed into said Circuit Court of the United States, and said court then and there, by virtue thereof, acquired exclusive jurisdiction of said fund and moneys due from said Missouri Pacific Railway Company to said Fitzgerald and Mallory Construction Company and of any controversy between said companies with respect to such fund.

"9. The said Supreme Court of Nebraska erred in holding and deciding that under and by virtue of said removal act of Congress the said fund so garnished in the hands of the Missouri Pacific Railway Company was not placed in the custody and under the exclusive control of said Circuit Court of the

Names of Counsel.

United States by reason of said removal of said action of John Fitzgerald against the Fitzgerald and Mallory Construction Company.

"10. The Supreme Court of the State of Nebraska erred in appointing a receiver of the Fitzgerald and Mallory Construction Company, and in investing or undertaking to invest the said receiver with any cause of action against the defendant, the Missouri Pacific Railway Company, forasmuch as it was made to appear, and did appear by the record in said court in said cause that in a certain cause entitled 'The Kansas, Colorado and Pacific Railroad Company against The Fitzgerald and Mallory Construction Company,' theretofore and then pending in the Circuit Court of the United States, in and for the District of Nebraska, by due proceedings had in the said Circuit Court, had appointed a receiver of said Fitzgerald and Mallory Construction Company, and of all of the property and assets thereof, and said receivership so appointed by said Circuit Court of the United States for the District of Nebraska had not been terminated and vacated, and said receivership had not been discharged.

"11. The Supreme Court of Nebraska erred in allowing as a charge against the Missouri Pacific Railway Company in favor of said Fitzgerald and Mallory Construction Company various items of alleged indebtedness of the Denver, Memphis and Atlantic Railway Company to the said Fitzgerald and Mallory Construction Company.

"12. The Supreme Court of Nebraska erred in refusing to allow as proper charges against the Fitzgerald and Mallory Construction Company the several items of indebtedness of said Construction company to the Missouri Pacific Railway Company.

"13. The Supreme Court of the State of Nebraska erred in holding that it had any jurisdiction to render and in rendering any judgment whatever against the defendant, the Missouri Pacific Railway Company, in this cause."

Mr. J. M. Woolworth, *Mr. J. W. Deweese*, and *Mr. F. M. Hall* for the motion to dismiss.

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Mr. John F. Dillon, *Mr. Winslow S. Pierce*, and *Mr. B. P. Waggener*, opposing.

I. The order of the Circuit Court, overruling the plaintiff's motion to remand, and the judgment on the issue joined by the plea in abatement to the jurisdiction, disposed of the question of Federal jurisdiction, so far as that court was concerned, and established and determined that the Circuit Court did have jurisdiction of the cause. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 136 U. S. 356, 371.

In this case the Circuit Court overruled and denied the plea to the jurisdiction, and entered the following order and judgment: "This cause having been heard on the motion of the complainant to remand the same to the state district court in and for Lancaster County, from whence it came, and upon the plea to the jurisdiction of this court filed by said complainant, and the court, after careful consideration thereof, and being fully advised in the premises, doth now on this day order, adjudge, and decree that said motion to remand and plea to the jurisdiction of this court be, and the same are hereby, overruled."

This order, judgment, and decree was made July 23, 1890, at the May term, 1890, of the Circuit Court. No exception was taken or preserved. It was not vacated or modified at that term of court. It is conceded that no appeal or writ of error was taken from that judgment and decree of the court. The Federal court having thus overruled the motion to remand, and having denied the plea to the jurisdiction, could not, at a subsequent term of that court, reverse, vacate, or modify such order or judgment. *Dowell* v. *Applegate*, 152 U. S. 327, 340; *Des Moines Navigation Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 559.

Fitzgerald, having invoked the jurisdiction of the Circuit Court by his plea to its jurisdiction, to determine the question so raised, is bound by the adverse decision of the court on the issue so made by him, and the judgment is final, until reversed on appeal or by writ of error. *Gould* v. *Evansville & Crawfordsville Railroad*, 91 U. S. 526.

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While it is true that the act of March 3, 1875, c. 137, 18 Stat. 470, provides, if in any suit commenced in one of such courts, "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removal thereof, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein," etc., yet we submit that when the question whether the suit has been properly removed or not is formally presented by motion and plea to the Circuit Court, its judgment on that question is conclusive in that case until reversed or modified by appeal or writ of error.

If the complainant had not filed a motion to remand, and had not presented a plea to the jurisdiction, then the act of March 3, 1875, could have been invoked to justify the action of the court in remanding the case at any time during the progress of the trial, whenever it was made to appear that the court, for any reason, did not have jurisdiction. The purpose of that act was to give the court authority to decide for itself whether or not it had jurisdiction, irrespective of what might be the wish of the parties litigant. The complainant, however, by this motion to remand, challenged the sufficiency of the petition for removal, and that was decided adversely to him. By his plea to the jurisdiction he put in issue the allegation of fact contained in the petition for removal, that the suit was brought against the defendant company on a liability which was created solely by the Kansas corporation, and that the Kansas corporation was the company which was in fact proceeded against, and not the Nebraska corporation. This was an issue of fact, and the issues so made by the plea to the jurisdiction were submitted to the court on the entire record, and the court by overruling and denying that plea found the issues against the complainant. That conclusion of the court, as stated by Mr. Justice Harlan in *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 554, "constituted

an adjudication by the Federal court that the facts existed which were necessary to give jurisdiction." In that case Mr. Justice Harlan further said: "When the Circuit Court assumes jurisdiction of the cause, the party denying its authority to do so may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose." *Railroad Co.* v. *Kuntz*, 104 U. S. 515.

How, in view of the record in this case, is it possible for the party making this motion to claim that no Federal question was made or arises on this record? We submit, therefore, that the state court never had jurisdiction to hear, try, and determine any of the matters in controversy; that the case has at all times since the decision of the Circuit Court on the question of jurisdiction been pending in the Circuit Court, and that all action taken by the state court has been without jurisdiction and without any authority in the premises whatever.

II. The state court should have removed the case into the Circuit Court on the original petition for removal made by the Missouri Pacific Railway Company.

As the subject-matter of controversy in this action was the building of the railroad in the State of Kansas, as to which the original Missouri company had no power, the petition for removal rightfully treated the Missouri Pacific as to this particular controversy as a citizen of Kansas.

And we here enter our protest against the practice of moving to dismiss or affirm a cause, as being too clear to justify oral argument in due and regular course, when upon full consideration and argument it has been decided by Justice Miller and Judge Dundy in one way, and by Judge Caldwell in another. The mere statement that such judges had differed is itself sufficient to entitle the parties to be heard at the bar of this court, and to relieve the court from the necessity of going through the voluminous record and arguments which are made on this motion to dismiss and affirm.

III. The Supreme Court of Nebraska had no jurisdiction to render any judgment against the Missouri Pacific Railway

Company, and all of its proceedings were *coram non judice* because of the petition for removal filed by the defendant Construction company.

IV. Other considerations establish the Federal jurisdiction over the cause.

One of the claims made by the petition of the complainant was for an accounting between the railway company and the Construction company. This action was to enforce a cause of action in favor of the Construction company against the railway company. It was separate and wholly independent of the controversies between the complainant and the Construction company. The relief sought was a judgment in favor of the Construction company against the railway company. It is conceded that the Construction company was an Iowa corporation, and it is also conceded that the railway company was not an Iowa corporation. This controversy was, therefore, "wholly between citizens of different States," and could be "fully determined as between them," and was removable under the third clause of section two of the act of March 3, 1887, (as corrected by act of August 13, 1888,) on application of the defendant railway company. This branch of the suit was for the benefit of the Construction company, and for the purposes of jurisdiction "should be regarded a suit in the name of the party for whose benefit it is brought." *Maryland* v. *Baldwin*, 112 U. S. 490.

V. The action of the complainant arose under the laws of the United States, and involved a Federal question, and for that reason was removable to the Circuit Court on the petition and application of the railway company.

VI. The Supreme Court of the State had no jurisdiction over the cause; the jurisdiction thereof was in the Federal Court.

(*a*) The petition of each, the railway company and the Construction company, for removal to the Circuit Court divested the Supreme Court of any jurisdiction to make any order or enter any judgment or decree in the case.

(*b*) The plaintiff, John Fitzgerald, by instituting garnishment proceedings against the railway company in his action

against the Construction company, himself placed the fund in the hands of the railway company *in custodia legis*, and by that act precluded himself from invoking the assistance of any other court to determine the amount due from the railway company to the Construction company.

(*c*) The order of revivor was a nullity.

VII. The court below, in its decision that it would not examine the order of the Circuit Court remanding the cause for want of jurisdiction, in order to determine whether such proceeding was in accordance with the practice of that court, committed error. By this decision it evaded the real questions which it was asked to decide, viz.:

(1) That the district court, in not removing the case into the Circuit Court on the petition and bond of the defendants, committed obvious error.

(2) That the order of the Circuit Court overruling the motion to remand, and its judgment in favor of the defendant on the plea to the jurisdiction, were conclusive of the issues thus presented, until reversed or modified by the Supreme Court of the United States.

(3) That the order of the Circuit Court remanding the cause, was a nullity, because that court had no appellate jurisdiction, and could not, at a subsequent term, reverse its final orders and decrees.

VIII. The defendant, in the seventh paragraph of its answer, alleged, in substance, that by the terms of the contract of April 28, 1886, between the Denver company and the Construction company, it was, among other things, substantially provided that the Denver company should procure the right of way for said line of railway to be constructed, and would cause to be executed a proper mortgage upon said right of way to secure the first mortgage bonds of said company, to the extent of $16,000 per mile.

The finding of the court below establishes the fact that the railway company never complied with this act of Congress, and the defendant pleads this failure to comply with this act of Congress as a defence *pro tanto* to the claim set up by the Construction company against it. It relies upon the act of

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Congress as the basis for that defence. Not only the act of Congress, but the rules and regulations of the Department at Washington, require certain things to be done, as conditions precedent to the right to enter upon the public domain. The right of way, by the first section of the act of March 3, 1875, c. 152, 18 Stat. 482, is only granted to certain railroad companies; namely, those railroad companies "which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same," etc.

It was claimed by the railway company that the Construction company assumed the burden of procuring the right of way, and to that end had control of the organization of the Denver company, and that its failure to obtain the right of way over the public lands in accordance with the act of Congress of 1875 deprived it of the right to call upon the railway company to pay for that portion of the railway constructed in violation of that act. This proposition was decided adversely to the railway company by the Supreme Court of the State of Nebraska, and it was held, that notwithstanding the said railway company had sustained damage by reason of the failure of the construction company to have secured a proper title to the right of way over the government land, "no allowance of a counterclaim can be made as to the alleged failure to comply with such requirements as were necessary to acquire a railroad right of way across government lands." 41 Nebraska, 451.

The court below could not ignore or disregard this defence of the railway company, without deciding what effect must or should be given to the act of Congress of 1875. The only right to construct the road over this land must, of necessity, have been extracted from this act of Congress. *Kansas Pacific Railway* v. *Dunmeyer*, 113 U. S. 629; *Van Wyck* v. *Knevals*, 106 U. S. 360.

And it was contended that the mortgage of the Denver company, attempting to encumber the fifteen miles of road so constructed over the government lands, was void under this act of Congress, and that in an accounting between the Con-

struction company and the railway company that fact should be taken into consideration, and the railway company should be protected, to the extent, at least, of the fifteen miles of road to which the Construction company had never in any manner acquired any title for the Denver company, which it owned, dominated and controlled.

In the case of *Anderson* v. *Carkins*, 135 U. S. 483, 486, this court said:

"To a bill for the specific performance of this contract the defendants answered that the contract was void under the homestead laws of the United States. Notwithstanding this defence, so expressly stated, a decree of specific performance was entered against them. Obviously this could not be so entered, without adjudging such defence insufficient, and denying to them the protection claimed under the homestead laws. . . . If, under these provisions, such a contract is void, then obviously no state statute can vitalize the contract or deprive a party thereto of the protection afforded by the public statutes. . . . Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws, . . . it follows that the case is one in which a right was specifically set up and claimed under the statutes of the United States. . . . Hence, the jurisdiction of this court cannot be doubted. . . . It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the Federal statute must first be released. The construction and scope of that are Federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has the right to invoke the judgment of this court."

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

Was any title, right, privilege or immunity under the Constitution or any statute of, or authority exercised under, the United States, specially set up or claimed by plaintiff in error, denied by the decision of the state court?

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, but we may refer to such assignment by way of convenience to ascertain the contentions of plaintiff in error.

Of the errors assigned here those which do not involve matters purely within the jurisdiction of the state courts may be grouped as follows:

That the Supreme Court of Nebraska erred —

First. In that the court decided against a right set up by plaintiff in error, under the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," 18 Stat. 482, c. 152, by its refusal to allow damages for the failure of the Construction company to properly comply with the act.

Second. In that the court in maintaining jurisdiction decided against the claim of plaintiff in error that by reason of process of garnishment in attachment against the Missouri Pacific company, in the action brought by Fitzgerald against the Construction company to recover an amount alleged to be due him individually, in the state court and removed into the Circuit Court, the Circuit Court acquired exclusive jurisdiction and custody of the fund or moneys due from the Missouri Pacific company to the Construction company, and of any controversy in respect thereof.

Third. In that the court in appointing a receiver of the Construction company to collect the amount of the decree against the Missouri Pacific company, and disburse the same under the direction of the court, decided against the claim of plaintiff in error that a receiver appointed by the Circuit Court in the cause therein pending in favor of the Kansas and Colorado Pacific Railway Company and against the Construction company was entitled to the possession of the latter's assets.

Fourth. In that the court in exercising jurisdiction, notwithstanding the cause had been wrongfully remanded by the Circuit Court, decided against the claim of plaintiff in error that the cause had been properly removed. And

herein also that the court in maintaining jurisdiction decided against the claim of plaintiff in error that the state district court erred in denying its application to remove.

1. We repeat what we said in *California Powder Works* v. *Davis*, 151 U. S. 389, 393, that "it is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a State in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented." *Eustis* v. *Bolles*, 150 U. S. 361, and cases cited.

In the case at bar, the state court did not decide a Federal question in this connection, but its decision rested on an independent ground broad enough to sustain the judgment.

The contention of plaintiff in error was that, although the contract between the Denver company and the Construction company required the Denver company to secure the right of way, it was understood that when the Missouri Pacific company and the Construction company entered into their contract the Construction company should use the name of the Denver company, exercise its power of eminent domain, comply with the act of Congress, and secure the right to build the road over the public lands; that the Construction company failed to secure the lawful right of way as to a portion of the road; that the Missouri Pacific company should be allowed a deduction for each and every mile so situated; and that the controversy in this regard depended upon a right construction of the act of Congress. It would seem that this dispute between the parties turned on whether the Construction company had failed in its duty to the Missouri Pacific company, and not on any difference between them as to the proper

meaning of the act, but it is sufficient to say that the validity of the act of Congress was not questioned, and that the decision of the state courts denied no right claimed under it. The finding of fact was that about fifteen miles of road was laid out over government land, and that no maps were filed with the Secretary of the Interior, showing the lines of way thereon, though they were filed with the local land officers. In *Real* v. *Hollister*, 20 Nebraska, 112, it was decided that in an action for breach of the covenant for quiet enjoyment, the plaintiff must allege and prove that he had been turned out of possession, or had yielded to a paramount title, and, applying that doctrine in this case, the state courts held that the Missouri Pacific company could not maintain its claim for damages, because its possession had not been disturbed or its title questioned. *Fitzgerald* v. *Fitzgerald &c. Construction Co.*, 41 Nebraska, 374, 451.

2. The answer and plea of the Missouri Pacific company to Mrs. Fitzgerald's petition for an order of revivor and the appointment of a receiver filed January 29, 1895, set up that on December 24, 1888, which was the same day that he instituted this suit as a stockholder, Fitzgerald brought an action against the Construction company to recover an amount alleged to be due him; that notice of garnishment was served on the Missouri Pacific company; that the cause was then removed into the Circuit Court, and there Fitzgerald recovered judgment; and that control over the indebtedness of the Missouri Pacific company to the Construction company and of the accounting between them was thus transferred to the Circuit Court.

The matter of the garnishment proceedings was referred to in the original answer of the Missouri Pacific company filed in this cause January 19, 1889, but the position now taken was put forward for the first time in the answer and plea to Mrs. Fitzgerald's petition in the Supreme Court. Apart, however, from the objection that the course of proceedings could not be obstructed in this way at so late a date and in the court of appellate jurisdiction, the position cannot be maintained, for it was not made to appear but that the

notice of garnishment may have been issued and served after jurisdiction had attached in this suit; and, moreover, it did not appear that the garnishment process was prosecuted or that any order or judgment charging the Missouri Pacific company was rendered. Under sections 224 and 225 of the Code of Nebraska, (Comp. Stat. Neb. 1895, 1170, 1171,) the garnishee must deliver the property of the defendant in the action or pay the money due, as disclosed on his examination, into court, or give bond that the amount shall be paid or the property be forth-coming, as directed by the court, or if the garnishee fail to appear and answer, or his disclosure is not satisfactory, or he fail to comply with the order of the court, etc., the plaintiff may proceed against him by action and recover judgment as in other cases, defendant being substituted as plaintiff when plaintiff is satisfied.

The Supreme Court of Nebraska disposed of this objection by saying "that the attachment proceeding was evidently abandoned in the Circuit Court, where the record shows an ordinary judgment for damages, unaccompanied by an order against the Missouri Pacific Company as garnishee."

We are unable to perceive that that court in declining to entertain the objection so passed upon a Federal question as to furnish ground for the interposition of this court.

3. By the amended petition filed May 4, 1891, the appointment of a receiver was prayed, but the judgment of the District Court was rendered December 28, 1891, for $429,573.43, to be paid to the clerk of the court to abide its further order, execution to issue on failure of payment.

The cause having been taken to the Supreme Court by appeal, judgment was there rendered, June 26, 1894, for $764,942.08, with interest from December 24, 1893, and the cause remanded to the district court with instructions to enforce the collection of said judgment, and to appoint a receiver to collect and pay out the proceeds thereof and of such other assets of the Construction company as might be within the jurisdiction of the court. December 30, 1894, pending an application for a rehearing, Fitzgerald died, and Mrs. Fitzgerald, having been appointed special administratrix

of his estate, filed, January 15, 1895, her petition for an order of revivor, and also that a receiver be appointed by the Supreme Court.

January 5, 1895, a rehearing was granted, and on April 4, the Supreme Court entered the order of revivor, and modified its former judgment by reducing the amount to $300,906.33. And on April 6, 1895, the court appointed a receiver, having reviewed and overruled the Pacific company's objections thereto presented by its answer and plea to Mrs. Fitzgerald's application. 62 N. W. Rep. 899, 910.

July 2, 1891, the Kansas and Colorado Pacific Railway Company brought its action in the state district court against the Construction company with garnishee notice to the Missouri Pacific company, which cause was removed into the Circuit Court on July 3, 1891. January 12, 1895, the Kansas company filed an amended and supplemental complaint, and a receiver was appointed by the Circuit Court, the district judge presiding.

As the state courts had been in possession of the *res* for years before January 12, 1895, when, pending the modification by the Supreme Court of its judgment of June 26, 1894, the Circuit Court permitted the amended and supplemental complaint to be filed by the Kansas company against the Construction company, and thereupon appointed a receiver, the Supreme Court of Nebraska held that the rule that the court which first acquires jurisdiction of the subject-matter of an action will retain it until the controversy is finally determined applied, and that the appointment of a receiver by the Circuit Court was under the circumstances ineffectual to divest the control of the Supreme Court over the assets of the Construction company or defeat its right to enforce its judgment in the accounting.

In our opinion the Supreme Court in so holding denied no Federal right of the Missouri Pacific company.

4. It is contended that by its judgment the Supreme Court affirmed the order of the state district court denying the application to remove, and that that order was erroneous. But as the Missouri Pacific company, notwithstanding such denial,

filed the record in the Circuit Court, and the cause proceeded in that court to final hearing, when it was remanded, and as the state court in the meantime awaited the action of the Circuit Court, the order worked no prejudice, and if any error were committed in that regard, it became wholly immaterial.

5. We are thus brought to the remaining and most important question arising on this motion.

Under the act of Congress of March 3, 1887, c. 373, 24 Stat. 552, 553, as reënacted for the purpose of correcting the enrolment, by the act of August 13, 1888, c. 866, 25 Stat. 433, 435, is the order of the Circuit Court remanding the cause to the state court open to review on this writ of error? If not, then we cannot take jurisdiction to revise the proceedings of the state court. Nor can the inquiry be affected by the fact that a motion to remand had been previously made and denied. That order was subject to reconsideration, as the question of jurisdiction always is, until final judgment, and, indeed, it was the duty of the Circuit Court under the statute, if it appeared at any time that jurisdiction was lacking, to dismiss or remand as justice might require. 18 Stat. 470, c. 137, § 5.

Prior to the passage of the act of March 3, 1875, just cited, an appeal or writ of error would not lie to review an order of the Circuit Court remanding a suit which had been removed because such an order was not a final judgment or decree. This was expressly held in *Railroad Company* v. *Wiswall*, 23 Wall. 507, decided at October term, 1874, and it was also ruled that the remedy was by mandamus. But by the last paragraph of section 5 of the act of March 3, 1875, c. 137, 18 Stat. 470, it was provided that "the order of said Circuit Court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal as the case may be."

By section 6 of the act of March 3, 1887, however, this paragraph was expressly repealed, and by the last paragraph of section 2 it was enacted that: "Whenever any cause shall be removed from any state court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be re-

manded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such case shall be allowed."

These provisions were referred to by Mr. Chief Justice Waite in *Morey* v. *Lockhart*, 123 U. S. 56, 57, and the Chief Justice said:

"It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed."

It was subsequently decided in the case of *In re Pennsylvania Company*, 137 U. S. 451, 454, that the power to afford a remedy by mandamus when a cause, removed from a state court, is improperly remanded, was taken away by the acts of March 3, 1887, and August 13, 1888.

Adverting to the clause just quoted from section 2 of those acts, Mr. Justice Bradley said:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohi-

bition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

We see no reason for reconsidering these conclusions and it may be regarded as settled that an order of the Circuit Court remanding a cause cannot be reviewed in this court by any direct proceeding for that purpose.

If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment under § 709 of the Revised Statutes. *Stone* v. *South Carolina*, 117 U. S. 430.

If a case be removed to the Circuit Court and a motion to remand be made and denied, then after final judgment the action of the Circuit Court in refusing to remand may be reviewed here on error or appeal. *Graves* v. *Corbin*, 132 U. S. 571.

If the Circuit Court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode. *The Removal cases*, 100 U. S. 457.

But if the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment.

A state court cannot be held to have decided against a Federal right when it is the Circuit Court, and not the state court, which has denied its possession.

The Supreme Court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction and declined to review the order of the Circuit Court.

As under the statute a remanding order of the Circuit Court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that "no appeal or writ of error from the decision of the Circuit Court remanding such cause shall be allowed."

And it is entirely clear that a writ of error cannot be maintained under section 709 in respect of such an order where the state court has rendered no decision against a Federal right but simply accepted the conclusion of the Circuit Court.

We regard this result as intended by Congress, in effectuation of the object of the act of March 3, 1887, to restrict the jurisdiction of the Circuit Court and to restrain the volume of litigation, which, through the expansion of Federal jurisdiction in respect to the removal of causes, had been pouring into the courts of the United States. *Smith* v. *Lyon*, 133 U. S. 315; *In re Pennsylvania Company*, 137 U. S. 451; *Fisk* v. *Henarie*, 142 U. S. 459, 467.

So far as the mere question of the forum was concerned, Congress was manifestly of opinion that the determination of the Circuit Court that jurisdiction could not be maintained should be final, since it would be an uncalled for hardship to subject the party who, not having sought the jurisdiction of the Circuit Court, succeeded on the merits in the state court, to the risk of the reversal of his judgment, not because of error supervening on the trial, but because a disputed question of diverse citizenship had been erroneously decided by the Circuit Court; while as to applications for removal on the ground that the cause arose under the Constitution, laws, or treaties of the United States, that this finality was equally expedient as questions of the latter character if decided against the claimant would be open to revision under section 709, irrespective of the ruling of the Circuit Court in that regard in the matter of removal.

It must be remembered that when Federal questions arise in causes pending in the state courts, those courts are perfectly competent to decide them, and it is their duty to do so.

As this court, speaking through Mr. Justice Harlan, in *Robb* v. *Connolly*, 111 U. S. 624, 637, said: "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the state courts

Syllabus.

are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' If they fail therein, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination."

Writ of error dismissed.

DICKSON *v.* PATTERSON.

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

No. 15. Submitted October 15, 1895. — Decided January 6, 1896.

In May, 1885, P., having an opportunity to purchase ten acres of land near Omaha, at a cost of $3600, payable $1250 in cash, the rest on credit, wrote to D. that he could buy the tract for $4800, payable $2500 in cash, the rest on credit, and asked him to join in the purchase. D. assented, sent his $1250 to P., and joined in a mortgage for the balance of the purchase money. In October, 1885, P. wrote to D. that he had sold the ten acres to B. for $6000, $3000 of which were in cash, and enclosed a cheque for $1500, and a deed to B. to be executed by D. in which the consideration was expressed at $6000. This amount was subsequently changed to $10,000 without D.'s knowledge. On the day after receiving the deed, B. reconveyed the property to P. The land was laid out into lots and streets under direction of P., and some of the lots were sold to *bona fide* purchasers. After the institution of this suit, the remainder was conveyed by P. to one M., for a recited consideration of $19,425. In February, 1887, the deception practised by P. as to the price of the land, and as to the change in the consideration of the deed to B. came to the knowledge of D., who thereupon wrote P., calling upon him to refund the overpayment in the purchase money, and to pay him one half of the increase in the amount of the consideration for the deed to B. P. made no payment, and commenced a correspondence which lasted until D. became possessed of knowledge of the reconveyance by B. to P. This bill in equity was then filed by D., praying for an accounting, and that he be decreed

entitled to all the benefits of the original purchase, and that the deed to B., the deed from B. to P., and the deed from P. to N. be declared fraudulent; that P. be required to convey to D. so much of the premises as had not been conveyed to other parties for a valuable consideration; that he account to plaintiff for the sums received from such sales, and that he be restrained from selling other lots. The court below dismissed the bill on the ground that D. had elected to retain what he had received and to pursue his claim for moneys still due, and could not maintain a suit to set the whole transactions aside. *Held*,

(1) That the plaintiff was entitled to a decree setting aside and annulling the deed purporting to have been executed by P. to M., the deed from B. to P., and the deed to B. from P. and D., leaving the title to the premises in question where it was prior to the execution of the last named deed; such decree to be without prejudice to any valid rights acquired by parties who purchased in good faith from P. while the fee was in him alone;

(2) That the cause should be referred to a commissioner for an accounting between D. and P. in respect of the sums paid by them, respectively, on the original purchase, as evidenced by the deed of 1885, to P. and D.; D. in such accounting to have credit for one-half of all amounts received by P. on the sales by him of any of the lots into which the ten acres were subdivided, and P. to have credit for any sums paid by him in discharge of taxes or other charges upon the property.

THE case is stated in the opinion.

Mr. Westel W. Morsman for appellant.

Mr. John L. Webster and *Mr. H. D. Estabrook* for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was brought to procure a decree rescinding certain sales of real estate on the ground of fraud.

The case made by the original and amended bill of the appellant, who was plaintiff below, is substantially as follows:

Plaintiff and defendant Patterson married sisters and had been friends for a long time. The former had expressed a wish to join the latter upon equal terms in the purchase of real estate in or near Omaha, Nebraska, with a view to platting the same into lots as an addition to that city.

Defendant accordingly wrote to plaintiff on May 18, 1885, stating that he was about to purchase ten acres of land, and that "this ten acres of land will cost $4800, $2500 cash. They will make 48 lots worth $250 each. If you want to go in it will cost you $1250 cash, balance to suit." The plaintiff having made further inquiries by letter, defendant answered that the expenses of surveying, advertising and platting the property would be about $300, and the net profits at least $6000; that they would probably not be called upon to make the deferred payments; that he, defendant, had realized large profits from other like ventures; that other persons desired to join him; and he urged plaintiff to do so.

Relying upon the above statements, plaintiff accepted the proposition, and subsequently sent defendant Patterson the sum of $1250 as his half of the cash payment. His wife joining him, he signed a mortgage for the balance of the purchase money, dated June 10, 1885, the same to be executed also by defendant and wife. This mortgage was sent to Dickson by Patterson for execution.

On June 9, 1885, the premises were conveyed by deed to plaintiff and Patterson, jointly, the consideration stated in it being $4800. The deed was duly recorded.

Patterson caused the premises to be laid out in lots and streets, the plat of which was recorded as "Patterson and Dickson Place." After writing several letters to plaintiff, speaking in the most encouraging terms of the probability of realizing large returns from the venture, Patterson, on October 21, 1885, wrote to Dickson: "I have sold our ten acres today for $6000, an advance of $1200. It did not turn out as well as I expected. . . . This is a very handsome profit for the length of time we have held it. He pays $3000 cash and the other $700 inside of six months, and assumes the mortgage and all taxes. It nets us a little over $500 each profit."

On October 30, 1885, Patterson enclosed his check for $1500 to plaintiff, correcting his statement as to net profits by the statement that $224.18 was yet due and coming to the plaintiff. He also enclosed a deed to one Otto Boehme, to be

signed by plaintiff and wife, in which the consideration was expressed to be $6000. That deed was dated October 28, 1885, and was duly executed by plaintiff and wife, but the amount of the consideration as set forth in the deed was thereafter changed without plaintiff's knowledge to $10,000. On the day after the conveyance to Boehme, the latter, without plaintiff's knowledge, reconveyed the property to Patterson, the consideration recited being $10,000. On February 23, 1886, Patterson vacated the plat made by him and plaintiff, and replatted the premises as "East Side Addition," of which he sold several lots.

After the filing of the original bill, Patterson filed for record a deed dated June 4, 1887, conveying all the premises, with the exception of eight lots, to one Isaac Martin, who was made a party defendant in the amended bill. That deed purported to have been made in execution of an agreement with Martin, he having failed to make payment pursuant to a prior contract alleged to have been made on February 17, 1887.

Long after the transactions above referred to, it became known to Dickson — and he so charged in his bill — that the purchase price of the premises in question was not $4800 but $3600 and the cash payment $1250 and no more, all of which was paid by the plaintiff; that the conveyance to Boehme and reconveyance by him to Patterson were fraudulent, having been made without consideration, and executed in pursuance of the preconcerted design of the latter to vest the title in himself.

Whereupon the plaintiff prayed that inasmuch as he had paid all the consideration for the premises, and as the defendant Patterson had advanced no part thereof, he, the plaintiff, was entitled to have all of the said premises and all the advantages arising from the said purchase. He further prayed that inasmuch as the deed to Boehme and the deed from Boehme to Patterson were fraudulent and void, an accounting be directed of all sums received by Patterson in that behalf, and also all sums received by plaintiff from him, and that it be ascertained what sum, if any, plaintiff should repay to him, which he offered and stood ready to pay as soon as ascer-

tained; that it be decreed that the plaintiff was entitled to have all the benefits of the original purchase; and that by the deed made to plaintiff and Patterson, the latter became seized in fee of an undivided half of the premises *in trust for the plaintiff*, and not otherwise. The bill further prayed that the deed made by plaintiff and wife together with Patterson and wife to Boehme, and as well as the deed made by Boehme to Patterson, and the deed from Patterson to Martin, be declared fraudulent and void; that it be decreed that Patterson convey the premises to the plaintiff in fee, except such lots as had been sold to other parties for a valuable consideration without his knowledge; that Patterson account to the plaintiff for the sums of money realized from such sales; and also that he be restrained from selling any other lots, or receiving any money on account of said sales, or transferring any security therefor, etc.

The bill was dismissed upon the ground that the plaintiff, after acquiring knowledge of the fraud, elected to retain what he had received from the sale of the land in question, and to pursue his claim for moneys claimed to be still due; that the fraud alleged having come to his knowledge, he was bound promptly to make his election, and having elected to let the sale stand, he could not thereafter maintain an action to set it aside.

This ruling was based upon certain letters offered in evidence from which it appeared that Dickson first charged Patterson with fraud in 1886, and wrote him on February 27 of that year, stating, among other things: "In your letter last October you state you sold it for $6000, and the deed called for the same amount, but I notice the records, etc., call for $10,000 — a slight difference of $4000. This change seems to have occurred after the paper left Kansas City. Then, too, I object to the original cost of the land as stated in your letter last May, viz., $4800, ($2500 cash and $2500 in note,) when I know now that the land only cost $3600, or a difference of $1200, making my half interest cost $600 less than you stated, which, taken together with my half of the $4000 which you did not report, would be something like $2600 which you are owing me. I

cannot say with you, 'thus far my feelings alone have been affected,' but you have taken money from me by false representations, the knowledge of which fact has only lately come to my hands. Now, I wish to know when you propose to pay me the above amount due me." Patterson replied to this letter on March 3, 1886, explaining that the amount of consideration in the deed had been changed at Boehme's request; and as to the land being purchased originally for $3600 it was not true. He added that he did not blame him for being aroused over such a false report, but that he, Patterson, could "explain all discrepancies in a manner that cannot be impeached, and when necessary can be proven up with living testimony and plenty of it." Boehme, also, at the instance of Patterson, wrote to Dickson, under date of March 2, 1886, stating that the consideration paid by him for the land was $6000 and no more; that the amount expressed in the deed to him was changed at his request in order that he might the more easily secure a large profit; and that he believed Patterson was honest and straight, and bore that reputation.

After some further correspondence with a view to a settlement — Patterson insisting that a balance was due him from plaintiff on account of a certain other real estate transaction in Kansas City — Dickson, on August 4, 1887, filed his bill in equity, praying a rescission of these sales and an accounting, as hereinbefore set forth.

The bill having been dismissed, for the reasons above stated, Dickson took an appeal to this court.

The evidence fully sustained the allegations of fraud made in the original and amended complaint. We cannot doubt from the record that after the land in question was purchased and conveyed to the plaintiff and defendant Patterson, jointly, the latter conceived the purpose of acquiring the title to the whole of it. To that end he pretended to have made a sale of it to Boehme, and induced the plaintiff not only to believe that it was a real sale at a named price, but to join in the deed to Boehme. The day after the title was vested in Boehme the latter reconveyed the property to Patterson. According to the preponderance of evidence that transaction

was a sham, but not more so than the pretended sale and conveyance to one Martin. That which purports to be a deed to Martin, reciting a consideration of $19,425 in hand paid, was in fact executed after the institution of this suit, although dated and certified to have been acknowledged on the 4th day of June, 1887. It would subserve no useful end to set forth in this opinion all the facts and circumstances bearing upon the issue of fraud. But we may remark that, according to the evidence, some one assumed the name of Martin long enough to go through the form of a purchase from Patterson, after which he disappeared, his whereabouts pending this suit being unknown, although his answer was filed by direction of Patterson.

We content ourselves with saying that the proof makes it clear that the pretended sales to Boehme and Martin were in execution of a scheme devised by Patterson to deprive Dickson of his interest in these lands without his receiving the full value of such interest, and thus to become himself the sole owner.

This was substantially the view taken of the case by the Circuit Court. The presiding judge not only expressed the fear that the charges of fraud and misconduct were well founded, but said that the testimony of the defendant Patterson was impeached by so many circumstances that it could not be safely made the basis of judicial action. Assuming the charges of fraud to have been proved, the court dismissed the bill upon the ground that the plaintiff's letters, written in 1886, show that he, "with knowledge of the fraud, not only retained what he had received from the sale, but elected to let it stand and pursue his claim for the moneys still due him thereon." Undoubtedly, it appears from these letters that the plaintiff charged that Patterson had falsely represented the original cost of the land (one-half of which Dickson was to pay) to have been $4800, when it was only $3600, and that the deed to Boehme, at the time it was executed by plaintiff and his wife, recited the consideration to be $6000, (the amount for which Patterson said he had sold the ten acres,) and yet, when put on record, it recited $10,000 as the consid-

eration. Upon the basis of $3600 as the price originally paid for the lands by Patterson representing himself and the plaintiff, and $10,000 as the amount paid by Boehme, the plaintiff rightfully claimed a larger sum than had been paid to him by Patterson. If this were the whole case there would be force in the suggestion that Dickson, with information of the fraud practised upon him, had elected to affirm the sale to Boehme and to claim the additional sum that he supposed to be due him upon a proper accounting.

But there are other considerations which preclude Patterson from insisting that Dickson made his election of remedies, and must abide by that election. During the correspondence that took place between the parties in 1886 Dickson, so far as the record shows, was not aware that the sale and conveyance to Boehme was merely fictitious, and in execution of Patterson's scheme to defraud him. Patterson assured him that that sale was a real one, and there is no proof to show that Dickson, at the time, knew or believed anything to the contrary. If it was a real sale, Dickson, having joined in the deed to Boehme, could not go behind it, unless he could show that the latter did not purchase in good faith. But, from what Patterson wrote to him, he had no reason to doubt the validity of the sale to Boehme. Besides, Patterson induced Boehme to inform Dickson by letter that the amount paid was only $6000, and that it was changed in the deed to $10,000 at his, Boehme's, request, and that Patterson was an honest man, with a good reputation. All this was well calculated to make the impression upon Dickson that the only relief he could have against Patterson was to obtain an accounting, and a decree or judgment for such additional sum as was justly due him.

After the correspondence between the parties ended in the latter part of the year 1886, the plaintiff, as we must assume from the record, ascertained for the first time all the facts as they are now disclosed, and, without unreasonable delay, commenced the present suit. We should not be justified by the record in saying that he had, for any considerable time before the bringing of this suit, such knowledge of all the circum-

stances of this transaction as enabled him to know with certainty what his rights were, and to determine what course should be taken to vindicate them. If, as the evidence shows, the real facts were concealed from him by one from whom he had reason to expect a frank disclosure of all the material circumstances as they occurred, he is not, for that reason — no rights of innocent third parties having intervened — to be denied the fullest relief to which according to the principles of equity he is entitled.

The plaintiff, in his amended complaint, claims that he paid the original consideration for these lands, and is entitled to a conveyance of them upon his paying to the defendant Patterson such sum as, upon a proper accounting, he ought to pay, Patterson being charged with such sums as he received on account of the premises or the lots into which they were divided by him.

We are of opinion that the plaintiff is not entitled to relief to that extent. But he is entitled to a decree setting aside and annulling the deed purporting to have been executed by Patterson to Martin, the deed from Boehme to Patterson, and the deed to Boehme from Patterson and Dickson and their wives, respectively, leaving the title to the premises in question where it was prior to the execution of the last named deed; such decree to be without prejudice to any valid rights acquired by parties who purchased in good faith from Patterson while the fee was in him alone. The cause should be referred to a commissioner for an accounting between Dickson and Patterson in respect of the sums paid by them, respectively, on the original purchase, as evidenced by the deed of June 9, 1885, from Tukey and Keysor and their wives, respectively, to Patterson and Dickson; Dickson in such accounting to have credit for one half of all amounts received by Patterson on the sales by him of any of the lots into which the ten acres were subdivided, and Patterson to have credit for any sums paid by him in discharge of taxes or other charges upon the property.

The decree is reversed, and the cause remanded for such further proceedings as are not inconsistent with this opinion.

UNITED STATES v. FULLER.

APPEAL FROM THE COURT OF CLAIMS.

No. 805. Submitted January 9, 1896. — Decided January 20, 1896.

Mates are petty officers, and as such are entitled to rations or commutation therefor.

THIS was a petition for a commutation of rations alleged to be due to claimant as a "mate" in the Navy.

The petitioner alleged his appointment as mate on March 4, 1870, and that from March 20, 1888, until August 12, 1891, he was attached to the receiving ship Vermont at the Navy Yard in Brooklyn; that, under sections 1579 and 1585 of the Revised Statutes, he was entitled to rations while so serving, or to the commutation price thereof; but that the same had been refused him, and he therefore prayed judgment in the sum of $380.

The Court of Claims found the following facts:

1. The claimant, a mate in the United States Navy, was attached to and served on the United States receiving ship Vermont from March 20, 1888, to August 14, 1891.

2. During his said service he was not allowed a ration nor commutation therefor.

3. Mates have not been regarded as petty officers by the Treasury Department, nor by the Navy Department, prior to the adoption of the Navy Regulations of 1893.

4. From the year 1799 master's mates in the United States Navy were warrant officers, except when acting under temporary and probationary appointments. Warrants were issued to them after at least one year's sea service under a probationary appointment. No such warrants were, however, issued after 1843, and in 1847 a regulation of the Navy Department forbade commanding officers to make such probationary appointments.

On October 7, 1863, the Secretary of the Navy issued the following circular:

"Seamen enlisted in the naval service may hereafter, as formerly, be advanced to the rating of master's mate, and such rating may be bestowed by the commander of a squadron, subject to the approval of the Department, or by the commander of a vessel, with the previous sanction of the Department.

"Seamen so rated will be entitled to the same pay, rank and privileges as appointed or warranted master's mates, but will not be released by their rating from the obligations of their enlistment, and may be disrated by the order or with the sanction of the Department. They will not, while rated as master's mates, be considered as subject to trial by a summary court-martial, nor be disrated by transfer, as in the case of petty officers.

"Seamen rated as master's mates will not be discharged with that rating, and will be considered as disrated to seamen upon the expiration of their enlistment, but upon their immediate reënlistment the rating of master's mate may be considered as renewed. The acceptance of such renewed rating will be considered as a renunciation of any claim to additional pay for reënlistment. All ratings of master's mates made by order of the commander of a squadron, and all such ratings renewed by reënlistment, will be reported to the Department as early as practicable."

Upon these facts the court held, as a conclusion of law, that the claimant was entitled to recover the sum of $372.60, for which judgment was entered, and the Government appealed.

Mr. Assistant Attorney General Dodge and *Mr. Charles C. Binney* for appellants.

Mr. Robert B. Lines and *Mr. John Paul Jones* for appellee.

Mr. Justice Brown delivered the opinion of the court.

Petitioner's claim is based upon the exception contained in Rev. Stat. § 1579, which reads as follows: "No person not

actually attached to and doing duty on board a seagoing vessel, *except the petty officers*, seamen, and ordinary seamen attached to receiving-ships, or to the ordinary of a navy yard, and midshipmen, shall be allowed a ration," which, by § 1585, for the purposes of commutation, is fixed at thirty cents.

The personnel of the Navy is divided generally into commissioned officers, non-commissioned or warrant officers, petty officers, and seamen of various grades and denominations. That a mate is not a commissioned officer is entirely clear, and is not disputed by either party. It is equally clear that he is above the grade of seaman, and the real question is whether he is a non-commissioned or warrant officer, a person "temporarily appointed to the duties of a commissioned or warrant officer," or a "petty officer."

We think little is to be gained in the solution of this question by a detailed examination of the several acts of Congress and navy regulations which antedate the Revised Statutes. Prior to 1843, "master's mates" were recognized by the law as warrant officers, or as "warranted master's mates," and appear to have been sometimes appointed by the President and sometimes rated (that is, promoted from lower grades) by commanding officers. But shortly after this time they seem to have fallen into disuse, and no further appointments were made, although the grade was not formally abolished, and those who had been previously appointed continued to hold their offices and receive their pay.

At the outbreak of the Civil War, however, a great increase in all the naval forces became necessary, and the Secretary of the Navy made temporary appointments of "acting masters and master's mates," which were confirmed by act of Congress of July 24, 1861, c. 13, 12 Stat. 272. By act of March 3, 1865, c. 124, 13 Stat. 539, their names were changed to that of "mates," and the Secretary of the Navy was authorized to increase their pay and to rate them from seamen and ordinary seamen who had enlisted in the naval service for not less than two years. By the act of July 15, 1870, c. 294, 16 Stat. 321, 330, they were formally recognized as a part of the naval forces, and their pay was fixed at $900 when at sea, $700 on shore

duty, and $500 on leave or waiting orders. These amounts were raised in 1894, 28 Stat. 212. Act of August 1, c. 176.

By the Revised Statutes, which were intended to consolidate and codify all the prior enactments upon the subject, the President was authorized to appoint (§ 1405) "as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper," who (§ 1406) "shall be known and shall be entered upon the Naval Register as warrant officers in the naval service of the United States," and whose pay was specified in a separate paragraph of § 1556, fixing the pay of the naval forces.

By § 1408 "mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years." By § 1556 their pay was fixed at the rates provided by the act of July 15, 1870, and by § 1410 "all officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed *petty officers*, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings." By § 1569 "the pay to be allowed to petty officers, *excepting mates*" (whose pay was fixed by § 1556), "and the pay and bounty upon enlistment of seamen, ordinary seamen, firemen, and coalheavers in the naval service, shall be fixed by the President," with the further provision, § 1579, that "no person not actually attached to and doing duty on board a seagoing vessel, *except the petty officers*, seamen, and ordinary seamen attached to receiving ships, or to the ordinary of a navy-yard, and midshipmen, shall be allowed a ration."

From this summary of the Revised Statutes it appears reasonably clear:

1. That boatswains, gunners, sailmakers, and carpenters are warrant officers to be appointed by the President, and that they are the only ones specifically mentioned as such.

2. That mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers pro-

moted by the Secretary of the Navy from seamen of inferior grades, who have enlisted for not less than two years, and that they are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President. From this it would seem to follow that, although their pay is fixed by law, instead of by the President, they are in other respects entitled to the emoluments of petty officers, among which are rations.

The exception of mates from § 1569 merely indicates that Congress, having already fixed their pay, such pay need not be fixed by the President. But they are still within the exception of "petty officers, seamen, and ordinary seamen attached to receiving ships," who are inferentially allowed a ration by § 1579. The exception of mates from other petty officers in § 1569 indicates that they are petty officers, and the exception of petty officers, from those who are not entitled to rations under § 1579, indicates that as such they are entitled to a ration.

We think there is no authority for saying that they are temporarily appointed to the duties of a warrant officer. While the words "acting master's mates," sometimes employed prior to the Revised Statutes, might indicate, by the use of the word "acting," a person temporarily appointed to the duties of a master's mate, officers who are recognized by law, and whose pay is fixed by a permanent statute, cannot be said to be temporarily appointed. The argument that a "warrant" is defined to be "an instrument conferring authority upon persons, inferior to a commission," and that mates must therefore be warrant officers, because they are appointed by the Secretary of the Navy, proves too much; since all petty officers hold by some sort of designation from a superior authority, and if a warrant be an instrument inferior to a commission, this would make all petty officers warrant officers. On the other hand, as, by § 1405, warrant officers are appointed by the President, it would seem to follow that, if they held their appointments from an inferior authority, they were not to be considered as warrant officers. There is also an implication to the same effect from the act of August

Syllabus.

1, 1894, c. 176, 28 Stat. 212, raising the pay of mates, and providing that "the law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates." This provision would be quite unnecessary if, under the general provisions of law, they fell within the designation of warrant officers.

After some hesitation and apparent confusion of opinion on the part of the Navy Department, this was the construction of the Revised Statutes finally settled upon by the Navy Regulations of 1893, Art. 28, and we think it is correct. The only difficulty in the case seems to have arisen from certain acts prior to the Revised Statutes, notably the act of 1813, which dealt with warranted "master's mates," under which mates continued to be classified by the Navy Department as warrant officers, until the Revised Statutes were adopted.

The judgment of the Court of Claims is, therefore,

Affirmed.

UNITED STATES *v.* NEW YORK.

NEW YORK *v.* UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 45, 136. Argued October 17, 18, 1895. — Decided January 6, 1896.

Any claim made against an Executive Department, "involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States," may be transmitted to the Court of Claims by the head of such Department under Rev. Stat., § 1063, for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

Any claim embraced by Rev. Stat., § 1063, without regard to its amount, and

Counsel for the State of New York.

whether the claimant consents or not, may be transmitted under the act of March 3, 1883, c. 116, to the Court of Claims by the head of the Executive Department in which it is pending, for a report to such Department of facts and conclusions of law for "its guidance and action."

Any claim embraced by that section may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the act of March 3, 1887, c. 359, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

In every case, involving a claim of money, transmitted by the head of an Executive Department to the Court of Claims under the act of March 3, 1883, c. 116, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the Department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.

Whether the words "or matter" in the second section of that act embrace any matters, except those involving the payment of money, and of which the Court of Claims under the statutes regulating its jurisdiction could, at the voluntary suit of the claimant, take cognizance for purposes of final judgment or decree, is not considered.

As the claim of the State of New York, the subject of controversy in this case, was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the Court of Claims for adjudication was only a continuation of the original proceeding commenced in that Department in 1862; and the delay by the Department in disposing of the matter before the expiration of six years after the cause of action accrued, could not impair the rights of the State.

The $91,320.84 paid by the State of New York for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defence was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.

The claim of the State of New York for money paid on account of interest to the commissioners of the Canal Fund, is not one against the United States for interest as such, but is a claim for costs, charges and expenses properly incurred and paid by the State in aid of the general government, and is embraced by the act of Congress declaring that the States would be indemnified by the general government for money so expended.

THE case is stated in the opinion.

Mr. David B. Hill for the State of New York. *Mr. T.*

E. Hancock, Attorney General of the State of New York, was on his brief.

Mr. Assistant Attorney General Whitney for the United States. *Mr. Assistant Attorney General Dodge* was on the brief.

Mr. Justice Harlan delivered the opinion of the court.

On the 3d day of January, 1889, the Secretary of the Treasury transmitted to the Court of Claims all the papers and vouchers relating to a claim of the State of New York against the United States, then pending in the Treasury Department, for interest paid on money borrowed and expended in enrolling, subsisting, clothing, supplying, arming, and equipping troops for the suppression of the rebellion of 1861. That claim, the Secretary certified, involved controverted questions of law, and exceeded three thousand dollars in amount. The communication accompanying the papers stated that the case was transmitted to the Court of Claims under and by authority of section 1063 of the Revised Statutes, to be there proceeded in according to law.

In further prosecution of this claim, the State promptly filed its petition in the court below and asked judgment against the United States for the sum of $131,188.02 with interest from the first day of July, 1862, together with such other relief as would be in conformity with law.

This claim was based on the act of Congress of July 27, 1861, c. 21, providing that "the Secretary of the Treasury be, and he is hereby directed, out of any money in the Treasury not otherwise appropriated, to pay to the Governor of any State, or to his duly authorized agents, the costs, charges, and expenses properly incurred by such State for enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops employed in aiding to suppress the present insurrection against the United States, to be settled upon proper vouchers to be filed and passed upon by the proper accounting officers of the Treasury." 12 Stat. 276.

By a joint resolution of Congress, approved March 8, 1862,

it was declared that the above act should be construed "to apply to expenses incurred as well after as before the date of the approval thereof." 12 Stat. 615.

Before July 4, 1861, the State of New York — pursuant to a statute passed by its legislature April 15, 1861, c. 277 — enlisted, enrolled, armed, equipped, and caused to be mustered into the military service of the United States for the period of two years or during the war thirty thousand troops to be employed in suppressing the rebellion. That statute provided that all expenditures for arms, supplies or equipments necessary for such forces should be made under the direction of the Governor and other named officers, and that the moneys therefor should, on the certificate of the Governor, be drawn from the treasury on the warrant of the comptroller in favor of such person or persons as from time to time were designated by the Governor; and the sum of $3,000,000, or so much thereof as was necessary, was appropriated out of any moneys in the treasury not otherwise appropriated to defray the expenses authorized by that act, or any other expenses of mustering the militia of the State or any part thereof into the service of the United States. That act also imposed, for the fiscal year commencing on the 1st day of October, 1861, a state tax to meet the expenses authorized, not to exceed two mills on each dollar of the valuation of real and personal property in the State. Laws of N. Y. 84th Session, 1861, page 634.

There was no money in the treasury of the State in 1861 that had not been specifically appropriated for the expenses of the state government; none that could have been used to defray the expenses of enlisting, enrolling, arming, equipping, and mustering troops into the service of the United States.

Under the laws of the State the moneys authorized to be raised by the act of April 15, 1861, did not reach the state treasury and were not available for use until the months of April and May, 1862.

The total state tax rate fixed at the session of the legislature beginning on the first Tuesday in January, 1861, was $3\frac{1}{8}$ mills, of which $1\frac{1}{2}$ mills was the amount authorized by the above

statute of 1861. The moneys realized from this tax were paid into the state treasury during the year 1862.

The State had no other means of raising the money required for the purpose of immediately defraying the expenses of enlisting, enrolling, arming, equipping, and mustering in such troops, except by borrowing money in anticipation of the collection of its taxes; and between June 3, 1861, and July 2, 1861, in order to provide for the public defence, it issued bonds in anticipation of such taxes to the amount of $1,250,000, payable on July 1, 1862, except that $100,000 was made payable June 1, 1862, at the rate of seven per cent per annum, which at that time was the legal rate of interest under the laws of the State.

The issuing of these bonds was necessary for the purpose of providing the money required, and upon their sale the full amount of their face value was received and was used and applied by the State, together with other moneys, in raising troops. The entire sum so expended between the 23d day of April, 1861, and the 1st day of January, 1862, was $2,873,501.19 exclusive of interest upon the bonds or loans made by the State for that purpose.

In addition to the above sums, the State during the years 1861 and 1862 paid, on account of interest that accrued on its bonds issued in anticipation of the tax for the public defence, the sum of $91,320.84.

By a statute of New York of April 12, 1862, the legislature specifically appropriated the sum of $1,250,000 for the redemption of comptroller's bonds issued for loans in anticipation of the tax imposed by the act of April 15, 1861, c. 192, and the additional sum of $91,320.84 for the payment of the accruing interest on those bonds. Laws of N. Y. 1862, 85th Session, 364.

Of the remainder of the above sum of $2,873,501.19 necessarily expended by the State of New York for the purpose stated, between April 23, 1861, and January 1, 1862, after deducting the amount of $1,250,000 raised by issuing bonds, $1,623,501.19 was taken from the Canal Fund of the State. That Fund, under the constitution of the State, was a Sinking

Fund for the ultimate payment of what is known as the canal debt. Const. N. Y. 1846, Art. VII, Sec. 1.

Under the tax rate of 1860 there had been levied and collected and paid into the treasury of the State the sum of $2,039,663.06 for the benefit of and to the credit of the Canal Fund. That sum reached the state treasury in April and May, 1861, subject to be invested by the state officers pursuant to the requirements of law and the constitution of the State, in securities for the benefit of the Canal Fund. On May 21, 1861, the lieutenant governor, comptroller, treasurer, and the attorney general, constituting the commissioners of the Canal Fund, authorized the comptroller to use $2,000,000 of the Canal Fund moneys for military purposes until the 1st of October next, and $1,000,000 until the 1st day of January, 1862, at five per cent; and of this amount the sum of $1,623,501.19 was used by the comptroller for the purpose of defraying the expenses of raising and equipping such troops. The following was the order: "State of New York, Canal Department, Albany, May 21, 1861. The comptroller is to be permitted to use two millions of dollars of the Canal Fund moneys for military purposes until the first day of October next, when the commissioners of the Canal Fund will invest one million of dollars of the Canal Sinking Fund under section 1, article VII, in the tax levied for military purposes until the 1st of July, 1862, at five per cent, and the comptroller may use one million of dollars of the tax levied to pay interest on the $12,000,000 debt until the 1st of January, 1862, when the commissioners will, if they have the means, replace that or as large an amount as they may have the means to do it with from the toll of the next fiscal year, so as that the whole advance from the Canal Fund on account of the tax be two millions of dollars. It is understood the comptroller will retain the taxes now in process of collection for canal purposes until the above investments are made, paying the funds five per cent interest therefor." This order was signed by the commissioners of the Canal Fund.

On December 28, 29, and 31, 1861, the United States repaid to the State, on account of moneys so expended by the latter,

the sum of $1,113,000 which sum with interest was placed in the Canal Fund on April 4, 1862. This left $510,501.19 unpaid of the moneys used from the Canal Fund.

The amount of interest at 5 per cent. per annum on the moneys of the Canal Fund during the time it was used by the State in raising troops was $48,187.13. But during the same time the State had received interest on portions of those moneys, while it was lying in bank unused, to the amount of $8319.95, and the net deficiency of the State on account of interest on such moneys during the period when they were so used was $39,867.18, which sum was paid into the Canal Fund from the state treasury.

The total amount paid by the State for interest upon its bonds issued in anticipation of the tax for the public defence, and upon the moneys of the Canal Fund used for the purpose of defraying the expenses of raising and equipping troops, was $131,188.02. No part of that sum has been paid by the United States.

The moneys above specified as actually expended by the State of New York were necessarily expended for the purpose of enlisting, enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting such troops and causing them to be mustered into the military service of the United States, and were so paid and expended at the request of the civil and military authorities of the United States.

Prior to January 3, 1889, the State had presented, from time to time, various claims and accounts to the Treasury Department of the United States for charges and expenses incurred by it in enlisting, enrolling, arming, equipping, and mustering troops into the military service of the United States. Those claims amounted in the aggregate to $2,950,479.46, and included charges for all the moneys paid and placed as hereinbefore specified. The department, from time to time, allowed thereon various sums aggregating $2,775,915.24, leaving a balance of $174,564.22 not allowed, and the claims for which were pending in the Department unadjusted when this case was transmitted to the Court of Claims on the 3d day of January, 1889. Of that sum of $174,564.22 the sums

hereinbefore specified, amounting to $131,188.02, constituted a part.

The claim of the State for expenditures in furnishing troops with clothing and munitions of war was filed in the Treasury Department in May, 1862, and included the above items of interest. The claim for interest has from that time been suspended in the Department, and was so suspended at the time it was transmitted to the Court of Claims.

The court, after finding the facts substantially as above stated, gave judgment in favor of the State for $91,320.84, on account of interest paid upon its bonds issued in anticipation of taxes imposed for the public defence. From that judgment the United States appealed. The State also appealed, and claims that it was entitled to judgment for the additional sum of $39,867.13 paid into what is called the Canal Fund as interest upon the moneys it had borrowed from that fund to be repaid with interest.

The Government moved to dismiss the State's appeal, its contention being that the judgment brought here by the State for review is not obligatory in character and appealable, but only ancillary and advisory. This motion assumes that the court below was without jurisdiction under existing legislative enactments to render a final judgment, reviewable by this court, upon any claim, whatever its amount, made against an Executive Department and transmitted to the Court of Claims to be there proceeded in according to law.

We recognize the importance of the question thus presented, and have bestowed upon it the most careful consideration. Its solution can be satisfactorily reached only by an examination of the various statutes regulating the jurisdiction of the Court of Claims, including those known as the Bowman act of March 3, 1883, c. 116, 22 Stat. 485, and the Tucker act of March 3, 1887, c. 359, 24 Stat. 505.

By the act of Congress of July 27, 1861, c. 21, the Secretary of the Treasury was directed, out of any money in the Treasury not otherwise appropriated, and upon vouchers to be passed upon by the accounting officers of that Department, to pay the

costs, charges, and expenses properly incurred by any State in enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting its troops to be employed in suppressing the rebellion of 1861. 12 Stat. 276.

The claim of New York was founded on the above act of Congress of July 27, 1861, if not on contract with the United States. It was transmitted by the Secretary of the Treasury to the Court of Claims under section 1063 of the Revised Statutes as one involving controverted questions of law.

By the act of June 25, 1868, c. 71, § 7, the jurisdiction of the Court of Claims was enlarged so as to embrace several classes of claims that might be transmitted to it by the head of an Executive Department for adjudication. 15 Stat. 75, 76.

The provisions of that act were preserved in section 1063 of the Revised Statutes which is as follows: "Sec. 1063. Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character,

the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

It is clear that under this section no claim against an Executive Department, not otherwise described than as one "involving disputed facts or controverted questions of law," could be transmitted to the Court of Claims for adjudication unless the amount in controversy exceeded three thousand dollars. It is equally clear that that section did not make the amount jurisdictional where a claim of that class is transmitted as one the decision of which would affect a class of cases, or furnish a precedent for the action of the Executive Department in adjusting a class of cases, nor where any authority, right, privilege, or exemption was claimed or denied under the Constitution of the United States. But, as bearing on the inquiry to be presently made whether that section was superseded by subsequent enactments, it should be here noted that there might be claims in the hands of an Auditor or of the Comptroller of the Treasury for examination, which in the first instance were to be passed on by some other Department than that of the Treasury. Claims of that special class could not be transmitted by the Secretary of the Treasury to the Court of Claims, under section 1063 of the Revised Statutes, for adjudication, except "upon the certificate of the Auditor or Comptroller of the Treasury," having it under examination. This is indicated not only by the words of that section, but by sections 1064 and 1065, the first of which sections provides that "all cases transmitted by the head of any Department, *or* upon the certificate of any Auditor or Comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the Court of Claims, and shall, in all respects, be subject to the same rules and regulations;" and the latter, that "the amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the Court of Claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court."

We come now to what is known as the Bowman act of March 3, 1883, c. 116, entitled "An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government." 22 Stat. 485.

By the first section of that act it is provided: "Sec. 1. Whenever a claim or matter is pending before any committee of the Senate or House of Representatives, or before either House of Congress, which involves the investigation and determination of facts, the committee or House may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee or to the House by which the case was transmitted for its consideration."

The second section is in these words: "Sec. 2. When a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action."

As the Bowman act contains no words of express repeal, the question arises whether, by necessary implication, its second section superseded section 1063 of the Revised Statutes, in respect of claims transmitted by an Executive Department to the Court of Claims.

The Court of Claims was required by section 1063 of the Revised Statutes to adjudicate any claim, properly transmitted from an Executive Department, by a final judgment, while the Bowman act prohibited any judgment being entered for

or against a claim transmitted under that act; the duty of the court, in cases involving controverted questions of fact or law, transmitted to and heard by it under the Bowman act, being only to report its findings of fact and conclusions of law to the proper Department, for "its guidance and action."

It is, nevertheless, suggested that the Bowman act, although without words of repeal, covers the entire subject of claims involving controverted questions of fact or law that may be transmitted to the Court of Claims from an Executive Department, and, it is argued, that we must apply the rule that a prior statute is to be regarded as repealed or modified where "the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute." *Frost* v. *Wenie*, 157 U. S. 46, 58.

If that act be held to have displaced the whole of section 1063 of the Revised Statutes (except the clause relating to claims transmitted by the Secretary of the Treasury, upon the certificate of an Auditor or of the Comptroller of the Treasury) the result would be that after its passage the Court of Claims was wholly without jurisdiction to render *judgment* on any claim for money transmitted from an Executive Department, whatever its nature or amount. Such a construction would exclude from judicial cognizance by that court not only claims exceeding $3000 in amount, and specifically designated as claims involving controverted questions of law and fact, but even claims the determination of which would affect a class of cases, or furnish a precedent for the future action of an Executive Department, and claims that involved an authority, right, privilege, or exemption asserted or denied under the Constitution of the United States. Congress, when it passed the Bowman act, must have had in view the provisions of section 1063 of the Revised Statutes under which the Court of Claims had so long exercised jurisdiction of claims for money made against an Executive Department and transmitted to that court for final adjudication. As the Bowman act makes no reference to that section, and contains no words of repeal, we cannot suppose that Congress intended to take from the

Court of Claims jurisdiction to render judgment in cases coming before it under the Revised Statutes. The object of that act is expressed in its title, and was to afford assistance and relief to Congress and the Executive Departments in the *investigation* of claims and demands against the Government. To that end, and in respect of claims and demands involving controverted questions of fact or law and pending in the Executive Departments, authority was given to the heads of such Departments upon their own motion, and whether the claimant desired it or not, to obtain, for their "guidance and action," findings of fact and conclusions of law, without regard to the amount involved. *Billings* v. *United States*, 23 C. Cl. 166, 174. Neither expressly nor by necessary implication did that act take from an Executive Department the right to send to the Court of Claims, for *final adjudication*, any claim made against it that was embraced by section 1063 of the Revised Statutes. So far as the Bowman act related to claims for money pending in an Executive Department, it only authorized the head of the Department to send them to that court for a report of facts and conclusions that would not have the force of a judgment reviewable by this court. In this view, there is no conflict between the Bowman act and the Revised Statutes. As there are no words of repeal in the Bowman act, we have given it such construction as will make it consistent with previous legislation, and thus avoid the abrogation of existing statutes which Congress had not repealed either expressly or by necessary implication. The second section of the Bowman act should be construed as if it were a proviso to section 1063 of the Revised Statutes. Thus construed the later statute is not in conflict with the earlier one.

We turn now to the act of March 3, 1887, c. 359, known as the Tucker act, entitled "An act to provide for the bringing of suits against the Government of the United States." 24 Stat. 505.

The first section of that act gives the Court of Claims original jurisdiction to hear and determine all claims founded upon the Constitution of the United States or any law of Congress,

except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: nothing, however, in that section to be construed as giving to any of the courts mentioned in the act jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as "war claims," nor other claims theretofore rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same. Jurisdiction was also given of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant. It also provided that no suit against the Government of the United States should be allowed under that act unless the same was brought within six years after the right accrued for which the claim is made.

Other sections of that act are as follows:

"SEC. 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, *with the consent of the claimant*, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.

"SEC. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled 'An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' approved March third, eighteen hundred and eighty-three [the Bowman act], if it shall appear to the satisfaction of the court,

upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court." By its sixteenth section all laws and parts of laws inconsistent with that act were repealed.

What is the scope of the twelfth section of the Tucker act? Did that section supersede section 1063 of the Revised Statutes, or section two of the Bowman act?

It is difficult to tell what was intended by the words "with the consent of the claimant," in the twelfth section of the Tucker act. If Congress intended that no claim, large or small in amount, involving controverted questions of fact or law, and pending in an Executive Department, should be transmitted to the Court of Claims, except with the consent of the claimant, that intention would have been expressed in words that could not have been misunderstood; for that court had long exercised jurisdiction in cases of that kind. But, in view of the words used, no such purpose can be imputed to Congress. The Tucker act cannot be held to have taken the place of section two of the Bowman act; for section thirteen of the Tucker act distinctly provides for *judgment in every case* then pending in or which might come before the Court of Claims *under the Bowman act*, of which that court could have taken judicial cognizance if the case had been commenced originally by suit instituted in that court by the claimant. That Congress did not intend to supersede the Bowman act is made still more apparent by the fourteenth section of the Tucker act, declaring "that whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same *in accordance with the provisions of the act* approved March third, eighteen hundred and eighty-three, entitled 'An

act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' [the Bowman act] and report to such House the facts in the case and the amount, where the same can be liquidated, etc." It thus appears that any bill, except for a pension, in either House of Congress, providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, may be transmitted to the Court of Claims, to be proceeded in, not, let it be observed, under the Tucker act, but under the Bowman act of March 3, 1883, and to report the facts, etc., to such House. It is impossible, therefore, to hold that the Tucker act displaced or repealed the second section of the Bowman act.

In our opinion the twelfth section of the Tucker act should be construed as not referring to claims which an Executive Department, proceeding under section 1063 of the Revised Statutes, seeks to have finally adjudicated by the Court of Claims, nor to claims described in that section, in respect of which the Department, upon its own motion, and whether the claimant consents or not, desires from that court a report under the Bowman act, of facts and law for its guidance and action. It refers only to claims which the head of an Executive Department, with the expressed consent of the claimant, may send to the Court of Claims in order to obtain a report of facts and law which the Department may regard as only advisory. It no doubt often happened that the head of a Department did not desire action by the Court of Claims in relation to a particular claim, but, in order to meet the wishes of the claimant, was willing to have a finding by that court which was not followed by a judgment, nor by any report for the guidance and action of the Department. So that section 1063 of the Revised Statutes, the second section of the Bowman act, and the twelfth section of the Tucker act may be regarded as parts of one general system, covering different states of case, and standing together without conflict in any essential particular.

The claim of New York, being for money and founded on

an act of Congress, was within the general jurisdiction of the Court of Claims. If not barred by limitation it could, in the discretion of the Secretary of the Treasury, have been transmitted or certified to the Court of Claims under the Bowman act after its passage for a finding of facts or law, and that court, when the Tucker act came into operation, could, under its thirteenth section, have rendered a final judgment, sending, however, to the Treasury Department a report of its proceedings. But the Secretary of the Treasury, in the exercise of an authority given him by statute and never withdrawn, chose to certify or transmit this claim to the Court of Claims, under section 1063 of the Revised Statutes, for final adjudication.

Touching the suggestion that the twelfth section of the Tucker act entirely superseded the second section of the Bowman act, it may be further observed that the Tucker act repeals only such previous statutes as were inconsistent with its provisions. There is no inconsistency between the sections just named; one, as we have said, the second section of the Bowman act, relating to claims involving controverted questions of fact or law, which an Executive Department may transmit to the Court of Claims without consulting the wishes of the claimant, in order to obtain a report of facts and law for its guidance and action; the other, the twelfth section of the Tucker act, relating to claims of the same class transmitted to that court with the expressed consent of the claimant in order to obtain a report of facts and law that would be only advisory in its character.

The object of the thirteenth section of the Tucker act is quite apparent. A case transmitted under the Bowman act is, we have seen, one in which the findings of fact and law are made for the guidance and action of the Executive Department from which it came, and, therefore, a rendition of judgment, in such a case, if it be one of which the court could at the outset have taken cognizance at the voluntary suit of the claimant, would be a saving of time for all concerned. If the cases embraced by the twelfth section of the Tucker act were only those provided for by the second section of the

Bowman act, the thirteenth section of the Tucker act, authorizing a final judgment or decree where the claim was one of which the court could originally have taken jurisdiction for purposes of final adjudication, would not have made special reference to cases coming before the Court of Claims under the Bowman act.

Our conclusions, then, as to the several statutes under examination, so far as they relate to claims pending in an Executive Department, are —

First. Any claim made against an Executive Department, "involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege or exemption is claimed or denied under the Constitution of the United States," may be transmitted to the Court of Claims by the head of such department under section 1063 of the Revised Statutes for final adjudication; provided, such claim be not barred by limitation, and be one of which, by reason of its subject-matter and character, that court could take judicial cognizance at the voluntary suit of the claimant.

Second. Any claim embraced by section 1063 of the Revised Statutes, without regard to its amount, and whether the claimant consents or not, may be transmitted under the Bowman act to the Court of Claims by the head of the Executive Department in which it is pending, for a report to such department of facts and conclusions of law for "its guidance and action."

Third. Any claim embraced by that section may, in the discretion of the Executive Department in which it is pending, and with the expressed consent of the plaintiff, be transmitted to the Court of Claims, under the Tucker act, without regard to the amount involved, for a report, merely advisory in its character, of facts or conclusions of law.

Fourth. In every case, involving a claim of money, trans-

mitted by the head of an Executive Department to the Court of Claims under the Bowman act, a final judgment or decree may be rendered when it appears to the satisfaction of the court, upon the facts established, that the case is one of which the court, at the time such claim was filed in the department, could have taken jurisdiction, at the voluntary suit of the claimant, for purposes of final adjudication.

Whether the words "or matter" in the second section of the Bowman act embrace any matters, except those involving the payment of money, and of which the Court of Claims under the statutes regulating its jurisdiction could, at the voluntary suit of the claimant, take cognizance for purposes of final judgment or decree, need not be now considered.

It results that as the claim of New York exceeded three thousand dollars, and was certified under section 1063 of the Revised Statutes as one involving controverted questions of law, the court below had jurisdiction to proceed to a final judgment, unless, as suggested by the Assistant Attorney General, the claim when transmitted to the Court of Claims by the Secretary of the Treasury was barred by limitation.

At the time the claim of New York was filed in the Treasury Department there was no statute of limitations in force expressly applicable to cases in the Court of Claims. But by the act of March 3, 1863, c. 92, § 10, it was provided that (with certain exceptions that have no application to this case) every claim against the United States, cognizable by the Court of Claims, should be barred unless the petition setting forth a statement of it was filed in or transmitted to that court within six years after the claim first accrued; claims that had accrued before the passage of that act not to be barred, if filed or transmitted as above stated, within three years after the passage of the act. 12 Stat. 765, 767. This limitation of six years was preserved in the Revised Statutes and in the Tucker act. Rev. Stat. § 1069; 24 Stat. 505.

Was the claim of New York barred because more than six years passed after it accrued before it was transmitted to the Court of Claims? In *Finn* v. *United States*, 123 U. S. 227, 232,

this court said: "The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims. Since the Government is not liable to be sued, as of right, by any claimant, and since it has assented to a judgment being rendered against it only in certain classes of cases, brought within a prescribed period after the cause of action accrued, a judgment in the Court of Claims for the amount of a claim which the record or evidence shows to be barred by the statute, would be erroneous." To the same effect was *DeArnaud* v. *United States*, 151 U. S. 483, 495.

But, in *United States* v. *Lippitt*, 100 U. S. 663, 668, 669, where the question was whether a claim that accrued in 1864, and which was presented to the War Department in 1865, and in 1878 was transmitted to the Court of Claims as one involving controverted questions of law, the decision whereof would affect a class of cases, the court said: "Limitation is not pleadable in the Court of Claims, against a claim cognizable therein, and which has been referred by the head of an Executive Department for its judicial determination, provided such claim was presented for settlement at the proper department within six years after it first accrued, that is, within six years after suit could be commenced thereon against the Government. Where the claim is of such a character that it may be allowed and settled by an Executive Department, or may, in the discretion of the head of such department, be referred to the Court of Claims for final determination, the filing of the petition should relate back to the date when it was first presented at the department for allowance and settlement. In such cases, the statement of the facts, upon which the claim rests, in the form of a petition, is only another mode of assert-

ing the same demand which had previously and in due time been presented at the proper department for settlement. These views find support in the fact that the act of 1868 describes claims presented at an Executive Department for settlement, and which belong to the classes specified in its seventh section, *as cases* which may be transmitted to the Court of Claims. 'And all the cases mentioned in this section, which shall be transmitted by the head of any Executive Department, or upon the certificate of any auditor or comptroller, shall be *proceeded in* as other cases pending in said court, and shall, in all respects, be subject to the same rules and regulations,' with right of appeal. The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the Government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the Court of Claims they are to be 'proceeded in as other cases in said court.'"

The same principle was recognized in *Finn* v. *United States*, 123 U. S. 227, 232, in which case the court, referring to the act of 1863, limiting the time for bringing suits in the Court of Claims, also said: "The duty of the court, under such circumstances, whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or qualification of the right to a judgment against the United States that — except where the claimant labors under some of the disabilities specified in the statutes — the claim must be put in suit by the voluntary action of the claimant, or be presented to the proper department for settlement, within six years after suit could be commenced thereon against the Government."

Upon the authority of those cases we adjudge that as the claim of New York was presented to the Treasury Department before it was barred by limitation, its transmission by the Secretary of the Treasury to the Court of Claims for adjudication was only a continuation of the original proceeding commenced in that department in 1862. The delay by the department in disposing of the matter before the expiration of six years after the cause of action accrued, could not impair the

rights of the State. Of course, if the claim had not been presented to the Treasury Department before the expiration of that period the Court of Claims could not have entertained jurisdiction of it.

For the reasons we have stated the motion of the United States to dismiss the appeal of the State is denied, and we proceed to the examination of the case upon its merits.

The entire sum for which the State asked judgment was $131,188.02, of which $91,320.84 represented the amount paid as interest on moneys borrowed for the purpose of raising troops for the national defence, and for the repayment of which, with interest at seven per cent, the State executed its short-time bonds. The balance, $39,867.18, represented the amount paid as interest on moneys received by way of loan from the Canal Fund and applied by the State for the same purpose.

On behalf of the Government it is contended that payment by the United States of the above sum of $91,320.84 is prohibited both by the statute, act of March 3, 1863, c. 92, 12 Stat. 765, Rev. Stat. § 1091, providing that interest shall not be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, and by the general rule based on grounds of public convenience, that interest "is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its legislature, or by a lawful contract of its executive officers." *United States* v. *North Carolina*, 136 U. S. 211, 216; *Angarica* v. *Bayard*, 127 U. S. 251, 260.

The allowance of the $91,320.84 would not contravene either the statute or the general rule to which we have adverted. The duty of suppressing armed rebellion having for its object the overthrow of the National Government, was primarily upon that Government and not upon the several States composing the Union. New York came promptly to the assistance of the National Government by enrolling, subsisting, clothing, supplying, arming, equipping, paying, and transporting troops to be employed in putting down the re-

bellion. Immediately after Fort Sumter was fired upon, its legislature passed an act appropriating $3,000,000, or so much thereof as was necessary, out of any moneys in its treasury not otherwise appropriated, to defray any expenses incurred for arms, supplies, or equipments for such forces as were raised in that State and mustered into the service of the United States. In order to meet the burdens imposed by this appropriation, the real and personal property of the people of New York were subjected to taxation. When New York had succeeded in raising thirty thousand soldiers to be employed in suppressing the rebellion, the United States, well knowing that the national existence was imperilled, and that the earnest coöperation and continued support of the States was required in order to maintain the Union, solemnly declared by the act of 1861, that "the costs, charges, and expenses properly incurred" by any State in raising troops to protect the authority of the nation, would be met by the General Government. And to remove any possible doubt as to what expenditures of a State would be so met, the act of 1862 declared that the act of 1861 should embrace expenses incurred before, as well as after, its approval. It would be a reflection upon the patriotic motives of Congress if we did not place a liberal interpretation upon those acts, and give effect to what, we are not permitted to doubt, was intended by their passage. Before the act of July 27, 1861, was passed the Secretary of State of the United States telegraphed to the governor of New York, acknowledging that that State had then furnished fifty thousand troops for service in the war of the rebellion, and thanking the governor for his efforts in that direction. And on July 25, 1861, Secretary Seward telegraphed: "Buy arms and equipments as fast as you can. We pay all." And on July 27, 1861, that "Treasury notes for part advances will be furnished on your call for them." On August 16, 1861, the Secretary of War telegraphed to the governor of New York: "Adopt such measures as may be necessary to fill up your regiments as rapidly as possible. We need the men. Let me know the best the Empire State can do to aid the country in the present emergency." And on February 11,

1862, he telegraphed: "The Government will refund the State for the advances for troops as speedily as the Treasurer can obtain funds for that purpose." Liberally interpreted, it is clear that the acts of July 27, 1861, and March 8, 1862, created, on the part of the United States, an obligation to indemnify the States for *any* costs, charges, and expenses *properly incurred* for the purposes expressed in the act of 1861, the title of which shows that its object was "to *indemnify* the States for expenses incurred by them in defence of the United States."

So that the only inquiry is whether, within the fair meaning of the latter act, the words "costs, charges, and expenses properly incurred" included interest paid by the State of New York on moneys borrowed for the purpose of raising, subsisting, and supplying troops to be employed in suppressing the rebellion. We have no hesitation in answering this question in the affirmative. If that State was to give effective aid to the General Government in its struggle with the organized forces of rebellion, it could only do so by borrowing money sufficient to meet the emergency; for it had no money in its treasury that had not been specifically appropriated for the expenses of its own government. It could not have borrowed money any more than the General Government could have borrowed money, without stipulating to pay such interest as was customary in the commercial world. Congress did not expect that any State would decline to borrow and await the collection of money raised by taxation before it moved to the support of the nation. It expected that each loyal State would, as did New York, respond at once in furtherance of the avowed purpose of Congress, by whatever force necessary, to maintain the rightful authority and existence of the National Government. We cannot doubt that the interest paid by the State on its bonds, issued to raise money for the purposes expressed by Congress, constituted a part of the costs, charges, and expenses properly incurred by it for those objects. Such interest, when paid, became a principal sum, as between the State and the United States, that is, became a part of the aggregate sum properly paid by the State for the United States. The principal and

interest, so paid, constitutes a debt from the United States to the State. It is as if the United States had itself borrowed the money, through the agency of the State. We therefore hold that the court below did not err in adjudging that the $91,320.84 paid by the State for interest upon its bonds issued in 1861 to defray the expenses to be incurred in raising troops for the national defence was a principal sum which the United States agreed to pay, and not interest within the meaning of the rule prohibiting the allowance of interest accruing upon claims against the United States prior to the rendition of judgment thereon.

The Court of Claims disallowed so much of the State's demand as represented interest paid by it on moneys borrowed from the Canal Fund. The instalment of interest paid into that Fund by the State was $48,187.13. But as the State itself earned interest to the amount of $8319.95 on a part of the money obtained by it from the commissioners of the Canal Fund, it only claimed $39,867.18 on account of interest paid to that Fund.

The Canal Fund was made by the constitution of the State a sinking fund for the ultimate liquidation of what is known as the canal debt of New York. In April and May, 1861, $2,039,663.06 from the taxes of 1860 reached the treasury of the State, and under the constitution and laws of New York that amount should have been invested in securities for the benefit of the Canal Fund, and the interest derived from those securities paid into the Fund. The State was permitted to use a part of the above sum under an agreement by its officers that interest thereon at the rate of five per cent should be paid. It recognized and fulfilled that agreement, and now claims that the interest it so paid to the Canal Fund constituted a charge or expense properly incurred in raising, subsisting, and supplying troops to suppress the rebellion.

We are of opinion that, so far as the question of the liability of the United States is concerned, there is, on principle, no difference between the claim for $91,320.84 and the claim for $39,867.18. We do not stop to inquire whether the ac-

tion of the canal commissioners, in allowing the State to use a part of the moneys collected for the benefit of the Canal Fund, was strictly in accordance with law. Suffice it to say, that the Canal Fund was entitled to any interest earned upon moneys belonging to it, and fidelity to the constitution and laws of New York required the State to recognize that right in the only way it could at the time have been done, namely, by paying the interest that ought to have been realized by the commissioners of the Canal Fund, if they had invested in interest-paying securities the moneys they permitted the State to use for military purposes. If the Canal Fund money, used by the state comptroller to defray the expenses of raising and equipping troops, had been borrowed upon the bonds of the State sold in open market, the interest paid on such bonds would, for the reasons we have stated, be a just charge against the United States on account of expenses properly incurred by the State for the purposes expressed by Congress. And such would have been the result if the moneys of the Canal Fund had been invested by the commissioners directly in bonds of the State, bearing the same rate of interest that was paid to the commissioners of that fund. The substance of the transaction was that the State, for moneys that could not be legally appropriated for the ordinary expenses of its own government, and which the law required to be so invested as to earn interest for the Canal Fund, used those moneys for military purposes, under an agreement by its officers, subsequently ratified by the State, to pay interest thereon. It was, in its essence, a loan to the State by the commissioners of the Canal Fund of money to be repaid with interest. The obligation of the United States to indemnify the State, on account of such payment, is quite as great as it would be if the transaction had occurred between the State and some corporation from which it borrowed the money. It is not the case of the State taking money out of one pocket to supply a deficiency in another over which it had full power; for, although the moneys brought into its treasury by the collection of taxes were under its control, the State was without power to manage and control taxes collected for

the Canal Fund, except as provided in its constitution and laws. It could not legally have become a party to any arrangement or agreement involving the use, without interest, of the moneys of the Canal Fund that had been set apart for the ultimate payment of the canal debt.

We are of opinion that the claim of the State for money paid on account of interest to the commissioners of the Canal Fund, is not one against the United States for interest as such, but is a claim for costs, charges, and expenses properly incurred and paid by the State in aid of the General Government, and is embraced by the act of Congress declaring that the States would be indemnified by the General Government for moneys so expended.

As the State was entitled to a larger sum than $91,320.84, *the judgment is reversed, and the cause is remanded with directions for further proceedings not inconsistent with this opinion.*

NALLE *v.* YOUNG.

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

No. 17. Submitted October 15, 1895. — Decided January 20, 1896.

In 1868, Y., a citizen of Louisiana, being then married, mortgaged his interest in certain real estate in that State to E. H., his wife joining in the mortgage. In 1870 the father of Mrs. Y. died, leaving a policy of insurance in her favor. Y. collected this sum and converted it to his own use and the use of the community. In 1876, by a transaction between Y. and the residuary legatee of E. H., who was also indebted to Y., her said indebtedness was discharged, and Y.'s interest in that mortgage was assigned to Mrs. Y. in replacement of her paraphernal moneys and property, so secured and converted by her husband. In 1881 Mrs. Y. became entitled to a further sum, on the final settlement of her father's estate, which was in like manner received by Y., and converted to his own use and that of the community. In 1881, on the petition of Mrs. Y., filed in 1881 in a suit against her husband for a dissolution of the community and a separation of property, a decree to that effect was made by the

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state court; and it was further adjudged and decreed that Y. was indebted to Mrs. Y. in the sums so received by him from her father's estate, with recognition of mortgage on the property described, and the property be sold to satisfy said judgment and costs. In 1882, in order to enable Y. to borrow from N. & Co., Mrs. Y. executed a mandate and power of attorney, authorizing the cancelling and erasure of the mortgage to E. H. What was done under that power was afterwards claimed by Y. and by Mrs. Y. not to amount to such cancellation, and by N. & Co. to be effective. A mortgage to N. & Co. was then executed by Y., and the inscription of Mrs. Y.'s mortgage was then renewed. In 1883 N. & Co. commenced proceedings to foreclose their mortgage, (Mrs. Y. not being made a party to the suit,) and obtained a decree of foreclosure in 1886. The property was duly appraised according to the law of Louisiana, and at the sale no sufficient bid was made. It was then advertised for sale on a credit of twelve months. In 1887, Y. notified the marshal that Mrs. Y. had an incumbrance on the property prior to the mortgage to N. & Co., (stating the amount of it,) and that a sale for less than that amount would be invalid. Notwithstanding this notice, a sale was made for a less sum. This sale was attacked by Y. and Mrs. Y. by various proceedings set forth in the opinion of the court, which resulted in a decree setting aside the sale, and adjudging that the attempted renunciation by Mrs. Y. of her special mortgage was invalid, and that that mortgage should be recognized as the first mortgage on the property, superior in rank to the mortgage of N. & Co. *Held*,

(1) That Mrs. Y. must stand upon her legal mortgage, resulting from the receipt of her paraphernal property, and recognized by the judgment of 1881, decreeing a separation of property; or upon a judicial mortgage arising from that judgment; or on the contract between herself and the residuary legatee of E. H.;

(2) That if her mortgage be held to be legal or judicial, its existence was not a bar to the confirmation of a sale for an amount insufficient to satisfy it, and that it could not rank the special conventional mortgage of N. & Co.;

(3) That by the transaction between the residuary legatee of E. H. and Mrs. Y., the respective debts were discharged by agreement and compensated each other, and when the principal obligation was thus discharged, the mortgage fell with it, and would not be revived, although the indebtedness were reacknowledged;

(4) That the decree below should be reversed.

Edward Nalle & Co., composed of Edward Nalle and Walter C. Flower, doing business in the city of New Orleans, filed their petition in the district court for the ninth district of Louisiana, holding sessions in and for the parish of Tensas, on May 30, 1883, against Wade R. Young, to foreclose a mortgage executed on June 2, 1882, to secure Young's note

for $1632.61, payable December 1, 1882, on his interest in certain real estate in that parish, known as the St. Peter plantation. The petition alleged "that said Wade R. Young resides permanently out of the State of Louisiana and is not represented in this State," and prayed for the appointment of a curator *ad hoc.* The appointment of a curator was made and citation served upon him. On June 25, 1883, Wade R. Young filed his answer to the petition, wherein he described himself as "a resident and citizen of the State of Mississippi," and on the same day filed his petition for the removal of the cause accompanied by a removal bond; and June 28, the district court entered an order transferring the case to the United States Circuit Court for the Western District of Louisiana, which was done accordingly. Plaintiffs thereupon prayed in that court that their petition be allowed to stand as a bill in equity, and October 12, 1883, the defendant Young filed his answer thereto, admitting the execution of the note and mortgage, but alleging in substance that he had been compelled to pay usurious interest; that the account current between the parties was composed of excessive and objectionable charges; that plaintiffs failed to carry out their agreement and understanding with him; and that upon a proper taking of accounts there was nothing or but little due.

In addition to his answer, to which a replication was filed, defendant made a reconventional demand, on which, upon a trial thereof, judgment passed against him. November 11, 1884, the cause was revived as to the heirs of Edward Nalle, who had deceased, and they entered their appearance March 24, 1885.

Proofs were taken, and the cause was referred to a master to state an account, who made a report of the amount due to Nalle & Co., less a specified credit. The cause coming on to be heard on the pleadings and proofs and oral testimony then adduced, a decree was entered November 6, 1886, "that plaintiff's mortgage on the property described in the act of mortgage annexed to the bill of complaint herein, viz.: [here follows description] the said interest of Wade R. Young in the above lands having been ascertained by a survey made by

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John Johnson, surveyor, on the 15th of March, 1879, be and the same is hereby, recognized, and ordered to be enforced to satisfy the sum of one thousand six hundred and thirty-two $\frac{61}{100}$ dollars, with 8 per cent per annum interest thereon from the 1st day of December, 1882, until paid, subject to the credit aforesaid, and also for the payment of the attorney's fees stipulated by said act of mortgage, being 5 per cent on said amount, and the costs of this suit, to be taxed."

An execution was thereupon issued, and the mortgaged premises seized and sold by the marshal, July 30, 1887, to Mrs. Mary Nalle, wife of Eustis F. Golson.

October 12, 1887, Mrs. B. F. Young, wife of Wade R. Young, on motion of her husband as her solicitor, was allowed to file "her bill and intervening petition, by her husband and next friend," against Nalle & Co., in which she averred that she was married to Wade R. Young in October, 1865, and resided with him continually in the State of Louisiana until the month of February, 1876; that in the year 1870 her father died in the parish of Catahoula, Louisiana, and left her a policy of insurance on his life for the sum of $5000, which was collected by her husband for her and by him converted to his own use and to the use of the community existing between them; that her father also left a large estate, consisting of property, real and personal, which was sold at probate sale in 1881, and her interest therein, amounting to $2500, adjudicated to her husband for his own sole use, benefit and advantage, and for that of the community existing between them; and that her husband had so received the paraphernal moneys and property of complainant in the sum of $7500, which had been converted by him to his own use and that of the community, and was now legally due complainant by her husband.

The petition further alleged that by an act of mortgage in 1868 by Margaret A. Young, William C. Young, and Wade R. Young, as joint owners, St. Peter plantation was mortgaged to Miss Eliza H. Young, to secure their joint and several note for $11,250, with interest at eight per cent from January 1, 1867; and averred that in the year 1876, by a transaction between her husband and Mrs. S. J. Metcalfe, as

sole surviving residuary legatee of Miss Eliza H. Young, and complainant, an undivided four ninths of that note and mortgage, being the individual indebtedness of her husband thereon, was assigned to her by Mrs. Metcalfe by express warranty; that a new note was then made and delivered to her and accepted by her in replacement of her paraphernal moneys and property, so secured and converted by her husband. It was further averred that in 1881 complainant brought suit against her husband for a dissolution of the community and a separation of property in the ninth district court in the parish of Tensas, and obtained judgment therein on the — day of — for said sum of $7500 and interest, with a recognition of her mortgage on the property described and a decree dissolving the community of acquets and gains between them; that in 1882, her husband desiring to execute a mortgage on the property in favor of Nalle & Co. to secure advances of money and supplies to enable him to carry on certain planting operations, at the request of Nalle & Co., applied to complainant to renounce her prior right of mortgage in favor of Nalle & Co., by authorizing the cancelling and erasure of the inscription of the mortgage transferred to her by Mrs. Metcalfe, so as to give Nalle & Co. the first mortgage; that Nalle & Co. refused to make any advances until given priority of rank; that for that purpose complainant executed a mandate and power of attorney authorizing the cancelling and erasure of her mortgage, and "upon such authority the said mortgage was attempted to be cancelled;" that the mortgage to Nalle & Co. was then executed by her husband; and that the inscription of her mortgage was then renewed. Petitioner then alleged that at the October term, 1886, a decree was rendered at the suit of Nalle & Co. against her husband for the foreclosure of their mortgage, the amount of indebtedness fixed, and the sale of the property ordered; that final process was issued in execution of that decree, and in obedience thereto the marshal advertised the property for sale for cash on Saturday, July 2, 1887; that on that day the property was appraised according to the requirements of the Louisiana law, and offered to the highest bidder for cash at not less than two-

thirds of the appraised value, which had been placed at the sum of $6000, and, no bid having been made, was advertised for sale on a credit of twelve months; that on July 30, 1887, her husband, as defendant, served notice and protest on the marshal of the prior incumbrance in favor of complainant for $7500 and interest, and that any sale for a price less than the amount of such prior incumbrance would be invalid; that notwithstanding the notice and protest the marshal, acting under the direction of Nalle & Co.'s solicitor, accepted the bid of one of them for $2000. Complainant charged that her attempted renunciation of her rights authorizing the erasure of her mortgage was of no effect under the laws of Louisiana, and set forth the grounds on which that charge was based; that her mortgage was the first incumbrance and superior to the mortgage in favor of Nalle & Co.; that no sale could be made to a purchaser for less than the amount of such mortgage; and that the attempted sale was absolutely null and void. It was further averred that Nalle & Co. pretended to have paid the taxes on the mortgaged property for the years 1882, 1883, 1884, 1885, and 1886, amounting to the sum of $624.60, and to have become subrogated by such payments to the privilege of mortgage existing in favor of the State and parish, and claimed a priority of lien on the mortgaged premises in consequence of such payment and subrogation; that no such taxes were legally due on the mortgaged property; and that Nalle & Co. and Mrs. Mary Nalle acquired no right by such payment and attempted subrogation. The petition then charged that the revenue acts of Louisiana for 1880, 1882, 1884, and 1886, in pursuance of which these taxes were levied, were unconstitutional and void as repugnant to the state constitution. It was further alleged that notwithstanding complainant had a first and prior incumbrance for $7500 and interest, Nalle & Co. did not make complainant a party to the foreclosure proceedings, according to the practice of the Circuit Court as a court of equity, and had caused the proceedings to be brought in disregard of complainant's rights, and had endeavored to have the mortgaged property sold and adjudicated to one of themselves for a low price, etc.; that if the

renunciation of complainant was invalid as charged, no valid sale could be made for a price not exceeding the amount of the prior mortgage, and the attempted sale would be null and void; that if the renunciation for any reason not known to the complainant was valid and binding, complainant was entitled to redeem by paying the amount of the prior incumbrances, if any such there might be; and that for the purpose of securing equitable protection, it had become necessary for complainant to intervene in the foreclosure suit, and to oppose the confirmation of the sale in order that a reference might be made to determine the priority of liens and adjust all conflicting claims.

Petitioner therefore prayed to be allowed to file this intervention *pro interesse suo*, and that Nalle & Co. (that is, Flower and the heirs of Nalle) be summoned to answer by writ of subpœna served on their solicitor; that the sale of the mortgaged premises by the marshal on July 30, 1887, be not confirmed but be set aside; that a reference be made to have the priority of liens determined and all conflicting claims adjusted; that a valid title be assured to the purchaser, and a sale made for the best interests of all concerned; that the attempted renunciation of her mortgage in favor of Nalle & Co. be declared null and void, and her mortgage recognized as the first and superior incumbrance on the property; that the revenue acts of Louisiana for 1880, 1882, 1884, and 1886 be declared unconstitutional, null and void; that the taxes levied in pursuance thereof be declared of no effect, and for general relief. This intervention was not sworn to, and was signed "Wade R. Young, solicitor." On the 24th of October, 1887, Mrs. Young and her husband prayed to amend their original petition by alleging that although Young removed with his family from Louisiana to Mississippi in 1876, he did not at that time establish a residence in Mississippi, and that it was not until January, 1883, that he abandoned finally his intention to return to Louisiana, renounced his residence and citizenship there, and declared himself a citizen of Mississippi with the intention of remaining permanently.

The copy attached to the intervening petition showed an

act of mortgage, March 18, 1868, by Wade R. Young, William C. Young, and Margaret A. Young, of the parish of Tensas, to Miss Eliza H. Young, to secure their certain promissory note for $11,250, payable with interest at eight per cent one year after date, on the property in question, being part of Lake St. Peter's plantation, with a confession of judgment; Mrs. B. F Liddell, wife of Wade R. Young, and Mrs. Willie T. Evans, wife of William C. Young, ratifying said act of mortgage, and renouncing all their rights in the property therein mortgaged, upon due examination separate and apart from their husbands; and an acceptance by Eliza H. Young. Upon the record of this mortgage in the parish of Tensas appeared the cancellation of five ninths thereof, being the indebtedness of W. C. Young, one of the mortgagors, and special legatee for M. A. Young, deceased, leaving four ninths of the indebtedness of Wade R. Young for himself and as special legatee for M. A. Young, deceased, still unpaid; also the cancellation and erasure of the mortgage to the extent of the remaining four ninths on the 5th of June, 1882, under a power of attorney signed by Wade R. Young and his wife, Mrs. B. F. Young, whereby Charles Young of the parish of Tensas was constituted and appointed attorney in fact with full and complete power in the name of Mrs. Young to cause the act of mortgage to be cancelled and erased. This power of attorney was executed June 1, 1882, in the presence of two witnesses, who signed the act with the parties, as did also the notary. The cancellation and power of attorney were duly certified as correct copies of the original as the same appeared on file and of record in the office of the clerk of the ninth district court of Tensas parish.

The act of transfer from Mrs. Metcalfe to Mrs. Young was dated December 2, 1876, and stated that Mrs. Metcalfe, residing in the parish of Catahoula; Wade R. Young of the parish of Concordia; and Mrs. B. F. Liddell, wife of Wade R. Young, "herein represented by her special attorney and attorney in fact, Volney M. Liddell, with a procuration hereto annexed," personally appeared before the notary and declared that whereas Mrs. Metcalfe, as sole surviving residuary legatee of

Miss Eliza H. Young, was the holder and owner of the note of Wade R. Young, William C. Young, and Margaret A. Young for the sum of $11,250, secured by act of mortgage; and whereas Mrs. Metcalfe was indebted to Wade R. Young for certain sums of money; and whereas Wade R. Young was indebted to his wife, Mrs. B. F. Liddell, for $7500, the dotal and paraphernal property of his wife, received by him, and converted to his own use, for the repayment of which his wife had a legal mortgage on the interest of her husband in his father's estate; therefore Mrs. Metcalfe transferred and assigned to Mrs. Young four ninths interest in said promissory note and mortgage, being the portion thereof due by Wade R. Young, and bearing on his interest in the St. Peter plantation, and warranted the validity thereof; and Wade R. Young declared that in consideration of the transfer and warranty by Mrs. Metcalfe, he thereby acknowledged the receipt of the four ninths interest of the note and mortgage, and granted to Mrs. Metcalfe an acquittance *pro tanto* of the sums due by her to him; and Mrs. Young declared that she accepted the transfer and assignment of said four ninths interest, and, in consideration thereof, and of the warranty by Mrs. Metcalfe of the validity of the note and mortgage, joined her husband "in so far as the mortgage accorded to her by law to secure the repayment of her paraphernal funds may bear upon the interest of her said husband in the succession of his deceased father, in giving to the said Mrs. S. J. Metcalfe an acquittance and release *pro tanto* of the sum due by her." This was signed by Wade R. Young, V. M. Liddell, attorney; S. J. Metcalfe, two witnesses, and the notary public, and a certificate was attached by the recorder of Catahoula parish that the foregoing was a true and correct copy of the original act of transfer and agreement on file in his office and recorded in its records December 6, 1876. There was also a certificate, under date of October 18, 1887, of the clerk of the ninth district court of Tensas parish that the foregoing was a true and correct copy of the copy of the act of transfer and agreement, "as the same now appear on file in my office and of record there." The copy of the judgment of Mrs. Young against her husband was as follows:

Statement of the Case.

"9th District Court, Parish of Tensas.

"Mrs. Bethia F. Liddell
vs. } No. 3050.
Wade R. Young, her husband.

"In this case a regular trial was had after issue joined, and the law and the evidence being in favor of the plaintiff and against the defendant, it is ordered, adjudged, and decreed that there be judgment of separation, dissolving the community of acquets and gains between the plaintiff, Mrs. Bethia F. Liddell, and the defendant, Wade R. Young, and that the said plaintiff do have and recover judgment against the defendant for the sum of $7500, seven thousand five hundred dollars, with a recognition of her mortgage on the property described in the petition, and that the same be sold to satisfy said judgment and costs.

"Thus done, read, and signed in open court this 9th day of July, 1881. WADE H. HOUGH,

"*Judge 9th District.*"

This was certified to by the clerk of the ninth district court as "a true and correct copy of original judgment rendered in suit of 'Bethia F. Liddell *vs.* Wade R. Young, her husband,' as the same appears on file and of record in my office in mortgage book 'O,' page 649 *et seq.*, on June 5, 1882."

On the same day the intervening petition was filed, Young filed what was entitled an "opposition to confirmation of sale," in which it was alleged that plaintiffs had attempted to proceed according to the practice of the courts of Louisiana, and in doing so had violated the rules and practice prescribed in the conduct of equity cases in the Circuit Court; that there was a want of parties; that there existed a prior incumbrance on the property fully equal to or exceeding its value, and that by the laws of Louisiana no valid sale of the property could be made for a price not exceeding the amount of such prior incumbrance. He then set forth the mortgage of 1868 in favor of Miss Eliza H. Young, to secure the $11,250 note; the transaction between Mrs. Metcalfe, his wife and him-

self of 1876; the judgment of 1881 in favor of his wife for $7500; the renunciation by his wife of her prior right of mortgage in favor of Nalle & Co.; and the execution of the mortgage to Nalle & Co. to secure the payment of his note for $1632.61, with interest at eight per cent until paid; and charged the renunciation to have been invalid. The rendition of decree in favor of Nalle & Co. against defendant for the foreclosure of their mortgage; the issue of final process in execution of the decree, and the proceedings and sale thereunder, were rehearsed at length, as in the intervening petition; and it was averred that his wife's mortgage was a first incumbrance, and that no sale or adjudication could be made to a purchaser for less than the amount of the mortgage. It was further alleged that the marshal in the second advertisement of the property for sale on twelve months' credit required the purchaser out of the price to deduct and pay in cash an amount for printing, marshal's fees, and clerk's fees, as well as taxes due on the property, and that much the largest amount required to be paid was claimed by Nalle & Co., or one of them, for taxes alleged to have been paid by them or him on the property, the legality of which was contested by defendant and by his wife; that this requirement was an oppressive and unjust act towards the mortgagor, and deterred a purchaser with whom defendant had arranged to buy; and other irregularities were set forth. As to the claim of the payment of taxes for the years 1882, 1883, 1884, and 1885, and as to the taxes pretended to be due for the year 1886, the payment of which the marshal made a condition precedent to the accepting of any bid, no taxes were due and no necessity existed for the payment thereof, and that Nalle & Co. acquired no rights by such payment and subrogation, and thereupon the grounds on which the illegality was charged were given at considerable length. Defendant prayed that the sale be not confirmed and be set aside; that his wife be made or allowed to become a party to the suit; that a reference be made to a master to settle the priority of liens; that the renunciation of his wife be declared invalid, and her mortgage for $7500 and interest be decreed the

first lien on the property and prior in rank to Nalle & Co.; that the revenue acts of Louisiana for the years 1880, 1882, 1884, and 1886 be decreed unconstitutional, null, and void, and the inscription of the mortgage to secure the taxes be erased as a cloud, and for general relief. And he further prayed that, if it be determined that the sale was a valid sale, he might be allowed to redeem by paying to complainants the amount of the debt, interest, and costs, and such other sums as might be found to be legally due.

Defendant also filed what he styled a cross-bill against the marshal, Mrs. Mary Nalle, and her husband Golson, and Nalle & Co., alleging the sale of the property by the marshal and the acceptance of the bid of Mrs. Mary Nalle, notwithstanding a written protest by defendant against the acceptance of any bid not exceeding $7500, the amount of the prior incumbrance; that the marshal attempted to transfer the possession of the property to Nalle & Co., or Mrs. Mary Nalle for them, by giving complainants' solicitor an order to take such possession; and that the marshal and Mrs. Mary Nalle were now seeking to evict defendant from the possession of his property, and were trespassing thereon, all of which was without color of right; that the marshal had no power to pass the title to Mrs. Nalle until the oppositions to the sale had been tried and determined and the sale confirmed, and that, even if he had, the sale was absolutely null and void because the amount of the bid did not exceed the amount of the prior special mortgage; and prayed for an injunction, whereupon a restraining order was issued, and subsequently a writ of injunction.

Nalle & Co. demurred to the petition of intervention, and moved to dismiss the opposition and dissolve the injunction. The motion was denied and the demurrer overruled. Thereupon Nalle & Co. answered the intervening petition of Mrs. Young and the cross-bill and opposition to confirmation of sale of Wade R. Young, alleging that Mrs. Young was, at the time of the erasure and cancellation of her alleged mortgage, to wit, June 1, 1882, a citizen of the State of Mississippi, and as such *sui juris* in every respect, having, under the laws of said State, full capacity as a *feme sole* to make any contract

whatever; denying that Wade R. Young moved his family to the State of Mississippi in 1876 with the intention of retaining, or that he did retain, either an actual or constructive domicil in the State of Louisiana; averring that the alleged agreement between Mrs. B. F. Young and Mrs. Metcalfe and Wade R. Young, under date of December, 1876, was null and void for reasons given; and that Mrs. Young and Wade R. Young were in equity and good conscience estopped from setting up her alleged mortgage. Wade R. Young and his wife filed a replication to the answer of Nalle & Co. and others "to the cross-bill and intervening petition."

The case came on to be heard "upon the cross-bill and opposition to the confirmation of the sale and the intervening petition" and the various papers heretofore referred to were offered in evidence as well as sundry depositions, and "generally everything of record in the suit." On June 9, 1890, the court entered a decree, whereby it was "ordered, adjudged, and decreed that the sale of the mortgaged property made by the marshal, in pursuance and execution of the foreclosure decree, be set aside, cancelled, and avoided. And it is further ordered, adjudged, and decreed that the attempted renunciation by the intervening petitioner, Mrs. Bethia F. Young, of her special mortgage on the property, was and is invalid and of no effect, and that said mortgage be recognized as the first mortgage on the property, superior in rank to the mortgage of the plaintiffs, E. Nalle & Co., and entitled to be paid by preference. And it is further ordered that the plaintiffs, E. Nalle & Co., pay the costs of the sale and of these proceedings."

From this decree Nalle & Co. and Mrs. Mary Golson, as purchaser, appealed to this court.

Mr. Charles J. Boatner for appellants.

Mr. Wade R. Young for himself and Mrs. Young, defendants in error.

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

The proceedings in the state court were ordinary and not executory, and in the Circuit Court the petition stood as a bill in equity to foreclose a mortgage. The decree of November 6, 1886, was a final decree, and the execution may be regarded as the equivalent of a direction to a master or commissioner to make sale in the enforcement thereof. Under the civil code and code of practice of Louisiana judicial sales are conducted by the sheriff or other public officer in the manner minutely described, and adjudicated to the purchaser, who thereupon becomes the owner of the article adjudged. Civil Code, Art. 2601 to Art. 2621; Code of Prac. 663 *et seq.* But in an equity foreclosure in a Circuit Court, while the requirements of the state law should be complied with and the forms of proceeding pursued as nearly as practicable, it is proper for the officer who makes the sale to make a report or return to the court for confirmation. Resistance to such confirmation may be made, under circumstances, and this sometimes results in the setting aside of the sale and an order for a resale. But the scope of these pleadings was much wider. To the confirmation of the sale the defendant, indeed, interposed objections, waiving any formal report for confirmation, but they were not passed upon by the Circuit Court independently of defendant's alleged cross-bill and the petition of Mrs. Young in intervention and these papers may all be considered together, as they were by the Circuit Court, and so treated they constituted in effect an independent suit brought by Young and his wife to set aside the sale and have the alleged mortgage of the wife declared the prior incumbrance and enforced; or for redemption.

The objections in respect of alleged irregularities in the conduct of the sale, or the invalidity of certain taxes and the requirement of their payment, need not be considered, as they are not sustained by the record, and mere informalities or irregularities in a judicial sale in Louisiana do not constitute a sufficient ground for setting it aside. *Stockmeyer* v. *Tobin*, 139 U. S. 176.

The principal objection to the sale was the insufficiency of the bid at which the property was disposed of, and that objection will be first examined.

Under Articles 679, 683, and 684 of the code of practice of Louisiana, when there exists a special conventional mortgage or privilege on the property put up for sale, the property is sold subject thereto, and the purchaser pays to the officer so much of the price as exceeds "the amount of the privileges and special mortgages to which such property is subject;" and, in case of sale on twelve months' credit, if there exist on the property any privileges or special mortgage, in favor of other persons than the judgment creditor, and who are preferred to him, the purchaser is entitled to retain in his hands out of the price the amount required to satisfy the privileged debts and special hypothecations to which the property sold was subject, but is bound to give his obligation for the surplus of the purchase money, if there be any, and subscribe his obligation at twelve months' credit, with security; but if the price offered is not sufficient to discharge the privileges and mortgages existing on the property, having a preference over the judgment creditor, there shall be no adjudication, and other property, if there be any, shall be seized.

If, therefore, the mortgage claimed by Mrs. Young was conventional or special, and had been properly recorded and not legally renounced, and it was prior to that of Nalle & Co., no sale of the mortgaged property could be made under the junior incumbrance of the latter, unless the price bid was sufficient to discharge the prior lien. But if the prior mortgage was legal or judicial, this requirement did not apply, and the property passed to the purchaser subject to the payment of the prior lien. *Alford* v. *Montejo*, 28 La. Ann. 593; *Godchaux* v. *Dicharry's Succession*, 34 La. Ann. 579.

The Circuit Court held that the mortgage asserted by Mrs. Young was a special mortgage, which took precedence over that of Nalle & Co.; that her renunciation was void, and, the price bid not being sufficient to discharge this prior special mortgage, that the sale could not be confirmed and must be set aside.

By the civil code, the partnership or community of acquets and gains exists between husband and wife by operation of law, unless otherwise stipulated in the contract. The separate

property of the wife is that which she "brings into the marriage, or acquires during the marriage by inheritance or by donation made to her particularly," and "is divided into dotal and extra dotal. Dotal property is that which the wife brings to the husband to assist him in bearing the expenses of the marriage establishment. Extra dotal property, otherwise called paraphernal property, is that which forms no part of the dowry." *Fleitas* v. *Richardson*, No. 2, 147 U. S. 550. 553; Arts. 2332, 2399, 2334, 2335.

By Article 2337, "by dowry is meant the effects which the wife brings to the husband to support the expenses of the marriage."

Article 2383 declares: "All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage or to belong to her at the time of the marriage, is paraphernal."

Mrs. Young claimed an indebtedness on the part of her husband to her, arising from his having received the proceeds of a life insurance policy on the life of her father in her favor for $5000, and the additional sum of $2500, being an amount which came to her from her father's estate, and was received by him. This was paraphernal property. The wife has a legal mortgage on the property of her husband "for the restitution or reimbursement of her paraphernal property." Art. 3319. "Conventional mortgage is that which depends on covenants. Legal mortgage is that which is created by operation of law. Judicial mortgage is that which results from judgments." Art. 3287. A legal mortgage results by operation of law, and "no legal mortgage shall exist, except in the cases determined by the present code." Arts. 3311, 3312.

Art. 2376 declares that the wife has a legal mortgage on the property of her husband for the restitution of her dowry as well as for the replacement of her dotal effects; and by Art. 2379 it is provided that, during the marriage, the husband may, with the consent of his wife, "be authorized by the judge, with the advice of five of the nearest relations of the wife, or friends, for want of relations, to mortgage, spe-

cially for the preservation of his wife's rights, the immovables which he shall designate; and then, the surplus of his property shall be free from any legal mortgage in favor of his wife;" while Art. 2390 is as follows: "The wife may alienate her paraphernal property with the authorization of her husband, or in case of refusal or absence of the husband, with the authorization of the judge; but should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of her husband for the reimbursing of the same. The husband may release the mass of his property from this legal mortgage, by executing a special mortgage in the manner required in the preceding section, for dotal effects." Thus it appears that a legal mortgage on all the husband's property exists until a special mortgage is executed according to the foregoing provisions, and the law does not contemplate a legal and a special mortgage existing at the same time. And the legal mortgage of the wife to affect third persons must be recorded in the office of mortgages for the parish where the property lies. Arts. 3342 to 3349.

Mrs. Young must either stand upon her legal mortgage resulting from the receipt of her paraphernal property, and recognized by the judgment of July 9, 1881, decreeing a separation of property, or a judicial mortgage arising from that judgment, or on the contract between herself and Mrs. Metcalfe, by which Mrs. Metcalfe purported to transfer to her an indebtedness due by Wade R. Young, secured on the property in controversy. If her mortgage be legal or judicial, its existence would not be a bar to the confirmation of a sale for an amount insufficient to satisfy it; and, moreover, it could not rank the special conventional mortgage of Nalle & Co., because it was not recorded until subsequently.

It is, indeed, insisted that it was altogether invalid under Art. 2428: "The separation of property, although decreed by a court of justice, is null, if it has not been executed by the payment of the rights and claims of the wife, made to appear

by an authentic act, as far as the estate of the husband can meet them, or at least by a *bona fide* non-interrupted suit to obtain payment." *Chaffee* v. *Sheen*, 34 La. Ann. 684, 690; *Nachman* v. *Le Blanc*, 28 La. Ann. 345, 346; *Bertie* v. *Walker*, 1 Rob. (La.) 431, 432. But this becomes immaterial, as whatever rights, if any, might be claimed under it, it could have no effect as against Nalle & Co. for want of record.

According to Arts. 3345 and 3349, all mortgages, whether conventional, legal or judicial, are required to be recorded as provided, and the preservation of the legal mortgage or privilege in favor of a married woman depends on the record of the evidence of her mortgage or privilege in the mortgage book of the parish where the property is situated; and that evidence, if not by written instrument, must consist of "a written statement, under oath, made by the married woman, or her husband, or any other person having knowledge of the facts, setting forth the amount due to the wife, and detailing all the facts and circumstances on which her claim is based." There was no such evidence as last named here, and no such inscription until after the mortgage to Nalle & Co. had been given and registered. *Lovell* v. *Cragin*, 136 U. S. 130, 149.

The transaction between Mrs. Metcalfe, Young, and Mrs. Young appears to have been that Mrs. Metcalfe being indebted to Young, and Young indebted to Mrs. Metcalfe, the respective debts were discharged by agreement and compensated each other, but that it was agreed that Young's indebtedness to Mrs. Metcalfe should be kept alive for the benefit of Mrs. Young, upon the consideration on Mrs. Young's part of the release of her paraphernal claims against her husband. Compensation had, however, taken place and the two debts were reciprocally extinguished. Arts. 2130, 2207, 2208.

This was the necessary effect by operation of law, and when the principal obligation was discharged the mortgage fell with it and would not be revived though the indebtedness were reacknowledged in favor of another. *Smith* v. *Mc Waters*, 22 La. Ann. 431, 432; *Davidson* v. *Carroll*, 20 La. Ann. 199; *Schinkel* v. *Hanewinkel*, 19 La. Ann. 260.

Again, contracts between husband and wife are forbidden

in Louisiana except as specified. Contracts of sale between them "can take place only in the three following cases: 1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights. 2. When the transfer made by the husband to his wife, even though not separated, as a legitimate cause, as the replacing of her dotal or other effects alienated. 3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry." Arts. 1790, 2446; *Carroll* v. *Cockerham*, 38 La. Ann. 813, 824.

This transaction was an attempt to extinguish the wife's general mortgage by the transfer of the special mortgage of a third party, satisfied by the act as between the immediate parties thereto, and if it could be done at all, it could only be when taking place in accordance with Articles 2379 and 2390, and recorded as required by Article 3345; and, as already seen, these articles were not complied with.

But were this otherwise, the judgment of 1881 did not recognize her alleged special mortgage, which recognition was evidently not prayed for, and recognized only her legal mortgage in complete disregard of her special mortgage if she had had any.

The rendition of judgment for all her paraphernal claims without any recognition of a special conventional mortgage to secure them would seem to have concluded the fact that none such then existed, or at least furnishes such persuasive proof thereof as must be controlling on this record. *Nicolson* v. *Citizens' Bank*, 27 La. Ann. 369.

Conceding, then, that the renunciation by Mrs. Young in favor of Nalle & Co. was ineffectual, her legal or judicial mortgage, if outstanding, was nevertheless subordinate to their mortgage and not entitled to precedence. In the jurisprudence of Louisiana, and under the statutes of that State, the right of redemption from a decree in foreclosure does not obtain. If a prior mortgage exists, the prior mortgagee is not a necessary party, and purchasers take subject to the prior lien. If there be a subsequent mortgage, the prior mortgage containing the *pact de non alienando* as Nalle & Co.'s mortgage

did, the mortgagee therein need not be made a party, but must take notice of the proceedings to enforce the prior mortgage at his peril. He may, however, apply to set aside the sale on proper grounds. *Dupasseur* v. *Rochereau*, 21 Wall. 130; *Watson* v. *Bondurant*, 21 Wall. 123; *Carite* v. *Trotrot*, 105 U. S. 751.

As heretofore noticed, Mrs. Young and her husband prayed for redemption, which is not, in any foreclosure case, allowable as such; while so far as their pleadings are regarded as seeking the setting aside of the sale and for a resale, we find no adequate grounds for according that relief.

The decree of June 9, 1890, *is reversed with costs; and the cause remanded to the Circuit Court with instructions to enter a decree overruling the objections to the sale of July* 30, 1887; *dissolving the injunction; adjudicating the property to Mrs. Mary Nalle, wife of Eustis F. Golson, and ordering the delivery of possession to her.*

GREGORY *v.* VAN EE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 601. Submitted December 23, 1895. — Decided January 27, 1896.

If the decree of a Circuit Court of Appeals is final under the sixth section of the judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so; and even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the Circuit Court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the Circuit Court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States.

Gregory, a citizen of Illinois, filed his bill in the Supreme Judicial Court of Massachusetts, December 16, 1884, against

Statement of the Case.

Frederick A. Pike, a citizen of Maine, and William C. N. Swift, a citizen of Massachusetts, to recover two certain non-negotiable promissory notes made by Swift, held by Pike, and alleged by Gregory to be his property. This suit was afterwards removed on Gregory's petition to the Circuit Court on the sole ground of the diverse citizenship of the parties. Pending the suit the notes were collected, and the proceeds transferred to the registry in the cause. On the petition of Swift and John C. Kemp Van Ee, who claimed to be interested in the notes, Van Ee was made a party defendant by order of court, against Gregory's objection, and filed a cross-bill. Butterfield was made a defendant on the application of himself and Swift, and filed a cross-bill, and Talbot, attorney for Pike and his estate, filed a petition for attorney's fees. Pike died, and his executrix, Mary H. Pike, was made a party. The Circuit Court dismissed the cross-bill of Butterfield and decreed payments out of the fund in favor of Mrs. Pike and Van Ee. From this decree separate appeals were taken, by Gregory as against Mrs. Pike, and as against Van Ee; by Talbot; and by Butterfield, to the Circuit Court of Appeals for the First Circuit and went to judgment there. The opinion of that court gives a clear idea of a somewhat confused record. 67 Fed. Rep. 687. The Court of Appeals concurred with the disposition of the case by the Circuit Court as to Mrs. Pike and Butterfield, but awarded relief to Talbot; and held that Van Ee was improperly made a party defendant, that his cross-bill was unauthorized and should be dismissed, but that it could be properly treated as an intervening petition, and, so treating it, that he was entitled thereon to the relief accorded by the Circuit Court. The case was remanded to the Circuit Court with directions to enter a final decree, modifying the original decree in the particulars pointed out. From the decree of the Circuit Court of Appeals separate appeals to this court were prayed by Gregory and allowed, as against Van Ee, Mary H. Pike, and Talbot, which appeals were separately docketed here as Nos. 601, 602, and 603. The appeals in Nos. 602 and 603, those against Mrs. Pike and Talbot, were dismissed November 25, and a motion to dismiss the appeal against Van Ee, No. 601, is now made.

Mr. Russell Gray for the motion.

Mr. E. J. Phelps and *Mr. F. A. Brooks* opposing.

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

The jurisdiction of the Circuit Court in the suit of Gregory against Pike and Swift rested on the fact that the controversy therein was between citizens of different States, and this was the sole ground on which Gregory removed the cause from the state court to the Circuit Court. The fund was in the Circuit Court because realized out of and substituted for the subject of contention in that suit, and Van Ee recovered on his intervening petition what he claimed to be his share of that fund.

In *Rouse* v. *Letcher*, 156 U. S. 47, we held that if the decree of a Circuit Court of Appeals is final under the sixth section of the judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so because the intervention is entertained in virtue of jurisdiction in the Circuit Court already subsisting. It was pointed out that where property is in the actual possession of the Circuit Court, this draws to it the right to decide upon conflicting claims for its ultimate possession and control, and that where assets are in the course of administration all persons entitled to participate may come in under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction in the Circuit Court would be lacking if such proceedings had been independently prosecuted; that the exercise of the power of disposition by a Circuit Court of the United States over such an intervention is the exercise of power invoked at the institution of the main suit; and that it is to that point of time that the inquiry as to the jurisdiction of the Circuit Court must necessarily be referred. Therefore, that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained.

Syllabus.

The Circuit Courts of the United States have cognizance of suits as provided by the acts of Congress, and when their jurisdiction as Federal courts has attached, they possess and exercise all the powers of courts of superior general jurisdiction. Accordingly they entertain and dispose of interventions and the like on familiar and recognized principles of general law and practice, but the ground on which their jurisdiction as courts of the United States rests is to be found in the statutes, and to that source must always be attributed.

Manifestly, the decree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly. And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the Circuit Court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the Circuit Court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States.

Appeal dismissed.

CHEMICAL BANK *v.* CITY BANK OF PORTAGE.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 736. Submitted January 7, 1896. — Decided January 27, 1896.

By authority of the directors of a national bank in Chicago, which had acquired some of its own stock, the individual note of its cashier, secured by a pledge of that stock was, through a broker in Portage, sold to a bank there. The note not being paid at maturity the Portage Bank sued the Chicago Bank in assumpsit, declaring specially on the note, which it alleged was made by the bank in the cashier's name, and also setting out the common counts. The bank set up that the purchase of its own stock was illegal and that money borrowed to pay a debt con-

Statement of the Case.

tracted for that purpose was equally forbidden by Rev. Stat. § 5201. The trial court was requested by the Chicago Bank to rule several propositions of law, and declined to do so. Judgment was then entered for the Portage Bank. The Supreme Court of the State of Illinois held that the Portage Bank was entitled to recover under the common counts, and that it was not necessary to consider whether the trial court had ruled correctly on the propositions of law submitted to it. *Held*, that that court, in rendering such judgment, denied no title, right, privilege, or immunity specially set up or claimed under the laws of the United States, and that the writ of error must be dismissed.

This was an action of assumpsit brought by the City Bank of Portage against the Chemical National Bank of Chicago, in the Superior Court of Cook County, Illinois. The declaration contained a special count upon a note signed by C. E. Braden, which it was alleged was made by defendant in that name; and the common counts. The defendant pleaded the general issue and a plea denying the execution of the note described in the special count. A jury was waived and the cause submitted to the court for trial.

Under the practice act of Illinois, where a trial is by the court, either party may "submit to the court written propositions to be held as law in the decision of the case," upon which the court shall write 'refused' or 'held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." Rev. Stat. Ill. c. 110, § 42; 2 Starr & Curt. 1808.

Defendant requested the court to hold as law in the decision of the case the eight propositions given in the margin.[1]

[1] 1. If the court finds from the evidence that some of the directors of the Chemical National Bank of Chicago were desirous of purchasing shares of the capital stock of said bank for themselves, individually; that in pursuance of such desire they instructed the president of said bank to purchase such an amount of said shares of stock not exceeding $100,000 par value, as might be offered at par, stating to him that they would take the stock so purchased at different times as their money came in; that in pursuance of such instruction the president of said bank caused a broker to purchase fifty shares of said capital stock, and in payment for said stock one Hopkins, assistant cashier of said bank, gave to said broker his individual note for the purchase price of said stock, payable on demand; that thereafter, payment of said note being demanded of said Hopkins, the pres-

Of these the court refused to hold propositions numbered one, two, three, four, six, and eight, and also proposition numbered six "if it appears that the bank, its officers knowing the facts, used the money;" and defendant excepted. The court held propositions numbered five and seven. The issues were found in favor of plaintiff, and judgment entered on the finding, and, the case having been taken to the Appellate Court for the first district of Illinois, the judgment of the Superior Court was affirmed. 55 Ill. App. 251. And this judgment of the Appellate Court was affirmed by the Supreme Court of the State on appeal. 156 Illinois, 149. Thereupon a writ of error from this court was sued out.

There was evidence tending to show that in 1893 the Chemical National Bank had taken some of its own stock in pay-

ident and cashier of said bank paid said note out of the moneys of said bank, and thereupon it was arranged by and between the president, the cashier, and the assistant cashier, that the cashier, Braden, should execute his individual note for $5000 to a broker; that fifty shares of said stock so purchased should be transferred upon the books of the bank to said Braden, and attached to said note to be given to said broker as collateral security; that said broker should procure said note to be discounted, and that the money realized by discounting said note should be paid into the moneys of the bank to replace the money of the bank used in paying the Hopkins note, and that in pursuance of such arrangement said Braden gave the note in controversy, and the same was discounted and the proceeds were deposited with the moneys of the Chemical National Bank of Chicago, then the court should find that said note was the individual note of said Braden, and not the note of the defendant, and should find the issues in favor of the defendant.

2. If the court believes the testimony given by J. O. Curry in this case to be true and to be a correct statement of the circumstances connected with the execution by Braden of the note sued on, then the court must find the issues joined in favor of the defendant.

3. Although the court may believe the testimony of Braden to be true, yet his testimony with all inferences that may be justifiably drawn therefrom in favor of the plaintiff does not justify a finding in favor of the plaintiff.

4. The fact that the money realized upon the note in suit was received by the Chemical National Bank of Chicago does not make said Chemical National Bank of Chicago liable upon said note; and this is true notwithstanding it was agreed by and between Curry, Braden, and Hopkins that the note should be treated as a note of the Chemical National Bank of Chicago and paid by it.

ment of a debt; that Hopkins, assistant cashier, had given to a firm of brokers his note payable on call, secured by part of this stock as collateral; that the brokers procured the money on the note and paid it to the bank, the assistant cashier not getting any of it; and that after the note had run fifteen days the holders called it in and it was paid out of the moneys of the bank. It was then agreed between Curry, president, Braden, cashier, and Hopkins, assistant cashier, that the bank should raise five thousand dollars through a broker in Minneapolis, by giving a note in Braden's name, payable to the broker and with the stock as collateral, and that, as the bank was to have the money, the note should be the bank's obligation and be paid by it. In carrying out this arrangement the note in suit was given, being signed by Braden in his own name and not as cashier, and made

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5. A national banking association is prohibited by law from purchasing shares of its own capital stock unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith.

6. The purchase by officers of a national banking association of shares of its own capital stock unless such purchase is necessary to prevent loss upon a debt previously contracted in good faith, cannot be regarded as a transaction of the association itself unless expressly authorized by its board of directors and a note executed by an officer in his own individual name for the purpose of borrowing money to make such a purchase cannot be regarded as the note of the association unless recognized as such by its board of directors and unless the lender parted with his money upon the faith of the liability of the association.

7. There is no evidence in this case legally sufficient to justify a finding that the plaintiff at the time it accepted the note in controversy and advanced money on the same had any knowledge whatever that Braden was not the real principal or that it advanced any money on the note upon the faith of any supposed liability of the defendant upon said note.

8. Although a corporation may be held liable upon a contract that is *ultra vires* or prohibited by law, when such contract has been fully executed by the other party, yet where such contract has been entered into by an officer of the corporation in his own individual name, and the other party, at the time he performed the same on his part, had no knowledge that the same was for the benefit of the corporation and did not part with any money or property on the faith of the liability of the corporation upon the contract, but, on the contrary, executed the contract on his part in reliance solely upon the individual liability of such officer, such other party cannot enforce such contract against the corporation as an undisclosed principal.

payable to the Minneapolis broker; and fifty shares of the stock held by the bank were issued in Braden's name and attached to the note as collateral. Braden did not own this stock; received none of the money; and had no personal interest in the transaction. The note was sent to the broker at Minneapolis, who endorsed it without recourse, procured the money from the City Bank of Portage, and sent it to the Chemical National Bank. He advanced no money on the note either to Braden or the bank; did not owe Braden anything; and the note was given by Braden to him purely as a means of raising money for the bank. There was also evidence that the board of directors of the Chemical National Bank, at a meeting thereof, had authorized the president to buy stock of the bank when offered for sale at par up to $100,000, agreeing to take it as soon as they could, but that no entry of this authority was made on the bank's records; that the money obtained on Hopkins' note was used in making such a purchase; and that the stock which was annexed to the Hopkins note and to that in suit was a part of the stock purchased under these circumstances, and not part of that taken by the bank upon a debt; of all which the City Bank of Portage had no notice.

The defence was that the purchase by the bank of its own stock was illegal; that it was equally illegal for the bank to borrow money to replace money paid out in making such a purchase; that that was what this transaction amounted to; and that plaintiff could not recover because the money was obtained and used for a purpose forbidden by section 5201 of the Revised Statutes of the United States, which is as follows:

"No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the

association, according to section fifty-two hundred and thirty-four."

The Supreme Court held that the plaintiff was entitled to recover under the common counts; that it was unimportant to consider whether the Superior Court ruled correctly on the propositions of law requested on behalf of defendant since they all related to the right of recovery on the note; and the court said:

"Curry, president of the Chemical National Bank, was called as a witness, and it may be inferred from his evidence, although he does not state the fact, that the bank stock procured by the bank was not taken in on a debt, but was purchased. Conceding that the Chemical National Bank purchased fifty shares of its own stock, contrary to the provisions of the national banking act, does that unlawful act so pollute the transaction between plaintiff and defendant, under which plaintiff loaned its money, that the defendant may keep the money and the plaintiff bear the loss? If the facts were as claimed by counsel, they would not defeat a recovery on the part of plaintiff. The purchase of the stock and the borrowing of the money from plaintiff were two distinct transactions. In the purchase of the stock the money used by the defendant in payment was raised on the note of Hopkins, assistant cashier. Afterwards the bank paid the Hopkins note with its own funds, and this ended the transaction so far as the purchase of stock was concerned. After this transaction was ended the bank applied to the plaintiff for a loan of money and obtained it, placing the bank stock previously obtained in the hands of plaintiff as collateral. The plaintiff did not know where, of whom or in what manner the Chemical National Bank had acquired the bank stock turned over as collateral, nor did it know what use that bank would make of the money loaned. Moreover, this money was not loaned by plaintiff to pay for bank stock, and, so far as appears, it was never used for that purpose. So far as appears from the evidence there was nothing illegal in the transaction between plaintiff and defendant which resulted in the loan of $5000."

Mr. Hiram T. Gilbert for plaintiff in error.

Mr. Daniel Kent Tenney and *Mr. Samuel P. McConnell* for defendant in error.

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

We are of opinion that the Supreme Court of Illinois in rendering judgment denied no title, right, privilege, or immunity specially set up or claimed by defendant under the laws of the United States, and that this writ of error cannot be maintained.

The contention of plaintiff in error is that the state court decided "either, *first*, that the cashier, Braden, by virtue of his office, had, under the laws of the United States regulating national banks, implied authority to borrow money in the name of the defendant and bind it to repayment thereof; or, *second*, that the transaction out of which the discounting of the Braden note arose, which transaction consisted of the original purchase of the fifty shares of the bank's stock, the giving of the Hopkins note, and the payment thereof out of the moneys of the bank was one which, in law, could be regarded as a transaction of the bank." And that therefore the state court decided against an immunity from liability expressly set up or claimed by the Chemical National Bank under the laws of the United States.

The Appellate Court reviewed the judgment of the Superior Court for errors committed on the trial, and, finding none, affirmed it, and the Supreme Court affirmed the judgment of the Appellate Court; and if no such claims were set up in the trial court, the Supreme Court, in approving the affirmance of its judgment by the Appellate Court, could not be held to have decided against a claim with which the trial court had not been called upon to deal. It does not appear that the immunity from liability was expressly claimed by plaintiff in error in the trial court on the ground that the bank could retain the money because it was obtained by means in excess of the powers of its cashier or other officers.

Opinion of the Court.

The propositions on which the trial court was asked to rule were manifestly directed to the right of recovery on the note as such, under the special count, and certainly fell far short of a claim of the character suggested as a defence to a recovery under the common counts. Moreover, the question of liability, whatever the authority of these bank officers to borrow this money for the bank, depended upon general principles of law applicable under the particular facts. *Western National Bank* v. *Armstrong*, 152 U. S. 346, 352, 353.

Nor can we perceive that the Supreme Court denied any immunity from liability claimed as arising out of the purchase by the bank of its own stock other than to prevent loss on previous indebtedness. The decision of the Supreme Court rested on the fact that that purchase of stock and the loaning of the money from the City Bank of Portage were two distinct transactions, and this was a ground broad enough to sustain the judgment without deciding any Federal question at all.

It is said that the Supreme Court had no power to decide any controverted question of fact, but we cannot review the decision of that court in that respect, even if the position were well taken; and we do not understand that the Supreme Court did so decide. It is true that, under sections 87 and 89 of the Practice Act, the Supreme Court of Illinois does not reëxamine controverted questions of fact, but it nevertheless examines the evidence bearing upon the issues of fact determined to see what principles of law are involved in a controversy, and whether they are properly applied by the trial court. *Sexton* v. *Chicago*, 107 Illinois, 323, 326; *Postal Telegraph Co.* v. *Lathrop*, 131 Illinois, 575, 580. In this case the Supreme Court recapitulated the evidence as being that on which the trial court rendered judgment in order to disclose the basis of the ruling that plaintiff was entitled to recover.

The affirmance by the Appellate Court of the judgment of the trial court without any recital of the facts found conclusively settles all controverted questions of fact necessary to support the judgment. *Utica & Deer Park Bridge Co.* v. *Iron Commissioners*, 101 Illinois, 518; *Bernstein* v. *Roth*, 145 Illinois, 189. If the Appellate Court disposes of a cause on

a finding of facts different from the finding of the trial court, it is its duty to recite in its final judgment the facts so found, (Rev. Stat. Ill. c. 110, § 87; 2 Starr & Curt. 1842,) but there was no such finding of facts by the Appellate Court here, and it is to be presumed that that court found the facts in the same way as did the trial court. As the Supreme Court proceeded to judgment upon the facts as thus determined, we must accept its view as controlling.

Writ of error dismissed.

UNITED STATES *v.* THORNTON.

APPEAL FROM THE COURT OF CLAIMS.

No. 138. Submitted December 20, 1895. — Decided January 6, 1896.

The claimant originally enlisted at Washington in August, 1878, and was discharged at Mare Island, California, November 6, 1886, receiving (under the provisions of Rev. Stat. § 1290, as amended by the act of February 27, 1877,) travel pay and commutation of subsistence from Mare Island to Washington. He did not return to Washington, but November 10, 1886, reënlisted at Mare Island as a private, and in the course of his service was returned to Washington, where, at the expiration of two years and four months, he was discharged at his own request. *Held*, That, as the service was practically a continuous one, and his second discharge occurred at the place of his original enlistment, he was not entitled to his commutation for travel and subsistence to the place of his second enlistment.

The petition in this case set forth that the petitioner enlisted as a private in the marine corps, November 10, 1886, at Mare Island, California, to serve five years, and was discharged March 13, 1889, at Washington D. C., by order of the Secretary of the Navy; that, under the provisions of Rev. Stat. § 1290, he was entitled to receive transportation and subsistence or travel pay and commutation of subsistence from the place of his discharge to that of his enlistment; that he made written application for the same to the Treasury Department, and was informed that his claim was adjusted and transmitted

to the Second Comptroller, who declined to allow the case, on the ground that he was discharged at his own request before the expiration of his term of enlistment.

The case having been heard before the Court of Claims, that court upon the evidence found the following facts:

1. The claimant enlisted at the age of 13 years 1 month and 3 days, in the marine corps of the United States, at Washington, D. C., on August 29, 1878, for a term of 7 years 10 months and 27 days, and was then "bound to learn music" in said corps.

April 17, 1880, he was rated as a drummer.

November 6, 1886, he was discharged from the service at Mare Island, California, as a drummer.

November 10, 1886, he reënlisted at Mare Island, California, as a private in said corps for a term of five years.

On March 13, 1889, before the expiration of the last-mentioned term of enlistment, Thornton, as a private in said corps, was, at his own request, and not by way of punishment for an offence, discharged from service at the Marine Barracks, Washington, D. C., by direction of the Secretary of the Navy.

The claimant was settled with in full for all pay and allowances except transportation and subsistence in kind, or, in lieu thereof, travel pay and commutation of subsistence, from Washington, D. C., the place of his discharge, to Mare Island, California, the place where he had reënlisted. And when he was discharged, at the end of his term of enlistment, he received travel pay and commutation of subsistence computed at the rate of one day for every twenty miles of the distance from Mare Island, California, to Washington, D. C.

2. The travel pay and commutation of subsistence of a private in the marine corps when discharged in the third year of his second term of enlistment, and when he is allowed the same, are stated by the proper accounting officers of the Treasury Department to be one day's pay at 60 cents per day, and one ration commuted at 30 cents for each twenty miles of the distance from place of discharge to place of last enlistment; and in the settlement of accounts they adopt 3136 miles as the distance from Washington, D. C., to Mare Island, California.

According to this practice the travel pay and commutation of subsistence on such a discharge would be for —

157 days' pay, at 60 cents	$94 20
157 rations, at 30 cents	47 10
Total	$141 30

3. Under a long-standing construction by the accounting officers of the Treasury Department of the law embraced in section 1290 of the Revised Statutes, it has been the practice to refuse travel pay and commutation of subsistence to enlisted men from the place of their discharge to the place of enlistment, when they have been discharged at their own request prior to the expiration of their term of enlistment.

The only exception made under this practice is when an enlisted man is discharged at his own request after twenty years of faithful service. (Army Regulations, 1863, par. 163.)

4. Before bringing suit here the claimant presented the claim set forth in his petition to the proper accounting officers of the Treasury Department, and it was disallowed in accordance with the practice mentioned in finding 3.

The court also found as a conclusion of law, that the claimant was entitled to recover of the defendants the sum of one hundred and forty-one dollars and thirty cents ($141.30), for which amount judgment was entered, and the government appealed.

Mr. Assistant Attorney General Dodge for appellants.

Mr. Robert Thornton, appellee, submitted on the record.

Mr. Justice Brown delivered the opinion of the court.

By Rev. Stat. § 1290, as amended by the act of February 27, 1877, c. 69, 19 Stat. 240, 244, "when a soldier is discharged from the service, except by way of punishment for an offence, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrolment, or original muster into the service. The Government may furnish the same in kind, but in case it shall not do so, he shall be allowed travel pay and commutation of subsistence, for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, en-

rolment, or original muster into the service, computed at the rate of one day for every twenty miles."

The case was disposed of in the court below as one depending solely upon the question whether a soldier, who is discharged from the service by his own consent, shall, under the above section, be allowed the transportation and subsistence therein provided for.

We do not find it necessary to express an opinion upon this question, as there is another point apparently not called to the attention of the Court of Claims, upon which we think the case must be reversed. The transportation provided for is "from the place of his discharge to the place of his enlistment, enrolment or original muster into the service." Claimant was originally enlisted at Washington in August, 1878, and was discharged at Mare Island, California, November 6, 1886, receiving, under the provisions of the above section, travel pay and commutation of subsistence from Mare Island to Washington. He did not return to Washington, however, but on the fourth day thereafter (November 10) reënlisted at Mare Island as a private, and in the course of his service was returned to Washington, where, at the expiration of two years and four months, he was discharged at his own request, and now claims transportation and commutation of subsistence from Washington to Mare Island as the place of his enlistment, amounting to $141.30. The result is that, notwithstanding his original enlistment and final discharge were both at Washington, he receives $282.60 for travel and subsistence twice across the continent without ever having, so far as it appears, expended a dollar or travelled a mile.

These allowances are both of them presumptively for expenses actually incurred, as is evident from the provision that they may be furnished *in kind*, and are designed to reimburse the soldier for all necessary outlays of returning to the place of his enlistment, which is treated as presumptively his home. Indeed, the law of January 11, 1812, c. 14, originally provided, 2 Stat. 671, 674, that the travel and subsistence should be allowed from the place of discharge to the place of residence of the claimant. By Rev. Stat., however, § 1290, Congress sub-

stituted for place of residence the expression "place of enlistment, enrolment or original muster into the service," the purpose of which was, doubtless, to protect the government against the soldier choosing a distant place for his assumed residence and recovering a large mileage, to which he was not justly entitled. The presumption, however, that these allowances are for expenses actually incurred is not absolutely conclusive, and if it be shown that the soldier cannot possibly intend to incur the expense for which the allowance is made, or for some other reason he is not within the spirit of the act, he is not entitled to the allowance. His claim, therefore, should be based upon something more than a mere technicality. If, for example, petitioner's discharge and reënlistment at Mare Island had been cotemporaneous acts, he would clearly not have been entitled to travel and subsistence to Washington; and such we understand to have been the practice of the Department. So, if such discharge and reënlistment were so near together that they constituted, practically, a continuous service, we think the second enlistment may be treated as a reënlistment, and if the soldier be returned to the place of his original enlistment and there discharged, he would not be entitled to an allowance for travel and subsistence.

In the case of *United States* v. *Alger*, 151 U. S. 362; 152 U. S. 384, where an officer resigned one day, and was appointed to a higher grade the next day, it was held that, for the purpose of computing longevity pay, he was to be considered as having been engaged in a continuous service. Bounties to private soldiers, in the form of increased pay after five years' service, are allowed by Rev. Stat. § 1282 and § 1284, to those who reënlist within one month (since extended to three months, act of August 1, 1894, c. 179, § 3, 28 Stat. 215, 216) after having been honorably discharged. This would seem to indicate an intention on the part of Congress to regard a reënlistment within thirty days as practically a continuous service for the purpose of additional pay, though not necessarily so for the purposes of transportation and subsistence.

In this case we are able to take judicial notice of the fact

that claimant could not possibly have travelled from Mare Island to Washington and back, within the four days which elapsed between his discharge and his reënlistment, and hence, if he intended to reënlist, that he received there an allowance to which he was not justly entitled, and, as the second discharge is at the place of his original enlistment, he is not entitled to another mileage across the continent. It will, perhaps, not be just to say of the claimant that the interval which elapsed between his discharge as a drummer and his reënlistment as a private at Mare Island, was for the purpose of drawing transportation and subsistence to Washington, but the case at least suggests that possibility. Nor do we undertake to say that the paymaster was not fully justified in paying the claimant his transportation and subsistence when originally discharged at Mare Island, since it was manifestly impossible for him to know whether the claimant intended to reënlist or not; but under the circumstances we think the service should be treated as a continuous one. Indeed, it is somewhat doubtful whether this is not specially provided for by § 1290, which allows transportation and subsistence from the place of his discharge "to the place of his enlistment, enrolment, or *original muster* into the service." If the word "original" preceded the word "enlistment" this construction would be freer from doubt, but the section as it reads certainly lends support to the theory that the allowances were not intended as a mere bounty.

Whether the claimant should be recharged, after his reënlistment, with the travel and subsistence allowed him on his first discharge raises a question which is not presented by the record in this case, and upon which we do not feel warranted in expressing an opinion. Other considerations may have a bearing upon this question, which do not enter into the present controversy. If, for instance, the claimant did not intend to reënlist when first discharged, but subsequently changed his mind, it does not necessarily follow that he should be recharged these allowances, if the government chose to reenlist him. The question at issue concerns only the propriety of the second claim and not of the first allowance. The case

is a somewhat exceptional one, and all that we decide is that, where the service is practically a continuous one, and the soldier's second discharge occurs at the place of his original enlistment, he is not entitled to his commutation for travel and subsistence to the place of his second enlistment.

The judgment of the Court of Claims is, therefore,

Reversed, and the case remanded with directions to dismiss the petition.

FIRST NATIONAL BANK OF GARNETT *v.* AYERS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 446. Submitted January 7, 1896. — Decided January 27, 1896.

The single fact that the statutes of Kansas regulating the assessment and taxation of shares in national banks permit some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, is so large and substantial as to amount to an illegal discrimination against national bank shareholders, in violation of the provisions of Rev. Stat. § 5219.

This was a writ of error to the Supreme Court of Kansas to review a judgment of that court affirming the judgment of the District Court of Anderson County, which was in favor of the defendants, and for costs against plaintiff. The action was brought to restrain the defendants from levying upon the property of the plaintiff in error for the purpose of collecting a warrant, issued for the collection of taxes upon the stockholders of the bank on the ground that certain deductions claimed on the part of some of the stockholders from the assessment upon their shares of stock were not allowed them, as they claimed they should have been, under the statutes of the United States.

The petition of the plaintiff in error stated the facts upon

which it was alleged the cause of action arose, and the defendants voluntarily entered appearance in the cause, and thereupon an agreement was signed by the parties to the action setting forth the facts upon which the case was to be tried. The material portion of the agreement set forth that the plaintiff was a corporation organized under the laws of the United States, with its office at the city of Garnett, Anderson County, Kansas. The defendant Ayers was sheriff of the county of Anderson during all the time mentioned in the complaint, and the defendant Hargrave during such time was treasurer of that county. The plaintiff was a national bank with a capital stock of $75,000, divided into 750 shares of the par value of $100 each; the actual value of such shares of stock was $100 per share on the first day of March, 1890. On the day last named certain stockholders, named in the statement, were justly indebted and owed in good faith the several sums of money set opposite their respective names in plaintiff's petition. These debts were not owing to any person, company or corporation as depositors in any bank or banking association, or any person or firm engaged in the business of banking in Kansas or elsewhere, nor were they debts owing on account of any of the things named in the Kansas statute hereinafter alluded to. The stockholders owing such debts duly complied with the statutes of Kansas in asking to be allowed to deduct from the value of their stock the amount of the debts which they were justly owing in good faith, as above stated. This was refused by the proper authorities, and an assessment was made against the named stockholders of the plaintiff without allowing any such deductions as claimed, and the taxes so levied on the stock held by the stockholders amounted to the sum of about $2000. The debts of the stockholders were all of the kind and character that could be deducted from "credits" under the statutes of Kansas, and due and legal demand was made to have such debts deducted from the value of the stock, which was refused. The debts were justly due and owing on the first of March, 1890, and no part of them had been deducted from the "credits" at any time or place during that year. The plaintiff paid the taxes assessed against its stockholders who did not

claim any deductions, and the only taxes remaining due were those assessed against the named stockholders who claimed deductions for their debts, as above stated. Other facts were agreed upon which it is not necessary to mention for the purpose of discussing the question involved in this case.

Several statutes of the State of Kansas are set forth, the first being the one which permits an action of this kind to be brought for the purpose of enjoining an illegal levy of any tax, charge, or assessment. Section 6847, General Statutes of Kansas, (to be found in vol. 2 of those laws,) defines the different terms used in the chapter on taxation. In this section the term "credit" is defined as follows: "The term 'credit' when used in this act shall mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate." Section 6851 of the same General Statutes permits a deduction of debts from "credits." That part of the section bearing upon this subject is as follows:

"Debts owing in good faith by any person, company or corporation may be deducted from the gross amount of credits belonging to such person, company or corporation: *Provided*, Such debts are not owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in this State or elsewhere; and the person, company or corporation making out the statement of personal property to be given to the assessor, claiming deductions herein provided for, shall set forth both the amount and nature of the credits, and the amount and nature of his debts sought to be deducted; but no person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment, or loan for a policy of life insurance, nor on account of any unpaid subscription to any religious, literary, scientific or benevolent institution or society: *Provided*, That in deducting debts from credits no debt shall be deducted where said debt was created by a loan on government bonds or other taxable securities."

Statement of the Case.

Section 1, chapter 84, of the Session Laws of Kansas for 1891 provides for the taxation of bank stock, and is as follows:

"SECTION 1. That section 6868 of the General Statutes of 1889 be amended as follows: Sec. 6868. Stockholders in banks and banking associations and loan and investment companies, organized under the laws of this State or the United States, shall be assessed and taxed on the true value of their shares of stock in the city or township where such banks, banking associations, loan or investment companies are located; and the president, cashier or other managing officer thereof shall, under oath, return to the assessor on demand a list of the names of the stockholders and amount and value of stock held by each, together with the value of any undivided profit or surplus; and said banks, banking associations, loan or investment companies shall pay the tax assessed upon said stock and undivided profits or surplus, and shall have a lien thereon until the same is satisfied: *Provided*, That if from any causes the taxes levied upon the stock of any banking association, loan or investment company shall not be paid by said corporation, the property of the individual stockholders shall be held liable therefor: *Provided further*, That if any portion of the capital stock of any bank or banking association or loan or investment company shall be invested in real estate, and said corporation shall hold a title in fee simple thereto, the assessed value of said real estate shall be deducted from the original assessment of the paid-up capital stock of said corporation, and said real estate shall be assessed as other lands or lots: *And provided further*, That banking stock or loan and investment company stock or capital shall not be assessed at any higher rate than other property: *And provided further*, That the provisions of this act shall apply to all mutual, fire and life insurance companies or associations having assets, accumulations, money or credits, and doing business under the laws of this State: *And provided further*, That such assets, money, and credits, held and under the control of such mutual fire and life insurance companies or associations, shall be subject to assessment and taxation."

These are the only sections of the Kansas statute that the plaintiff in error claims have any bearing upon this case, and counsel for plaintiff in error states that the only really important question herein is the right of stockholders of a national bank to treat their stock therein as a credit from which they may be allowed to deduct the debts which they are owing in good faith.

Upon the above agreed statement of facts the court, after due consideration, found generally for the defendants, and entered judgment in their favor for the costs of this action against the plaintiff, to which finding and judgment of the court plaintiff at the time duly excepted. The plaintiff also filed its motion for a new trial, which motion was by the court overruled, and duly excepted to by plaintiff. The summons in error issued from the Supreme Court of Kansas was duly served, and the record removed into that court for review, where, after argument, the judgment of the court below was affirmed with costs. 53 Kansas, 463, upon the opinion in *Dutton* v. *Bank &c.*, 53 Kansas, 440. The plaintiff thereupon sued out a writ of error from this court, directed to the Supreme Court of Kansas, and the record is now here for review.

Mr. J. W. Gleed for plaintiff in error.

Mr. Abraham Bergen and *Mr. C. T. Richardson* for defendants in error.

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

By the decision of the Supreme Court of Kansas, section 6847, General Statutes of that State, defining the word "credit" as used in the chapter providing for the assessment and collection of taxes, was held not to include shares of stock in a national or state bank, and the owners of such shares were held to have no right under that statute to deduct from the assessed value of their shares the amount of their debts. This court is bound by the interpretation given to the Kansas statute by the Supreme Court of that State, *People* v. *Weaver*,

100 U. S. 539, 541, and the only question that remains to be decided by us is whether, under that construction, the statute is in conflict with section 5219 of the Revised Statutes of the United States, which provides as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located, but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

The plaintiff in error claimed that an illegal discrimination was made against the holders of national bank stock, because the statute of the State of Kansas permits certain kinds of debts owing in good faith by any person, company or corporation to be deducted from the gross amount of credits belonging to such person, company or corporation in listing their property for taxation, while owners of shares of stock in national banks are not allowed to deduct their indebtedness from the value of their shares of stock, and for that reason the plaintiff says that the Kansas statute is in conflict with the above cited section 5219 of the statutes of the United States. It will be seen that the term "credit," when used in the Kansas statute, is defined by that statute to mean and include every demand for money, labor or other valuable thing, whether due or to become due, but not secured by a lien on real estate; and it is only from such credits, so defined, that the class of debts named in the statute and owing in good faith by any person, company or corporation may be

deducted. There is no proof in the case as to the proportion which credits, from which such debts may be deducted, bear to the whole amount of the credits owned in the State, nor is there any proof as to what proportion the entire credits owned in the State bear to other moneyed capital owned therein. Debts owing to any person, company or corporation as depositors in any bank or banking association, or with any person or firm engaged in the business of banking in Kansas or elsewhere, cannot be deducted; and no person, company or corporation is entitled to any deduction on account of any bond, note or obligation given to any mutual insurance company, or deferred payment or loan for a policy of life insurance; nor on account of any unpaid subscriptions to any religious, literary, scientific or benevolent institution or society; nor can any debt be deducted from credits where the debt was created by a loan on government bonds or other taxable securities. (Section 6851, General Statutes of Kansas.)

It is thus seen that there is a very large and important class of what is termed moneyed capital from which no deductions are permitted on account of debts. The statute treats shares of stock in a national bank upon a perfect equality and in the same way as shares of stock in a state bank for the purpose of assessment and taxation.

In *Mercantile Bank* v. *New York*, 121 U. S. 138, it was held that the main purpose of Congress in fixing limits to taxation on investments in shares of national banks was to render it impossible for a State in levying such a tax to create and foster an unequal and unfriendly competition by favoring state institutions or individuals carrying on a similar business and operations and investments of a like character. Mr. Justice Matthews, in delivering the opinion of the court in the above cited case, gave an exhaustive review of the cases which had been decided in this court up to that time, under this section of the United States statute, and it is evident from the opinion and decision of the court in that case that the intent of the United States statute was to prevent an unjust discrimination against the moneyed capital invested in shares of national banks, by rendering it "impossible for the

State in levying a tax on such shares to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character." *Mercantile Bank case, supra*, 155.

From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff calls judicial notice of what is claimed to be a fact, viz., that the amount of moneyed capital in the State of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. This we cannot do. There is no proof whatever upon the subject. The state court has itself determined from its own knowledge that the credits from which debts may be deducted do not constitute a large or even material part of the moneyed capital of the State, and, on the contrary, that court says that debts secured by liens on real estate, money invested in corporate stocks of all kinds and descriptions, including railroad, banking, insurance, loan and trust companies, and all the multifarious forms of moneyed securities, moneys on deposit subject to call, and other forms of invested capital, constitute the great bulk of the moneyed capital in that State, and from all such moneyed capital no deduction for debts is allowed.

As the record appears there is no fact of which the court can take judicial notice. The relative proportions in which the moneyed capital of the State of Kansas is invested in the various kinds of securities to be therein found, this court cannot judicially know. When proof shall be made regarding that matter, it may then be determined intelligently whether, within the case of *The Mercantile Bank, supra*, there has been a real discrimination against the holders of national bank shares and hence a violation of the above cited act of Congress. The single fact that the statute of Kansas per-

mits some debts to be deducted from some moneyed capital, but not from that which is invested in the shares of national banks, is not sufficient to show such violation. The judgment must be

Affirmed.

UNITED STATES *v.* GETTYSBURG ELECTRIC RAILWAY COMPANY.

SAME *v.* SAME.[1]

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

Nos. 599, 629. Argued January 8, 9, 1896. — Decided January 27, 1896.

An appropriation by Congress for continuing the work of surveying, locating, and preserving the lines of battle at Gettysburg, Pennsylvania, and for purchasing, opening, constructing, and improving avenues along the portions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the Secretary of War may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps, and other organizations, with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure, is an appropriation for a public use, for which the United States may, in the exercise of its right of eminent domain, condemn and take the necessary lands of individuals and corporations, situated within that State, including lands occupied by a railroad company.

Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress, must be valid, and the proposed use in this case comes within such description.

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[1] The docket title of each of these cases was *United States* v. *A certain Tract of Land in Cumberland Township, Adams County, State of Pennsylvania.*

Statement of the Case.

The mere fact that Congress limits the amount to be appropriated for such purpose does not render invalid the law providing for the taking of the land.

The quantity of land which should be taken for such a purpose is a legislative, and not a judicial, question.

When land of a railroad company is taken for such purpose, if the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts may enter into the question of the amount of the compensation to be awarded.

The court below can, before a new trial, authorize the allegation as to the decision by the Secretary of War upon the necessity of taking the land to be amended, if necessary.

THESE are two writs of error to the Circuit Court of the United States for the Eastern District of Pennsylvania. They involve the same questions.

By the act of Congress, approved August 1, 1888, c. 728, 25 Stat. 357, entitled "An act to authorize condemnation of land for sites of public buildings and for other purposes," it is provided: "That in every case in which the Secretary of the Treasury, or any other officer of the Government, has been or hereafter shall be authorized to procure real estate for the erection of a public building or for other public uses, he shall be and hereby is authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

By the act of Congress, approved March 3, 1893, c. 208, 27 Stat. 572, 599, generally called the Sundry Civil Appropriation act, it was provided, among other things, as follows: "Monuments and Tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations, with reference to the study and correct understanding of the battle, and to mark the same

with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War."

Subsequently to the passage of that act and on the 5th of June, 1894, 28 Stat. 584, a joint resolution of Congress was approved by the President, which, after reciting the passage of the act of 1893, and the appropriation of the sum of $25,000 thereby, contained the further recital that the sum of $50,000 was then under consideration by Congress as an additional appropriation for the same purposes, and that it had been recently decided by the United States court, sitting in Pennsylvania, that authority had not been distinctly given for the acquisition of such land as may be necessary to enable the War Department to execute the purposes declared in the act of 1893, and that there was imminent danger that portions of the battlefield might be irreparably defaced by the construction of a railroad over the same, thereby making impracticable the execution of the provisions of the act of March 3, 1893, it was, therefore, "*Resolved*, By the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is authorized to acquire by purchase (or by condemnation) pursuant to the act of August first, eighteen hundred and eighty-eight, such lands, or interest in lands, upon or in the vicinity of said battlefield, as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March third, eighteen hundred and ninety-three: *Provided*, That no obligation or liability upon the part of the government shall be incurred under this resolution, nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress." A further appropriation of $50,000 was made for this purpose by the act of August 18, 1894, c. 301, 28 Stat. 372, 405, the same session of Congress.

Acting under the authority of these various statutes and joint resolution, the United States District Attorney for the Eastern District of Pennsylvania, by direction of the Attorney

General, filed a petition in the name of the United States for the purpose of condemning certain lands therein described, for the objects mentioned in the acts of Congress.

The petition in the first case recited the foregoing facts, and also stated the inability to agree with the owners upon the price of the land desired, and asked for the appointment of a jury, according to the law of the State of Pennsylvania in such case provided. The second section of the act of Congress, approved August 1, 1888, above mentioned, provides that the practice, pleadings, forms and modes of proceedings are to conform so far as may be to those existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held. The Gettysburg Electric Railway Company answered this petition, and set up the fact that it was a corporation existing under the laws of Pennsylvania, and that by virtue of its charter it had the power to build its road along a certain portion of the Gettysburg borough limits, described in the answer; that it had acquired as a part of a route of one of the branches of its road, and for the purpose of using the same as a part of its right of way, the tract of land particularly mentioned and described in the petition, and which is the subject of the condemnation proceedings. It alleged that the effect of the condemnation of the strip of ground would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity and prevent its construction and operation. The company further answered that the greater part of the appropriation of $25,000, under the act of March 3, 1893, had already been expended for the purposes stated therein, and that the balance remaining to the credit of the appropriation was less than $10,000. The electric railway company afterwards filed a further or amended answer, and therein set forth that the entire balance remaining unexpended of the appropriation of $25,000, under the act of March 3, 1893, and of $50,000, which had been appropriated by the act approved August 18, 1894, were covered by contracts already made under the authority of the Secretary of War, and that there was not in point of fact, at that time, any part of either appropriation available for the

purpose of paying any judgment which might be recovered by the company in these condemnation proceedings.

Evidence was given on the question of the value of the land to be taken, and on the fifth of November, 1894, the jury filed a report awarding the sum of $30,000 as the value of the land proposed to be taken in the first or main proceeding. The Gettysburg Electric Railway Company duly filed exceptions to the award, and on the same day appealed therefrom. The United States also appealed. The case was argued, and in April, 1895, an order was entered that the first and second exceptions filed by the defendant be sustained and that the petition of the United States be dismissed. Those two exceptions are as follows:

"1. The act of Congress approved August 1, 1888, provides for the acquisition of real estate by the United States by condemnation only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, Esq., United States Attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the fifth paragraph thereof, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons."

"2. The purpose specified in the sixth paragraph of the said petition, namely, 'of preserving the lines of battle,' 'properly marking with tablets the positions occupied,' and 'determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets,' are none of them public uses or purposes, authorizing the condemnation by the United States of private property."

The second proceeding was taken for the purpose of condemning a certain other portion of land containing a little over two acres. There was no trial in that matter, but the

case was dismissed, under the motion made by the defendant to quash the proceedings, upon the same grounds stated in the main case.

The substance of the holding of the circuit judge was that the intended use of the land was not that kind of a public use for which the United States had the constitutional power to condemn land. The district judge dissented from that view and was of the opinion that the use was public, and that the United States had the power to condemn land for that purpose.

Mr. Solicitor General and *Mr. Attorney General* for the United States.

Mr. Thomas Hart, Jr., for the Gettysburg Electric Railway Company. *Mr. Charles Heebner* was with him on the brief.

I. The purposes named in the act of March 3, 1893, are not public uses, and the United States are not authorized to condemn private property for them.

We concede that the United States have the right to take private property for certain public uses; but, on the other hand, it is well settled that this right cannot be exercised, within the limits of a State, for a purpose which is not incident to some power delegated to the General Government. *Kohl* v. *United States*, 91 U. S. 367; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *United States* v. *Fox*, 94 U. S. 315; *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Shoemaker* v. *United States*, 147 U. S. 282.

The question, therefore, for consideration is whether the four purposes named in the act of 1893, namely: the preservation of the lines of battle; the marking the positions occupied by the various commands; the opening and improving avenues; and the determination of the leading tactical positions, have such relation to the powers granted by the Constitution as to come within the above stated rule.

It is to be observed at the outset that the question of the publicity of the use is not at all determined and concluded by the fact that the sovereign itself is the medium of the exercise

of the power. Such a doctrine would simply put it in the power of the government to take for any purpose it chose. The inquiry must always be: What are the objects to be accomplished — not who are the instruments for attaining them. There would be no limitation on the taking of property by the United States if it were conclusively considered that a use was a public one merely because the property was taken directly into the possession of the government.

There is in the decisions a good deal of uncertainty and conflict as to the meaning of the words "public use," two different classes of views existing — one holding that there must be a use or right of use on the part of the public or some limited portion of it, the other holding that the words are equivalent to public benefit, utility, or advantage.

It must be remembered that the question is not, for what purposes may the power of eminent domain be properly exercised by a sovereign State in the absence of restriction. The Constitution provides that private property shall not be taken for public uses without just compensation. These words are a limitation, the same in effect as, "you shall not exercise this power except for public use." Numerous cases have so held. *Harvey* v. *Thomas*, 10 Watts, 63; *United States* v. *Jones*, 109 U. S. 513; *Twelfth Street Market Company's case*, 142 Penn. St. 580; *Palairet's Appeal*, 67 Penn. St. 479; *Keeling* v. *Griffin*, 56 Penn. St. 305; *West River Bridge Co.* v. *Dix*, 6 How. 507; *Memphis Freight Co.* v. *Memphis*, 4 Coldwell, 419; *Sholl* v. *German Coal Co.*, 118 Illinois, 427; *In re Niagara Falls & Whirlpool Railway*, 108 N. Y. 375.

There is a difference between the powers of the Federal government and the powers of a state government in acquiring land within that State by the exercise of the right of eminent domain. This difference is thus expressed in Cooley's Constitutional Limitations, 6th ed. page 645:

"As under the peculiar American system the protection and regulation of private rights, privileges and immunities in general belong to the state government, and those governments are expected to make provision for the conveniences and necessities which are usually provided for their citizens

through the exercise of the right of eminent domain, the right itself, it would seem, must pertain to those governments also, rather than to the Government of the Nation; and such has been the conclusion of the authorities. In the new territories, however, where the Government of the United States exercises sovereign authority, it possesses, as incident thereto, the right of eminent domain, which it may exercise directly or through the territorial government; but this right passes from the nation to the newly formed State whenever the latter is admitted into the Union. So far, however, as the General Government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions — as must sometimes be necessary in the case of forts, lighthouses, military posts or roads and other conveniences and necessities of the Government — the General Government may still exercise the authority, as well within the States and within the Territory under its exclusive jurisdiction, and its right to do so may be supported by the same reasons which support the right in any case; that is to say, the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority."

The adjudicated cases show the character of the use for which the right to take private property has been sustained. *Burt* v. *Merchants' Ins. Co.*, 106 Mass. 356, for a postoffice; *Kohl* v. *United States*, 91 U. S. 367, for United States Courts; *United States* v. *Jones*, 109 U. S. 513, to improve water communication between the Mississippi and Lake Michigan; *United States* v. *Great Falls Manuf. Co.*, 112 U. S. 645, for supplying Washington with water; *In re League Island*, 1 Brewster, 524, for a navy yard; *Gilmer* v. *Line Point*, 18 California, 229, for a fort; *Reddall* v. *Bryan*, 14 Maryland, 444, for water works for Washington; *Orr* v. *Quimby*, 54 N. H. 590; *United States* v. *Chicago*, 7 How. 185, for military purposes. See also Constitution, Art. I., Sec. 8; *Fort Leavenworth Railroad* v. *Lowe*, 114 U. S. 525.

Argument for the Gettysburg Electric Railway Company.

The purposes specified in the various acts of Congress authorizing or regulating the taking of private property for public use are national cemeteries, sites for life-saving stations, lighthouses, for improvement of rivers and harbors, for fortifications and coast defences, and Government Printing Office. The present case is none of these. To what authority in Congress is it germane?

The provision for opening and improving avenues need not be considered. Congress has power to provide only for those highways, whether roads, bridges or railroads, which are intended as a means of communication between the States. *California* v. *Central Pacific Railroad*, 127 U. S. 1; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525; *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312.

When this case was argued in the court below the objects of the act of 1893 were referred by the learned United States Attorney to Art. I., Sec. 8, of the Constitution empowering Congress "to levy and collect taxes, duties, imports and excises, to pay the debts and provide for the common defence and general welfare of the United States."

It is quite sufficient, however, to say in the words of the opinion below, that the power to lay and collect taxes is quite distinct from the right to take private property for public use, and that it is not the power of taxation but the right of eminent domain which is here asserted.

This matter is to be looked at solely with reference to what the United States proposes to do by the terms of the act under which these proceedings are conducted.

The United States has not yet acquired any ground for a national park. The ground is already acquired, to a large extent, by the Gettysburg Battlefield Memorial Association, a corporation of the State of Pennsylvania, but its purposes and acts cannot be used to help out the action of the United States in the proposed condemnation.

The government may purchase land and devote it to a great many purposes which it could not be contended would entitle it to condemn the same against the will of the owner.

When, however, it seeks to take private property it can and will be prevented from accomplishing that purpose if the object be not one which it has power to carry out.

It is by no means clear, however, that the United States may condemn land in a State for the purpose of a national park.

This question was argued and received some consideration in *Shoemaker* v. *United States*, 147 U. S. 282, but the decision was expressly rested upon the ground that the place of the exercise of the power was the District of Columbia, over which Congress has exclusive power of legislation.

II. The appropriation for the payment of the property taken being entirely inadequate, it is submitted that the proviso to the resolution of June 6, 1894, "that no obligation or liability upon the part of the government shall be incurred under this resolution, or any expenditure made except out of the appropriation already made and to be made during the present session of this Congress," renders the whole unconstitutional, nugatory, and void.

The first act of March 3, 1893, appropriated the sum of $25,000. The act of August 18, 1894, appropriated the sum of $50,000, and this is the total of the appropriations made during the session of Congress at which the resolution of June 6, 1894, was passed. See proviso thereto.

By the supplemental answers it appears that the balance to the credit of the first named appropriation was, February, 1895, $2882.17, and the balance to the credit of the other was, as of the same date, $36,000.

It further appears, however, by the answers filed March 20, 1895, that the entire balance remaining unexpended of both of the above mentioned appropriations is covered by contracts already made under the authority of the Secretary of War, for purposes for which the said appropriations were made, and that the execution of the said contracts will require the expenditure of the entire balances remaining of both appropriations.

The taking of land from a citizen for the use of the United States cannot be constitutional without a provision being

made for a tribunal for the ascertainment of compensation, and for a method by which payment can be enforced by such proper tribunal, or a pledge of public faith being made that a distinct fund should be held by the government for its payment.

The settled and fundamental doctrine is thus stated by Chancellor Kent, 2 Com., 12th ed., 339, note *f*: "The settled and fundamental doctrine is that government has no right to take private property for public purposes without giving a just compensation; and it seems to be necessarily implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception, concurrently in point of time with the actual exercise of the right of eminent domain." See also *Bloodgood* v. *Mohawk & Hudson River Railroad*, 18 Wend. 9; *People* v. *Hayden*, 6 Hill, 359; *Loweree* v. *Newark*, 38 N. J. Law, 151; *Connecticut River Railroad* v. *Commissioners*, 127 Mass. 50; *In re Sedgeley Avenue*, 88 Penn. St. 509; *Orr* v. *Quimby*, 54 N. H. 590; *Cherokee Nation* v. *Southern Kansas Railway*, 135 U. S. 641, 659; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645.

In the present case, although the act of 1888 provides a method of ascertaining damages in cases of condemnation by the United States, there is no adequate fund provided for the payment thereof. Upon an ascertainment in the condemnation proceedings of the damage to the Electric Railway Company, it will have to await the pleasure of Congress before it can obtain payment.

III. The act of Congress does not authorize the acquisition of a railway in actual operation.

The law is settled that only an intention in express terms or shown to exist by necessary implication, will sustain the taking of property already devoted to a public use. General terms such as "land," etc., are not sufficient.

In *West River Bridge Co.* v. *Dix*, 6 How. 507, Justice Woodbury said, page 543, that the right to take a franchise was subject to the limitation "that it must be in cases where a clear intent is manifested in the laws, that one corporation and its uses shall yield to another, or another public use under

the supposed superiority of the latter and the necessity of the case."

It must be admitted that in the act of 1893 there is no expression of an intent to take this railway, or any part of it. The government knew of the situation when the act of 1893 was passed. This company had acquired this strip for the purpose of constructing its railway in 1891. The deeds were recorded in February and November, 1892. The United States could have taken the railroad, but it then said nothing on the subject.

IV. A part only of the franchise of a railroad company cannot be condemned and taken. The franchise is indivisible.

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

The really important question to be determined in these proceedings is, whether the use to which the petitioner desires to put the land described in the petitions is of that kind of public use for which the government of the United States is authorized to condemn land.

It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. *Kohl* v. *United States*, 91 U. S. 367; *Cherokee Nation* v. *Kansas Railway*, 135 U. S. 641, 656; *Chappell* v. *United States*, 160 U. S. 499.

Is the proposed use, to which this land is to be put, a public use within this limitation?

The purpose of the use is stated in the first act of Congress, passed on the 3d day of March, 1893, (the appropriation act of 1893,) and is quoted in the above statement of facts. The appropriation act of August 18, 1894, also contained the following: "For continuing the work of surveying, locating and preserving the lines of battle at Gettysburg, Pennsylvania, and for purchasing, opening, constructing and improving avenues along the portions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the Sec-

retary of War may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure; fifty thousand dollars, to be expended under the direction of the Secretary of War."

In these acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the second volume of Judge Dillon's work on Municipal Corporations, (4th ed. § 600,) that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

As just compensation, which is the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the government itself, there is not much ground to fear any abuse of the power. The responsibility of Congress to the people will generally, if not always, result in a most conservative exercise of the right. It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself.

In examining an act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.

Upon the question whether the proposed use of this land is a public one, we think there can be no well founded doubt.

And also, in our judgment, the government has the constitutional power to condemn the land for the proposed use. It is, of course, not necessary that the power of condemnation for such purpose be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defence and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any act of Congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 421, in these words : "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

The end to be attained by this proposed use, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned

from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government

at the public expense. The right to take land for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored.

No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

It is needless to enlarge upon the subject, and the determination is arrived at without hesitation that the use intended as set forth in the petition in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land.

Second. It is objected that the appropriations made by the several acts of Congress had been exhausted when the amended answers were put in, and that the proviso attached to the joint resolution above mentioned, prohibiting any expenditure other than such as might be appropriated in that session of Congress, renders it impossible for the land owner to obtain payment with any certainty for his property that might be taken from him. Although it is set up in the answer of the electric company to the petition filed on the part of the United States, the fact that the fund appropriated has been exhausted does not appear by any evidence contained in either record. So far as this court can see from the record, there is an appropriation amounting to $75,000, for the purpose of obtaining land, a part of which has been found to be worth $30,000, and the other, and much smaller portion, is not valued. The proviso, therefore, would seem to be immaterial, as the appropriations were much larger than the value of the land to be taken. The mere fact that Congress limited the amount to be appropriated for the purposes indicated does not

render the law providing for the taking of the land invalid. *Shoemaker* v. *United States*, 147 U. S. 282, 302. Mr. Justice Shiras, in delivering the opinion of the court in the case cited, said: "The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000. It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the land is to be agreed upon, or, in the absence of agreement, is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is not unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of property should have a right to receive in case proceedings to condemn had to be resorted to." If it appeared by proof that the appropriation for the purpose indicated had been exhausted before the proceedings had been commenced to take the land in controversy, or during the hearing, then the provision in the joint resolution directing that no obligation or liability upon the part of the government should be incurred or any expenditure made except out of the appropriations already made and to be made during the then session of Congress, would give rise to a very serious question. It is not now presented. Congress has the power, even now, to appropriate moneys for this purpose in addition to that which it appropriated in the two acts of 1893 and 1894. This court cannot, therefore, upon the record as it stands give judgment for the land owner on the ground that the appropriation for the land has been exhausted in other ways, and that Congress prohibited the incurring of any obligation to a greater extent than the moneys then appropriated.

Third. Another objection taken in the court below, though

not decided by that court, but which counsel for defendant in error now urges as an additional ground for the affirmance of the judgment, is that the land proposed to be taken in this proceeding was already devoted to another public use, to wit, that of the railroad company, and that it does not appear that it was the intention of Congress to take land which was devoted to another public use. The defendant in error concedes what is without doubt true, that this is a question of intention simply; the power of Congress to take land devoted to one public use for another and a different public use upon making just compensation cannot be disputed. Upon looking at the two acts of Congress and the joint resolution of June 6, 1894, above referred to, in the latter of which it is stated, "There is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of the act of March 3, 1893," we think it is plainly apparent that Congress did intend to take this very land, occupied and used by this company for its railroad.

Further elaboration is unnecessary. It is so plain to our minds that extended argument would be unprofitable.

Fourth. It is also objected that the exception below is valid, wherein it is stated that all the land of the railroad company ought to be taken, if any were to be taken. The use for which the land is to be taken having been determined to be a public use, the quantity which should be taken is a legislative and not a judicial question. *Shoemaker* v. *United States*, 147 U. S. 282, 298. As to the effect of the taking upon the land remaining, that is more a question of the amount of compensation. If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 333, 334.

Fifth. It is also objected that the petition does not allege that the Secretary of War has decided it to be necessary to take this land. A perusal of the petition shows that the

allegation therein contained upon this subject is not very clear. It might possibly be regarded as sufficiently alleged in an argumentative kind of way, but it certainly is not as plainly alleged as it ought to be. The petition, however, can be easily amended on application to the court below before further proceedings are taken.

This, we think, completes the review of the material questions presented by the record. The first and important question in regard to whether the proposed use is public or not, having been determined in favor of the United States, we are not disposed to take any very technical view of the other questions which might be subject to amendment or to further proof upon the hearing below.

The judgment of the Circuit Court in each case must be reversed, and the record remitted to that court with directions to grant a new trial in each.

SIOUX CITY AND ST. PAUL RAILROAD COMPANY *v.* UNITED STATES.

PETITION FOR REHEARING.

Received December 17, 1895. — Decided January 13, 1896.

The court adheres to its opinion and decision in this case, 159 U. S. 349, and corrects an error in statement in it, which does not, in any degree, affect the conclusions which were there reached.

THE case is stated in the opinion.

Mr. J. H. Swan and *Mr. George B. Young* for petitioners.

MR. JUSTICE HARLAN delivered the opinion of the court.

In the opinion of this court, 159 U. S. 349, 367, it was said: "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." This was not strictly correct. The diagram referred to was prepared in the Department of the Interior, but it was based on the original survey made and furnished by the railroad company. Other sentences in the same connection are subject to the like criticism. But this inaccuracy of statement does not affect in any degree the grounds upon which the court reached the conclusion that the diagram of 1867 should not control, and that the measurement and diagram of 1887 should be taken as the basis for determining the area of the odd-numbered sections within place limits.

None of the other matters mentioned in the petition for a rehearing require special notice. The views therein presented were fully considered by the court before the original opinion was filed. The point now pressed by counsel as to errors in the matter of addition is immaterial, even if it be well taken; for whatever the excess in the quantity of land received by the railroad company, the result, in the present case, will be the same as stated in the opinion, namely, that the railroad company is not entitled to any of the lands *here in dispute*, whatever may be the aggregate quantity of acres.

The application for rehearing is

Denied.

MISSOURI *v.* IOWA.

ORIGINAL.

No. 10. Original. Submitted December 17, 1895. — Decided February 3, 1896.

At the request of the parties, this court, after deciding where is the true and proper southern boundary line of the State of Iowa, appoints a commission to find and remark the same with proper and durable monuments.

The State of Missouri, through its Attorney General, filed in this court in vacation its bill, in which, after setting forth the former proceedings had herein for the determination of the boundary line between it and the State of Iowa, which are reported in 6 How. 659, and 10 How. 1, it was further said:

"Complainant states that it is highly important to the States of Iowa and Missouri that the question of boundary should be speedily and finally settled; that heretofore the peace of the people of the States of Missouri and Iowa, especially in the county of Mercer, in the former, and the county of Decatur, in the latter, have been seriously disturbed in consequence of frequent conflicts of jurisdiction arising from differences of opinion as to the location of the said state line between said counties.

"Complainant further states that the State of Missouri has no adequate relief at law, and, as the controversy herein involves questions of jurisdiction and sovereignty, it is respectfully prayed that the State of Iowa may be made a defendant in this proceeding, and that she may be permitted to answer the matters and things herein set forth, and upon a final hearing that the northern boundary line of the State of Missouri, it being the boundary line between the complainant and defendant, be by the order and decree of this court ascertained and established; that the rights of possession, jurisdiction, and sovereignty of the State of Missouri to all the territory south of the line heretofore marked and run out by said J. C. Sullivan

in 1816, remarked by the commissioners heretofore named in 1850, and approved by the decree of the Supreme Court of the United States rendered as aforesaid, be restored to said State of Missouri, and that said State of Missouri be quieted in her title thereto, and that the defendant, The State of Iowa, be forever enjoined and restrained from disturbing the said State of Missouri, her officers and her citizens, in the full enjoyment and possession of the territory lying south of said line, and that such other and further relief may be granted as the nature of the case may require."

The State of Iowa, by its Attorney General, filed its answer, denying some of the allegations in the bill, admitting others, making further averments on its own part, and concluding:

"Said respondent, with the view to have an ultimate and final decision of the controversy, prays that this answer may also be treated as a cross-bill, and joins in the prayer of said complainant that the said boundary line between said complainant and respondent be, by the order and decree of this court, ascertained and established, and to that end that a commission be appointed, in such manner as to this court shall be deemed proper, to retrace the line traced and marked by the commission of this court in 1850, and as set forth in the decree of this court in the case of *State of Missouri* v. *The State of Iowa*, as aforesaid, and that such retracing of such line thus found be by such commissioners marked with fixed and enduring monuments, and that the title of the State of Iowa in and to all land or territory north of the line thus found and marked be forever quieted in the said respondent, and for such other and further relief as equity and good conscience may require."

To this answer the State of Missouri filed replication as follows:

"Complainant, for its reply to respondent's answer herein, states that it is true, as heretofore alleged in complainant's petition heretofore filed in this cause, that the officers of the State of Iowa are exercising jurisdiction over territory lying south of the boundary line between the States of Missouri and Iowa.

"Complainant, for further reply to respondent's answer herein, states that it is necessary, in order that conflicts of jurisdiction should be avoided between said States, that the true boundary line, as heretofore established under a decree of this court by Hendershott and Minor, in 1850, should be reëstablished and relocated, and to this end it is asked that the court may enter a decree relocating and reëstablishing said line, and that such other and further orders may be made herein as are necessary to effect the same."

The parties further stipulated, each by its Attorney General, as follows:

"It is hereby agreed that the above entitled cause may be submitted to the court on the petition, answer, and reply of the parties hereto, and if to the court it seems proper that a commission of two civil engineers or surveyors may be appointed to retrace the line established and decreed by the Supreme Court of the United States in the case of *The State of Missouri* v. *The State of Iowa*, one of such commissioners to be appointed by the State of Missouri and one by the State of Iowa, and if the parties are unable to agree that they may appoint a third, that such commission shall proceed without unnecessary delay and retrace the line as run and located by Hendershott and Minor in 1850 between the 50th and 55th mile-posts on said line, beginning and ending the survey at such points as may be necessary to ascertain the true original line between said mile-posts, and, having found said true line, to mark the same by plain and enduring monuments and make report of their said retracing and survey of said line to this court."

Mr. R. F. Walker, Attorney General of the State of Missouri, for the complainant.

Mr. Milton Remley, Attorney General of the State of Iowa, for the respondent.

Mr. Chief Justice Fuller, on the 3d of February, 1896, announced that the Court ordered the following decree to be entered in the case.

Opinion of the Court.

This cause coming on to be heard on the original bill filed herein by the State of Missouri against the State of Iowa, the answer thereto by the State of Iowa, and the reply to said answer by the State of Missouri, and the pleadings and stipulations filed herein by counsel for the respective parties having been duly considered, and the decrees heretofore rendered by this court on February 13, 1849, and on January 3, 1851, with the report of commissioners forming part thereof, in a cause then pending before this court between the said States of Missouri and Iowa in regard to the same boundary line now in controversy having been examined:

It is, thereupon, this third day of February, A. D. 1896, ordered, adjudged, and decreed, that the true and proper northern boundary line of the State of Missouri and the true and proper southern boundary line of the State of Iowa is the line run, located, marked, and defined by Hendershott and Minor, commissioners of this court, under the order and decree of this court, as set forth in their report annexed to said decree of January 3, 1851. And it appearing further to the court that the proper boundary line between said States, run, located, and established by Hendershott and Minor, as aforesaid, has, between the fiftieth and fifty-fifth mile-posts on the same, become obliterated, and that the monuments originally placed thereon have been destroyed, therefore it is further ordered, adjudged, and decreed that James Harding of the State of Missouri, Peter Dey of the State of Iowa, and Dwight C. Morgan of the State of Illinois, be and they are hereby appointed commissioners to find and remark with proper and durable monuments such portions of said line so run, marked and located by Hendershott and Minor as have become obliterated, especially between the fiftieth and fifty-fifth mile-posts on the same, and that they begin and end such survey at such points along said line as will enable them to definitely relocate and redesignate the same.

It is further ordered, that the clerk of this court at once forward to the chief magistrate of each of said States and to each of the commissioners designated by this decree a copy of said decree duly authenticated, and that said commissioners

request the coöperation and assistance of the state authorities in the performance of the duties imposed upon them by this decree, and proceed with all convenient speed to discharge their duty in relocating and remarking such portions of said line as have become obliterated, as herein directed, and make their report thereof and of their proceedings in the premises to this court on or before the first day of May, 1896, together with a complete bill of costs and charges annexed.

And it is further ordered that, should either of said commissioners die or refuse to act or be unable to perform the duties required by this decree, while the court is not in session, the Chief Justice is hereby authorized and empowered to appoint another commissioner to supply the vacancy, and he is authorized to act on such information in the premises as may be satisfactory to himself.

It is further ordered, that all costs of this proceeding, including not exceeding ten dollars per day for each commissioner, and the other costs incident to the marking and establishment of this line, shall be paid by the States of Missouri and Iowa equally.

So ordered.

APPENDIX.

I.

AMENDMENT TO RULES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

Ordered that the 51st Rule of Practice in Admiralty be amended so as to read as follows:

51.

When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be filed, unless allowed or directed by the court on proper cause shown. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain or add to, the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

(Promulgated January 27, 1896.)

II.

ASSIGNMENT TO CIRCUITS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

ORDER.

There having been an Associate Justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of said court among the Circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, viz.:

For the First Circuit, HORACE GRAY, Associate Justice.

For the Second Circuit, RUFUS W. PECKHAM, Associate Justice.

For the Third Circuit, GEORGE SHIRAS, JR., Associate Justice.

For the Fourth Circuit, MELVILLE W. FULLER, Chief Justice.

For the Fifth Circuit, EDWARD D. WHITE, Associate Justice.

For the Sixth Circuit, JOHN M. HARLAN, Associate Justice.

For the Seventh Circuit, HENRY B. BROWN, Associate Justice.

For the Eighth Circuit, DAVID J. BREWER, Associate Justice.

For the Ninth Circuit, STEPHEN J. FIELD, Associate Justice.

Announced February 3, 1896.

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ASSIGNMENT OF ERROR.

An assignment of error which indicates the subject-matter in the charge to which the exceptions relate with sufficient clearness to enable the court, from a mere inspection of the charge, to ascertain the particular matter referred to, is sufficient. *Hickory* v. *United States*, 408.

BOUNDARY LINE.

At the request of the parties, this court, after deciding where is the true and proper southern boundary line of the State of Iowa, appoints a commission to find and remark the same with proper and durable monuments. *Missouri* v. *Iowa*, 688.

CASES AFFIRMED.

1. *Moore* v. *United States*, 150 U. S. 57, 61, affirmed and applied to a question raised in this case. *Goldsby* v. *United States*, 70.
2. Affirmed upon the authority of *Washington & Idaho Railroad Company*

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CLAIMS AGAINST THE UNITED STATES.

The claimant originally enlisted at Washington in August, 1878, and was discharged at Mare Island, California, November 6, 1886, receiving, (under the provisions of Rev. Stat. § 1290, as amended by the act of February 27, 1877,) travel pay and commutation of subsistence from Mare Island to Washington. He did not return to Washington, but, November 10, 1886, reënlisted at Mare Island as a private, and in the course of his service was returned to Washington, where, at the expiration of two years and four months, he was discharged at his own request. *Held*, that, as the service was practically a continuous one, and his second discharge occurred at the place of his original enlistment, he was not entitled to his commutation for travel and subsistence to the place of his second enlistment. *United States* v. *Thornton*, 654.

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CONSTITUTIONAL LAW.

1. The Fourteenth Amendment to the Constitution in no way undertakes to control the power of a State to determine by what process legal rights may be asserted, or legal obligations be enforced, pro-

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3. The question of laches does not depend upon the fact that a certain definite time has elapsed since the cause of action accrued, but upon whether, under all the circumstances of the particular case, the plaintiff is chargeable with a want of due diligence in failing to institute proceedings earlier; and, under the peculiar circumstances of this case, the bill is not open to the defence of laches. *Ib.*
4. The bill in this case is not open to the charge of multifariousness. *Ib.*
5. In May, 1885, P., having an opportunity to purchase ten acres of land near Omaha, at a cost of $3600, payable $1250 in cash, the rest on credit, wrote to D. that he could buy the tract for $4800, payable $2500 in cash, the rest on credit, and asked him to join in the purchase. D. assented, sent his $1250 to P., and joined in a mortgage for the balance of the purchase money. In October, 1885, P. wrote to D. that he had sold the ten acres to B. for $6000, $3000 of which were in cash, and enclosed a cheque for $1500, and a deed to B. to be executed by D. in which the consideration was expressed at $6000. This amount was subsequently changed to $10,000 without D.'s knowledge. On the day after receiving the deed, B. reconveyed the property to P. The land was laid out into lots and streets under direction of P., and some of the lots were sold to *bona fide* purchasers. After the institution of this suit, the remainder was conveyed by P. to one M., for a recited consideration of $19,425. In February, 1887, the deception practised by P. as to the price of the land, and as to the change in the consideration of the deed to B. came to the knowledge of D., who thereupon wrote P., calling upon him to refund the overpayment in the purchase money, and to pay him one half of the increase in the amount of the consideration for the deed to B. P. made no payment, and commenced a correspondence which lasted until D. became possessed of knowledge of the reconveyance by B. to P. This bill in equity was then filed by D., praying for an accounting, and that he be decreed entitled to all the benefits of the original purchase, and that the deed to B., the deed from B. to P., and the deed from P. to M. be declared fraudulent; that P. be required to convey to D. so much of the premises as had not been conveyed to other parties for a valuable consideration; that he account to plaintiff for the sums received from such sales, and that he be restrained from selling other lots. The court below dismissed the bill on the ground that D. had elected to retain what he had received and to pursue his claim for moneys still due, and could not maintain a suit to set the whole transactions aside. *Held*, (1) That the plaintiff was entitled to a decree setting aside and annulling the deed purporting to have been executed by P. to M., the deed from B. to P., and the deed to B. from P. and D., leaving the title to the premises in question where it was prior to the execution of the last named deed; such decree to be without prejudice to any valid rights acquired by parties who purchased in good faith from P. while the fee was in him alone; (2) That the cause should be referred to a

ESTOPPEL.

EVIDENCE.

INDICTMENT.

INSOLVENT DEBTOR.

IOWA.

JUDGMENT.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

D. JURISDICTION OF THE COURT OF CLAIMS.

LOCAL LAW.

MANDAMUS.

See MANDATE, 1.

MANDATE.

1. When a case has once been decided by this court on appeal, and remanded to the Circuit Court, that court must execute the decree of this court according to the mandate. If it does not, its action may be controlled, either by a new appeal, or by writ of mandamus; but it may consider and decide any matters left open by the mandate, and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court, at the time of rendering its decree, may be consulted to ascertain what was intended by the mandate; and, either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate. *In re Sanford Fork & Tool Co.*, 247.
2. When the Circuit Court, at a hearing upon exceptions to an answer in equity, sustains the exceptions, and (the defendant electing to stand by his answer) enters a final decree for the plaintiff; and this court, upon appeal, orders that decree to be reversed, and the cause remanded for further proceedings not inconsistent with its opinion, the plaintiff is entitled to file a replication, and may be allowed by the Circuit Court to amend his bill. *Ib.*

MARRIED WOMAN.

See CONSTITUTIONAL LAW, 7;
MORTGAGE;
NOTICE, 1.

MASTER AND SERVANT.

See RAILROAD, 1.

MATE.

See OFFICERS IN THE NAVY.

MINERAL LAND.

1. The decree and complaint, taken together, fully describe and furnish ample means for identification of the property to which the defend-

NEW TRIAL.

NOTICE.

OFFICERS IN THE NAVY.

PATENT FOR INVENTION.

PENSION.

PERJURY.

PRACTICE.

1. There is nothing in this case to take it out of the ruling in *Isaacs* v. *United States*, 159 U. S. 487, that an application for a continuance is not ordinarily subject to review by this court. *Goldsby* v. *United States*, 70.
2. The court below can, before a new trial, authorize the allegation as to the decision by the Secretary of War upon the necessity of taking the land to be amended, if necessary. *United States* v. *Gettysburg Electric Railway Company*, 668.
3. The court adheres to its opinion and decision in this case, 159 U. S. 349, and corrects an error of statement in that opinion, which in no way affects the conclusions there reached. *Sioux City & St. Paul Railroad Co.* v. *United States*, 686.

See ASSIGNMENT OF ERROR;
CRIMINAL LAW, 11;
EVIDENCE, 4;
INDICTMENT, 5;
JURISDICTION, B, 3;
MANDATE, 1, 2;
NEW TRIAL.

PRESUMPTION.

See EVIDENCE, 9.

PUBLIC LAND.

1. The provision in the act of March 3, 1875, c. 152, 18 Stat. 482, granting the right of way through the public lands of the United States to any railroad duly organized under the laws of any State or Territory, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, plainly means that no corporation can acquire a right of way upon a line not described in its charter or articles of incorporation. *Washington & Idaho Railroad Co.* v. *Cœur d'Alene Railway & Navigation Co.*, 77.
2. A railroad company whose road is laid out so as, under the provisions of the act of March 3, 1875, 18 Stat. 482, entitled "An act granting to railroads the right of way through the public lands of the United States," to cross a part of such public unsurveyed domain, cannot take part thereof in the actual possession and occupation of a settler, who is entitled to claim a preëmption right thereto when the proper time shall come, and who has made improvements on the land so occupied by him, without making proper compensation therefor. *Washington & Idaho Railroad Co.* v. *Osborn*, 103.
3. The act of March 3, 1877, c. 107, 19 Stat. 377, providing for the sale of desert lands in certain States and Territories, does not embrace alternate sections, reserved to the United States, along the lines of railroads for the construction of which Congress has made grants of lands. *United States* v. *Healey*, 136.

RAILROAD.

SEAL.

SERVITUDE.

See CONSTITUTIONAL LAW, 4, 5.

STATUTE.

A. Construction of Statutes.

1. When a court of law is construing an instrument, whether a public law or a private contract, it is legitimate, if two constructions are fairly possible, to adopt that one which equity would favor. *Washington & Idaho Railroad Co.* v. *Cœur d'Alene Railway & Navigation Co.*, 77.
2. When the practice in a department in interpreting a statute is uniform, and the meaning of the statute, upon examination, is found to be doubtful or obscure, this court will accept the interpretation by the department as the true one; but where the departmental practice has not been uniform, the court must determine for itself what is the true interpretation. *United States* v. *Healey*, 136.

See Eminent Domain;
Jurisdiction, B, 1.

B. Statutes of the United States.

See Claims against the United States;
Constitutional Law, 6;
Corporation, 1;
Criminal Law, 1, 2, 3, 4, 6, 11;
Evidence, 3, 5;
Habeas Corpus, 1, 2, 5;
Indictment, 3;
Jurisdiction, A, 2, 7, 11, 12, 13; B, 3; D, 1 to 6.
Light-house, 1, 2;
National Bank;
Public Land, 1, 2, 3, 4, 6, 7;
Removal of Causes, 7;
Union Pacific Railway Company, 1, 3, 5, 6, 7.

C. Statutes of States and Territories.

Alabama. *See* Local Law, 6.
Kansas. *See* National Bank.
Louisiana. *See* Constitutional Law, 4.

TAXATION.

See National Bank.

TRADE MARK.

See Corporation, 1.

TRESPASS.

See Mineral Land, 4.

UNION PACIFIC RAILWAY COMPANY.

1. The objects which Congress sought to accomplish by the act of July 1, 1862, c. 120, 12 Stat. 489, granting a subsidy to aid in the construction of both a railroad and a telegraph line from the Missouri River to the Pacific Ocean, and by the act of July 2, 1864, c. 216, 13 Stat.