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IN

THE SUPREME COURT

AT

OCTOBER TERM, 1895

J. C. BANCROFT DAVIS

REPORTER

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

MELVILLE WESTON FULLER, Chief Justice.
STEPHEN JOHNSON FIELD, Associate Justice.
JOHN MARSHALL HARLAN, Associate Justice.
HORACE GRAY, Associate Justice.
DAVID JOSIAH BREWER, Associate Justice.
HENRY BILLINGS BROWN, Associate Justice.
GEORGE SHIRAS, Jr., Associate Justice.
EDWARD DOUGLASS WHITE, Associate Justice.
RUFUS W. PECKHAM, Associate Justice.

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

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1895.

WESTERN UNION TELEGRAPH COMPANY *v.* STAGGART.

ERROR TO THE SUPREME COURT OF THE STATE OF INDIANA.

No. 662. Argued January 16, 17, 1896. — Decided May 18, 1896.

A statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional.

The statute of Indiana of March 6, 1893, c. 171, which directs the state board of tax commissioners to take as the basis of valuation of the property within the State of every telegraph company, incorporated in Indiana or in any other State, the proportion of the value of its whole capital stock which the length of its lines within the State bears to the whole length of all its lines, yet, as construed by the Supreme Court of the State, makes it the duty of the tax commissioners to make such

deductions, on account of a greater proportional value of the company's property outside the State, or for any other reason, as to assess its property within the State at its true cash value; and, so construed, is constitutional.

THIS was a bill in equity, filed December 19, 1893, in the Circuit Court of the county of Marion and State of Indiana, by the Western Union Telegraph Company against Thomas Taggart, the auditor of that county, and Sterling R. Holt, its treasurer, and against the auditors and treasurers of other counties of Indiana, to restrain them from apportioning and collecting a tax assessed upon the plaintiff by the board of tax commissioners of the State, under the statute of Indiana of March 6, 1893, c. 171, the material parts of which are copied in the margin.[1] The principal allegations of the bill were as follows:

---

[1] An act supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight joint stock associations, companies, copartnerships and corporations transacting business in the State of Indiana, repealing sections 68, 69, 70 and 71 of said act, and all laws in conflict therewith, and declaring an emergency.

SEC. 1. Any joint stock association, company, copartnership or corporation, whether incorporated under the laws of this State or of any other State or of any foreign nation, engaged in transmitting to, from, through, in or across the State of Indiana, telegraphic messages, shall be deemed and held to be a telegraph company; and every such telegraph company shall, annually, between the first day of April and the first day of June, make out and deliver to the auditor of State a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing:

First. The total capital stock of such association, company, copartnership or corporation.

Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share.

Third. Its principal place of business.

Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof.

Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the State, and the location and assessed value

That the plaintiff was, and for many years had been, a corporation of the State of New York, and "the owner of a large amount and number of telegraph poles, lines, wires,

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thereof in each county or township where the same is assessed for local taxation.

Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the State of Indiana and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated.

Seventh. All mortgages upon the whole or any part of its property, together with the dates and amount thereof.

Eighth. (*a.*) The total length of the lines of said association or company.

(*b.*) The total length of so much of their lines as is outside the State of Indiana.

(*c.*) The length of the lines within each of the counties and townships within the State of Indiana.

SEC. 5. Upon the filing of such statements, the auditor of State shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of State may call for. In case of the failure or refusal of any association, company, copartnership or corporation to make out and deliver to the auditor of State any statement or statements required by this act, such association, company, copartnership or corporation shall forfeit and pay to the State of Indiana one hundred dollars for each additional day such report is delayed beyond the first day of June, to be sued and recovered in any proper form of action, in the name of the State of Indiana, on the relation of the auditor of State, and such penalty, when collected, shall be paid into the general fund of the State.

SEC. 6. Upon the meeting of the state board of tax commissioners for the purpose of assessing railroad and other property, said auditor of State shall lay such statements, with such information as may have been furnished him, before said board of tax commissioners, who shall thereupon value and assess the property of each association, company, copartnership or corporation in the manner hereinafter set forth, after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership or corporation to appear before them with such books, papers or statements as they may require; or they may require additional statements to be made to them, and may compel the attendance of witnesses in case they shall deem it necessary to enable them to ascertain the true cash value of such property.

cables, fixtures, instruments, machinery, appliances, apparatus and real estate, constituting a plant for the transmission and conveyance of telegraph messages, which said telegraphic plant extends into and through every State and Territory of the United States, the Dominion of Canada, and under

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SEC. 7. Said state board of tax commissioners shall first ascertain the true cash value of the entire property owned by said association, company, copartnership or corporation from said statements or otherwise, for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: Provided, however, that in case the whole or any portion of the property of such association, company, copartnership or corporation shall be incumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock, or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership or corporation. Such board of tax commissioners shall, for the purpose of ascertaining the true cash value of the property within the State of Indiana, next ascertain, from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the State of Indiana and not specifically used in the general business of such associations, companies, copartnerships or corporations, which said assessed values for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of tax commissioners shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships or corporations within the State of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships or corporations, as above ascertained, after deducting the assessed value of such real estate without the State, which the length of the lines of said associations, companies, copartnerships or corporations in the case of telegraph and telephone companies within the State of Indiana, bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining or chair car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the State, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes within the State of Indiana, bears to the whole length of the lines or routes of such associations, com-

the Atlantic Ocean to England and to Cuba;" and that the plaintiff, by reason of rights under contracts with various persons and corporations in the United States and in other parts of the world, and under letters patent from the United States, and valuable franchises granted by the United States and by New York and other States of the Union, (but not

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panies, copartnerships or corporations; and such amount so ascertained shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the State of Indiana. From the entire value of the property within the State, so ascertained, there shall be deducted, by said board, the assessed value for taxation of all the real estate, structures, machinery and appliances within the State and subject to local taxation in the counties and townships as hereinbefore described in item No. 5 of sections 1, 2, 3 and 4 of this act; and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be, by said board, assessed to said association.

SEC. 8. Said state board of tax commissioners shall thereupon ascertain the value per mile of the property within the State by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the State, by the number of miles within the State; and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership or corporation within the State of Indiana.

SEC. 9. Said state board of tax commissioners shall thereupon, for the purpose of determining what amount shall be assessed by it to said association, company, copartnership or corporation in each county in the State through, across, into or over which the line of said association, company, copartnership or corporation extends, multiply the value per mile, as above ascertained by the number of miles in each of such counties, as reported in said statements or as otherwise ascertained, and the result thereof shall be, by said board, certified to the auditor of State, who shall thereupon certify the same to the auditors, respectively, of the several counties through, into, over or across which the lines or routes of said association, company, copartnership or corporation extend; and such auditors shall apportion the amount certified for their counties, respectively, among the several townships into, through, over or across which such lines or routes extend, in proportion to the length of the lines in such townships.

SEC. 10. To enable said county auditors to properly apportion the assessments between the several townships, they are authorized to require the agent of said association or company to report to them, respectively, under oath, the length of the lines in each township; and the auditor shall thereupon add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures and appliances situated in any township, and extend the taxes thereon upon the duplicates as in other cases.

by Indiana,) and by many municipalities in those States, and by the governments of England and of Cuba, was "enabled to do a large and profitable business, by and by means of said telegraphic plant, and not only earn an amount which would be equivalent to rent upon said property, in case the same was owned by another corporation and leased by complainant, but also to make a profit for complainant in addition to said amount so applicable as rent of such telegraphic plant."

That the "portion of said telegraphic plant, situated within said State of Indiana, is of the actual cash value of $686,126, the said cash value being ascertained by taking the cost of original construction, as nearly as the same can be ascertained, and deducting therefrom a sum partially equal to the depreciation of the plant; and could be replaced by an entirely new plant of the same extent and location, and of far more valuable and lasting material, for the sum of $1,226,625."

That the pretended statute of March 6, 1893, was not a law of the State of Indiana, (for reasons not insisted on in this court,) and that on July 11, 1893, the plaintiff, reserving its rights to contest the validity of that statute, filed with the auditor of the State a statement and return, as therein required — a copy of which was annexed, and which included substantially the same objections as were stated in the bill, and showed that the entire mileage of the company was 189,576 miles, 6436 of which were in the State of Indiana; that it had no real estate, machinery and appliances in Indiana subject to local taxation; that the cost of its real estate in other States was $5,013,326, and the amount of its outstanding mortgage bonds was $1,211,000.

That the state board of tax commissioners on August 21, 1893, made its assessment and valuation of the plaintiff's property in Indiana, deducting the real estate, structures, machinery and apparatus within the State and subject to local taxation, at the sum of $2,297,652, and at the rate of $357 per mile of telegraph line; "and, in fixing said valuation upon complainant's said property in Indiana, acted under and by virtue of the assumed authority of said pretended statute, approved March 6, 1893, and placed upon complainant's said

property additional values, beyond the true cash value of complainant's said property as measured by the cost of replacement of the same, making reasonable allowances for deterioration, by adding values of complainant's business, property and good will, both in and outside of Indiana, and franchises granted by the State of New York, the United States and foreign countries; and in witness thereof caused to be entered upon the official record of said board, required by law to be kept by said board, on said August 21, 1893, the following statement and certificate:

"'In accordance with the requirements of the act of the general assembly of the State of Indiana, approved March 6, 1893, the state board of tax commissioners, after full consideration, does hereby assess and value telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight joint stock associations, companies, copartnerships and corporations, transacting business in the State of Indiana, which assessment and valuation is as follows, to wit: Assessment and valuation of telegraph and telephone companies in the State of Indiana by the state board of tax commissioners for the year 1893, exclusive of real estate, structures, machinery, fixtures and appliances subject to local taxation within the State.'" The first line under that heading was: "Western Union Telegraph Company. Miles, 6436. Per mile, $357. Total, $2,297,652."

"That the state board of tax commissioners, during its said session in the year 1893, did not attempt to specify or describe the property of complainant, falling within the description of real estate, structures, machinery and appliances subject to local taxation.

"That, in making said assessment, said state board of tax commissioners assumed to take as the basis thereof the value of the entire capital stock of complainant, at a valuation per share based upon the price of the shares of complainant's capital stock dealt in in the stock exchange market of New York City, dividing such aggregate value by the total number of miles of telegraph line of complainant, wherever situated, and both in and outside of Indiana, and thereby obtaining a pretended valuation per mile of the telegraph line of com-

plainant, amounting to the said sum of $357 per mile, which said pretended valuation per mile said board, acting under the authority of said pretended statute, imputed to and imposed upon each mile of the whole number of complainant's telegraph line in Indiana, thereby imputing to and imposing upon the whole telegraph line of complainant in Indiana, which is of the length of 6436 miles, said pretended valuation of $2,297,652, which said pretended valuation is grossly excessive and far beyond the true cash value of complainant's said property in Indiana.

"That said state board of tax commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than by pursuing the requirements of said pretended statute.

"That neither on April 1, 1893, nor at any time prior or subsequent thereto, was there any market value for all the shares of the capital stock of complainant;" that the whole number of shares was 948,200, of the par value of $100 each; that the number of shares sold or speculated in on April 1, 1893, on the New York stock exchange, was 1168 shares, at the average price of $94.50, and only a part of those was actually delivered; and that the price so obtained did not fairly represent the actual value of the plaintiff's property.

"That any price at which any or all shares of complainant might be sold, by any holder or holders thereof, whether such price be calculated upon any market value or upon actual value, includes, amongst other things, a consideration of franchises of great value owned or exercised by complainant, granted by the State of New York, by the United States, by Canada, by Great Britain, by Cuba, and by other States, countries and municipalities; a consideration of complainant's good will, its past earnings from every source, its probable future earnings from every source, the business ability, enterprise and skill of the present managers of complainant's business, the probable continuance of business ability, enterprise and skill in the future management of complainant's business; the contract and other relations of complainant to powerful

railroad, telephone and cable companies; a consideration of the real estate of complainant situated in the city of New York, which is of great value, to wit, of the value of $3,500,000, and in the city of Chicago, which is of great value, to wit, of the value of $1,700,000, and of the real estate of complainant of great value, situated in many other States and countries, none of which is situated in the State of Indiana; as well as the consideration of the actual value of all complainant's telegraph lines, poles, wires, cables, conduits, instruments, appliances and office furniture, including that which is situated in Indiana and taxable by the State of Indiana.

"That, in estimating such market or actual value of the shares of the stock of complainant, the values of said intangible franchises, rights, contracts, earnings, business, business ability, enterprise, skill and management and good will, and of all said real and personal estate of complainant, are blended so as to render it impossible to separate and distinguish the portions of value applicable to any or each of said elements of value of said shares."

That the plaintiff was the owner of many thousand miles of telegraph in the States of Massachusetts, New York, Pennsylvania and New Jersey, and in other densely populated portions of the United States, of the cost and value of $2500 per mile on the average, and requiring great expenditures for the maintenance thereof; of many thousand miles of cable under the high seas, of the cost and value of $3500 per mile on the average; and of many thousands of miles of lines of telegraph in uninhabited or sparsely inhabited portions of the United States and Mexico, which, by reason of the great cost of transportation of material, and cost of maintenance, were of great cost and value; that all the plaintiff's lines in the State of Indiana, by reason of the proximity to supplies of material, and the very cheap transportation, were of minimum value, as compared with the plaintiff's lines situated elsewhere; and that, by reason of these facts, the average mile of the telegraph line of the plaintiff within Indiana was of the value of forty per cent of the value of the average mile of the whole line situated outside of the State of Indiana, reckoning such

value upon the cost of construction and maintenance, and making allowance for deterioration.

That sixty-six per cent of the plaintiff's whole business in transmitting telegraphic messages, and sixty per cent of its business in the State of Indiana, was interstate and international business; and that the average net earnings of a mile of the line in the State of Indiana amounted to only sixty per cent of the net earnings of the average mile of its line outside of the State.

That the plaintiff duly accepted the provisions of the act of Congress of July 24, 1866, c. 230, now sections 5263–5269 of the Revised Statutes; that all the telegraph lines owned or operated by the plaintiff in Indiana were constructed upon railroads, streets and other post roads of the United States, and thereby the plaintiff was an agent of the government of the United States in the transmission of intelligence by electricity; and that the Statute of Indiana of March 6, 1893, and the assessment and valuation of the plaintiff's property under that statute, rendered its property in Indiana substantially valueless, and prevented it from performing its obligations to the United States.

That much of the plaintiff's capital stock, to the amount of $7,633,230, "is invested in and represented by the capital stock and bonds of other telegraph and telephone corporations, whose telegraph or telephone plants are leased to or operated by complainant, which said telegraph and telephone corporations possess no property in the State of Indiana, and do not own or use any franchise granted by the State of Indiana, and are wholly situated outside of the State of Indiana.

"That the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid, upon the value of complainant's shares of stock, whether said board pretended to value said property upon a basis which included the consideration or estimation of market value or actual value of the shares of stock of complainant, necessarily includes, and does in fact include, values which are no part of the true cash value of the property of complainant in Indiana; but are imputed and fictitious values

Counsel for Plaintiff in Error.

distributed to complainant's said property in Indiana, as portions of the value of the business, business ability, enterprise and skill of complainant, of the real and personal estate owned and leased by complainant and outside of the State of Indiana, and of complainant's franchises granted by States other than Indiana and municipalities outside of Indiana, and by the United States and by foreign States and nations, and of the contract relations and other relations existing between complainant and other corporations, all of which said property, things in action, and other things and matters of value, are beyond the jurisdiction of the State of Indiana, whether for the purpose of taxation or for any other purpose."

That the auditor of the State, on September 15, 1893, certified the valuation aforesaid to the auditors of the counties through which the plaintiff's telegraph lines extended; and that the county auditors were engaged in apportioning and distributing the same among the townships, and were preparing to deliver tax duplicates to the county treasurers, to the end that they might collect the tax from the plaintiff.

That the statute of 1893, c. 171, was contrary to the constitution of Indiana in various particulars pointed out, (but not now relied on,) and that this statute, and the assessment and valuation of the plaintiff's property by the state board of tax commissioners in compliance with its provisions, levied a tax upon interstate and international commerce, in violation of article 1, section 8, of the Constitution of the United States, and deprived the plaintiff of its property without due process of law, and denied it the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution.

The defendants demurred generally to the bill. The court sustained the demurrer, and, the plaintiff declining to amend its bill, entered final judgment for the defendants. The plaintiff appealed to the Supreme Court of Indiana, which affirmed the judgment. 141 Indiana, 281. The plaintiff thereupon sued out this writ of error.

Mr. John F. Dillon, (with whom was *Mr. Rush Taggart* on the brief,) for plaintiff in error.

Argument for Plaintiff in Error.

I. In the method of valuation prescribed by the statute and in the assessment now in question actually made by the board of assessors pursuant to the statute, there was necessarily included a valuation of the Federal franchises of the plaintiff in error, which Federal franchises, or the value thereof, are not taxable by the State of Indiana.

In discussing this point *Mr. Dillon* cited and commented on *California* v. *Central Pacific Railroad Co.*, 127 U. S. 1; *Pittsburgh &c. Railway* v. *Backus*, 154 U. S. 421, 439; *The Delaware Railroad Tax*, 18 Wall. 206; *State Railroad Tax cases*, 92 U. S. 575; *People* v. *Coleman*, 126 N. Y. 433; *People* v. *Barker*, 146 N. Y. 304; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; 141 U. S. 40. With reference to the last two cases he said:

We distinguish the case at bar from the Massachusetts case on these two grounds: (1) That in the case at the bar it is expressly averred that the valuation complained of in the bill of complaint did include the value of the Federal and other franchises of the company; and, (2) That, by so including them, an unfair result was obtained, since the result was to value and assess property of the company in Indiana far beyond its actual and real value under any of the tests which have been suggested by this court.

If a tax levied by a State is upon a Federal "franchise" it is settled that it is unconstitutional. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Brown* v. *Maryland*, 12 Wheat. 419; *Weston* v. *Charleston*, 2 Pet. 449; *California* v. *Central Pacific Railroad*, 127 U. S. 1. Nor is the Western Union Telegraph Company, having accepted the act of Congress of July 24, 1866, subject to have imposed on it a license tax by the State of Indiana. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Asher* v. *Texas*, 128 U. S. 129; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Lyng* v. *Michigan*, 135 Id. 161. A State may tax the "property" of a corporation having a Federal franchise, but it cannot tax the "Federal franchises" of a corporation. *California* v. *Central Pacific Railroad*, 127 U. S. 1.

That the Western Union company accepted the act of

Congress of July 24, 1866, and thus acquired Federal franchises of a valuable character for which it yields to the United States a large consideration and subjects itself to great burdens, is an admitted fact upon the record.

That the value of this franchise was included by the State of Indiana in the valuation and assessment of the property of the Western Union Telegraph Company in the case at the bar is admitted of record. That such valuation largely exceeded the value of the property of the Western Union company situate within the State of Indiana is also admitted on the record.

The tax in the case at the bar is not a tax merely upon the "property," but includes a tax upon the Federal and other "franchises" of the telegraph company engaged in interstate commerce, which franchises are not derived from the State of Indiana, and are not taxable by it.

If you include in the gross valuation for assessment purposes the value of such franchises (which in this case it is admitted of record was done), can it be said that such franchises are not taxed? If such a doctrine be established by this court, it arms the States with the power to destroy the instrumentalities of interstate commerce, and they will exercise it as they have already begun to do without scruple and without limit.

II. The necessary effect of the method of taxation adopted by the taxing authorities of Indiana in this case was to bring within the operation of the statute of Indiana property, or the value of property, of the telegraph company outside of the State of Indiana. Such taxation cannot be deemed due process of law under the Fourteenth Amendment to the Constitution of the United States; and, therefore, the statute requiring or permitting such a mode of assessment, and the assessment made under it must be treated as unconstitutional and void.

III. The mode prescribed or allowed by the statute, section 7 of the act of March 9, 1893, viz., the market value of its shares, etc., for ascertaining the true cash valuation of the entire property of the plaintiff in error, which mode it is admitted on the record was followed by the tax commissioners of Indiana in arriving at the assessment now complained of, is a mode under which, as applied to the plaintiff

in error, it is legally impossible that it should result in ascertaining the true cash value of the property of the plaintiff in error within the State of Indiana, and therefore such assessment upon the plaintiff in error (which is a Federal agency and engaged in interstate commerce), is in violation of the commerce clause of the Constitution and of the Fourteenth Amendment thereto.

Mr. Alpheus H. Snow, *Mr. Willard Brown* and *Mr. Charles W. Wells* filed a brief for plaintiff in error.

Mr. William A. Ketcham, Attorney General of the State of Indiana, (with whom was *Mr. Alonzo Greene Smith* on the brief,) and *Mr. Attorney General* for defendants in error.

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

It is not and cannot be doubted that each State of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the National Government are not interfered with. *Delaware Railroad Tax case*, 18 Wall. 206, 232; *Telegraph Co.* v. *Texas*, 105 U. S. 460, 464; *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Marye* v. *Baltimore & Ohio Railroad*, 127 U. S. 117, 123, 124; *Leloup* v. *Mobile*, 127 U. S. 640, 649; *Pullman's Co.* v. *Pennsylvania*, 141 U. S. 18; *Cleveland &c. Railway* v. *Backus*, 154 U. S. 439, 445.

The principal grounds upon which the plaintiff contends that the statute of Indiana of March 6, 1893, c. 171, is unconstitutional, and the valuation and assessment of the plaintiff's property under it invalid, are that they necessarily included a taxation of franchises granted to the plaintiff by the United States, as well as of the plaintiff's property outside of the State of Indiana, neither of which was subject to taxation in that State; and also, by taking the market value of shares of the plaintiff's stock, in fixing the valuation of the entire prop-

erty of the plaintiff, and by apportioning that valuation according to the proportion thereof within the State of Indiana, of all the plaintiff's telegraph lines everywhere, adopted an arbitrary rule, and imposed an unlawful burden upon interstate commerce.

But in each of these respects the case presented by this record appears to us to be governed by previous decisions of this court. The argument for the plaintiffs in error, in effect, if not in express words, invites the court to modify or to overrule those decisions. It becomes important, therefore, to state somewhat fully the scope and extent of those decisions, the reasons on which they proceeded, and the provisions of the statutes thereby construed.

The statutes of Massachusetts, the constitutionality of which was attacked by the present plaintiff, and upheld by this court, in the two cases of *Western Union Tel. Co.* v. *Massachusetts*, 125 U. S. 530, and 141 U. S. 40, were undistinguishable in any material respect from the statute of Indiana now before us, and may, as suggested at the bar, have been the model upon which this statute was framed.

The material provisions of those statutes of Massachusetts were as follows: Every corporation, chartered or organized in Massachusetts or elsewhere, and owning a telegraph line in Massachusetts, was required to return annually to the tax commissioner of the State a statement of the amount of its capital stock, the par value and market value of its shares, the locality and value of its real estate and machinery subject to local taxation within the State, the whole length of its lines, and the length of so much of its lines as was within the State. The tax commissioner was required to ascertain the true market value of its shares, and to estimate the fair cash valuation of all the shares constituting its capital stock; and the corporation was required to pay annually "a tax upon its corporate franchise at a valuation thereof equal to the aggregate value of the shares in its capital stocks," as so determined by the tax commissioner; deducting, however, from that valuation, such proportion thereof as was proportional to the length of that part of its line lying without the State, and also an

amount equal to the value, as determined by the tax commissioner, of its real estate and machinery within the State and subject to local taxation therein. Mass. Pub. Stat. c. 13, §§ 38–40, 42.

In the first of the Massachusetts cases, Mr. Justice Miller, delivering the opinion of the court, said that "the main ground, on which the telegraph company resisted the payment of the tax alleged to be due," was that it was a violation of the rights conferred upon the company by the provisions (which had been accepted by the company) of the act of Congress of July 24, 1866, c. 230, reënacted in section 5263 of the Revised Statutes, by which it was enacted that any telegraph company organized under the laws of any State, should "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," "and over, under or across the navigable streams or waters of the United States." 14 Stat. 221; Rev. Stat. § 5263. The argument then made by counsel and the decision of the court upon this point are shown by the following passages in the opinion:

"The argument is very much pressed, that it is a tax upon the franchise of the company, which franchise, being derived from the United States by virtue of the statute above recited, cannot be taxed by a State; and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that Commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein." 125 U. S. 546, 547.

"While the State could not interfere, by any specific statute, to prevent a corporation from placing its lines along these post

roads, or stop the use of them after they were placed there, nevertheless the company, receiving the benefit of the laws of the State for the protection of its property and its rights, is liable to be taxed upon its real or personal property as any other person would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State, and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support." 125 U. S. 548.

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts; and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution." 125 U. S. 552. See also *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, 416, 417; *Central Pacific Railroad* v. *California*, 162 U. S. 91, 123.

It was further argued in that case, that the tax was excessive and invalid, because, in ascertaining the whole valuation of the stock, no deduction was made on account of the value of real estate and machinery situated, and subject to local taxation, outside of the State of Massachusetts; although it appeared that the company owned lands and buildings outside of the State, the cost of which was more than $3,000,000, and upon which it had been assessed and had paid taxes of more than $48,000. 125 U. S. 542, 544, 552.

The court, notwithstanding, declared that it did not feel called upon to defend all the items and rules by which the authorities of the State arrived at the taxable value on which its ratio of percentage of taxation should be assessed, or to

hold the tax void because the court might have adopted a different system had it been called upon to accomplish the same result; and decided that the rule adopted to ascertain the amount of the value of the capital engaged in business within the boundaries of the State, on which the tax should be assessed, was not an unfair or an unjust one, and that the details of the method by which this was determined did not exceed the fair range of legislative discretion. 125 U. S. 553.

The same views were affirmed in the second case between the same parties. 141 U. S. 44, 45.

Those decisions clearly establish that a statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing than the system of taxation adopted is oppressive and unconstitutional.

We are then brought to a consideration of the statutes of Indiana, as construed by the Supreme Court of the State and by this court.

The statute of Indiana of March 6, 1891, c. 91, repealed previous laws, and established a comprehensive and complete system of taxation. By § 3, all property within the jurisdiction of the State, not expressly exempted, was declared to be subject to taxation; and by subsequent sections the property of all corporations owning or operating railroads within the State was classified for the purposes of taxation as follows:

By § 78, the "right of way, including the superstructure, main, side or second track, and turnouts, turntables, telegraph poles, wires, instruments and other appurtenances, and the stations and improvements of the railroad company on such right of way" (excepting machinery, fixtures and stationary

engines) were considered real estate, and denominated "railroad track." By § 79, the value of such "railroad track" was taxed in the several counties, townships, cities and towns, in the proportion that the length of the main track therein bore to the whole length of the road in the State, except that the value of the side or second track, and of all turnouts, station houses and other buildings belonging to the railroad, was taxed in the county, township, city or town in which they were situated. By § 80, the movable property belonging to a railroad company was denominated "rolling stock," and considered personal property; and was taxed in the several counties, townships, cities and towns in the proportion that the main track used or operated therein bore to the length of the main track used or operated by the corporation, whether owned by it or not. By § 81, all other personal property, including machinery, fixtures, stationary engines, tools and materials for repairs, was taxed in the county, township, city or town in which it was on the first day of April in each year; and by § 82, all real estate of any railroad company, (other than that denominated "railroad track,") with all improvements thereon, was taxed in the county, township, city or town where it was situated.

Each railroad corporation was required, by § 83, to return annually to the county auditor an inventory of all these kinds of property, except "railroad track;" and, by § 85, to return to the auditor of the State, to be laid before the state board of tax commissioners, a statement showing, among other things, "first, the property denominated 'railroad track,' giving the length of the main and side or second tracks and turnouts, and showing the proportions in each county and township, and the total in the State; second, the rolling stock, whether owned or hired, giving the length of the main track in each county, and the entire length of the road in this State;" and also the amount of its capital stock, and the market value, or if no market value, the actual value of its shares, the total amount of its indebtedness except for current expenses, and the total listed valuation of all its tangible property in the State.

By §§ 129, 137, the state board of tax commissioners was declared not to be bound by these returns; and was required to "appraise and assess all property at its true cash value, as defined by this act, according to their best knowledge and judgment, and so as to equalize the assessment of property throughout the State," and to "assess the railroad property, denominated in this act as 'railroad track' and 'rolling stock,' at its true cash value," and was authorized to examine persons and papers. And by § 130, each member of the board was required to declare, as part of his oath of office, that he would "in no case assess any property at more or less than its true cash value."

This court, at the last term, in several cases, affirming judgments of the Supreme Court of Indiana, held that the statute of 1891 did not, in the case of a railroad partly in that State and partly in another, require that the value of the part in Indiana should be determined absolutely by dividing the whole value upon a mileage basis; but only that the total amount of stock and indebtedness should be taken into consideration in ascertaining the value; and that the statute was constitutional. *Pittsburg &c. Railway* v. *Backus*, 154 U. S. 421, 430, 435, and 133 Indiana, 625; *Indianapolis & Vincennes Railroad* v. *Backus*, 154 U. S. 438, and 133 Indiana, 609; *Cleveland &c. Railway* v. *Backus*, 154 U. S. 439, and 133 Indiana, 513.

In those cases, the objections to the constitutionality of that statute were answered by this court, speaking by Mr. Justice Brewer, as follows:

"It is not to be assumed that a State contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the State. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear." 154 U. S. 428.

"It is obvious that the intent of this act was simply to reach the property of the railroad within the State." "No intent to

the contrary can be deduced from the provision requiring the corporation to file a statement of its total stock and indebtedness; for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the State. The stock and the indebtedness represent the property. As said by Mr. Justice Miller in *State Railroad Tax cases*, 92 U. S. 575, 605, 'When you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.'" 154 U. S. 428, 429.

"It is not stated, in this statute, that when the value of a road running in two States is ascertained, the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis; but only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless it is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair." 154 U. S. 430, 431.

In support of the last statement were cited *State Railroad Tax cases*, 92 U. S. 608, 611; *Delaware Railroad Tax case*, 18 Wall. 206; *Erie Railway* v. *Pennsylvania*, 21 Wall. 492; *Western Union Telegraph Co.* v. *Massachusetts*, 125 U. S. 530; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18; *Maine* v. *Grand Trunk Railway*, 142 U. S. 217; *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386; *Columbus Southern Railway* v. *Wright*, 151 U. S. 470.

"The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values, plus

that arising from a connected operation of the whole; and each part of the road contributes, not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts; because there is a value created by and resulting from the combined operation of all its parts as one continuous line." 154 U. S. 444.

"Now, when a road runs into two States, each State is entitled to consider, as within its territorial jurisdiction, and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values, and attempt to extract from the total value of the entire property that which would exist if the miles of road within the State were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributable to the portion of the road in Indiana, and partly to that in Ohio; and each State has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the States; and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the State." 154 U. S. 444, 445.

"The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value; and if property is taxed at its actual cash value, it is

taxed upon something which is created by the uses to which it is put. In the nature of things, it is practically impossible — at least in respect to railroad property — to divide its value, and determine how much is caused by one use to which it is put, and how much by another. Take the case before us; it is impossible to disintegrate the value of that portion of the road within Indiana, and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation. And because of this fact it is something which an assessing board is not required to attempt." 154 U. S. 445, 446.

"It is enough for the State, that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value, and by that rule property engaged in interstate commerce is controlled, the same as property engaged in commerce within the State. Neither is this an attempt to do by indirection what cannot be done directly, that is, to cast a burden on interstate commerce. It comes rather within that large class of state action, like certain police restraints, which, while indirectly affecting, cannot be considered as a regulation of interstate commerce, or a direct burden upon its free exercise." 154 U. S. 446, 447.

"It is true, there may be exceptional cases," "as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock." 154 U. S. 431.

This court further held that the question of the cash valuation of the company's property was a question of fact, the determination of which was committed to the state board of tax commissioners; and that the decision of the board could not be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. 154 U. S. 434, 435.

By § 69 of the statute of Indiana of 1891, telegraph companies, incorporated under the laws of any other State, besides being taxable upon their tangible property in Indiana in the same manner as other tangible property was taxed, were required to make annual returns of their receipts from business in the State, including the proportion of gross receipts for business done in connection with the lines of other companies; and to pay a tax of one per cent on such receipts.

The supplemental and amendatory statute of March 6, 1893, c. 171, now in question, repealed that section of the statute of 1891, and substituted provisions very like those of the statutes of Massachusetts, above considered, for the taxation of the telegraph property, and not essentially different from those of the statute of Indiana of 1891 for the assessment of railroad property, except in being more favorable to the company by expressly providing for a deduction of the value of real property outside the State from the total valuation.

By § 1 of the statute of 1893, every telegraph company, whether incorporated under the laws of Indiana, or of any other State, engaged in telegraph business in Indiana, was required to return annually to the auditor of the State a statement of its whole capital stock, the par value of its shares, their market value, or, if they had no market value, the actual value thereof; its principal place of business; its real estate, machinery and appliances, subject to local taxation in each county and township within the State; its real estate outside the State and not directly used in the conduct of its business, and the sums at which such real estate was assessed for local taxation; the mortgages upon the whole or any part of its property; the whole length of all its lines, the length of its lines outside the State of Indiana, and the length of its

lines in each county and township within the State. By §§ 6, 7, the state board of tax commissioners, "after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain," and requiring books and papers to be produced, and witnesses to be examined "in case they shall deem it necessary to enable them to ascertain the true cash value of such property," were required to value and assess the property of each company by ascertaining the true cash value of its entire property, for that purpose taking the aggregate value of its shares, if they had a market value, or if they had none, the actual value thereof or of the capital of the company; then, for the purpose of ascertaining the true cash value of the property within the State, (first ascertaining and deducting the assessed value for taxation, in the localities where the same was situated, of its real estate outside the State, and not specifically used in its general business,) taking the proportion of the whole aggregate value of its property, as above ascertained, which the length of its lines within the State bore to the total length of its lines; and deducting therefrom the assessed value for taxation of real estate, machinery and appliances within the State and subject to local taxation in the counties and townships.

The Supreme Court of Indiana considered the present case to be governed by the decisions of this court in the cases of the *Railroad Companies* v. *Backus*, above cited; and, after referring to some of the passages above quoted from those decisions, added: "All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate telegraph property. It is not easy to see how one mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out one mile, even though it be through a swamp or under a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole and by reason of its several connections, and not by virtue of any part taken by itself. No way, therefore, by which the value of the lines in this State

can be determined seems so just and equitable as to take that proportion of the whole value which the mileage in this State bears to the whole mileage." 141 Indiana, 294, 295.

In that court (as now in this) the telegraph company insisted that the statute of 1893, in applying the mileage basis of valuation to the lines of telegraph, compelled the state board of tax commissioners to add large outside values to the values of the Indiana portions of the lines, because the parts of the company's property outside the State were proportionately of greater value than the parts within the State. To which that court answered: "The act, it is true, provides a method of valuation, the mileage method, as a basis for the taxation of certain property within the State of Indiana. But this is simply a means for determining the true cash value of the property within the State; and if in the case of appellant's property, or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportional values outside of the State, or for any other reason, then the board must make such deductions, so that, finally, only the property within the State of Indiana shall be assessed, and that at its true cash value." 141 Indiana, 297.

The state court distinctly held that the statute of 1893, being supplementary to and amendatory of the statute of 1891, must be construed in connection therewith, and be treated as a part of one and the same general tax act; that the duties and powers of the state board of tax commissioners, as defined and prescribed in the statute of 1891, were not abridged or changed, in any respect, by the statute of 1893; and therefore, interpreting the statute of 1893 in the light of the provisions of the statute of 1891, (which have been cited above,) concluded "that in the act of 1893 the legislature provided the mileage method as the basis for the assessment of telegraph and other like property, both as to lines situated partly within and partly without this State, and also as to lines running through several counties or other subdivisions of the State; but that it was not the intention of the legislature, nor is it the meaning of that act, that any property

outside of the State should be assessed by importation of values or otherwise, or that any property should be assessed at more or less than its true cash value. Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property such values, if any, of extra-state property as will leave the remaining property, within and without the State, as near as may be, of equal proportional value." "The act of 1893 provides, generally, for a mode of ascertaining the true cash value of that part of interstate telegraph and other property which is within the State of Indiana, to wit, the mileage method. But should there be particular cases where that method must be modified in order to reach the necessary result, namely, the true cash value of such part of the property as is within the jurisdiction of the State, the law of 1893 itself supplies the means of doing so." 141 Indiana, 285, 297–300.

The statute of Indiana of 1893 regarding telegraph companies, therefore, as construed and applied by the Supreme Court of the State, like the statute of 1891 regarding railroad companies, while it takes, as the basis of valuation of the company's property within the State, the proportion of the value of its whole capital stock which the length of its lines within the State bears to the whole length of all its lines, makes it the duty of the state board of tax commissioners, to make such deductions, on account of a greater proportional value of the company's property outside the State, or for any other reason, as to assess its property within the State at its true cash value only; and is therefore governed by the same considerations upon which the provisions of the statute of 1891 for taxing railroad companies were held to be constitutional by the decisions of this court in the *Indiana Railroad cases*, above cited.

The bill in the present case was filed before those decisions were rendered; and is so drawn as to make it somewhat difficult to distinguish matters of fact alleged with such clearness and precision as to be admitted by the demurrer, from the

argumentative statements, and the conclusions of law, which are freely scattered throughout the bill.

The bill alleges that the state board of tax commissioners, in fixing the valuation of the plaintiff's property in Indiana, (deducting the value of real estate, machinery and fixtures subject to local taxation within the State,) at the sum of $2,297,652, and at the rate of $357 per mile of telegraph line, placed upon that property, beyond its true cash value, as measured by the cost of replacing the same, making reasonable allowances for deterioration, additional values of the plaintiff's business, property and good will, both in and out of the State, and franchises granted by the United States, by the State of New York and by foreign countries. This allegation is made by way of preliminary and inducement to the concluding statement of the paragraph, that "in witness thereof" the tax commissioners entered upon their record a certificate and statement, which is set forth, and which has no tendency to prove anything of the kind, but merely shows an assessment and valuation made by the state board of tax commissioners, "after full consideration," and "in accordance with the act of the general assembly of the State of Indiana, approved March 6, 1893." Moreover, the cost of the property, or of its replacement, is by no means a true measure of its value; the bill, while it elsewhere states the value of the plaintiff's real estate in other States, and of its stocks and bonds of other companies, nowhere undertakes to fix the value of its franchises from the United States, the State of New York, and foreign countries; and the tax commissioners, by the authorities already cited, had the right and the duty, in estimating the value of the plaintiff's property in Indiana, to take into consideration those franchises and the other elements mentioned in this paragraph of the bill.

The bill further alleges that the state board of tax commissioners did not attempt to specify or describe the plaintiff's real estate, machinery and appliances subject to local taxation. But the statute did not require of them any such specification or description; nor does the plaintiff appear to have requested them, or to have done anything towards assisting them to do so.

The bill then alleges that the commissioners took, as a basis of their assessment, the value of the plaintiff's entire capital stock, estimating the value of the shares according to the price of such shares in the stock exchange market in New York City, and dividing such aggregate value by the total number of miles of the plaintiff's telegraph lines, wherever situated, and thereby obtaining a pretended valuation of $357 per mile of its telegraph line in Indiana, which was "grossly excessive and far beyond the true cash value of complainant's said property in Indiana." But the bill immediately proceeds to allege that "said state board of tax commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than by pursuing the requirements of said pretended statute." And the facts stated elsewhere in the bill demonstrate that the commissioners did not obtain their valuation by merely applying the rule stated in this paragraph. Had they done so, the result would have been that the whole number of shares of stock, being 948,200, at $94.50 a share, would have been $89,594,900, which, divided by 189,576, the whole number of miles of all the plaintiff's lines, would give a value per mile of upwards of $472, or nearly one third more than the valuation adopted.

The bill further alleges that there was no market value for all the shares of the plaintiff's stock; that the price obtained for a very few shares in the New York stock exchange did not fairly represent the actual value of the plaintiff's property; and that any price at which any shares might be sold by holders thereof, whether calculated upon any market value or upon actual value, included a consideration of the plaintiff's franchises, its contracts with other companies, its actual past and probable future earnings from many sources, skill and enterprise of its managers, and all its real and personal estate in Indiana or elsewhere, including real estate of great value in other States, all which were "blended so as to render it impossible to separate and disintegrate the portions of value applicable to any and each of said elements of value of said

shares." This is hardly more than an argument to show the difficulty of ascertaining the cash value of the plaintiff's property in the State of Indiana. It certainly has no tendency to show that the tax commissioners did not, as they were required to do by the statute, as since construed by the Supreme Court of the State, assess the plaintiff's property in Indiana at its true cash value, according to their best knowledge and judgment, and after making all proper deductions, on account of larger proportional values of its property and business outside the State, or for any other reason.

The remaining allegations of the bill are either repetitions or amplifications of those already considered, or are averments of conclusions of law. The allegation that "the attempted and pretended valuation of complainant's said property by said state board of tax commissioners, in manner aforesaid," "necessarily includes, and does in fact include values, which are no part of the true cash value of the property of complainant in Indiana," is but equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this court in *Pittsburg &c. Railway* v. *Backus*, above cited, "Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined." 154 U. S. 434, 435.

Judgment affirmed.

FARMERS' LOAN AND TRUST COMPANY *v.* CHICAGO, PORTAGE AND SUPERIOR RAILWAY COMPANY AND CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

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

No. 60. Argued October 18, 21, 22, 1895. — Decided May 4, 1896.

The wrongs specifically charged in the bill in this case are those which were set forth in the suit of *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 151 U. S. 1; but there is this difference between the two cases, that in that case the Omaha Company demurred, and on the demurrer a decree was entered against it, whereas, in this case, the Omaha Company took issue upon the charge of having committed such wrongs, and the testimony shows that it did not commit them.

The act of the legislature of Wisconsin of 1882, revoking the grant of land to the Portage Company and bestowing it upon the Omaha Company, neither in terms nor by implication burdened the transfer with a continuing obligation for the debts of the Portage Company; and no creditor of the Portage Company had any legal or equitable right to any portion of those lands.

THE case is stated in the opinion.

Mr. Thomas Ewing and *Mr. Milton I. Southard*, (with whom was *Mr. Herbert B. Turner* on the brief,) for appellant.

Mr. Thomas Wilson for appellees. *Mr. Charles M. Osborn* and *Mr. Samuel A. Lynde* were on his brief.

MR. JUSTICE BREWER delivered the opinion of the court.

This case comes before us on appeal from a decree of the Circuit Court for the Western District of Wisconsin, of date September 2, 1889, dismissing the bill of plaintiff and appellant for want of equity. The original bill was filed in that court on July 25, 1885. The defendants named therein were

the Chicago, Portage and Superior Railway Company, (to be hereafter called the Portage Company, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, (to be hereafter called the Omaha Company,) Ransom R. Cable, Henry H. Porter, A. A. Jackson and Charles J. Barnes. After some preliminary pleadings the defendants filed answers, testimony was taken, and the case was submitted for hearing on the pleadings and proofs.

The plaintiff sued as trustee in a deed of trust executed by the Portage Company on January 1, 1881, to secure a proposed issue of negotiable bonds to the amount of $10,200,000, of which 758 bonds of $1000 each were claimed to be still outstanding and unpaid. The deed of trust covered all the property of the railway company, including a certain grant of lands made by the United States to the State of Wisconsin and transferred by the State to it. The claim, in a general way, was that these lands had been wrongfully wrested by the Omaha Company from the Portage Company, and a decree was asked declaring this deed of trust a first lien on such lands. The wrongs specifically charged in the bill are those set forth in the suit of Angle against the same two railway companies, reported in 151 U. S. 1, to which case, therefore, reference may be had for a full statement thereof. That case was disposed of on demurrer, while this is before us upon the proofs; and in view of the opinion there filed the question we have now to consider is whether the testimony sustains the charges.

The plaintiff states three propositions, each of which it claims is established by the evidence, and either one of which it says entitles it to the relief prayed for:

"First. — That the Omaha Company wrongfully and fraudulently prevented the Portage Company from complying with the conditions of the grant, and caused the grant to be transferred to itself.

"Second. — That the Omaha Company, by its wrongful acts, became the sole stockholder of the Portage Company, and as such stockholder wrongfully and fraudulently used its powers and position to strip the Portage Company of its property and transfer it to itself.

"Third. — That the act of the legislature of Wisconsin of February 16, 1882, revoking the grant to the Portage Company, and the act of March 7, 1883, confirming the revocation, did not divest or attempt to divest the creditors of the Portage Company of their legal or equitable rights, nor attempt to prevent them from having these lands appropriated so far as may be necessary to the satisfaction of their debts. Otherwise these acts would be null and void as impairing the obligation of a contract and invading private rights."

Involved in and essential to the plaintiff's case is the specific charge that the Omaha Company bribed certain officials of the Portage Company (in whose hands was perhaps the only valid outstanding stock of the Portage Company, and held by them in trust) to dispose of that stock, so that the Omaha Company, with knowledge of the trust attending the stock, and in breach thereof, became the controlling, if not the sole, stockholder in the Portage Company. It is true that on January 20, 1882, A. A. Jackson, of Janesville, Wisconsin, C. J. Barnes, of the city of Chicago, Illinois, and J. C. Barnes, of the city of New York, transferred to R. R. Cable, who was acting for the Omaha Company, one million dollars of the capital stock of the Portage Company standing in the name of Jackson, and so much of another million dollars of capital stock, standing in the name of J. C. Barnes, as was absolutely valid and full paid stock, together with five hundred shares standing in the name of C. J. Barnes. This transaction is challenged, and its honesty and good faith are primary matters of inquiry.

In order to a clear understanding a brief statement of what had theretofore transpired is essential. Prior to 1880 the Portage Company had done a little work in the construction of the line aided by the land grant, and but little. The work had been stopped, and the company was practically a dormant corporation, owning the land grant and subject to certain indebtedness. Its principal, if not sole, creditor was the Chicago and Northern Construction Company, which had done all the work on the road. This construction company, having expended some money in construction, for which the railroad

company was indebted to it, was itself indebted to A. A. Jackson, an attorney of Janesville, in the sum of $18,000; to I. C. Sloan, an attorney of Madison, in the sum of $2000; and to Edward Ruger, of Janesville, for engineering services, in the sum of $10,000, (for which sums these parties had recovered judgments,) and to others in smaller sums, aggregating not exceeding $10,000. At the time of the negotiation hereafter referred to, with Gaylord and others, the railway company had issued $400,000 in bonds and $500,000 stock, of which issue the construction company owned and held all the bonds and $350,000 of the stock. Mr. J. C. Barnes was the individual who had put the most money into the construction company, and was practically its owner. In the summer of 1880 one Willis Gaylord entered into arrangements with Barnes for the reorganization of the railway company, and the securing of means for the construction of the road. The exact terms of the arrangements between Gaylord and Barnes may be open to some question, for Gaylord was not produced as a witness, and Barnes' recollection was not clear. A contract in writing, executed on the 20th of September, 1880, between Gaylord, the New England and Western Investment Company and William H. Schofield, by which the latter two parties were to render their services in securing funds for the building of the road, throws some light on the question. It recites:

"And whereas, in the securing of said railway company's charter, land grant, rights of way, surveys, about sixty (60) miles of roadbed graded and other lawful and proper expenses, there has been over seven hundred thousand dollars of money expended, which is represented by the aforesaid charter, land grant, rights of way and other property, it is to be provided that out of the new series of first mortgage bonds there is to be set apart and made a special trust seven hundred (700) of said new first mortgage bonds of $1000 each; also ten per cent of the capital stock of the company, and, by the order in writing of said Willis Gaylord, countersigned by the president of said railway company, paid to the persons entitled to receive the same, as designated by the said Gaylord, in full liquidation and satisfaction of all claims and demands (except as

hereinafter stated) of the present owners of said railway, and for all expenditures and claims made and due for said charter, land grant, right of way, surveying, grading and all and every kind of expense on account of said railway company (not including a certain amount of floating debt now outstanding, which does not exceed forty thousand dollars ($40,000) and to be provided for hereinafter), and the aforesaid $700,000 in first mortgage bonds are to have the interest coupons for the first two years from their date cut off and cancelled, and the said bonds, together with ten per cent of the capital stock as aforesaid are to be placed in trust, as a special trust, and be delivered to the parties entitled to receive the same, as designated by the said Gaylord, to be delivered, however, only *pro rata*, as the other bonds and stock are delivered for material or money, and as the road is constructed and put in operation in sections of ten (10) miles each.

"And whereas there is in the form of floating debt, in lawful and proper claims, approximately but not exceeding $40,000, it is to be provided that when, through said examination, the enterprise is found to be satisfactory to said investment company, and the proposed new bonds and stock are prepared and deposited as herein provided for, then said investment company will proceed at once to the negotiation of the same, and will, as soon as cash to the amount of $40,000 shall have been procured, pay or cause to be paid said sum to A. S. Barnes & Co., in payment of said floating debt, and on such payment being made, the reorganization or substitution of new directors and officers of said railway company, as herein provided, shall then take place.

"And the said Gaylord shall furnish satisfactory evidence and assurance that the said $700,000 of first mortgage bonds and ten per cent of capital stock will pay, cancel and fully release all claims, demands and incumbrances against said railway company, except said floating debt, and that the floating debt aforesaid does not and shall not exceed $40,000."

Apparently, from this recital, the $40,000, or such a matter, due by the construction company to Jackson and others, was treated as a debt of the railway company and was to be paid

in cash, leaving the indebtedness of the railway company to the construction company to be satisfied by the $700,000 bonds and the 10 per cent of the stock. It would seem from other evidence that Barnes was to take $350,000 of the bonds and the stock and Gaylord was to take the balance of the bonds, although there is testimony that Gaylord was to receive fifty of the Barnes bonds for personal services and by way of commission. There was a modification of this contract on January 20, 1881, but the change is not material to this controversy. On March 28, 1881, the action of Gaylord in the two contracts of September 20, 1880, and January 20, 1881, was approved by the directors of the railway company, who also, on the same date, passed a resolution as follows:

"*Resolved*, . . . that for all present outstanding stock certificates new certificates of stock for a like amount shall be issued and delivered to the parties entitled to receive the same upon the surrender and cancellation of their old certificates of stock and in exchange therefor."

The second day thereafter, on March 30, a resolution was passed, which, after referring to the appropriation of bonds to the amount of $700,000 and stock to the amount of a million for the purpose of discharging the indebtedness of the company, recites the receipt of full value in real property and other valuable consideration for such bonds and stock, and gives the consent of the company to the immediate issue of one half the amount thereof.

Just before the passage of these two resolutions, and on March 26, 1881, the construction company assigned to Jackson its claim against the railway company for bonds and stock, as well as all of its claims and demands of any and every kind against the railway company. Jackson took this assignment really for J. C. Barnes, and was to hold the claim, thus assigned, for him until he should be able to pay the amounts due to Ruger, Sloan and others. Subsequently, and on May 17, 1881, Jackson forwarded to the president of the railway company a letter, giving notice of the assignment, stating that of the 400 bonds which had belonged to the construction company 361 had been surrendered to the railway company

to be exchanged for new bonds, and that he had in his possession the remaining 39, and proposing to surrender the 39 and release all claims for the 361 upon the issue to him of $650,000 of full paid stock. Whereupon the board of directors took the following action:

"On motion of Wm. T. Watson, duly seconded, the following resolution was adopted:

"Whereas A. A. Jackson, as the assignee of the Chicago and Northern Pacific Construction Company, holds 39 bonds of this company issued by this company under its former name of the Chicago and Northern Pacific Air Line Railway Company, bearing date July 1, 1872, with the coupons thereto annexed, and as assignee of said construction company he is also entitled to receive from this company 361 bonds of this company of $1000 each, with interest thereon from the 1st day of July, 1872, at the rate of seven per cent per annum, amounting in all, on the 1st day of June, 1881, to the sum of $649,663.00; and

"Whereas the said Jackson has made a proposition to this company, in writing, proposing to surrender to this company said 39 bonds so held by him and to release this company from its liability and obligation to deliver to him 361 bonds and interest upon the company issuing and delivering to him 6500 shares of the capital stock of this company:

"Therefore Resolved, That the proposition of A. A. Jackson be, and the same is hereby, accepted, and the president and secretary are hereby authorized and directed to sign, seal and deliver to said A. A. Jackson certificates of full paid stock of this company of the par value of $650,000, upon said Jackson's delivery to them of said 39 bonds, with the coupons thereto annexed, and a properly executed instrument releasing and discharging this company from its liability and obligation to execute and deliver to him bonds of this company for $361,000 and interest at 7 per cent from July 1, 1872, in pursuance of his proposition; and

"Resolved, That the proposition of A. A. Jackson be entered upon the records of this company in connection with this order."

In accordance, therefore, with the terms of this resolution, and that of March 28, heretofore quoted, Jackson was entitled to receive, on the surrender of the $350,000 of old stock and 39 bonds in his possession and the release of all claim in respect to the 361 theretofore surrendered, the sum of $1,000,000 in full paid stock of the company. This stock when issued to Jackson would, under the arrangement between him and Barnes, be held by Jackson for the benefit of J. C. Barnes. This stock was in fact issued and delivered to Barnes for Jackson. That this stock was not obtained surreptitiously, but delivered knowingly by the officers of the company to Barnes for Jackson, is evidenced by the following letters and receipt, the letters being signed by the president of the company:

"Chicago, Portage and Superior Railway Company. Wm. H. Schofield, President.

"President's Office, 150 Broadway,
"New York, *June* 18, 1881.

"R. G. Rolston, Esq'r, President Farmers' Loan and Trust Company, New York.

"Dear Sir: I have this day deposited with the Farmers' Loan and Trust Company eight thousand six hundred and fifty (8650) shares of $100 each of the capital stock of the Chicago, Portage and Superior Railway Company to be paid out or delivered by you upon special orders by me prepared and this day left with you for acceptance. Will you please sign the form of acceptance on said stock orders, and when so signed and upon the presentation and surrender to you of this order deliver to Jno. C. Barnes, Esq'r, the aforesaid special orders representing the said 8650 shares of stock, and this is your general authority for the delivery of said stock to the persons and at the terms named in said special orders.

"Chicago, Portage and Superior Railway Company,
"By Wm. H. Schofield, *President.*"

"Office of the Farmers' Loan and Trust Company, 26 Exchange Place, cor. William St.

"NEW YORK, *June* 17, 1881.

"Received from the Farmers' Loan and Trust Company certificates for the delivery of eighty-six hundred and fifty shares of the capital stock of the Chicago, Portage and Superior Railway Company in accordance with the terms of said certificates.

"J. C. BARNES.
"Per E. D. HOTCHKISS."

"NEW YORK, *Oct.* 22, 1881.

"To the Farmers' Loan and Trust Co., New York:

"You are hereby authorized and directed to deliver to John C. Barnes, Esq., of the city of New York, all the certificates of the capital stock of the Chicago, Portage and Superior Railway Company, referred to and described in 90 certain orders signed and accepted by you, on the surrender to you of all of said orders, without regard to any of the conditions or limitations contained or specified in said orders.

"CHICAGO, PORTAGE AND SUPERIOR RAILWAY COMPANY,
"By WILLIAM H. SCHOFIELD, *President.*"

Further, on the stubs of the stock book of the company, in the handwriting of the president, except the signature of J. C. Barnes, appear these entries:

On the stub of certificate numbered 1 (the stubs of certificates from 1 to 90, inclusive, being precisely similar except in number of shares): "On acc't stock, bonds & interest cancelled and returned. No. 1 for 500 shares June 18, 1881. Issued to A. A. Jackson of Janesville, Wisconsin. Received certificate No. 1, as above described, June 18, 1881."

And on stub No. 132: "On account of stock, bonds & int. cancelled & returned. No. 132 for 1350 shares October 24, 1881. Issued to A. A. Jackson of Janesville, Wis. To make bal. of 1,000,000 June 18, '81. Received certificate No. 132, as above described, Oct. 24, 1881, for A. A. Jackson, $1,000,000

in ten thousand shares. Dated June 18, '81, and present date. J. C. Barnes."

On the day of receiving the last of these stock certificates, to wit, October 24, Barnes wrote to Jackson, advising him of the issue of the 10,000 shares in his name; that the certificates were in his (Barnes') hands, and that he, Jackson, could vote on that stock. On October 31 Jackson, being in New York, received from Barnes this receipt:

"A. S. Barnes & Co., publishers.

"NEW YORK, *Octo.* 31, 1881.

"Received from A. A. Jackson ninety-one (91) certificates of stock of the Chicago, Portage and Superior Railway Company, aggregating ten thousand (10,000) shares, as follows:

"No. 1 to 5, inc., 500 sh's ea	2,500
" 6 " 55, " 100 " "	5,000
" 56 " 75, " 50 " "	1,000
" 76 " 90, " 10 " "	150
" 132 for	1,350
"Total shares	10,000

"The above certificates are issued to A. A. Jackson and have not been transferred, but are held for his future order.

"J. C. BARNES."

Jackson took that receipt, as he testifies, simply because he did not care to carry the certificates home, and wished something to show where they were and that they were held subject to his order. On November 15 thereafter J. C. Barnes transmitted to his nephew, C. J. Barnes, in Chicago, the stock, accompanied by this letter and power of attorney:

"NEW YORK, *Nov.* 15, 1881.

"Charles J. Barnes:

"By express to-day I send you ten thousand shares of C., P. & S. railway stock, issued to A. A. Jackson, and which belonged to him for settlement of construction company's claims, etc. I send these shares at the request of Mr. Jack-

son. He will explain why they are sent, and his argument agrees with my own convictions. These shares are not ever to be parted from your custody, except as it shall be deemed necessary to protect the mutual interest of Jackson, yourself and myself, and are only to be used in extreme case of necessity for our mutual benefit. I also enclose authority to sell the ten thousand shares which stand in my name on the company book. J. C. BARNES.

"NEW YORK, *November* 15, 1881.

"This is to say that Charles J. Barnes is my true and lawful attorney for negotiation and sale of a certain number of certificates of stock standing in my name on the books of the Chicago, Portage and Superior Railway Co., said certificates dated June, 1881, and aggregating $1,000,000.

"J. C. BARNES."

It would seem clear from this evidence, not depending on imperfections of memory, but contained in writings, (many of them on the books of the company and made by its officers,) that Jackson was the legal holder of this million of dollars of stock, free from all obligation to the company, and subject only to the trust in favor of J. C. Barnes. It is difficult to see why Jackson did not have the legal right, with the assent of Barnes, to dispose of this stock to whomsoever he saw fit, and at any price he could obtain. The debt of the railway company to the construction company is not disputed; the documentary evidence establishes that for that debt the company issued this stock as full paid stock; no limitations are expressed in the proposition of Jackson or the resolution of acceptance, and for aught that these records disclose he had the same right and control over this stock, subject only to his trust in favor of Barnes, that any stockholder in any corporation has over his. It is true that the transaction between Jackson and the railway company seems to involve some departure from the arrangement indicated by the contract between Gaylord and others, of September 20, 1880, for that apparently contemplated the issue of $700,000 of bonds,

$1,000,000 stock and the payment of $40,000 in cash in satisfaction of all the debts of the railway company; but this transaction was the later one, and, in so far as it modified the earlier arrangement, superseded it. It is probable that there was in fact no modification, but only an addition, and that Gaylord and J. C. Barnes still expected to receive $700,000 in bonds and $1,000,000 in stock, in addition to this $1,000,000 of stock issued to Jackson, for additional certificates of stock to the amount of $1,000,000 were made out by the officers of the company in the name of J. C. Barnes, though never delivered to him. Apparently they regarded this as a bonus for their services.

It is this last $1,000,000 of stock which is referred to in the authority given by J. C. Barnes to C. J. Barnes of November 15, 1881, heretofore quoted, and also in the following letter of authority given on November 19 by J. C. Barnes to Jackson:

"A. A. Jackson, Esq., Janesville, Wis.:

"I hereby authorize and empower you to negotiate the sale for me of the certain ten thousand (10,000) shares of stock now standing in my name on the books of the Chicago, Portage and Superior Railway Company, said shares representing the par value of one million dollars.

"J. C. Barnes."

It was evidently the doubt as to the validity of this latter stock as full paid stock that induced the parties in making the transfer to Cable to thus describe it in their contract of sale: "And so much of the ten thousand shares of the capital stock standing in the name of John C. Barnes, aforesaid, on the books of said company (which last named stock said Jackson and C. J. Barnes, as agents of said John C. Barnes, are authorized and empowered to sell upon such terms as they shall see fit, a copy of the said authority from said John C. Barnes to said A. A. Jackson being hereto annexed and made a part hereof) as is absolutely valid and full paid stock."

We do not deem it necessary to enter into any consideration of the question of its validity, or whether it was full paid

stock, and only refer to it for the purpose of showing that the transaction with Jackson was independent of the arrangement between Gaylord and Barnes, and was unaccompanied by any conditions which may be claimed to have attached to the stock issued in Barnes' name.

The testimony further discloses that, from some time in the latter part of 1881 until the sale made by Jackson to Cable, Schofield, as the president of the railway company, was negotiating with the officers of the Grand Trunk Railway Company with a view to securing their interest in the Portage Company, and their aid in floating its bonds in European markets, and that those negotiations had proceeded finally so far as to disclose a possibility, perhaps a probability, of success. Jackson and J. C. Barnes were aware of the pendency of these negotiations, and of the various steps therein, so far as they were disclosed by the records of the Portage Company, and the contracts which were reported by Schofield to the directors of that company. The Grand Trunk Company having secured an entrance into Chicago, evidently saw the possibility of benefit to itself in obtaining control of a road running into the far Northwest, and upon that view entered into these negotiations. It is also true that when the Grand Trunk Company found that Cable, acting for the Omaha Company, had purchased this Jackson stock, it abandoned all negotiations and gave up the thought of attempting to secure control of the Portage Company. It is claimed by Jackson that the delays in negotiations with the Grand Trunk Company were such that he had lost all confidence in their success; that he offered the stock to officers of that company at the same price that Cable subsequently paid for it, and that they declined to take it.

Putting the most unfavorable construction upon the testimony, it does not seem to us that either Jackson or Barnes can be condemned of any breach of trust, or other obligation, to the Portage Company when, having offered the stock to the Grand Trunk Company, at the price afterwards paid by Cable, and such offer having been declined, they sold it to the Omaha Company. It may be that thereby Schofield and

Gaylord were deprived of the profits which they expected to secure by successfully carrying through the negotiations with the Grand Trunk Company, but we do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of negotiations then pending. Jackson and Barnes had the same right to look after their own interests in the sale of the stock that Schofield and Gaylord had after theirs in the negotiations with the Grand Trunk Company. It seems very probable, if we may speculate as to what would have been the result if the negotiations with the Grand Trunk Company had been successfully carried to completion, that the $1,000,000 of stock which Jackson held, instead of being worth $200,000, would have been worth little or nothing, and we do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder or to enable another stockholder to make gains and profits.

In short, to sum up this branch of the case, from the testimony in this record it is, we think, clear that Jackson was guilty of no breach of trust in selling this stock; that it belonged, both legally and equitably, to J. C. Barnes and himself; that they had a full legal and moral right to sell it to any one who would pay their price, and it equally follows that the Omaha Company and Cable, in making the purchase, were themselves guilty of no wrong.

Another claim is that the Omaha Company wrongfully prevented the Portage Company from earning the land grant. This, it is said, was done by inducing the general manager of the company to withdraw the engineering corps and to stop the contractor from proceeding with the work of construction, and, after all work had in fact been stopped, by false swearing securing an *ex parte* injunction to restrain the officials of the Portage Company from any further efforts in its behalf. But the testimony does not make good these charges. It is true Mr. Cable, after his purchase of the stock, asked Mr. Peck, the general manager, to discontinue the work of con-

struction, but the latter, as he himself testifies, declined to do this, not recognizing Mr. Cable as having any authority in the matter. He did, however, after consultation with the president and learning that negotiations for the assistance of the Grand Trunk Company had been abandoned, notify the contractors by telegraph of the fact, and that there seemed to be no immediate prospect of raising money to continue the work. With reference to the alleged obtaining of an *ex parte* injunction on false affidavits, the facts are these: The president of the Portage Company, who was a resident of New York, after the giving up of the negotiations with the Grand Trunk Company, returned to that city, and there had in his possession the books and papers of the company — indeed, for all practical purposes, the office of the company seems to have been theretofore transferred from Chicago to New York. Mr. Cable sought to have the stock which he had purchased transferred on the stock books of the company, but failed in his efforts. He was informed that the president was calling special meetings of the directors of the company in New York without giving notice to the local directors and without their presence, and by virtue of authority granted at such meetings was disposing of bonds and stock — information which we regret to say had no slight foundation in the actual facts. Whereupon he filed his bill in the Circuit Court of Cook County, Illinois, which, reciting his purchase and ownership of the stock, the conduct of the president and other officials of the corporation, as above stated, prayed an injunction against the Portage Company and its president. In order that the exact scope of this injunction may be apparent we quote from the prayer in the bill, the order of the court being that an injunction issue as prayed for:

"That a preliminary injunction issue restraining the defendants and their officers, directors, agents and servants from issuing or causing or allowing to be issued any of the capital stock of said corporation, and from issuing, selling, pledging or causing to be issued or sold or pledged, any of the mortgage bonds of said corporation until the further order of this court, and also restraining said defendants and their officers,

directors, servants and agents from transferring or allowing to be transferred upon the books of said corporation any of the capital stock which has been issued by said Schofield as above stated and which is above charged to have been wrongfully, fraudulently and improperly issued, or any other fraudulent capital stock of said company, and that said defendants, their officers, agents and servants, be also restrained and prohibited from calling or holding or causing to be called or held any meeting of the directors of said corporation or attempting to transact business at such meeting and from taking part as an officer or director at such meeting unless full notice of such meeting and the time and place of holding the same shall have been given to each of the above named directors of said corporation, and not in that event unless such meeting and meetings shall be notified to be held and shall be held at the principal office of said corporation, in the city of Chicago, in the State of Illinois.

"And that until such time as said books and papers of said corporation shall be returned to and kept at its office in the city of Chicago aforesaid, open to the inspection of your orator, said defendants will be prohibited and restrained from doing any act or thing concerning or affecting the financial affairs of said corporation for the amount of its liabilities or the amount of its capital stock, and from entering upon the records of said company any statement or record of its actings or doings."

It is true that the temporary restraining order, or temporary injunction, was granted on the 9th day of February, 1882, without notice, but the defendants were in a few days served with process. They made no attempt to have the order vacated, but, on the contrary, on March 20, 1882, the Portage Company filed a cross-bill seeking to restrain Cable from disposing of the stock he had purchased, and praying that it be delivered up for cancellation. Nothing, however, came of this litigation, and it was abandoned in consequence of negotiations and a settlement between Cable and the investment company.

Finally, it is insisted that the Omaha Company wrongfully

and fraudulently secured through the action of the legislature of the State of Wisconsin a transfer of the land grant to itself, and further that the action of the legislature in making such transfer did not divest, or attempt to divest, the creditors of the Portage Company of their legal or equitable rights, nor prevent them from having the lands appropriated so far as was necessary to the satisfaction of their debts.

With reference to the first portion of this charge, it is sufficient to say that there is absolutely no foundation for it in the testimony. It does not appear that there was any corruption, or attempted corruption, by the Omaha Company of any of the members of the legislature, or other officials. Everything it did was open and above board. At the instance of the officials of the Portage Company it consented that a stipulation be introduced into the act of forfeiture and transfer that it should pay to the governor of the State the sum of $78,000, to be used in payment of labor claims for work done on the Portage Company's line, and after the passage of the act it did pay the stipulated sum. We are left, therefore, to the single question whether the act of the legislature, either in terms or by implication, burdened the transfer with a continuing obligation for the debts of the Portage Company. No such burden was in terms imposed. The grant was, so far as the legislative action discloses, simply taken away from the Portage Company because of a failure to comply with the conditions under which it had originally been bestowed upon it. On such failure of the Portage Company all its right to the lands ceased. Whatever the legislature might thereafter do in its behalf was a mere act of grace. No creditor of the Portage Company had any legal or equitable right to any portion of those lands, and if the legislature had simply revoked the grant and resumed possession on behalf of the State there would be no pretence of a claim that any such creditor could subject the lands, or any interest therein, to the satisfaction of his debt. There is no intimation of a contrary doctrine in the opinion filed in *Railway Company* v. *Angle*, *supra*. All that was there held was that the legislative action did not condone, and was not intended to condone,

any wrongs done by the Omaha Company; and that if the Omaha Company had been guilty of any fraudulent conduct, in consequence of which the Portage Company had been prevented from earning the grant and the legislature thereby induced to revoke it and bestow it upon the Omaha Company, the party wronged by those acts of the Omaha Company was entitled to redress. But here, as we have seen, although the charges are the same, yet the testimony fails to make good those charges, or to show any fraudulent or wrongful conduct on the part of the Omaha Company. The legislative act condoned no wrong, for there was no wrong to condone. It neither placed nor continued any burden upon the land grant, and hence the mortgage creditors of the Portage Company, having no lien, legal or equitable, cannot pursue the lands in the hands of the Omaha Company.

There is this substantial difference between the *Angle case* and the present: While in each are charges of grievous wrong on the part of the Omaha Company, in consequence of which property which otherwise would have been subjected to the payment of the plaintiff's claims was obtained by the Omaha Company, in the *Angle case* the Omaha Company demurred, saying there was no remedy notwithstanding the wrongs alleged. We held that if such wrongs as were alleged had been committed, the law did furnish a remedy. In this case the Omaha Company took issue upon the charge of having committed such wrongs, and the testimony shows that it did not commit them. So the proof fails to make good the charges, and the decree of the Circuit Court was right, and is

Affirmed.

Mr. Justice Harlan concurs in the result upon the grounds stated in his opinion at the circuit. 39 Fed. Rep. 143; 151 U. S. 1–28.

KIRK *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 214. Argued April 14, 1896. — Decided May 4, 1896.

If, under any circumstances, a patentee can sue to recover for the use of a patented article, made before the letters-patent were granted, he cannot do so when he was not the inventor of the thing patented; when the device had been in public use for more than two years before the patent was applied for; when the alleged use was by the United States; and when the government, so far from agreeing to pay a royalty for it, had protested against any patent being issued for it.

THIS was a claim by George E. Kirk as assignee of letters-patent No. 462,224, for a street letter-box, issued October 27, 1891, to Samuel Strong, upon an application filed therefor March 9, 1874.

The original petition was filed October 27, 1884, about ten years after the application for the patent was filed, and seven years before it was finally issued.

The case having been tried by the Court of Claims, that court made a finding of facts, of which the following is an abstract:

On March 30 and August 31, 1869, there were granted to said Samuel Strong two patents, Nos. 88,525 and 94,449, for improvements in street letter-boxes, and on the 15th of September of the same year, Strong entered into a contract in writing with the defendant, through the Postmaster General, whereby Strong contracted to furnish cast-iron street letter-boxes for the use of the Post Office Department, in such numbers and at such times and places as might be ordered by the Postmaster General, up to October 1, 1872. These letter-boxes were to be of the size, shape, weight and model of one deposited by him in the Post Office Department, the design and construction of which were carefully specified in the contract, the United States on its part agreeing to pay $5.50 for each box furnished and put up, according to order.

A few days after this contract was executed, namely, Sep-

tember 27, Strong assigned to one Gideon L. Walker all his interest in the two patents above mentioned, as well as his interest in and to a certain invention in street letter-boxes for which he claimed he had prepared and filed specifications, preparatory to obtaining a patent therefor. But whether such patent was ever issued did not appear.

The letter-boxes so contracted to be furnished by Strong were actually furnished by him, and were the letter-boxes for which he had secured a patent for what is known as the "flat-top" letter-box. But, in consequence of complaints made to the Postmaster General to the effect that such boxes were too wide, unsightly in appearance and unsatisfactory, he called together at Washington a convention of postmasters and other postal officials, to consult with regard to the general good of the service. Before this convention, which met in January, 1870, the Postmaster General laid for inspection several models of letter-boxes, including the one then in use, furnished by Strong, under his contract; but the convention rejected all such models, and, endeavoring to avoid conflict with any existing patent, devised a letter-box based upon their own experience, and by a communication addressed to the Postmaster General, dated January 15, 1870, recommended the adoption of a box "about one and a half feet in length, about six inches in depth and twelve inches in width, with an opening at the top sufficiently large to receive newspapers and magazines, the opening or receptacles especially protected from the weather with a curved top to carry off the water, and a door in the side or front, with side flanges, to take the matter from, and that the hours for collection be distinctly shown upon the outside of the box." At the same time and in the same communication they condemned the street letter-box "now furnished the department under the contract known as the Strong patent."

Pursuant to such recommendations, a letter-box was devised and adopted by the Postmaster General, known as the "round-top," and Strong was engaged to model, manufacture and furnish to the Post Office Department such boxes, with such alterations and improvements therein as the Postmaster

General might suggest; and in pursuance thereof a written contract was entered into between Strong and the defendant on February 18, 1870, to continue in force for four years thereafter. This contract in terms superseded and annulled the contract theretofore made on September 15, 1869. Under this contract of February 18, 1870, Strong modelled and manufactured boxes, with such alterations and improvements therein as were suggested by the Postmaster General, until boxes giving satisfaction to the Postmaster General had been made; and the boxes so modelled and manufactured by said Strong were the boxes furnished by him to and for the use of the Post Office Department, under and during the existence of his said contract, and none other, for which he was paid $5.50 for each of the small size and $7.50 for each of the large size of said boxes.

A few days prior to the expiration of the said contract, namely, on February 11, 1874, Strong filed in the Patent Office a caveat, and on March 9 an application and specifications claiming to be the inventor of the cast-iron street letter-box so devised and adopted by the Postmaster General as aforesaid; which letter-box, so devised and adopted by the Postmaster General, was modelled and manufactured by Strong under the instructions of the Postmaster General, as provided should be done in his contract, and the said boxes so modelled, manufactured and furnished by said Strong were in public use in the letter-carrier cities of the United States for more than two years prior to March 9, 1874, the date when Strong filed his application for a patent thereon.

Pending such application, and on July 29, 1874, the Postmaster General addressed a letter to the Commissioner of Patents, saying, that the department had been informed by Strong that he had taken out two caveats to protect his alleged rights to a certain street letter-box now in use by authority of the department, stating that such box had been in use for four years, under contract with Strong of February 18, 1870, and had been recommended by the convention of postmasters, reduced to shape and form by Strong, as described by them, and could in no just sense be considered

as the invention of Strong, he having simply carried out the views of the convention in this respect.

On January 26, 1881, Strong assigned all his interest in the letters-patent and the invention to the claimant, but it did not appear that Gideon L. Walker, to whom Strong had theretofore executed an assignment in writing, as before mentioned, consented to such assignment to the claimant or any one else on the application of September 4, 1869, referred to in said written assignment.

After the filing of the original petition in this case, to wit, October 27, 1891, there was issued to the claimant, George E. Kirk, assignee of said Samuel Strong, letters-patent No. 462,224, which patent covers the same and identical street letter-box accepted by the Postmaster General, known as the "round-top," which was modelled and manufactured by Strong, as hereinbefore set forth.

Subsequently to February 18, 1874, the date of the expiration of the contract with Strong, the Postmaster General contracted with the Union Foundry and Manufacturing Company, of Reading, Pennsylvania, and others, at divers times, to manufacture and furnish for the use of the Post Office Department the same and identical kind of street letter-box theretofore modelled, manufactured and furnished by said Strong under his contract, as aforesaid; and it does not appear that the contracts for the boxes to be furnished were with the knowledge or consent of said Strong or claimant.

During the six years prior to the filing of the original petition, and up to the date of filing the last amended petition, January 15, 1892, there were purchased for the use of the Post Office Department about 35,000 such letter-boxes, a reasonable royalty for the use of which would be $1.00 per box.

Upon the foregoing finding of facts the Court of Claims decided as a conclusion of law that the claimant was not entitled to recover, and the petition was, therefore, dismissed. Thereupon petitioner appealed to this court.

Mr. R. H. Steele and *Mr. Robert A. Howard* for appellant. *Mr. E. H. Holman* was on *Mr. Howard's* brief.

Mr. Assistant Attorney General Dodge for appellees. *Mr. Charles C. Binney* was on his brief.

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

In his amended petition of January 26, 1891, claimant asserts himself to be the assignee of the improvements made by Strong, for which the two patents of March 31 and August 31, 1869, were issued; as well as the assignee of another patent, issued February 7, 1882; and also of an application for still another of March 9, 1874. He sets forth the contracts of September 15, 1869, and February 18, 1870, and the performance of the same, and alleges that, "at the termination and expiration of said contract, the said Samuel Strong applied to the Postmaster General of the United States for a renewal of the same; and that, notwithstanding a verbal understanding and promise on the part of the said Postmaster General, made at the time of the execution of the said contract, that there would be such a renewal, said renewal was denied to said Samuel Strong, and no further renewal of said contract has since been made by and between the said parties thereto."

The gist of his complaint is that, after the expiration of the contract, the government continued to use the boxes that had theretofore been manufactured by Strong; that all such letter-boxes "were covered by the claims of the aforesaid application for letters-patent of March 9, 1874, and included by said contracts, and now owned by said claimant;" that such use was in violation of the rights of claimant, in virtue of his said assignment; that since February 18, 1874, the government has refused to renew this contract with Strong, or to pay him anything for the use of the boxes, and that he is entitled to the sum of $3.50 upon each of said boxes used, under an implied contract to pay for the same.

His allegation with regard to the patent for which application was filed March 9, 1874, is that the application therefor was examined by the primary examiner and rejected; that an

appeal was taken to the examiners in chief, which reversed the decision of the primary examiner, and held that Strong was entitled to a patent; that, in accordance with such judgment, the Commissioner of Patents allowed the claims, received the final fee, and ordered the patent to issue, but, notwithstanding all that, "still withholds the patent for reasons known only to himself, and entirely contrary to the said express mandate of law."

In an amended petition, filed January 15, 1892, claimant sets forth that a patent was issued to him on October 27, 1891, in pursuance of the application of March 9, 1874, and that on January 15, 1870, a convention of postmasters, which met at Washington, recommended for adoption to the Postmaster General the boxes filed with the board, and known as the Strong boxes, and that it was the intention and understanding of the Postmaster General that the invention so adopted should be used by the government, and a reasonable and just compensation made for the use of the same.

In this connection, however, it is found by the Court of Claims that the two patents of 1869 were, on the 27th day of September of that year, assigned to Gideon L. Walker, and consequently that Kirk took nothing by the assignment to him of the same patents of January 6, 1881; and that the patent of February 7, 1882, was not included in the assignment to Kirk, but still appeared to be owned by Strong. It follows that the only invention or patent in which claimant appears to have any interest is that known as the "round-top" box, which claimant holds by authority of the assignment of January 6, 1881, for which letters-patent were never issued until 1891, seventeen years after Strong's contract with the government had expired. The court further found that the round-top letter-box was devised and adopted by the Postmaster General himself; that Strong was employed to model, manufacture and furnish these boxes for a term of four years, with such alterations and improvements therein as the Postmaster General might suggest; that a few days before the expiration of this contract, Strong filed a caveat in the Patent Office and made application for a patent for the

boxes so devised and adopted by the Postmaster General, which letter-box had been manufactured by Strong under his instructions; and that they had been in public use for more than two years prior to March 9, 1874, when Strong filed his application therefor; that the Postmaster General protested against the grant of a patent to Strong, and that the same was not granted until seventeen years thereafter.

Discarding, then, the patents of 1869 and 1872 as immaterial, the case resolves itself into the question whether the assignee of a person who did not invent the letter-box in dispute, who had no patent for it until after the suit was commenced, who had no contract to manufacture it, and who finally obtained a patent against the protest of the government's agent, can recover of the government a royalty for the use of the device upon the theory of an implied promise to pay for such use. There can be but one answer to this proposition.

The application of Strong to patent a letter-box which he did not invent was naturally suggested by the fact that his contract for manufacturing the same was about expiring, and he desired to foreclose others from obtaining a further contract by securing a patent for the box. If a patentee could under any circumstances sue to recover for the use of a patented article, made before letters were granted, (as to which it was held in *Gayler* v. *Wilder*, 10 How. 477, 493; *Brown* v. *Duchesne*, 19 How. 183, 195; *Marsh* v. *Nichols*, 128 U. S. 605, 612; *Sargent* v. *Seagrave*, 2 Curt. 553, 555; and *Rein* v. *Clayton*, 37 Fed. Rep. 354, that an inventor has no exclusive right before a patent has been issued,) it certainly could not apply to a case where the patentee was not the inventor of the thing patented; where the device had been in public use for more than two years before the patent was applied for; and where the government, so far from agreeing to pay a royalty for it, had protested against any patent being issued for it. We know of no principle upon which a contract can be evoked from a distinct refusal of one party to recognize the rights of the other, and a formal protest against any such rights being granted to him.

Certain criticisms are made in the briefs of counsel upon the findings of fact of the Court of Claims, but as no exceptions appear to have been taken thereto, and as the testimony is not, and under our rules cannot be, sent up with the record, these findings must be accepted as conclusive, and for the reasons above stated the judgment of the court below is

Affirmed.

WIGGAN *v.* CONOLLY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 225. Submitted April 16, 1896. — Decided May 4, 1896.

The treaty of February 23, 1867, 15 Stat. 513, with the Ottawas and other Indians, introduced the limit of minority upon the inalienability of lands patented to a minor allottee, in that respect changing the provisions of the treaty of July 16, 1862, 12 Stat. 1237; and this limitation was applicable to lands then patented to minors under the treaty of 1867, and cut off the right of guardians to dispose of their real estate during their minority, even under direction of the court of the State in which the land was situated.

By the first article of the treaty of 1862, negotiated June 24, ratified July 16, and proclaimed July 28, 12 Stat. 1237, it was provided that — "The Ottawa Indians of the United Bands of Blanchard's Fork and of Roche de Bœuf, having become sufficiently advanced in civilization, and being desirous of becoming citizens of the United States, it is hereby agreed and stipulated that their organization and their relations with the United States, as an Indian tribe, shall be dissolved and terminated at the expiration of five years from the ratification of this treaty; and from and after that time the said Ottawas, and each and every one of them, shall be deemed and declared to be citizens of the United States, to all intents and purposes, and shall be entitled to all the rights, privileges and immunities of such citizens, and shall, in all respects, be subject to the laws of the United States, and of the State or States thereof in which they may reside."

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The seventh article reads that — "Proper patents by the United States shall be issued to each individual member of the tribe and person entitled for the lands selected and allotted to them, in which it shall be stipulated that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner until they shall, by the terms of this treaty, become a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered, except as aforesaid, by any Ottawa Indian, of the lands allotted to him or her, made before they shall become a citizen, shall be null and void.

"And forty acres, including the houses and improvements of the allottee, shall be inalienable during the natural lifetime of the party receiving the title."

Esther Wilson, as appears by the census roll, duly certified by the Commissioner of Indian Affairs and the Secretary of the Interior, of date March 30, 1864, was an allottee under this treaty, and at that time a girl of the age of seven years. On December 1, 1865, a patent was issued to her for the land in controversy, the granting words of which are as follows:

"Now know ye, that the United States of America, in consideration of the premises, and pursuant to the third and seventh articles of the treaty aforesaid, have given and granted, and by these presents do give and grant unto the said Esther Wilson and to her heirs, the tract of land above described: Provided, however, and these presents are upon the express condition, and with the limitation as required by the treaty aforesaid, that the said Esther Wilson shall not alienate or incumber the aforesaid tracts of land until she shall become, by the terms of said treaty, a citizen of the United States; and any conveyance or incumbrance of said lands, done or suffered by said Esther Wilson, made before she shall become a citizen, shall be null and void; to have and to hold the said tracts of land, with the appurtenances, unto the said Esther Wilson and to her heirs and assigns forever, subject to the limitation and condition aforesaid."

On February 23, 1867, a treaty was negotiated between the United States and several Indian tribes, 15 Stat. 513, the scope

and purpose of which is disclosed by this recital in the preamble: "Whereas it is desirable that arrangements should be made by which portions of certain tribes, parties hereto, now residing in Kansas, should be enabled to remove to other lands in the Indian country south of that State, while other portions of said tribes desire to dissolve their tribal relations and become citizens."

Among the parties to this treaty were the Ottawa Indians. Certain amendments were suggested by the Senate on June 18, 1868, which were accepted by the Indians September 30, 1868, and the treaty proclaimed October 14 following. The third section provides for a cession by the Shawnees of a part of their reservation in the Indian Territory to the United States. The sixteenth recites that this ceded territory "is hereby sold to the Ottawas at one dollar per acre;" while the seventeenth section reads as follows:

"The provisions of the Ottawa treaty of one thousand eight hundred and sixty-two, under which all the tribe were to become citizens upon the sixteenth of July, one thousand eight hundred and sixty-seven, are hereby extended for two years, or until July sixteenth, one thousand eight hundred and sixty-nine; but at any time previous to that date any member of the tribe may appear before the United States District Court for Kansas, and declare his intention to become a citizen, when he shall receive a certificate of citizenship, which shall include his family, and thereafter be disconnected with the tribe, and shall be entitled to his proportion of the tribal fund; and all who shall not have made such declaration previous to the last mentioned date shall be still considered members of the tribe. In order to enable the tribe to dispose of their property in Kansas, and remove to their new homes and establish themselves thereon, patents in fee simple shall be given to the heads of families, and to all who have come of age among the allottees under the treaties of one thousand eight hundred and sixty-two, so that they may sell their lands without restriction, but the said lands shall remain exempt from taxation so long as they may be retained by members of the tribe, down to

the said sixteenth of July, one thousand eight hundred and sixty-nine."

On October 26, 1872, Benjamin Esterly, as the guardian of Esther Wilson, appointed such guardian by the probate court of Franklin County, State of Kansas, (in which county the lands in controversy are situated,) executed a deed to John Wiggan, which deed recites a sale of the entire 80 acres at private sale for the sum of $60, the confirmation of such sale by the probate court, and an order on the guardian to execute a deed. Subsequently the grantee therein, John Wiggan, conveyed to Horace Wiggan and Albert E. Wiggan. On February 17, 1881, the allottee, she having in the meantime been married, under the name of Esther King, commenced an action in the District Court of Franklin County against said last named grantees for the recovery of the possession of the lands. Trial being had, a judgment was rendered in her favor, which, on June 4, 1886, was affirmed by the Supreme Court of the State. On May 6, 1891, the death of Esther King was suggested, and an order of revivor entered by the Supreme Court in the names of her heirs at law, Alexander Conolly and John King, her husband and only child. On May 26, 1892, a writ of error was allowed by the chief justice of that court, and on June 20, 1892, there was filed an affidavit that one of the defendants, now plaintiff in error, Albert E. Wiggan, was a minor at the time of the judgment of affirmance, and had not attained his majority until within less than two years prior to the suing out of the writ of error. The case, therefore, in this court is pending between one of the original defendants and the heirs of the original plaintiff.

Mr. Benjamin T. Duval and *Mr. H. C. Mechem* for plaintiffs in error.

No appearance for defendants in error.

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

The first question presented by counsel for plaintiff in error

is whether the treaty of 1867 was of any validity so far as respects the Ottawa Indians. The treaty of 1862 provided that at the expiration of five years from the date of its ratification, that is, on July 16, 1867, the Ottawas should become citizens of the United States, and the tribal organization and relations with the United States should be dissolved.

The treaty of 1867, though originally negotiated in February, was not concluded in that year, but was amended in 1868, and not ratified and proclaimed until October 14, 1868, and more than five years after the ratification of the treaty of 1862. At the time, therefore, that the later treaty took effect the Ottawa Indians had, it is contended, under and by virtue of the earlier treaty, become citizens not only of the United States but also of the State of Kansas, and hence the United States had no power to enter into treaty with them, citizens of a State, without the consent of that State. The Nation could not, without the consent of the State, withdraw citizens of the State from its jurisdiction.

We cannot yield our assent to this contention. The negotiations in February, 1867, were while the tribal organization and relations to the United States continued. They amounted substantially to a proposition by the tribe to change the treaty of 1862, and continue the tribal organization and relations with the United States. This was a valid act on the part of the tribe. And though the proposition was not accepted by the United States until after July 16, 1867, yet when accepted the acceptance related back to the date of the proposition. That some modifications were made in matters of detail did not affect the substantial character of the transaction. The tribe proposed to continue its organization and relations to the United States and the Government accepted the proposition. The State of Kansas has never objected, even if it had any right to object, and it does not lie in the power of an individual to assert any supposed political rights of the State or challenge the action of the Nation and the Indians in this behalf. The treaty of 1867 was valid and determined the status and rights of the Indians politically and in respect to their property.

The second proposition of counsel is that under the treaty of 1867 all the Ottawas became citizens on July 16, 1869, that the allottee Esther Wilson and her property became then subject to the jurisdiction and laws of the State of Kansas, and that a guardian's sale of her property made thereafter in conformity with the provisions of the laws of that State passed a valid title.

If the only provision in the treaty of 1867 affecting this question was the first clause of the seventeenth section there might be force in this contention, for that simply extends to July 16, 1869, the time for terminating the tribal existence and transforming all the members thereof into individual citizens of the United States and of the State in which they reside. Even then we should be confronted with the proposition that under the seventh article of the treaty of 1862 it was provided that forty acres, including therein the houses and improvements of the allottee, should be inalienable during his or her life. While that provision continued in force it may well be doubted whether a deed of the entire allotment, whether made by the individual or a guardian, would be sufficient to transfer a legal title to any portion of the allotment, and whether, prior to any such deed, there must not be a setting off to the allottee according to the demand of the treaty of the inalienable forty acres. It must be borne in mind that the proceeding in the state court was not in any sense one in partition, or an equitable suit to determine relative rights in a single tract, but was a legal action to recover possession, against which was set up simply an alleged legal title in defeat thereof.

But we do not care to rest our decision upon this suggestion. We think there is something more vital. The treaty of 1867 must be considered as an entirety in its relations to the treaty of 1862. By the treaty of 1862 the tribal organization was to disappear on July 16, 1867. If nothing had transpired after that, on that date the relations of the tribe to the United States would have ended, the members of the tribe would have had title to their lands, and they would have become, and been treated thereafter, as individual citizens of the United States

and of the State in which they resided. But the treaty of 1867 contemplated a different outcome. It proceeded upon the understanding that some at least of the Ottawas, as of the other tribes, desired to remove from the State of Kansas to the Indian Territory, and there continue tribal relations with the National Government. That is evidently the thought expressed in the recital to the treaty of 1867. Some of the Indians desired to be citizens; some wanted to retain their tribal relations. In carrying out that express purpose the time for the dissolution of the Ottawa tribe was postponed until July 16, 1869, with the proviso that at any time prior thereto any individual member could become a citizen at his election, and a further provision as to those who did not so elect, as thus expressed in the seventeenth section, "all who shall not have made such declaration previous to the last mentioned date shall be still considered members of the tribe." For what purpose "still considered members"? Simply to be at that instant changed into citizens and to lose their tribal relation? Obviously not; but that they might, if they had not elected to become citizens, remove to the Indian Territory, and continue their tribal relations. Emphasizing this thought is the subsequent sentence, to the effect that in order to enable the tribe to dispose of their property in Kansas and remove to their new homes patents should be issued under certain conditions. In other words, the idea was that those Indians who did not elect to become citizens should receive patents for their lands under such circumstances and conditions as to enable them to dispose of the lands and remove to the Indian Territory, and, there as a fragment of the original Ottawa tribe, continue tribal relations with the Government. The provision in reference to patents must be considered as superseding those of the treaty of 1862. And by its term patents were to issue to the heads of families and to all among the allottees coming of age, in the language of the treaty "so that they may sell their lands without restriction." It does not appear that the allottee in this case was the head of a family, and, according to the testimony, she was a minor. This treaty of 1867 introduced a new limitation upon the inalienability of lands patented to a minor

allottee, that is, the limit of minority. And such limit must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right of the United States to add with the consent of the tribe a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the Nation and the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge.

It follows, therefore, that at the time of this assumed power of the guardian of Esther Wilson to dispose of her realty such realty was inalienable, and a deed made by the guardian, though under the authority of the probate court of the county of the State in which the lands were situated, conveyed no title. That this conclusion renders ineffective an attempt to dispose of the lands of an Indian girl, at the price of seventy-five cents an acre, does not any the less commend it to one's sense of justice.

The judgment is

Affirmed.

DIBBLE *v.* BELLINGHAM BAY LAND COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 230. Argued April 17, 1896. — Decided May 4, 1896.

In a suit in a state court to quiet title, two claims to title were set up by the plaintiff. The first was that his title had been acquired by adverse possession, sufficient under the local law. On this point the trial court found that, in 1862, the plaintiff's grantor entered into possession of the land in question, and that he and the plaintiff had since been continuously and then were in actual, notorious and adverse possession thereof, under color and claim of title. The second claim was under a deed from husband and wife, executed by the former under an alleged power of attorney from the latter which had been lost without having been

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recorded. On this point the trial court found that the existence and validity of the power of attorney was established. It entered a decree that the plaintiff was entitled to the possession of the land, that the defendant was not the owner of it, that the cloud be removed, and that the power of attorney be established. On appeal to the Supreme Court of the State this decree was affirmed. The case being brought here by writ of error the Chief Justice of the Supreme Court of the State certified that the question had been duly raised in the trial court whether the said power and the deed made under it, which, by the law at the time of its making were absolutely void, were made valid by the territorial act of February 2, 1888, and whether, if so made valid, it was not in violation of the Fourteenth Amendment to the Constitution. *Held*, that, as it was settled in the State that actual, uninterrupted and notorious possession, under claim of right, was sufficient without color of title, and that a void deed, accompanied with actual occupancy, was sufficient to set the statute of limitations in motion, the judgment could be sustained on the first point, which raised no Federal question, and that consequently this court was without jurisdiction.

If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution of the United States, and another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the decision, this court will not review the judgment.

If it appears that the court did in fact base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction.

This result cannot be in any respect controlled by the certificate of the presiding judge, for the office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question.

If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, this must appear on the face of the record before the decision can be reëxamined in this court, and this is equally true where the denial of a title, right, privilege or immunity under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, is urged as the ground of jurisdiction.

No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a State to a statute of limitations of a State, and there is no reason for disregarding it in this instance.

THIS was a complaint filed by the Bellingham Bay Land Company against Carmi Dibble in the Superior Court of

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Whatcom County, Washington, on June 7, 1891, seeking a decree quieting plaintiff's title to certain lands therein described, and establishing the existence and validity of a certain power of attorney alleged to have been lost without having been recorded. Defendant disclaimed as to the west half of the property in question, and, after demurrer overruled to an amended complaint, answered by way of denial and assertion of defendant's claim set out in the complaint, and also by way of cross-complaint. A trial was had on issues joined and the Superior Court filed findings of fact and conclusions of law.

The court found that plaintiff was a corporation duly organized and existing under the laws of the State of Washington, with full powers to purchase, own and sell real estate; that on or prior to March 28, 1862, Thomas Jones and Betsy Jones, his wife, were the owners of a certain donation land claim situated in the county of Whatcom and Territory of Washington, as particularly described; that these lands were donated to Thomas Jones and his wife, under the donation laws of the United States, and that by virtue of the division which was made of them by the surveyor general, and by the certificate and patent, the west half of the lands was donated to Thomas Jones and the east half to Betsy Jones, his wife. The court further found that on March 28, 1862, for a valuable consideration paid therefor, Thomas Jones for himself and as attorney in fact for his wife, executed good and sufficient deeds of conveyance for all the tract of land to Edward Eldridge, and that since that date Eldridge had duly conveyed the premises to plaintiff, a small parcel excepted; that prior to the execution of the deed by Jones for himself and his wife, Betsy Jones had duly executed and delivered her power of attorney to Thomas, authorizing him to sell and convey the lands; that the power of attorney was executed under the seal of said Betsy, and was duly acknowledged and witnessed and properly certified, but that the same was not placed on the records of the county, but became and still remained lost, and at the date of the execution of the deed had not been revoked. The court then described the parcel conveyed by Eldridge to other parties than plaintiff.

The court further found that "on the said 28th day of March, 1862, the said Eldridge entered into possession of all of the said donation claim of Thomas Jones and Betsy Jones, and that from that date to the present time the said Edward Eldridge and his grantees, including the plaintiff in this case, have been continuously and now are in the actual, open, notorious, and adverse possession of all of the said property, under claim and color of title, excepting only the small parcels hereinbefore referred to as having been conveyed to other persons by the said Edward Eldridge; "that neither the defendant nor his grantors, ancestors or predecessors had been seized or possessed of the said premises or any part or parcel thereof at any time since the said 28th day of March, 1862, and that the defendant is not now in possession of the said land;" that defendant claimed to be the owner of the premises, and to have procured deeds for the land from persons claiming to be the heirs of Betsy Jones, and had caused these deeds to be recorded in Whatcom County, and had created a cloud upon plaintiff's title; that there was not sufficient evidence to establish the fact that Betsy Jones died intestate, or that the persons under whom defendant claimed, Lovatt and others, were the heirs at law of Betsy Jones; that at the time when defendant claimed to have purchased the property from these alleged heirs he had full notice and knowledge of the conveyance previously made by Thomas Jones for himself and his wife, and that he had notice of the existence of the power of attorney under which Jones conveyed as attorney in fact for his wife, and had notice that plaintiff was in possession of the premises, claiming to be the owner under the Jones' deed; and "that it and its immediate grantors had been in the possession of the said premises for more than ten years last past."

The Superior Court found as conclusions of law that plaintiff was entitled to the relief prayed, (including, among other things, the establishment of "the existence and validity of the said power of attorney,") and entered a decree that plaintiff was the owner and in possession and entitled to the possession of the land in question excepting the enumerated

parcel; that defendant was not the owner of the premises or any part or parcel thereof; and that the cloud created upon the title of the property by the deeds to defendant from Lovatt and others be removed, and plaintiff's title be quieted against all claims of defendant; and "that the said power of attorney from the said Betsy Jones to Thomas Jones, her husband, be and the same is hereby established;" and for costs.

The cause was then taken on appeal to the Supreme Court of the State and the decree below affirmed. 4 Wash. 764. Of the four judges of the Supreme Court who participated in the decision, all concurred in the judgment, and three, including the Chief Justice, in the opinion. Thereafter the Chief Justice signed a certificate and this writ of error was brought.

Mr. Alfred L. Black, (with whom was *Mr. E. B. Leaming* on the brief,) for plaintiff in error.

Mr. J. A. Kerr, (with whom was *Mr. W. Lair Hill* on the brief,) for defendant in error.

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

By section two of article XXVII of the constitution of the State, all laws in force in the Territory of Washington not repugnant to that constitution were continued in force until they expired by their own limitation or were altered or repealed by the legislature.

By section five of the territorial act of February 2, 1888, brought forward as section 1447 of the General Statutes, (1 Hill's Statutes and Codes, 506,) it was provided that all powers of attorney theretofore made and executed by any married woman joined with her husband and duly acknowledged and certified, and all powers of attorney theretofore made or executed by husband or wife to the other, authorizing the sale or other disposition of real estate duly acknowl-

edged, and all conveyances theretofore and thereafter executed under and by virtue of such powers of attorney and acknowledged and certified as provided, should be valid and binding, but no rights vested in third persons should be affected by anything in the section contained.

Plaintiff in error contends that the validity of that section was drawn in question as repugnant to the Fourteenth Article of Amendment to the Constitution, and its validity sustained in that the Supreme Court of the State held that the power of attorney and deed executed under it were thereby validated.

The certificate of the Chief Justice of that court was to the effect that in the trial by the court below and on the hearing on appeal, "the following question was duly and regularly raised, to wit: Whether the power of attorney alleged to exist and to have been made by Betsy Jones to her husband, Thomas Jones, prior to the 28th day of March, A.D. 1862, and a deed executed under it to Edward Eldridge on the 28th day of March, 1862, which said power of attorney and deed, on the respective dates of the execution thereof, were absolutely void, were made valid and effective by the retrospective portion of section 1447 of volume one of Hill's Code of this State;" and that the section thus applied was in violation of the Fourteenth Amendment; and further that the Supreme Court "did not express any written opinion on the question so raised as aforesaid, except such as is necessarily involved by the decree of this court in the above entitled action, dated on the seventeenth day of September, A.D. 1892, and affirming the whole of the decree of the Superior Court of Whatcom County, State of Washington, in the above entitled action, entered and filed in the office of the clerk of the said Superior Court on the 20th day of February, A.D. 1892; and such opinion as is expressed by the statement of this court in its written opinion in the above entitled action, that the color of title necessary to support a claim by adverse possession in respondent, the Bellingham Bay Land Company, rests and depends solely upon a warranty deed from the owner, Betsy Jones, executed by her husband, Thomas Jones, by virtue of

the power of attorney urged and alleged by respondent to have been made valid by the retrospective part of the said code section; which said statement, as set forth in the opinion of this court, is an integral and necessary part of the decision by this court rendered in affirming the said decree of the lower court."

In respect of the Supreme Court, it is provided by section 5 of the Code of Procedure of Washington that: "In the determination of causes, all decisions of the court shall be in writing, and the grounds of the decision shall be stated;" and by sections 68 and 73 it is made the duty of its clerk to record its proceedings and enter its orders, judgments and decrees. And the thirteenth rule of the court provides that "all opinions of the court shall be recorded by the clerk in a well bound volume, and the original filed with the papers in the case." 2 Washington, 689.

It is the settled course of decision that this court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the state court. *Kreiger* v. *Shelby Railroad Co.*, 125 U. S. 39, 44.

If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution of the United States, and another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the decision, this court will not review the judgment. *Eustis* v. *Bolles*, 150 U. S. 361, 366.

If it appears that the court did in fact base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction. *Klinger* v. *Missouri*, 13 Wall. 257.

Nor can this result be in any respect controlled by the certificate of the presiding judge, for the office of the certificate, as it respects the Federal question, is to make more certain

and specific what is too general and indefinite in the record, but it is incompetent to originate the question. *Parmelee* v. *Lawrence*, 11 Wall. 36; *Powell* v. *Brunswick County*, 150 U. S. 433.

If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, this must appear on the face of the record before the decision can be reëxamined in this court, and this is equally true where the denial of a title, right, privilege or immunity under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, is urged as the ground of jurisdiction.

In its opinion the Supreme Court of Washington, after stating the case, said: "The proof of two facts was attempted by the respondent, the establishment of either of which would be fatal to appellant's claim. The facts attempted to be proven were as follows: (1) That plaintiff's title to the land in controversy had been acquired by adverse possession; (2) that Betsy Jones had executed a power of attorney to her husband, Thomas Jones, authorizing him to sell the disputed premises." Thereupon, after overruling a contention by the appellant that under the pleadings as framed no testimony tending to prove adverse holding was admissible, the court took up the first proposition, and held that plaintiff had established his title by adverse possession during the statutory period; that the adverse possession was actual, notorious, exclusive and continuous, under claim or color of title; that Eldridge entered into possession under the highest claim of title, to wit, a warranty deed from the owners, and on the day he received the deed, which was recorded the next day, took actual possession of the land, and maintained it for over twenty-nine years before the commencement of the action or any assertion of defendant's claim; and that defendant had knowledge of Eldridge's reputed ownership prior to his acquisition of the rights of the alleged heirs. Having reached this result, the court added: "This renders an investigation of the second proposition discussed unnecessary." Thus it appears that the decision of the court rested on a ground that

did not involve the question of the validity of the power of attorney and deed. As the record disclosed this ground of defence, and as the opinion put the decision solely on that ground, it would be quite inadmissible to allow a certificate of the presiding judge to overthrow that conclusion. This certificate does not have that effect, and we cannot believe that any such result was intended. It was evidently drawn by counsel, as was indeed admitted at the bar, and states that a Federal question was duly raised, but the Chief Justice declined to say that it was decided except as such decision might be involved in the affirmance of the whole of the decree of the Superior Court, or by the statement of the court in the opinion that "the color of title necessary to support a claim of adverse possession" depended on the deed of Betsy Jones executed by her husband by virtue of the power of attorney.

Although the Superior Court found as a conclusion of law that plaintiff was entitled "to have the existence and validity of the said power of attorney from Betsy Jones established by decree of the court," yet the terms of the decree in that regard simply established the power of attorney, which might well enough be held to mean the establishment of its existence, it having been lost and not recorded, and not of its validity; but if a broader signification be attributed, still the affirmance of the decree, which adjudicated that plaintiff was the owner and that defendant was not, and quieted the title of plaintiff, did not amount to a decision of the alleged question, as the legal efficacy of the power of attorney as a muniment of title became immaterial in view of the ground on which the decision of the Supreme Court was placed.

Nor was the question of the validity of the act of February 2, 1888, necessarily disposed of by anything stated in the opinion. The judgment proceeded on claim of title as well as color of title. The court held that Eldridge entered into and maintained actual possession under claim of title, and it seems to be settled in Washington that "actual, uninterrupted and notorious possession, under claim of right, is sufficient without color of title." *Moore* v. *Brownfield*, 7 Wash. 23.

In *Probst* v. *Presbyterian Church*, 129 U. S. 182, this court

held that it was not necessary that the holder by adverse possession should have a paper title under which he claimed, if he asserted ownership of the land and this assertion was accompanied by an uninterrupted possession. *Ewing* v. *Burnet*, 11 Pet. 41, and *Harvey* v. *Tyler*, 2 Wall. 328, were cited, and it was said: "The fair implication in both these cases is that where possession is taken under claim of title, it sufficiently shows the intention of the party to hold adversely within the meaning of the law upon that subject. There is no case to be found which holds that this adverse claim of title must be found in some written instrument." In this case the Superior Court found that Eldridge and his grantees had been nearly thirty years "continuously and now are in the actual, open, notorious and adverse possession of all of the said property under claim and color of title," and this finding was reiterated by the Supreme Court.

"The intention guides the entry and fixes its character," said the court in *Ewing* v. *Burnet*, and the state courts had no difficulty as to Eldridge's intention in making the entry. Clearly it was within the province of those courts to determine what constituted a sufficient claim of ownership to set the statute in motion. Eldridge entered with the intention of asserting and did assert ownership, and it was for the state courts to say what the effect of that adverse possession was, whether the Jones deed was void or voidable.

Moreover, as to color of title, it is held in Washington that a void deed, accompanied with actual occupancy, is sufficient to set the statute in motion. *Ward* v. *Higgins*, 7 Wash. 617, 624.

This is the usual rule as to general statutes of limitations, though as to short statutes in relation to sales of real estate for taxes a different view has been expressed. *Pillow* v. *Roberts*, 13 How. 472; *Hall* v. *Law*, 102 U. S. 461, 466; *Redfield* v. *Parks*, 132 U. S. 239; *Hurd* v. *Brisner*, 3 Wash. 1. Prior to December 1, 1881, the limitation of actions for the recovery of real property or the possession thereof was twenty years, and this by the territorial act of that date was reduced to ten years. The general statute of limitations was relied on

here and there was an adverse possession for nearly thirty years.

No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a State to a statute of limitations of a State, *Bausermann* v. *Blunt*, 147 U. S. 647, and we perceive no reason for disregarding it in this instance.

We are of opinion that jurisdiction cannot be maintained on the ground that the validity of the act of February 2, 1888, being section 1447 of the General Laws of Washington, was drawn in question and its validity sustained.

It is urged that jurisdiction may be sustained on two other grounds, namely, that a right claimed under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, by virtue of the patent issued for these lands, was denied by the decision; and that the validity of the territorial act of December 1, 1881, being section 26 of the Code of 1881, now section 112 of the state Code of Procedure, (2 Hill, 37,) was drawn in question as contrary to the Constitution, and its validity sustained.

We are unable to discover that Federal questions in these particulars were raised or disposed of by the decision.

The contention seems to be that the patent for this land was not issued until September 6, 1871; that the statute of limitations did not begin to run until that date; that as the action was commenced June 9, 1891, a period of less than twenty years elapsed between these two dates, and that the decision of the Supreme Court, if rested on twenty years' adverse possession, held that the bar commenced at a date anterior to that of the patent and in that way denied rights claimed under it; and if rested on ten years, gave a retrospective effect to the act of December 1, 1881, as ten years had not elapsed between that date and the commencement of the action.

There does not seem to have been any controversy as to the effect of the issue of the patent. The Superior Court in its findings simply referred to the fact that by the certificate and the patent the west half of the land was donated to Thomas

and the east half to Betsey Jones, and found nothing as to when the patent issued; and the Supreme Court made no reference to the matter.

If resort be had to the evidence, it appears therefrom that the patent issued September 6, 1871, and that the right to the patent matured prior to 1862 when Mrs. Jones left the Territory. The execution and delivery of the patent after the right to it had become complete were the mere ministerial acts of the officers charged with that duty. *Barney* v. *Dolph*, 97 U. S. 652; *Simmons* v. *Wagner*, 101 U. S. 260. The state courts could properly hold under the circumstances of this case that the statute of limitations was set in motion when that right accrued, and was not postponed to the issue of the patent.

Eldridge did not occupy the position of a stranger to the title, not connected therewith by transfer from the original holder. If the Jones deed was sufficient to sustain claim or color of title if the patent had issued March 28, 1862, its sufficiency for that purpose could not be rendered any the less by the issue of the patent at a subsequent time, and, in any view of the alleged infirmities of the deed, the patent would take effect by relation rather than operate extrinsically to the destruction of the claim under the original owners.

The judgment of the Supreme Court was based on twenty years' adverse possession. We presume as § 760 of the Code of 1881 provided that no right accrued before the code took effect should be affected by its provisions, the court was of opinion that the act of December 1, 1881, could not be availed of to lengthen the time originally prescribed. At all events it was for the state court to determine the applicable bar, *Murray* v. *Gibson*, 15 How. 421, and we cannot take jurisdiction to review its judgment.

Writ of error dismissed.

CORNELL *v.* GREEN.

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

No. 160. Argued March 18, 19, 1896. — Decided May 18, 1896.

In order to give this court appellate jurisdiction under the act of March 3, 1891, c. 517, § 5, upon the ground that the case "involves the construction or application of the Constitution of the United States," a construction or application of the Constitution must have been expressed or requested in the Circuit Court.

A decree of the Circuit Court, dismissing on general demurrer, for want of equity, a bill filed by a grantee of land, praying that proceedings for foreclosure, to which his grantor was made a party as executor and as guardian, but not individually, be set aside for the alleged reason that the grantor was not a party to or bound by those proceedings, does not "involve the construction or application of the Constitution of the United States," within the meaning of the act of March 3, 1891, c. 517, § 5.

This was a bill in equity, filed by John E. Cornell in the circuit court of Cook county in the State of Illinois, against Hetty H. R. Green, Julius White, trustee, and Benjamin E. Gallup, trustee, to redeem land in Chicago from two mortgages, and to set aside a decree of foreclosure thereof, and a sale and conveyance under that decree. The case was in substance as follows:

George W. Gage, being the owner in fee simple of the land, mortgaged part of it on July 22, 1871, to White as trustee, and the rest on May 7, 1873, to Gallup as trustee; and on December 18, 1874, conveyed the whole in fee to William F. Tucker, by deed duly recorded.

On September 24, 1875, Gage died, leaving a widow, Sarah H. Gage, and six children, two of them minors, and a will by which he appointed William F. Tucker, Lewis L. Coburn and the widow his executors, and devised to them all his real estate.

On November 27, 1875, Mrs. Green, having become the

owner of the debts secured by both mortgages, filed a bill in equity to foreclose them, against Sarah H. Gage, described as widow of George W. Gage, and executrix of his will; his six children, including the two minors; "William F. Tucker, Joseph K. Barry and John W. Clapp, all of whom are residents of the county of Cook, State of Illinois, and citizens of said last named State, and guardians of said minor children, the said William F. Tucker being also one of the executors of the last will and testament of the said George W. Gage, deceased;" Coburn, described as an executor of Gage's will; White, Gallup and other persons. That bill set forth the mortgages, and breaches of the conditions thereof, and Gage's death, family and will; and alleged that Gage, on December 18, 1874, conveyed to said Tucker all the land in question, subject to said incumbrances; and "that said above named parties against whom this bill of complaint is brought have, or claim to have, some interest in said premises described in said trust deed, by mortgage, judgment, conveyance or otherwise; but your oratrix states those interests, whatever they are, are subject to the rights of your oratrix under her securities before mentioned, and cannot be set up against the same, nor in any way interfere therewith;" and prayed for process "directed to the said Sarah H. Gage and the other defendants hereinbefore named." In the subpœna issued upon that bill, and in the officer's return thereon, Tucker was described as guardian and as executor, and not otherwise.

On April 5, 1876, none of the defendants above mentioned having appeared or answered to that bill, (except Gage's two minor children, who appeared by a guardian *ad litem*, and submitted their rights to the court,) an order was entered that the bill be taken for confessed against them, and the case referred to a master to ascertain the amounts due upon the mortgages. On July 31, 1876, a decree was entered, confirming the report of the master, and ordering a sale of the land by him to satisfy the amounts found due. On December 7, 1876, the land was accordingly sold by auction to Mrs. Green. On February 2, 1877, a final decree was entered, confirming the sale, and foreclosing the mortgages; and on February 3, 1877,

pursuant to that decree, a deed of the land was made by the master to Mrs. Green.

On September 13, 1887, Tucker died, intestate, leaving a widow, and three children, all of age. His widow died before the end of the year; and in January and February, 1890, his three children conveyed to Cornell, by deeds duly recorded, all the land described in the two mortgages.

On April 4, 1890, Cornell filed the present bill against Mrs. Green, and the trustees named in the two mortgages, setting forth his own title, and the mortgages, and a copy of the record of the proceedings upon the bill of foreclosure; alleging "that the said William F. Tucker was the owner, in his own right, of all said property, and so appeared of record at the time said bill for foreclosure was filed as aforesaid, and during the pendency thereof, and at the time of said sale, and still continued to be the owner thereof up to the time of his death; that the said William F. Tucker was not made a party defendant to said foreclosure proceedings, nor was the said William F. Tucker ever in court or subject to the orders, decrees and judgments of said court; that said decree of foreclosure, so entered as aforesaid, was of no binding force or effect upon said Tucker, nor upon his heirs, nor upon your orator, the grantee of said property as aforesaid;" and praying that, upon payment by the plaintiff of the sums due upon the mortgages, the mortgages might be released, and the decree of foreclosure and the deed to Mrs. Green be set aside and annulled.

On April 21, 1890, this suit was removed into the Circuit Court of the United States for the Northern District of Illinois, upon the petition of Mrs. Green, duly alleging that the plaintiff was a citizen of Illinois, and that she was a citizen of Vermont, and that there was in the suit a controversy which could be fully determined as between them, being citizens of different States.

On May 26, 1890, Mrs. Green demurred generally to this bill, for want of equity. On July 14, 1890, the court sustained the demurrer, and dismissed the bill, upon the ground, as stated in its opinion, that Tucker in his individual capacity

was sufficiently made a party to the bill of foreclosure, and was bound by the decree thereon. 43 Fed. Rep. 105.

On July 7, 1892, Cornell appealed to this court; and assigned, as errors, the dismissal of his bill for want of equity; the refusal to grant the prayer of his bill; and the decision that his grantor, Tucker, was barred of his equity of redemption by reason of the foreclosure proceedings, "in a case in which Sarah H. Gage, William F. Tucker, executor and guardian, and others, were defendants, the said Tucker never having been personally sued or served with process, or in any way submitted himself to the jurisdiction of said court, and that said finding deprived said complainant of his property without due process of law."

Mr. Lyman Trumbull, *Mr. F. B. Dyche* and *Mr. Robert Rae* for appellant. *Mr. Richard S. Thompson* was on their brief.

Mr. Charles W. Ogden for appellee.

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

No question of the jurisdiction of the Circuit Court has been certified to this court; and the appellate jurisdiction of this court is sought to be maintained upon the single ground that the case "involves the construction or application of the Constitution of the United States," within the meaning of the Judiciary Act of March 3, 1891, c. 517, § 5. 26 Stat. 828.

But, in order to bring a case within this clause of the act, the Circuit Court must have construed the Constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the Constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.

The case at bar, as shown by the record, was simply this: Gage made two mortgages of land, conveyed the equity of

redemption to Tucker, and died, leaving a widow and minor children, and a will appointing his widow, Tucker and a third person his executors, and devising all his real estate to them. The mortgages were foreclosed, pursuant to a decree *pro confesso*, upon a bill in equity, which stated the above facts, and in which Tucker was named as a defendant, as executor of Gage, and as guardian of his minor children, but not in his individual capacity, and was described in the same way in the subpœna. Cornell, claiming title by deed from Tucker's heirs, brought the present bill to redeem the land from the mortgages, and to set aside the proceedings for foreclosure; and therein alleged that Tucker owned the land at the time of all those proceedings, and until his death, and was not made a party to those proceedings, nor subject to the orders of the court therein, and that the decree of foreclosure was of no binding force or effect upon Tucker, or upon his heirs, or upon Cornell as their grantee.

The Circuit Court, upon general demurrer, dismissed this bill for want of equity, holding that in the former suit Tucker was sufficiently made a party to bind him by the decree in his individual, as well as in his representative capacity. 43 Fed. Rep. 105.

The Constitution of the United States is not mentioned in the bill of Cornell, or in the demurrer of the defendant, or in the decree or the opinion of the court. The case appears to have been treated throughout as depending upon a question of chancery practice, not of constitutional right. The first indication of anything like an intention on the part of the plaintiff to invoke the protection of the Constitution of the United States is in the suggestion, in the assignment of errors, "that said finding deprived said complainant of his property without due process of law."

The case is governed in every respect by recent decisions construing the same clause of the act of Congress.

In a case decided at this term, it was said by the Chief Justice, in delivering judgment: "A case may be said to involve the construction or application of the Constitution of the United States, when a title, right, privilege or immunity is

claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891." *Ansbro* v. *United States*, 159 U. S. 695, 697, 698.

In support of that judgment, several cases were cited, two of them very like the case at bar. *Carey* v. *Houston & Texas Railway*, 150 U. S. 170, 181; *In re Lennon*, 150 U. S. 393, 401.

Appeal dismissed for want of jurisdiction.

Mr. Justice Brown dissenting.

Had Tucker not been made a party to the bill at all, and the court had attempted to dispose of his rights to the land in question, upon the sale under the foreclosure proceedings, there could be no doubt that it would be treated as an attempt to deprive him of his property without due process of law, and that such sale would have been invalid as against him, his heirs or vendees, under the Fourteenth Amendment.

This is in substance exactly what is claimed in this case. The bill averred broadly that he was not made a party at all, but the court, putting its own construction upon the foreclosure proceedings, which were made an exhibit to the original bill, decided that he was. Whether he was bound individually by the proceedings against him in his representative capacity — in other words, whether he individually *was* a party defendant to the bill — is beside the question. It is sufficient that he is averred not to have been, that a construction of the Constitution was necessarily involved, and that

the position of the plaintiff in that connection is not a frivolous one, or wholly destitute of foundation. *Chicago Life Ins. Co.* v. *Needles*, 113 U. S. 574.

That it requires us to put a construction upon the pleadings in the foreclosure suit does not militate against this position, as we have repeatedly held in analogous cases, where a contract is claimed to have been impaired by state legislation, that we would put our own construction upon such contract, and then inquire whether it had been impaired. *Jefferson Bank* v. *Skelly*, 1 Black, 436, 443; *New Orleans Water Co.* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 293; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492.

It seems to me this case should have been determined upon its merits, and I therefor dissent from the opinion of the court.

LOWE *v.* KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 174. Submitted March 24, 1896. — Decided May 18, 1896.

A person upon whose oath a criminal information for a libel is filed, and who is found by the jury, as part of their verdict acquitting the defendant, to be the prosecuting witness, and to have instituted the prosecution without probable cause and with malicious motives, and is thereupon adjudged by the court to pay the costs, and to be committed until payment thereof, in accordance with the General Statutes of Kansas of 1889, c. 82, § 326, and who does not appear to have been denied at the trial the opportunity of offering arguments and evidence upon the motives and the cause of the prosecution, is not deprived of liberty or property without due process of law, or denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

An information, in the name and behalf of the State of Kansas, by J. V. Beekman, the county attorney of Chatauqua County, against one F. Keifer, for a criminal libel upon Sandy

Lowe, was filed September 28, 1889, in the district court of that county and State, and was afterwards, upon the defendant's motion for a change of venue, transferred to the district court of Elk county for trial.

Annexed to the information was the affidavit of Lowe, subscribed and sworn to before the clerk of the court, "that the allegations and averments contained in the foregoing information are true."

The General Statutes of Kansas of 1889 contain the following provisions:

By section 309 of chapter 31, regulating crimes and punishments, "In all indictments or prosecutions for libel, the jury, after having received the direction of the court, shall have the right to determine, at their discretion, the law and the fact."

By section 326 of chapter 82, establishing a code of criminal procedure, "Whenever it shall appear to the court or jury trying the case, that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid."

At the trial of this information, the court, in charging the jury, after reading these statutes, and giving directions as to the law of libel, further instructed the jury as follows:

"You will observe that section 326 aforesaid provides that the jury may in any case find that the prosecution has been instituted without probable cause and from malicious motives, and when the jury do so find it is their duty to state the name of the prosecuting witness in their finding, and in such case the prosecuting witness may be by the court adjudged to pay the costs in the case, and he may be by the court committed to the jail until the same are paid or secured to be paid; and in this case, if you are of the opinion that the provision of said section ought to be enforced, you are at liberty to and ought to enforce the same."

"You will observe from section 309, above quoted, that you

are, in your discretion, the judges of both the law and the fact of this case; and, this being so, we can only direct you as best we may to the law of the case."

The jury returned the following verdict: "We, the jury impanelled and sworn in the above entitled case, do upon our oaths find the defendant not guilty; and we do further find that this prosecution was instituted without probable cause and from malicious motives, and that the name of the prosecuting witness is S. Lowe."

The court, "being satisfied therewith, ordered that the same stand as and for the verdict of the jury;" and thereupon ordered "that the defendant F. Keifer be discharged and go hence without day."

Lowe then moved that so much of the verdict as found "that this prosecution was instituted without probable cause and from malicious motives" be set aside, and that he have a new trial in that respect, for the reasons "that the said S. Lowe, upon the trial already had, has not been heard and could not be heard, either in person or by counsel, in his own defence, touching the matter and things above mentioned as stated and contained in said verdict, being neither plaintiff or defendant in this prosecution;" and that the verdict was contrary to the law and the evidence; and that the instructions aforesaid were erroneous; and also moved in arrest of judgment, for the same reasons, and because "he has the right, by the law of the land, to be so heard in his own defence, and to a separate trial concerning his liability as prosecuting witness in this action, which separate trial he hereby demands of this court."

The court overruled both motions; and, upon a further hearing on the verdict, adjudged that "the prosecuting witness, S. Lowe, in the above entitled action, pay all costs of said action, taxed at $1053.40," and be committed to the county jail until he paid the costs or executed a sufficient bond to pay them within six months.

To all these instructions and rulings, and to the judgment aforesaid, Lowe excepted, and tendered a bill of exceptions, which was allowed by the court.

Counsel for Appellant.

Lowe appealed to the Supreme Court of the State, which affirmed the judgment, upon an opinion of the Supreme Court Commissioners, holding that the constitutionality of section 326 of chapter 82 had been settled by the decision of *In re Ebenhack*, 17 Kansas, 618, (in which the Supreme Court upheld the constitutionality of the similar provision of section 18 of chapter 83, concerning proceedings before justices of the peace for misdemeanors,) and that, according to the decision of the Supreme Court in *State* v. *Zimmerman*, 31 Kansas, 85, as the jury were expressly authorized by the statute to determine both the law and the fact, neither the trial court nor the appellate court of the State had power to interfere with the verdict. 46 Kansas, 255.

A motion for a rehearing was overruled by the Supreme Court of the State in an opinion, which, after citing the decision in *Ebenhack's case*, proceeded and concluded as follows: "After a defendant is acquitted, the State is not entitled to a new trial before a jury as to which party must pay the costs. The prosecuting witness is so connected with the State in the trial that, after the acquittal of the defendant, he cannot demand a re-trial upon the evidence before another jury. If costs are improperly taxed by the court after the acquittal of the defendant, of course a motion can be made for the re-taxation, and a proper inquiry may be had thereon. In this case, it appears that the district court approved the verdict of acquittal, and also the finding of the jury against the prosecuting witness; therefore, in this case, the court below pronounced judgment of acquittal, and for the commitment of the prosecuting witness, in accordance with its own opinion — not merely the opinion of the jury." 47 Kansas, 769, 770.

Lowe thereupon sued out this writ of error, contending that he had been deprived of his liberty or property without due process of law, and had been denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States.

Mr. George Chandler for appellant.

No appearance for appellee.

Opinion of the Court.

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

The code of criminal procedure of the State of Kansas provides that "whenever it shall appear to the court or jury trying the case, that the prosecution has been instituted without probable cause and from malicious motives, the name of the prosecutor shall be ascertained and stated in the finding; and such prosecutor shall be adjudged to pay the costs, and may be committed to the county jail until the same are paid, or secured to be paid." Kansas Gen. Stat. of 1889, c. 82, § 326.

The only question presented by the record for the determination of this court is whether this enactment, as applied by the Supreme Court of Kansas to this case, contravenes the Fourteenth Amendment of the Constitution of the United States, by depriving Lowe of his liberty or property without due process of law, or by denying him the equal protection of the laws.

Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases. *Murray* v. *Hoboken Co.*, 18 How. 272, 277; *Dent* v. *West Virginia*, 129 U. S. 114, 124.

By the common law, at first, while no costs, *eo nomine*, were awarded to either party, yet a plaintiff who failed to recover in a civil action was amerced *pro falso clamore*. Bac. Ab. Costs, A; *Day* v. *Woodworth*, 13 How. 363, 372. And from early times the legislature and the courts, in England and America, in order to put a check on unjust litigation, have not only, as a general rule, awarded costs to the party prevailing in a civil action, but have, not infrequently, required actual payment of costs, or security for their payment, from the plaintiff in a civil action, or even from the prosecutor in a criminal proceeding.

For instance, plaintiffs have been required, by general statute or by special order, to give security for the costs of the

action, or to pay the costs of a former suit before suing again for the same cause. *Shaw* v. *Wallace*, 2 Dall. 179; *Hurst* v. *Jones*, 4 Dall. 353; *Henderson* v. *Griffin*, 5 Pet. 151, 159. Third persons allowed to intervene, on condition of giving bond to pay costs, may be compelled to do so by attachment, without remitting the payee to suit upon the bond. *Craig* v. *Leitensdorfer*, 127 U. S. 764, 771. And in an information to enforce a charitable trust a relator is required, who may be compelled, if the information is not maintained, to pay the costs. *Attorney General* v. *Smart*, 1 Ves. Sen. 72, and note; *Attorney General* v. *Butler*, 123 Mass. 304, 309.

English statutes, from long before the American Revolution, authorized costs against informers upon a penal statute, or against private prosecutors of an indictment or information, to be awarded by the court, either absolutely, or unless the judge, before whom the trial was had, certified that there was probable cause for the prosecution. Stats. 18 Eliz. c. 5; 27 Eliz. c. 10; 4 W. & M. c. 18, § 1; 13 Geo. III, c. 78, § 64; Bac. Ab. Costs, E; *The King* v. *Heydon*, 1 W. Bl. 356; *S. C.* 3 Burrow, 1304; *The King* v. *Commerell*, 4 M. & S. 203; *The Queen* v. *Steel*, 1 Q. B. D. 482. In like manner, by the act of Congress of May 8, 1792, c. 36, § 5, "if any informer or plaintiff on a penal statute, to whose benefit the penalty or any part thereof, if recovered, is directed by law to accrue, shall discontinue his suit or prosecution, or shall be nonsuit in the same, or if upon trial a verdict shall pass for the defendant, the court shall award to the defendant his costs, unless such informer or plaintiff be an officer of the United States specially authorized to commence such prosecution, and the court before whom the action or information shall be tried, shall at the trial in open court, certify upon record, that there was reasonable cause for commencing the same, in which case no costs shall be adjudged to the defendant." 1 Stat. 277. And that provision has been substantially reënacted in section 975 of the Revised Statutes.

If the statute of Kansas, now in question, had provided that, upon the failure of the prosecution, the prosecutor should be absolutely liable to pay the costs, and should be committed

until he paid or secured them, there could have been no doubt of the validity of the statute. Or if the statute had made him liable for costs unless the court before which the trial took place certified that there was probable cause for instituting the prosecution, its validity would have been equally clear. The liability imposed upon him by the statute is less than in either of the cases supposed. He is not made absolutely liable for the costs; nor is a certificate of probable cause required to protect him from liability. But the burden is thrown upon the defendant of proving want of probable cause, as well as malicious motives, on the part of the prosecutor, before the latter can be charged with the costs.

In the case at bar, there can be no doubt of the prosecutor's identity, for he signed and made oath to the information, and was named in the verdict. Being the actor in the litigation, he had no right to complain of being obliged, if unsuccessful, to pay the costs upon the conditions previously prescribed by the legislature. Whether the question of probable cause for the prosecution, as affecting the question of costs, should be tried and determined by the court or the jury, and with or after the main question of the guilt of the defendant, is matter of convenient practice, not of constitutional right. A prosecution for libel, at least, can hardly be tried without exhibiting to the court and jury the motives and grounds of action of the prosecuting witness. It is not to be doubted that, by virtue of the statute, he had the right, if seasonably claimed, to be heard, and to introduce evidence, at the trial of the case, upon the question whether he instituted the prosecution without probable cause and from malicious motives. The record transmitted to this court omits all the oral testimony offered at the trial, and contains nothing having any tendency to show that at the trial he was denied the opportunity of offering arguments or evidence in support of his good faith and probable cause, or requested of the court any ruling or instruction upon that subject. It was after the verdict had been rendered in accordance with the statute, and after the trial court, "being satisfied therewith," had approved it, that he appears, for the first time, to have asserted — as a ground for setting aside that

part of the verdict which found "that this prosecution was instituted without probable cause and from malicious motives" — that he had not and could not have been heard upon that matter at the trial.

The Supreme Court Commissioners, indeed, expressed an opinion, based upon the decision in *State* v. *Zimmerman*, 31 Kansas, 85, that the finding of the jury could not be reviewed by the court. 46 Kansas, 255. But the Supreme Court of the State, in its opinion delivered upon denying a motion for a rehearing, put the final judgment upon the grounds that the prosecuting witness was so connected with the State in the trial of the prosecution, that he was not entitled to a separate trial by another jury upon the question of his liability for costs; and that "the court below pronounced judgment of acquittal, and for the commitment of the prosecuting witness, in accordance with its own opinion — not merely the opinion of the jury." 47 Kansas, 769, 770. And there is nothing in the statute, or in either of the opinions delivered below, to countenance the theory that the prosecutor had not the right to be heard, at the trial before the jury, upon every question which was to be determined by their verdict. If any evidence, offered upon one of the issues on trial, is incompetent upon the other issue, its effect must be restricted accordingly by the instructions of the court, as in the case of two persons indicted jointly, pleading separately, and tried together. *Sparf* v. *United States*, 156 U. S. 51, 58.

The necessary conclusion is that the proceeding by which judgment for the costs of the prosecution was rendered against the present plaintiff in error was due process of law.

As the statute is applicable to all persons under like circumstances, and does not subject the individual to an arbitrary exercise of power, it has not denied him the equal protection of the laws. *Duncan* v. *Missouri*, 152 U. S. 377.

Judgment affirmed.

Mr. Justice Brown dissenting.

Did the statute of Kansas require broadly that the prosecutor in every criminal case should be held liable for costs, I

should have felt much less hesitation in acceding to the views of the majority of the court, since the name of the prosecutor can easily be ascertained, either from the original complaint, by an inspection of the record, or from the testimony upon the trial, and I have no doubt that it is within the competency of the legislature to make him responsible for such costs.

But the difficulty with the statute in question is that it makes him responsible only upon the contingency that the prosecution was instituted without probable cause and from malicious motives, and authorizes the jury to find this fact from the testimony introduced upon the trial of the principal case, without giving the prosecutor any opportunity of rebutting such testimony, by proving that the prosecution was instituted in good faith, and with probable cause to believe that the defendant was guilty. Such evidence would be obviously incompetent in the principal case, since the very testimony that would tend to show probable cause and acquit him of malicious motives would also tend to the prejudice of the defendant, and would be inadmissible against him. For example, suppose A should make a complaint against B for larceny, and upon the trial, either by reason of the death, illness or absence of his witnesses, or through the efforts of B and his friends to spirit them away, he might be unable to offer any testimony against him, of course B would be acquitted; and A would be adjudged guilty of having instituted the prosecution maliciously and without probable cause, notwithstanding that he might have been able to show that he had made the complaint upon the statement of these witnesses that they had seen B take the property, and had afterwards seen it in his possession. Such testimony would obviously not have been admissible upon the trial of B, since it would not only have been hearsay, but it would have seriously prejudiced him in the eyes of the jury. At the same time, it would be obviously necessary to the exoneration of A.

It is a fatal objection to the statute that it undertakes to settle in one trial the rights of two parties to a criminal cause whose interests are adverse, and to try two distinct and disconnected issues, viz., the guilt of the principal defendant and

the innocence of the prosecutor upon testimony applicable to but one of such issues. It seems to me entirely clear that, if the prosecutor can be subjected to a judgment for costs and to imprisonment, without being able to lay before the jury the testimony which would tend to his acquittal, he is deprived of his liberty and property without due process of law, within the meaning of the Fourteenth Amendment.

Notwithstanding that this was a prosecution for libel, in which it might be expected that the motives of the prosecutor would appear more clearly than in ordinary prosecutions, the statute appears to have worked a peculiar hardship upon the defendant. As stated in the opinion of the court, after the verdict was rendered, Lowe moved to set the same aside so far as it bore against him, upon the ground that he had not been heard, and could not be heard, in his own defence, and also moved in arrest of judgment upon the same ground, but the court denied both motions, and upon appeal to the Supreme Court, that court held, following in that particular *State* v. *Zimmerman*, 31 Kansas, 85, that, under section 326 of the Criminal Code, above cited, the court had no power to set aside a verdict of acquittal, and that it was equally powerless to set aside the verdict against the prosecutor, inasmuch as it was a part of the verdict of acquittal. In delivering the opinion, the court says: "The force of another universal practice of courts everywhere ought to be adverted to, and that is that when a jury returns a verdict of not guilty in a criminal case the trial court has no power to set it aside or modify it in any respect. These findings against the prosecuting witness were a part of a verdict of a jury in a criminal case, wherein express power by statutory enactment is given a jury to determine both the law and the facts. The trial court has no power to interfere with that verdict in any prejudicial respect, and this court is as powerless as the court below." In neither the principal opinion nor in the opinion upon motion for a rehearing was there any intimation that the prosecutor had been or could be heard in his own defence, notwithstanding his whole case was rested upon that ground.

It results then that, under the construction given by the

Supreme Court to this statute, the verdict and judgment against the prosecutor, however unjust it may be, is one which no court has power to set aside, because it is a part of the verdict of acquittal of the defendant in the principal action, and the court cannot set aside one part of the verdict without setting aside the whole. If any further argument were needed to satisfy one of the great injustice of this statute, it would seem that this construction supplied it.

The unnecessary hardship of the statute is the more manifest when compared with certain sections of the Revised Statutes of the United States, having a similar object. Thus, by section 970, when, in certain prosecutions instituted by a collector of customs or other officer, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause for the seizure, the court shall cause the proper certificate thereof to be entered, and the claimant shall not be entitled to costs nor the prosecutor be liable to suit. In such case the certificate is granted or refused by the court upon a hearing of both parties subsequent to the trial of the main issue and upon motion of the United States for such certificate. *Averill* v. *Smith*, 17 Wall. 82; *United States* v. *Abatoir Place*, 106 U. S. 160; *United States* v. *Frerichs*, 16 Blatch. 547; *The City of Mexico*, 25 Fed. Rep. 924.

A similar procedure is contemplated by section 975, making the informer or plaintiff in a penal statute liable for costs, unless he be an officer of the United States authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same. So also, by section 989, it is made the duty of the court to certify that there was probable cause for certain acts done by the collector or other officer, under which it has been decided that the certificate may be granted by another judge than the one before whom the verdict was rendered, and after an execution has issued, as well as before. *Cox* v. *Barney*, 14 Blatch. 289. In all these cases a separate finding by the court is evidently contemplated.

Indeed, in section 327 of the Criminal Procedure of Kansas, immediately following the section by authority of which

judgment was entered in this case, it is provided that "if a person charged with a felony shall be discharged by the officer taking his examination, or if recognized or committed for any such offence, and no indictment or information be preferred against him, the cost shall be paid by the prosecuting witness, unless the court shall find that there was probable cause for instituting the prosecution, and that the same was not instituted for malicious motives." This section is apparently not obnoxious to the objection above made, since it contemplates a hearing by the court upon the question of probable cause and the motive for the prosecution.

In *State* v. *Ensign*, 11 Neb. 529, the Supreme Court of Nebraska, construing a statute similar to the one in question, held that the legislature had exceeded its power. "The mere failure," said the court, "to prove the charge made in a complaint is not conclusive evidence of the want of probable cause or of malice. A party may be convinced of the existence of a tippling or gambling shop at a certain place, or of other means by which the morals of the community are corrupted or debased, and yet upon the trial, from the peculiar or secret nature of the business, may be unable to prove the charge. Does such a case upon the trial assume the form of a contest between the accused and the accuser as to which shall be imprisoned? We think not."

I do not think it constitutional to so frame a criminal law as to make it incumbent upon the prosecutor to enter a complaint at the peril of being mulcted in costs in case the prosecution was malicious, without giving him an opportunity of showing that the complaint was in good faith and with probable cause to believe that the defendant was guilty.

For these reasons I am unable to concur in the opinion of the court.

NORTHERN PACIFIC RAILROAD COMPANY *v.* EGELAND.

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

No. 238. Argued and submitted April 20, 1896. — Decided May 18, 1896.

When, in an action by a railroad employé against the company to recover damages for injuries suffered while on duty, the inference to be drawn from the facts is not so plain as to make it a legal conclusion that the plaintiff was guilty of contributory negligence, the question whether he was or was not so guilty must be left to the jury.

The defendant in error, plaintiff below, was a common laborer in the employ of the plaintiff in error. When returning from his work on a train, the conductor ordered him and others to jump off at a station when the train was moving about four miles an hour. The platform was about a foot lower than the car step. His fellow-laborers jumped and were landed safely. He jumped and was seriously injured. He sued to recover damages for those injuries. *Held*, that the court below rightly left it to the jury to determine whether he was guilty of contributory negligence.

The case is stated in the opinion.

Mr. C. W. Bunn for plaintiff in error submitted on his brief.

Mr. Henry J. Gjertsen for defendant in error.

Mr. Justice Peckham delivered the opinion of the court.

This action was brought in the United States Circuit Court for the District of Minnesota, Fourth Division, by the plaintiff against the railroad company to recover damages which he alleged he had sustained by reason of the neglect of the agents and servants of the company. The plaintiff had a verdict, and the judgment entered thereon was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. 12 U. S. App. 271.

The questions in the case arise on the exceptions taken to the refusal of the court to instruct the jury as follows:

"First. That there is no negligence shown on the part of

the defendant which would entitle the plaintiff to recover a verdict against the defendant.

"Second. That even if there should be any negligence shown on the part of the defendant, yet the plaintiff was guilty of such contributory negligence that he could not recover in this action."

The only ground for a new trial urged upon us has been the second of the two just stated, and we shall confine the discussion to that ground alone.

Upon the trial, evidence was given upon the part of the plaintiff tending to show that he was one of a section crew going out to work on the defendant's road and coming back daily. He and the rest of the crew were brought to their work and taken back from it by the defendant in a train consisting of a caboose and several flat cars drawn by an engine, all under the control of one Potter, the conductor. Potter controlled all the men, including plaintiff, from the time they boarded the work train in the morning until they left the train in the evening, and during the day directed the men, including the plaintiff, what work to do. Returning on the train from his day's work by daylight on September 13, 1890, plaintiff was in the caboose, as it neared the Lake Park station, where he and some others of the crew were to leave the train. The train slowed down as it came to the station and was running between four and five miles an hour when Potter, the conductor, gave orders to the men to get off. Three of the crew jumped down upon the platform of the station, which was about a foot below the car step. They landed safely, and plaintiff was then ordered by Potter, the conductor, to jump. He threw his shovel and dinner pail on the platform so that he might more easily get off himself, and then jumped in the direction in which the train was moving, supposing that was the safest way. He landed on the platform, and then in some way fell and hurt himself. He jumped because, as he said, he was told to by the conductor, and because he thought he could do so safely, or the conductor would not have given the order. He relied on the conductor's direction at the time he jumped, and at that time the train,

which had been slowing up, was going not faster than four miles an hour.

These are the principal and material points in the case which the plaintiff's evidence tended to establish as facts. It must be upon the assumption that they are facts that the defendant's requests to charge as above set forth are to be treated.

The trial judge, after the refusal to charge as requested by the defendant, did charge, among other things, as follows:

"I instruct you that to jump off a railroad train moving at a rate of speed of four or five miles an hour is presumably a negligent act *per se*, and that in order to rebut this presumption of negligence and recover for an injury sustained from so jumping the plaintiff must satisfy you that he was ordered and directed to do so by the conductor, Potter, and he must do that by a preponderance of evidence. Plaintiff admits the jumping, and he attempts to excuse the act, and in order to do that he must satisfy you that Potter ordered and directed him so to do, and also that the order was calculated to divert his attention from the danger of jumping, or that the order created a situation which interfered with his free agency to some extent, and such order created a confidence that the attempt could be made with safety.

* * * * *

"If the danger to be met by jumping was manifestly great, it was obviously dangerous, so that an ordinarily prudent person in the same situation would not have jumped, then it was contributory negligence to obey the direction of the conductor, if the same was given. But if the danger was not so great under the circumstances but that the plaintiff might reasonably believe that he could obey it by taking proper care, particularly as his superior commanded it, and if his purpose was to obey in pursuance of his sense of duty, and without waiting to think or consider the risk and danger he jumped, then it would not be contributory negligence to obey and jump. So the question that presents itself for your determination is, whether under all the circumstances of the case, if you should come to the determination that this instruction or com-

mand was given by Potter to jump when the train was running at the speed testified, whether the plaintiff under those circumstances had the right to rely upon the order, whether he was justified in reasonably believing that he could make the attempt with safety. If the order was not given and he voluntarily jumped off the train, seeing that the others had done so in safety, and he thought he could do the same, then he took the risk; and if in consequence of so jumping he was injured he could not recover because it would be contributory negligence on his part. On the other hand, if the company was negligent and brought this injury upon the plaintiff entirely by its negligence and without any fault on his part, if you find that from the evidence, then the question would be what compensation shall he have for the injuries he has sustained, or what amount will remunerate him for the injury he has suffered."

The charge as above given was duly excepted to by the plaintiff in error, and it is now urged on its behalf that it was erroneous to submit the question of contributory negligence on the part of the plaintiff to the jury, and that the court should have decided as a matter of law that the plaintiff was guilty of such negligence, and should have instructed the jury to return a verdict for the defendant on that ground.

Two cases are cited on behalf of the company as authority for the position taken on its behalf. They are *Railroad Company* v. *Jones*, 95 U. S. 439, and *Kresanowski* v. *Northern Pacific Railroad*, 18 Fed. Rep. 229. The case last cited follows the case in 95 U. S., and both are claimed to be fatal to the right of the plaintiff to recover in this action.

We think the difference between the cases cited and the case at bar is clear and material. The persons injured in those cases were seated, in the first case, on the pilot of the engine, and in the other on the front beam of the engine with his feet over the pilot. The positions were most dangerous, and the danger was plain and obvious at the first sight. No other place on either train was as dangerous, and yet each of the plaintiffs substantially selected his position as a fit and proper place to ride in. The great and obvious danger of the posi-

tions in which the plaintiffs voluntarily placed themselves is the material and controlling fact upon which the cases were decided. So great and so obvious was the danger that when it was urged as an argument in this court that the plaintiff in the *Jones case* had been ordered to ride where he did, and that such order constituted an excuse, the court replied "as well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive." In neither of the two cases cited was there in truth an order to ride on the pilot. In the *Jones case* the plaintiff had been warned about riding on the pilot and forbidden to do so. There was room for him in the box car which was a part of the train, and he could have gone into it in as little if not less time than it took to climb to the pilot. The only foundation for the claim that he was directed to do as he did is found in the statement that when the party was about to leave on their return that evening the plaintiff was told by Van Ness, who was in charge of the laborers when at work, "to jump on anywhere; that they were behind time and in a hurry." To that the court remarked: "The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late and that he must hurry, this was no justification for taking such a risk. . . . His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

In the case in 18 Fed. Rep., it simply appeared that there was not room on the engine for all the men who wished to ride upon their return from their work, unless some rode on the pilot. There is no pretence of a direction given to ride there, and even if there had been it would constitute no justification for thus riding, under the rule as given in the *Jones case*, *supra*. Both these cases, therefore, stand on the same ground, which is the exceedingly dangerous position taken by the plaintiffs upon the engines, the danger of which was open and obvious to every one, and it was therefore held that the

necessary inference or legal conclusion to be drawn from these uncontradicted facts was that the plaintiffs, in their choice of positions on the engines, were guilty of negligence directly contributing to the injury.

In this case the question of negligence depends upon the material difference in the facts, and we are of the opinion that the inference to be drawn from those facts was not so plain as to be a legal conclusion, but was one for the jury to determine. In this case the plaintiff was a servant, a common laborer, in the employment of the company. He was returning from his work on a train provided by the company, and that train was under the command of Potter, the conductor, who was also the direct superior of the plaintiff and the controller of his movements while at work. The plaintiff would naturally, therefore, be inclined to obey the orders of such superior, particularly if they were not of an obviously very dangerous character. Bearing upon the question of danger was the speed of the train at the time the plaintiff jumped. It was then going about four miles per hour, quite slowly; the platform of the station was but about a foot lower than the car step; it was broad daylight; three of his fellow-laborers, in obedience to the orders of the conductor, had themselves jumped and landed safely upon the platform; the plaintiff states that he jumped because of this order, and he says he relied on it, supposing he could jump safely or else the order would not have been given. Taking all these facts together, ought it to be said, as a necessary legal inference therefrom, that the plaintiff in obeying this order was guilty of such an obviously dangerous act as to constitute contributory negligence on his part? The act of jumping under such circumstances cannot, with any regard to common sense, be regarded as of the same obviously dangerous character and to as great an extent as that of riding on the pilot of an engine. If plaintiff reasonably thought he could with safety obey the order by taking care and jumping carefully, and if because of the order he did jump, the jury ought to be at liberty to say whether under such circumstances he was or was not guilty of negligence. If the train had been going at the rate of thirty, or even fifteen, miles per hour,

the chance of injury resulting from a jump would have been so great that plaintiff would probably have obeyed such an order at his own risk. We think a speed of four miles an hour, considering all the facts hereinabove detailed and including the direction to jump, left the question of contributory negligence one for the jury. In this respect we think the trial judge was correct.

This is a different case from one where a would-be passenger at a railroad station attempts to board a passing train while it is in quite rapid motion because of the statement of the conductor on the train that if he wants to take that train he must jump on, as it would not stop. *Hunter* v. *Cooperstown & Susquehanna Valley Railroad*, 112 N. Y. 371. Here there is an element of obedience to the command given by the person in charge of the train and of the crew, and given to a common laborer, and upon a matter where the jury might find the danger was not so great and so obvious as to render obedience to the order a risk of the person obeying.

The case was left for the decision of the jury upon all the facts to say: First, whether the defendant was guilty of negligence in not stopping and giving the order referred to; and, second, if it were thus guilty, whether the plaintiff was himself guilty of negligence contributing to the injury. The jury found in favor of the plaintiff on both the above questions, and we do not think that we ought to interfere.

The judgment should, therefore, be

Affirmed.

TELFENER v. RUSS.

PETITION FOR REHEARING.

No. 462. Presented May 7, 1896. — Denied May 18, 1896.

Petitions for rehearing of a case decided March 30, 1896, 162 U. S. 170, are denied.

Two petitions for rehearing were received.

Mr. Clarence H. Miller and *Mr. Joseph Wheeler* for petitioner.

Mr. Justice Field delivered the opinion of the court.

It is firmly established that the State of Texas cannot, in opposition to its wishes, be compelled to accept an office survey constructed by merely copying and adopting the field-notes of a previous survey made on the ground for other parties by other surveyors, and that such office surveys are not sufficient to enable a purchaser to enforce an executory contract for the sale of public lands under the act of July 14, 1879, as amended March 11, 1881. *Bacon* v. *Texas*, 2 Tex. Civ. App. 692, and cases cited.

We adhere to the ruling that error was committed by the Circuit Court in the manner in which this matter of the necessity of surveys on the ground was left to the jury. We also intimated that it seemed from the evidence, so far as before us, that the surveys in this instance were not in fact made on the ground, but that was not essential to the decision.

Some expressions in our former opinion implying that payment was a prerequisite to recovery are complained of. What we intended to say was that under the pleadings, and on plaintiff's contention as it seemed to be pressed, it was necessary that he should show that he had so far complied with the law as to have obtained a vested right to patents as against the State on making the required payments in the required time, and this we thought he had failed to do as to all the tracts, it being borne in mind that each tract must be treated

as a separate purchase under the statute, as held in *Bacon* v. *Texas*, *supra*, though this contract, as between the parties, was an entire contract for the transfer of rights in the many tracts necessary to make up the agreed number of acres.

Petition denied.

MURRAY *v.* LOUISIANA.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 718. Argued and submitted April 16, 1896. — Decided May 18, 1896.

Congress has not, by Rev. Stat. § 641, authorized a removal of a prosecution from a state court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the State, excluded colored citizens from juries because of their race. Said section does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence. For such denials arising from judicial action after a trial commenced the remedy lies in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated. The denial of, or inability to enforce in the judicial tribunals of a State, rights secured by any law providing for the equal civil rights of citizens of the United States, to which § 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at and during the trial of a case.

Neal v. *Delaware*, 103 U. S. 370, and *Gibson* v. *Mississippi*, 162 U. S. 565, affirmed to the above points.

Rulings of the court below refusing writs of *subpœna duces tecum* held to work no injury to defendant.

The state court, on the trial of the plaintiff in error for murder, permitted to be read in evidence the evidence of a witness taken in the presence of the accused at a preliminary hearing, read to and signed by the witness, the prosecuting officer alleging that the witness was beyond the jurisdiction of the court, and his attendance could not be procured. The bill of exceptions to its allowance was not presented to the trial judge for signature until two weeks after sentence, after refusal of a new trial, and after appeal. The record does not disclose the nature or effect of the

testimony so admitted. *Held*, that there is nothing in this record which would authorize this court to convict the Supreme Court of Louisiana of error in that behalf.

In October, 1894, in the Criminal District Court for the parish of Orleans, State of Louisiana, an indictment for murder was found against one Jim Murray, alias Greasy Jim. On December 13, 1894, the accused was arraigned, pleaded not guilty, and was remanded for further proceedings.

On January 10, 1895, Thomas F. Maher, as attorney for the accused, challenged the grand jury on the ground that it was not a legally constituted body, because the jury commissioner had discriminated against the prisoner on account of his race and color, by having excluded from the venire from which the grand jury was selected all colored men or negroes, which action was charged to be in conflict with the constitution and laws of Louisiana and with the Constitution of the United States.

To procure evidence to sustain his said challenge, the accused by his counsel asked for a *subpœna duces tecum*, directed to Francis C. Zachaire, register of the voters of the parish of Orleans, calling on him to furnish the total number of voters registered in the parish; the total number of white voters registered; the total number of colored voters; the total number of whites and of colored voters who could sign their names at the closing of the registration office of the parish previous to the last Congressional election held on November 6, 1894. Also for a *subpœna duces tecum*, addressed to the jury commissioners of the parish, commanding them to furnish the court, on the trial of the challenge to the grand jury, the names and residences of thirty-five hundred citizens who appeared before them in the month of September, 1894, for qualification as jurors, and the names and residences of the one thousand citizens whom they qualified and placed in the jury wheel, from which the grand jury, which found the indictment in the present case, was drawn. These motions for subpœnas were endorsed by the minute clerk as follows: "Filed subject to orders."

Statement of the Case.

On February 2, 1895, the challenge to the grand jury came on to be heard.

Apparently to save time, the State's attorney offered in evidence and as part of the present record the evidence taken before another section of the court, in the case of the *State of Louisiana* v. *George Heard*, on a challenge to the grand jury, in which similar grounds of challenge had been made. The counsel for the accused, who had also acted as counsel for George Heard, made no objection to the filing of this evidence, but himself filed, as part of the present record, the assignments of error and the bills of exceptions filed by him in the other case.

Among other things there appeared in this evidence in the case of Heard, and was read to the court in the present case, the return of the registry clerk, showing a statement of registered voters of the parish of Orleans, after the general election of November, 1892, viz.: Total number of voters, 59,262, of whom there were native white who sign, 35,382; native born who make their mark, 4571; foreign white who sign, 8283, and who make their mark, 1672; colored who sign, 5431, and who make their mark, 4223. This admitted record contained the testimony of several deputy sheriffs, who served jury summons, and which went to show that few persons of color were so summoned; also the testimony of the three jury commissioners, who testified that colored persons were summoned to appear before the commissioners to qualify as jurors, and that there were names of colored persons in the jury wheel from which this grand jury was drawn. They testified that in taking names from the registration list the commissioners selected them with reference to their qualifications as jurors, without regard to color; that a great many colored men were summoned, and there was no discrimination against colored men.

The court held that the plaintiff's challenge was not sustained by the evidence; that while it was undeniable that the exclusion from the general service of all people of the African race on account of their color would be an unlawful abridgment of the rights of such citizens, yet that the evidence did

not disclose such a case, but showed that the general service was not exclusively made up of the names of white persons, and that it was clearly established that colored people were not excluded on account of their race or color. The challenge was overruled. To which action of the court the accused by his counsel took several exceptions, which were duly allowed and signed.

The defendant then by his attorney made a motion to quash the indictment, upon the allegation that act No. 170 of the acts of 1894, under the provisions of which the grand jury which indicted the accused was organized, was unconstitutional because it did not conform to the provisions of the state and Federal Constitutions, which provide that there shall be no discrimination on account of race, color or previous condition of servitude. The motion to quash was overruled, and thereupon the accused filed an application for the removal of the cause to the Circuit Court of the United States. The allegations of the petition to remove stated the action of the court in overruling the challenge of the grand jury, and that there was a local prejudice against the accused as a colored man charged with having murdered a white man, which would prevent a fair and impartial trial in any state court. This petition was filed in the state court on February 19, 1895. On February 28, 1895, the trial was commenced, and was so proceeded in that on March 1, 1895, the jury found a verdict of guilty.

On March 7, 1895, a motion for a new trial and a motion in arrest of judgment were filed. In a petition accompanying these motions it was made to appear that on February 26, 1895, the accused had filed in the Circuit Court of the United States a petition for a writ of *habeas corpus* and for an injunction forbidding the state court to proceed. No action in the matter appears to have been taken by the United States Circuit Court.

The motion for a new trial and the motion in arrest of judgment were refused, and on March 7, 1895, sentence of death was pronounced against the accused. Certain bills of exceptions to the charge and rulings of the court were

signed, and an appeal to the Supreme Court of Louisiana was allowed. On June 3, 1895, the Supreme Court affirmed the judgment of the trial court, and by a writ of error that judgment of the Supreme Court of Louisiana was brought to this court.

Mr. Thomas F. Maher for plaintiff in error.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, and *Mr. Alexander Porter Morse* for defendant in error submitted on their brief.

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

Several of the assignments of error bring into question the correctness of the judgment of the Supreme Court of the State of Louisiana affirming the action of the trial court in proceeding with the trial in disregard of a petition by the accused to have the cause removed into the Circuit Court of the United States upon the allegation that the petitioner was a negro, and that persons of African descent were, by reason of their race and color, excluded by the jury commissioners from serving as grand and petit jurors.

To dispose of such assignments it is sufficient to cite *Neal* v. *Delaware*, 103 U. S. 370, and *Gibson* v. *Mississippi*, 162 U. S. 565, decided at the present term, in which, after careful consideration, it was held that Congress had not, by section 641 of the Revised Statutes, authorized a removal of the prosecution from the state court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the State, excluded colored citizens from juries because of their race; that said section did not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; that for such denials arising from judicial action after a trial commenced the remedy lay in the revisory power of the higher courts of the State, and ultimately in the power of review which this court

may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated; and that the denial or inability to enforce, in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at and during the trial of the case.

The petition for removal complained of the acts of the jury commissioners in illegally confining their summons to white citizens only, and in excluding from jury service citizens of the race and color of the petitioner, but did not aver that the jury commissioners so acted under or by virtue of the laws or constitution of the State; nor was there shown, during the course of the trial, that there was any statutory or constitutional enactment of the State of Louisiana which discriminated against persons on account of race, color or previous condition of servitude, or which denied to them the equal protection of the laws.

Other assignments ask our attention to errors alleged to have been committed in the course of the trial. It is claimed that the rights of the accused were disregarded in the proceedings under his challenge to the grand jury. The principal matters complained of seem to be the action of the court in endorsing on the challenge to the grand jury the words "filed subject to argument on face of papers;" and on the motion for *subpœna duces tecum*, directed to the registrar of voters, the words "filed subject to orders," and on the motion for *subpœna duces tecum* addressed to the jury commissioners the words "filed subject to orders;" and it is claimed that such indorsements were irregular, deprived the accused of opportunity to sustain the allegations contained in his written challenge and deprived him of due process of law.

The indorsements or orders made upon the various papers

appear to us to have only signified that the court withheld immediate action on the motions. They evidently were not treated by the court as concluding the accused, because the record shows that subsequently the hearing of the challenge was proceeded in, and that evidence was adduced by both the State and the accused.

An exception was taken to the refusal of the court to grant what was termed a *subpœna duces tecum*, directed to Francis E. Zacharie, registrar of voters. The reason given by the court was that the so called writ of *subpœna duces tecum* did not purport to be such, did not describe or refer to any paper or document which was in the possession of the registrar, and which the defendant required. The court was of opinion that either the defendant should have specified the books or documents required ; or, if he wished information from the registrar, he should have subpœnaed him to attend and testify. We perceive no error in this action.

Exception was likewise taken to the refusal of the court to grant a writ of *subpœna duces tecum* on the jury commissioners, not commanding them to produce specified books or papers, but that they should furnish the names and residences of the 3500 citizens whom they had summoned to qualify as jurors. The court thought that the writ asked for was not a writ of *subpœna duces tecum*, and that the defendant, if he desired information from the commissioners, should have subpœnaed them to attend as witnesses. Besides, the defendant had the advantage of their testimony by consenting to the use of their evidence in the *Heard case.*

At all events, no injury was suffered by the defendant by the refusal of the court to grant him the writs prayed for, because the evidence he desired to get did not tend to show that the rights of the accused were denied by the constitution or laws of the State, and therefore did not authorize the removal of the prosecution from the state court.

A more serious question is presented by an exception to the action of the trial court in permitting to be read the evidence of one King Jones, which had been taken in the presence of the accused in open court at a preliminary hearing, and read

to and signed by the witness. The reason given by the district attorney for the use of the deposition was that after due diligence he was unable to procure the attendance of the witness, who was not within the jurisdiction of the court.

The record, however, discloses that the bill of exceptions to the allowance of this evidence was not presented for signature to the judge until March 14, 1885, two weeks after the sentence was rendered, and after a new trial had been refused and an appeal allowed. No error was assigned, in the Supreme Court of Louisiana, to the admission of this evidence, nor is it made the subject of assignment in this court. Neither does the record disclose the nature or effect of the testimony so admitted. In the absence of a bill of exceptions, disclosing at least the substance of the evidence, and of an assignment of error, we are permitted to suppose that the evidence was trivial, and that it did no injury to the defendant. We certainly have nothing in this record which would authorize us to convict the Supreme Court of Louisiana of any error in that behalf.

There was a motion to quash the indictment on the ground that act No. 170 of 1894, under the provisions of which the grand jury was drawn, was unconstitutional in that it was alleged to be a local or special law, and not enacted according to a constitutional requirement of previous public notice. This motion was refused by the trial court, and its action was approved by the Supreme Court of the State. Error is assigned in this court, but no Federal question is thereby presented.

Nor can we perceive any merit in the assignment which avers that this act No. 170 is in conflict with the Fourteenth Amendment to the Constitution of the United States, because such law is alleged to confer on the jury commissioners of the parish of New Orleans judicial powers in the selection of citizens for jury services. It is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute, than that which prevails in other cases, or on the trial of white citizens.

A careful inspection of this record has failed to disclose any

particular in which the accused was deprived of any right or immunity secured to him under the laws or Constitution of the United States, and the judgment of the Supreme Court of Louisiana is accordingly

Affirmed.

SALINA STOCK COMPANY *v.* SALINA CREEK IRRIGATION COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 191. Submitted March 31, 1896. — Decided May 18, 1896.

Without denying its power to pass upon a judgment of the Supreme Court of a Territory on a question of practice, in an equity case, this court is not inclined to do so unless it can perceive that injustice has been done.

The Salina Creek Irrigation Company, a corporation organized under the laws of the Territory of Utah for the purpose of controlling and regulating the waters of Salina Creek, in that Territory, and of furnishing and distributing the same to and among its stockholders, filed its complaint in the District Court of the First Judicial District of the said Territory on February 11, 1890, against the Salina Stock Company, a Utah corporation engaged in the business of stock raising upon a ranch in Sevier County, about twenty-two miles east of the town of Salina, in that county, and Elwin A. Ireland, alleging that the stockholders of the plaintiff company were owners in severalty of lands in the said county aggregating eighteen hundred and sixty-two acres, situated at or near Salina, which lands were valuable for agricultural purposes, but would not produce crops without irrigation; that the greater part of Salina Creek, which flowed in a westerly direction to Salina and to the said lands, was supplied by two branches known, respectively, as Yogo Creek and Neoche Creek; that for more than fifteen years prior to the commission of the injuries complained of, the plaintiff, its stock-

holders and grantors, had been diverting and appropriating, at and near Salina, all the waters of Salina Creek, (the same, as alleged, being otherwise unappropriated,) and had been using the same for domestic purposes and for irrigating their lands, and that for these uses all the water of said creek, when the flow thereof was uninterrupted, was necessary and not more than sufficient. It was averred that at frequent times within the six years next preceding the filing of the complaint the defendants, by means of dams and ditches by them constructed, diverted large quantities of the waters of Yogo and Neoche Creeks, and in the years 1888 and 1889 so diverted nearly all the waters thereof, and thereby greatly diminished the flow of water in Salina Creek; that these acts had been done without the consent of the plaintiff and greatly to the loss and damage of its stockholders, and that the defendants threatened to continue so to divert the said waters, and would so do, to the great and irreparable injury and loss of the plaintiff and its stockholders, unless restrained by injunction. The plaintiff asked, therefore, that the defendants be perpetually enjoined from diverting, appropriating or in any manner interfering with the waters of Yogo and Neoche Creeks.

The defendants filed their answers on March 27, 1890, averring therein that for more than ten years then last past they and their grantors had been entitled to the use, for agricultural, domestic and stock raising purposes, of all the waters of Yogo and Neoche Creeks, by virtue of actual diversion thereof and continuous appropriation of the same for the said purposes during the said period, and were so entitled at the time of the filing of their answer, and that neither the plaintiff company nor its stockholders had any rights with relation to the waters of the said two creeks. They asked for a decree quieting their title.

The court tried the case without a jury, and subsequently filed its finding of facts, which was as follows:

"That the said waters of Neoche and Yogo Creeks flow into and mingle with the waters of Salina Creek, in Sevier County, Utah, and flow down through the bed of said last mentioned creek to and past the lands of the stockholders

of said plaintiff corporation; that in and during the years 1871, 1872 and 1873 the said stockholders of the plaintiff corporation, their predecessors and grantors, diverted from the natural bed or channel of Salina Creek below the confluence of Yogo and Neoche Creeks with Salina Creek, and used and appropriated upon lands adjacent thereto, all the waters of said Salina Creek during the whole of the period from the 15th day of June until the 1st day of November of each and every year, and that during the period from the 1st day of November until the 1st day of April following the water was by said stockholders, their predecessors and grantors, used for domestic and culinary purposes and for the watering of stock, and that during the period from April 1 until June 15 only a small part of the waters of said creek were used. That all of said water was so, as aforesaid, diverted, used and appropriated for culinary, domestic and agricultural purposes, and was necessarily consumed in the households and in the watering of stock and upon agricultural crops. That the waters of said creeks have been continuously since said appropriation so made as aforesaid up to the time of the filing of the complaint herein and are now so diverted, used and appropriated.

"That during the months of April, May and one half of the month of June the waters of said Neoche and Yogo Creeks are high and the flow thereof is greater than is necessary for or than has been used or appropriated by plaintiff corporation or its stockholders, and that the waters of said creeks which were so unused and unappropriated by said plaintiff or its stockholders have been used and appropriated by defendants. That whatever rights in and to the waters of said creeks are owned or held by the said defendants, the same are secondary and servient to the rights of plaintiff.

"That before the commencement of this action the stockholders of plaintiff corporation by their several deeds in writing conveyed to plaintiff corporation all their several rights, titles and interests in and to the waters of Neoche and Yogo Creeks in trust, as hereinbefore stated, and the plaintiff corporation is now the legal owner and holder of said waters and of the rights therein and has the primary right to use control

and divert the same in the manner and to the extent as hereinbefore set forth."

The court also filed its conclusions of law, and these were embodied, in effect, in the following decree, entered February 14, 1891:

"It is ordered, adjudged and decreed that the plaintiff, Salina Creek Irrigation Company, is entitled to the use and appropriation of all the waters flowing, or to flow through, or in those certain creeks known as Yogo and Neoche Creeks, in Sevier County, Utah Territory, during the period from the 15th day of June to the 1st day of November in each and every year; that the said plaintiff is also entitled to the use and appropriation, for culinary and domestic purposes and for the purpose of watering animals, of so much of the waters of said creeks as it may need or require to use during the period from the 1st day of November to the 1st day of April following of each and every year, and that it is entitled to the use and appropriation, for culinary and domestic use, and for the watering of stock and for agricultural purposes, of water from said creeks during the period from April 1st to the 15th of June of each and every year, and that during the last named period the said defendants are also entitled to the use of a portion of the waters of said creek; and it is further ordered, adjudged and decreed that the said defendants, Salina Stock Company and E. A. Ireland, and each of them, and their and each of their servants, agents and employés, be, and they are hereby, perpetually enjoined and forbidden from in any manner using or diverting any of the waters of said Yogo and Neoche Creeks during the period from the 15th day of June until the 1st day of November in each and every year, so as in any manner or to any extent to injure the quality or lessen the flow of said streams or either of them into Salina Creek; and said defendants and each of them are further restrained and enjoined from in any manner diverting, using or appropriating the waters of said creeks during the period from the 1st day of November until the 1st day of April following of each and every year so as in any manner to deprive the said plaintiff corporation or its stockholders of the use of sufficient

of the waters of said creeks for culinary and domestic purposes, and for the watering of stock. And said defendants and each of them are further perpetually restrained and enjoined from in any manner using the waters of said creeks or either of them during any portion of the year or at all so as in any manner to lessen, injure or deteriorate the natural quality thereof."

The defendants moved for a new trial, and their motion having been overruled, they appealed to the Supreme Court of the said Territory, assigning as error, among other things, that there was no evidence to justify the finding and decree of the trial court, and that the decree was so uncertain that the rights of neither of the parties could be ascertained under it.

The said Supreme Court heard and decided the case, and on September 12, 1892, filed its opinion therein, which, after discussing the evidence as it appeared in the defendants' statement on motion for a new trial, observed that it was shown thereby that in the year 1878 the defendants or their grantors diverted a portion of the waters of Yogo and Neoche Creeks several miles above Salina, and continued such diversion during the spring, summer and fall of each year up to the time this action was commenced, for stock raising and culinary purposes, and for the purpose of irrigating land on those tributaries; that those two streams furnished about one third of the waters of Salina Creek, and emptied into it above the land irrigated by the plaintiff; that although a number of the grantors of the plaintiff company were residents of Salina and appropriators of water from Salina Creek prior to the time of the appropriation by the defendants' grantors of the waters of Yogo and Neoche Creeks, no specific rights with relation to the waters of Salina Creek existed in all the grantors of the plaintiff prior to the time when the defendants or their grantors appropriated water from Yogo and Neoche Creeks; that the plaintiff's grantors did not make appropriation of all the waters of Salina Creek prior to the time when the defendants' grantors appropriated nearly all the waters of Yogo and Neoche Creeks in 1878. The opinion then proceeded as follows:

"Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants [defendants] are entitled to the use of more water than is awarded them in the decree of the court below and that said decree as well as the findings of fact should be modified and made more certain so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party without a resort to further proceedings. This should be done upon the proofs taken in the case without the necessity of awarding a new trial. The respondent [plaintiff] should be entitled to the use and appropriation of all the waters flowing or to flow through or in Yogo and Neoche Creeks during the period from and including the fifteenth day of June to the first day of November in each year, except that during twenty-four hours of Monday of each week during that period the appellants should have the exclusive use of one half of the waters flowing through Yogo Creek, and that during twenty-four hours of Friday of each week during that period the appellants should have the exclusive use of one half of the water flowing through Neoche Creek for farming, grazing, stock raising and culinary purposes, and that during all such period the appellants should also have the right to use the waters of both such creeks as may be necessary for watering stock and for culinary purposes only, and that from and including the first day of November to the fifteenth day of June in each and every year the said respondent should be entitled to the use and appropriation of such waters of Yogo and Neoche Creeks as it may need for culinary and domestic purposes and for watering stock and agricultural purposes, not exceeding one half of the waters flowing through such creeks, and that during the same period last stated the appellants shall be entitled to use and appropriate such waters of Yogo and Neoche Creeks as it may need for the same purpose, not exceeding one half of the waters flowing through such creeks, and each party should be enjoined from interfering with the rights of the other under such decree."

The court entered a judgment remanding the case to the

said District Court with directions to modify the decree and findings therein in conformity with the foregoing opinion.

The Salina Stock Company and Elwin A. Ireland (defendants in the District Court and appellants in the said Supreme Court) thereupon appealed to this court, alleging that the said Supreme Court erred in vacating the findings of the District Court, and rendering judgment on the evidence taken at the trial below.

Mr. C. W. Bennett for appellant.

Mr. J. L. Rawlins for appellee.

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

The single question presented in this record is the regularity of the action of the Supreme Court of the Territory of Utah in rendering judgment as follows:

"This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered and adjudged that the judgment of the District Court therein be and the same is hereby modified, and this cause is remanded back to said District Court, with directions to modify the decree and findings therein in conformity with the opinion of this court."

That portion of the opinion of the Supreme Court which was particularly directed to a modification of the decree of the District Court was in the following terms:

"Without entering into a discussion of the other questions presented by the record, we are satisfied from the facts shown that the appellants are entitled to the use of more water than is awarded them in the decree of the court below, and that the decree of the court below, as well as the findings of facts, should be modified and made more certain, so as to settle the whole controversy between the parties; settle it so that it may be ascertained with reasonable certainty how much the court has decreed in favor of either party, without a resort to further proceedings. This should be done upon the proofs

taken in the case without the necessity of awarding a new trial."

Whether this decree was so far final as to be the subject of an appeal to this court might be questionable. But neither of the parties have suggested such a question, and we shall assume that, reading the decree in the light of the opinion, it may be regarded, if unreversed, as a final disposition of the controversy.

We are therefore asked to reverse a final decree of the Supreme Court of the Territory of Utah, in an equity case, on a question of practice. The act of April 7, 1874, c. 80, 18 Stat. 27, provides that, on appeal from a territorial court, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree. No such statement is given us in this record, nor are any of the rulings of the trial court, in the admission or rejection of evidence, complained of. But the sole contention is that it was not competent for the Supreme Court to modify the findings of fact of the court below and enter a judgment on the facts as thus modified — that, if dissatisfied with the findings, the Supreme Court should have sent the cause back for a new trial. Several California cases are cited, in which it was held that when the findings are erroneous it is not the province of the Supreme Court, on appeal, to look into the evidence with a view to reform the findings, and then to enter a judgment in accordance with what the findings ought to have been, but that, in such a case, the Supreme Court will reverse the judgment and remand the cause for a new trial.

While it is true that the Code of Civil Procedure of California is in similar terms to that of Utah, it does not follow that the courts of the latter will be regulated by decisions of California courts in construing the provisions of the code.

Section 3006, vol. 2, Compiled Laws, embraced in the Utah Code of Civil Procedure, is as follows: "The court may re-

verse, affirm or modify any order or judgment appealed from, and may direct the proper judgment or order to be entered, or direct a new trial, or further proceedings to be had."

In the case before us the Supreme Court of Utah has practically interpreted the provision as authorizing it to modify the findings of the court below, and to make a corresponding change in the judgment, without awarding a new trial. Those modifications of the findings and judgment were favorable to the defendants in the trial court, who took the appeal to the Supreme Court of the Territory. Yet they are the parties who have appealed to us to say that, instead of amending the decree in the manner it did, the court should have reversed the judgment, and directed a new trial.

A somewhat similar question was raised in the case of *Stringfellow* v. *Cain*, 99 U. S. 610, which was likewise an appeal from the Supreme Court of Utah. There the Supreme Court of the Territory set aside the findings of the trial court, and directed a decree on the evidence, at the same time making its own findings from the evidence; and this court refused to disturb the decree of the Supreme Court, saying: "Without undertaking to decide what would be the proper practice in an ordinary civil case when the judgment is reversed, and a new trial was refused in the District Court, we are clearly of the opinion that in a suit like this, when all the evidence is before the Supreme Court that could be considered by the District Court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence, and render the judgment which ought to have been rendered by the District Court."

Gray v. *Howe*, 108 U. S. 12, was likewise an appeal from the Supreme Court of the Territory of Utah. There the Supreme Court on appeal had reversed the judgment of a District Court, set aside the findings of that court, and without itself making a new statement of facts in the nature of a special verdict entered a final judgment; and this court held that such record presented nothing for our examination, and that consequently the judgment of the Supreme Court of the Territory must be affirmed on appeal.

It has been frequently held that the authority of this court on appeal from the Supreme Court of a Territory is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings duly excepted to in the admission or rejection of evidence. *San Pedro Company* v. *United States*, 146 U. S. 120; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 447, 450; *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U. S. 509, 514; *Haws* v. *Victoria Copper Mining Co.*, 160 U. S. 303, 312. Without denying the authority of this court to find error in the judgment of the Supreme Court of a Territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority unless we were able to perceive that injustice had been done; and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, and with no exceptions taken to rulings in the admission or rejection of evidence, there is nothing here which we can examine. It follows that the judgment of the Supreme Court of the Territory of Utah must be and is

Affirmed.

BARNITZ *v.* BEVERLY.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 863. Submitted April 13, 1896. — Decided May 18, 1896.

A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

On November 1, 1885, George A. Kirtland executed to Martha Barnitz several promissory notes, covering a principal debt of $1500 and interest, payable semi-annually for five years, at the rate of eight per cent per annum, and after ma-

turity at the rate of twelve per cent per annum. These notes were secured by a mortgage of the same date upon a quarter section of land in Shawnee County, Kansas. The principal note and the last note for interest not having been paid, an action was commenced, on January 21, 1893, in the District Court of Shawnee County by Martha Barnitz to recover on said unpaid notes and to foreclose the mortgage. John L. Beverly and others were made co-defendants with Kirtland. On July 7, 1893, a judgment was rendered against Kirtland for the sum of $2113.46 and costs, and against him and the other defendants for the foreclosure of the mortgage and the sale of the mortgaged premises. Appraisement having been waived, the judgment, pursuing the laws of Kansas, provided for a stay of execution for six months, and that interest should run at the rate of twelve per cent per annum. On January 9, 1894, an order of sale was issued, and on February 12, 1894, the mortgaged property was sold thereunder at sheriff's sale to Martha Barnitz for the sum of $2000. On February 16, 1894, a motion was filed in the District Court for a confirmation of the sale, and this motion came on for hearing on February 26, 1894, when Beverly appeared and claimed to be the owner of the premises, by virtue of conveyances since the date of the mortgage, and to be in possession thereof in good faith by a tenant, and asked the court to order the sheriff to execute to the purchaser only a certificate of purchase, as provided for by chapter 109 of the Laws of Kansas of 1893. The sale was confirmed, and Beverly's motion was overruled, and the court ordered that the sheriff should execute to the purchaser, Martha Barnitz, a deed for the premises.

John L. Beverly took the case on error to the Supreme Court of the State, and that court, on April 30, 1895, affirmed the judgment of the District Court. A motion for a rehearing was subsequently allowed — the membership of the Supreme Court having been in the meantime changed — and on December 7, 1895, the Supreme Court reversed and set aside its previous decision and judgment, reversed the judgment and ruling of the District Court, and directed that a sheriff's deed should not be executed to the purchaser, but that a cer-

tificate of purchase should be given, as provided for by chapter 109 of the Laws of 1893.

To this judgment of the Supreme Court of Kansas a writ of error was sued out from this court.

Chapter 109 of the Laws of 1893 is as follows:

"SEC. 1. After sale by the sheriff of any real estate on execution, special execution, or order of sale, he shall, if the real estate sold by him is not subject to redemption, at once execute a deed therefor to the purchaser; but if the same is subject to redemption, he shall execute to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, together with the amount of the costs up to said date, stating that unless redemption is made within eighteen months thereafter according to law, that the purchaser or his heirs or assigns will be entitled to a deed to the same: *Provided*, That any contract in any mortgage or deed of trust waiving the right of redemption shall be null and void.

"SEC. 2. The defendant owner may redeem any real property sold under execution, special execution, or order of sale, at the amount sold for, together with interest, costs and taxes, as provided for in this act, at any time within eighteen months from the day of sale as herein provided, and shall in the meantime be entitled to the possession of the property; but where the court or judge shall find that the lands and tenements have been abandoned, or are not occupied in good faith, the period of redemption for defendant owner shall be six months from the date of sale, and all junior lien holders shall be entitled to three months to redeem after the expiration of said six months."

"SEC. 23. Real estate once sold upon order of sale, special execution or general execution shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for.

"SEC. 24. The holder of the certificate of purchase shall be

entitled to prevent any waste or destruction of the premises purchased, and for that purpose the court, on proper showing, may issue an injunction; or, when required to protect said premises against waste, appoint and place in charge thereof a receiver, who shall hold said premises until such time as the purchaser is entitled to a deed, and shall be entitled to rent, control and manage the same, but the income during said time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of its legal title.

"Sec. 25. The provisions of this act shall apply to all sales under foreclosure of mortgage, trust deed, mechanics' lien or other lien, whether special or general, and the terms of redemption shall be the same.

"Sec. 26. The sheriff shall at once make a return of all sales made under this act to the court; and the court, if it finds the proceedings regular and in conformity with law and equity, shall confirm the same and direct that the clerk make an entry upon the journal that the court finds that the sale has in all respects been made in conformity to law, and order that the sheriff make to the purchaser the certificate of sale or deed provided for in section 1 of this act."

Mr. D. M. Valentine, *Mr. A. A. Godard*, *Mr. Leonard S. Ferry* and *Mr. Thomas F. Doran* for plaintiff in error.

Mr. E. A. McMath and *Mr. William J. Scott* for defendant in error.

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

No provision of the Constitution of the United States has received more frequent consideration by this court than that which provides that no State shall pass any law impairing the obligation of contracts. This very frequency would appear to have rendered it difficult to apply the result of the court's deliberations to new cases differing somewhat in their facts from those previously considered.

This record discloses that, in the present case, the Supreme Court of Kansas filed two opinions, in which, after elaborate reviews of the decisions of this court, opposite conclusions were reached. The case was twice argued and decided. On the first hearing a majority of that court held, expressing its views in an opinion by Chief Justice Horton, that chapter 109 of the Laws of Kansas of 1893 did not apply to contracts made before its passage, and that, if it did so apply, the law was void, as respects prior contracts, because it impaired their obligations.

A change in the membership of the court having taken place, a rehearing was had; and it was held by a majority of the court, speaking through Chief Justice Martin, that the act in question was applicable and valid in the case of contracts made before and after its passage. *Beverly* v. *Barnitz*, 55 Kansas, 451, 466.

It is the last decision which is brought before us for review. In so far as it construes the act to be applicable to prior contracts, we are, of course, bound by that decision. Whether, when so construed, the act is valid, is a question open for our consideration.

The decisions of this court are numerous in which it has been held that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States. But it will be sufficient for our present purpose to mention a few only.

Bronson v. *Kinzie*, 1 How. 311, 316, holds that a state law, passed subsequently to the execution of a mortgage, which declares that the equitable estate of the mortgagor shall not be extinguished for twelve months after a sale under a decree in chancery, and which prevents any sale unless two thirds of the amount at which the property has been valued by appraisers shall be bid therefor, is within the clause of the Constitution of the United States which prohibits a State from passing a law impairing the obligation of contracts. In

this case, the court dealt with the contention, usually made on these occasions and which is relied on by the defendants in error in the present case, that the law was a regulation of the remedy and did not directly affect the contract; and Chief Justice Taney said:

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

And he quoted the language of the court in *Green* v. *Biddle*, 8 Wheat. 75:

"It is no answer that the acts of Kentucky now in question are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owners, they are just as much a violation of the compact as if they directly overturned his rights and interests. . . . If the remedy afforded be qualified and restrained by conditions of any kind, the right of the owner may, indeed, subsist, and be acknowledged, but it is impaired, and rendered insecure, according to the nature and extent of such restrictions."

Proceeding to apply these principles to the case before him, the Chief Justice further said:

"It was the plaintiff's absolute and undoubted right, under an ordinary mortgage deed, if the money is not paid at the appointed day, to go into the court of chancery and obtain its order for the sale of the whole mortgaged property, (if the whole is necessary,) free and discharged from the equitable interest of the mortgagor. This is his right by the law of the contract; and it is the duty of the court to maintain and enforce it, without any unreasonable delay.

"When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the court; and it must, therefore, be

governed, and the rights of the parties under it measured, by the rules as above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract, and formed a part of it, without any express stipulation to that effect in the deed. Thus, for example, there is no covenant in the instrument giving the mortgagor the right to redeem, by paying the money after the day limited in the deed, and before he was foreclosed by the decree. . . . Yet no one doubts his right or his remedy, for, by the laws of the State then in force, this right and this remedy were a part of the law of the contract, without any express agreement by the parties. So, also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed a part of it, and any subsequent law, impairing the rights thus acquired, impairs the obligations which the contract imposed.

"This brings us to examine the statutes of Illinois which have given rise to this controversy. As concerns the law of February 19, 1841, it appears to the court not to act merely on the remedy, but directly upon the contract itself, and to engraft upon it new conditions injurious and unjust to the mortgagee. It declares that, although the mortgaged premises should be sold under the decree of the court of chancery, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue twelve months after the sale; and it moreover gives a new and like estate, which before had no existence, to the judgment creditor, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable interest in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditor an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests

are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties unquestionably impairs its obligations, and is prohibited by the Constitution."

In *McCracken* v. *Hayward*, 2 How. 608, 612, there came for consideration the validity of a law of the State of Illinois, providing that a sale shall not be made of property levied on under an execution, unless it should bring two thirds of its valuation according to the opinion of three householders. The opinion of the court was pronounced by Mr. Justice Baldwin, in the course of which he used the following language:

"In placing the obligation of contracts under the protection of the Constitution, its framers looked to the essentials of the contract more than to the form and modes of proceeding by which it was to be carried into execution; annulling all state legislation which impaired the obligation, it was left to the States to provide and shape the remedy to enforce it.

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. . . . The obligation of the contract between the parties, in this case, was to perform the promises

and undertakings contained therein; the right of the plaintiff was to damages for the breach thereof, to bring suit and obtain a judgment, to take out and prosecute an execution against the defendant till the judgment was satisfied, pursuant to the existing laws of Illinois. . . . Any subsequent law which denies, obstructs or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied on, to be ascertained by appraisement, or any other mode of valuation than a public sale, affects the obligation of the contract, for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right. The same power in a state legislature may be carried to any extent, if it exists at all; it may prohibit a sale for less than the whole appraised value, or for three fourths, or nine tenths, as well as for two thirds, for if the power can be exercised to any extent, its exercise must be a matter of uncontrollable discretion, in passing laws relating to the remedy which are regardless of the effect on the right of the plaintiff."

In *Howard* v. *Bugbee*, 24 How. 461, a statute of the State of Alabama, authorizing a redemption of mortgaged property in two years after the sale under a decree, by *bona fide* creditors of the mortgagor, was held unconstitutional and void as to sales made under mortgages executed prior to the enactment. It was contended that the law did not affect the mortgage contract, but only enlarged the time at the completion of which the purchaser at the mortgage sale would acquire an indefeasible title, and that the new law only operated as between the purchaser and *bona fide* creditors of the mortgagor. But this court, through Mr. Justice Nelson, recognized the cases of *Bronson* v. *Kinzie* and *McCracken* v. *Hayward* as applicable to and decisive of the case.

Brine v. *Insurance Company*, 96 U. S. 627, 637, is worthy of notice, because in that case the court had occasion to apply the principles of previous cases, announced in protection of the rights of creditors, to the case of a mortgagor whose land had been ordered by the Circuit Court of the United States for the Northern District of Illinois to an immediate sale, in

disregard of a law of the State in existence at the time the mortgage was executed, which allowed to the mortgagor twelve months to redeem after a sale under a decree of foreclosure, and to his judgment creditor three months after that.

The view of the trial court was that remedy of an immediate sale, by decree of the Circuit Court of the United States sitting in equity, was not affected by the state statute. But this court held, through Mr. Justice Miller, that all the laws of a State existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts — that the construction, validity and effect of contracts are governed by the place where they are made and are to be performed, if that be the same — that it is therefore said that these laws enter into and become a part of the contract. In the opinion it was said:

"There is no doubt that a distinction has been drawn, or attempted to be drawn, between such laws as regulate the rights of the parties, and such as apply only to the remedy. It may be conceded that in some cases such a distinction exists. In the recent case of *Tennessee* v. *Sneed*, 96 U. S. 69, we held that so long as there remained a sufficient remedy on the contract, an act of the legislature, changing the form of the remedy, did not impair the obligation of the contract. But this doctrine was said to be subject to the limitation that there remained a remedy which was complete, and which secured all the substantial rights of the party. At all events, the decisions of this court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States."

The learned justice, in enforcing his argument, quoted largely from the opinion of Chief Justice Taney in the case of *Bronson* v. *Kinzie*, as expressing truly "the sentiment of the

court as it was then organized, as it is organized now, and as the law of the case."

These principles were applied in the case of *Seibert* v. *Lewis*, 122 U. S. 284, where, after citing *Bronson* v. *Kinzie*, *Von Hoffman* v. *City of Quincy*, 4 Wall. 535, and *Louisiana* v. *New Orleans*, 102 U. S. 203, as declaring the settled doctrine of this court that "the remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation," the court, through Mr. Justice Matthews, held: That the legislature of Missouri having, by the act of March 23, 1868, to facilitate the construction of railroads, enacted that the county court should, from time to time, levy and cause to be collected, in the same manner as county taxes, a special tax in order to pay the interest and principal of any bond which might be issued by a municipal corporation in the State on account of a subscription, authorized by the act, to the stock of a railroad company, which tax should be levied on all the real estate within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes, it was a material part of this contract that such creditor should always have the right to a special tax to be levied and collected in the same manner as county taxes at the same time might be levied and collected; that the provisions contained in the subsequent enactments of Missouri, respecting the assessment and collection of such taxes, were not a legal equivalent for the provisions of the act of 1868, and that the law of 1868, although repealed by the legislature of Missouri, was still in force for the purpose of levying and collecting the tax necessary for the payment of a judgment recovered against a municipal corporation in the State upon a debt incurred by subscribing to the stock of a railroad company in accordance with its provisions.

The case of the *Conn. Mutual Life Ins. Co.* v. *Cushman*, 108 U. S. 51, does not collide with the previous and subsequent cases. There the new statute did not lessen the duty of the mortgagor to pay what he had contracted to pay, nor affect the time of payment, nor affect any remedy which

the mortgagee had by existing law for the enforcement of his contract.

Neither is the case of *Morley* v. *Lake Shore & Michigan Southern Railway Co.*, 146 U. S. 162, in anywise inconsistent with the cases above cited. The holding there was that the rate or amount which was prescribed by the statute of a State, as damages for a failure to pay or satisfy an existing judgment, was a matter within the control of the State, as a matter of public policy, and did not arise out of the contract between the creditor and the debtor.

Without pursuing the subject further, we hold that a statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Let us briefly apply the conclusion thus reached to the facts of the present case.

The plaintiff was the holder of several promissory notes, dated November 1, 1885, secured by a mortgage of the same date upon a tract of land in Shawnee County, Kansas. The mortgage contained an express waiver of an appraisement of the real estate. Default in payment having ensued, the suit was brought, praying that the mortgaged premises should be sold according to law, without appraisement, that the proceeds arising from the sale should be applied to the payment of the indebtedness due the plaintiff, and that the defendants should be forever barred and precluded of any right of redemption.

Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises the purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or the owner had no possession, title or right in any way to the premises.

Under the new law the mortgagor shall have eighteen months from the date of sale within which to redeem, and, in the meantime, the rents, issues and profits, except what is necessary to keep up repairs, shall go to the mortgagor or

the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest and costs, but of the amount paid by the purchaser, with interest, costs and taxes.

In other words, the act carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged, (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrance,) but a remainder — an estate subject to the possession, for eighteen months, of another person who is under no obligation to pay rent or to account for profits.

The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem.

Obviously this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation.

We, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?

Opinion of the Court.

Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to again levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties.

It is contended that the right to redeem granted by the new statute only operates on the purchaser and not on the mortgagee as such. This very argument was foreseen and disposed of in *Bronson* v. *Kinzie*, where this court said:

"It, the new act, declares that although the mortgaged premises should be sold under the decree, yet that the equitable estate of the mortgagor shall not be extinguished, but

shall continue for twelve months after the sale; and it moreover gives a new and like estate to the judgment creditors to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable estate in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors (meaning creditors other than the mortgagee) an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the Constitution."

The judgment of the Supreme Court of Kansas is reversed and the cause remanded to that court with directions for further proceedings not inconsistent with this opinion.

UNITED STATES *v.* RIDER.

CERTIFICATE OF DIVISION IN OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

No. 197. Argued April 1, 1896. — Decided May 18, 1896.

The scheme of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, precludes the contention that certificates of division of opinion in criminal cases may still be had under Rev. Stat. §§ 651 and 697.

Review by appeal, by writ of error or otherwise, must be as prescribed by that act, and review by certificate is limited by it to the certificate by the Circuit Courts, made after final judgment, of questions made as to their own jurisdiction; and to the certificate by the Circuit Courts of Appeal

of questions of law in relation to which the advice of this court is sought as therein provided; and these certificates are governed by the same general rules as were formerly applied to certificates of division.

On the twenty-third day of November, A. D. 1891, the United States District Attorney for the Southern District of Ohio filed a criminal information in the Circuit Court of the United States for that district against Frank M. Rider, John F. Burgess and Samuel N. Rutledge, charging that on October 15, A. D. 1891, defendants "were then and there the county commissioners in Muskingum County, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter and keep in repair all necessary bridges over streams and public canals, on all state and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum River between Taylorsville and Duncan's Falls, Muskingum County, Ohio; and the Secretary of War of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum River, one of the navigable streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum River by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, Tuesday, the 6th of January, 1891, was set and named as the day when such evidence should be heard before Lieut. Col. Wm. E. Merrill, Corps of Engineers, at the U. S. Engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the third day of February, 1891, and afterwards, to wit, on the 25th day of February, 1891, and after said day of hearing, the Secretary of War gave notice in writing to said defendants,

controlling said bridge as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw-span below the new U. S. lock No. 9, in said river, and requiring the following change to be made, viz., the construction of a draw-span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice, and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891, and that the service of said notice as aforesaid was made on the 3d day of March, 1891, by delivering, personally, a copy thereof to said commissioners, at their office in Zanesville, Ohio. And the said Frank M. Rider, John F. Burgess and Samuel N. Rutledge, county commissioners of Muskingum County, Ohio, as aforesaid, did unlawfully, on, to wit, the fifteenth day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail and refuse to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, contrary to the form of sections 4 and 5 of an act of Congress approved September 19, 1890, in such case made and provided, and against the peace and dignity of the United States of America."

The defendants were tried December 11, 1891, and found guilty as charged in the information, whereupon they moved for a new trial.

On the trial before the District Judge certain questions on the constitutionality of the sections of the act of September 19, 1890, 26 Stat. 453, c. 907, §§ 4 and 5, under which the information was filed, were reserved for hearing and decision upon a motion for a new trial before the Circuit and District Judges. The motion coming on to be heard, those judges were divided in opinion, and certified, under section 697 of the Revised Statutes, the points of disagreement to this court, the questions upon which such division of opinion took place being as follows:

"1st. Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections 4 and 5 of the act of September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river.

"2d. Whether the failure to comply by persons owning and controlling the said bridge with the order of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor."

Mr. Assistant Attorney General Dickinson for plaintiffs in error.

Mr. S. M. Winn, (with whom was *Mr. F. H. Southard* on the brief,) for defendants in error.

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

The appellate jurisdiction of this court is defined by the acts of Congress. By section 6 of the act of April 29, 1802, c. 31, 2 Stat. 156, 159, whenever there was a division of opinion in the Circuit Court upon a question of law, the question might be certified to this court for decision; provided that the case might proceed in the Circuit Court if in its opinion further proceedings could be had without prejudice to the merits; and that no imprisonment should be allowed or punishment inflicted upon which the judges were divided in opinion.

In *United States* v. *Daniels*, 6 Wheat. 542, 547, Chief Justice Marshall explained that "previous to the passage of that act, the Circuit Courts were composed of three judges, and the judges of the Supreme Court changed their circuits. If all the judges were present, no division of opinion could take place. If only one judge of the Supreme Court should attend, and a division should take place, the cause was continued till the next term, when a different judge would attend. Should the same division continue, there would then be the opinion of two judges against one; and the law provided, that in

such case that opinion should be the judgment of the court." Act of March 2, 1793, 1 Stat. c. 22, §§ 2, 333; *Davis* v. *Braden*, 10 Pet. 286. But, continued the Chief Justice, the act of 1802 made the judges of the Supreme Court stationary, so that the same judges constantly attended the same circuit and the court being always composed of the same two judges, any division of opinion would remain and the question continue unsettled. "To remedy this inconvenience, the clause under consideration was introduced." 6 Wheat. 548; *Ex parte Milligan*, 4 Wall. 2.

The act of April 10, 1869, c. 22, 16 Stat. 44, provided for the appointment of a Circuit Judge in each circuit, but this did not repeal the act of 1802, as the same necessity existed as before for the power to certify questions. *Insurance Company* v. *Dunham*, 11 Wall. 1.

By the act of June 1, 1872, c. 255, 17 Stat. 196, whenever in any proceedings or suit in a Circuit Court there occurred any difference of opinion between the judges, the opinion of the presiding judge was to prevail for the time being; but upon the entry of a final judgment, decree or order, and a certificate of division of opinion as under the act of 1802, either party might remove the case to this court on writ of error or appeal, according to the nature of the case. This act continued in force about two years, when it was supplanted by §§ 650, 652 and 693 of the Revised Statutes, by which its provisions were restricted to civil suits and proceedings; and by §§ 651 and 697 the provisions of § 6 of the act of 1802 were reënacted as to criminal cases. *United States* v. *Sanges*, 144 U. S. 310, 321. These sections are printed in the margin.[1]

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[1] SEC. 650. Whenever, in any civil suit or proceeding in a Circuit Court held by a Circuit Justice and a Circuit Judge or a District Judge, or by a Circuit Judge and a District Judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.

SEC. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before a Circuit Court upon which the judges are divided in opinion, the point upon which they disagree, shall, during the

In civil cases, prior to March 3, 1891, the appellate jurisdiction was limited by the sum or value of the matter in dispute, but the jurisdiction on certificate was not dependent thereon, and, after final judgment or decree, if the amount in controversy reached the jurisdictional amount, the whole case was open for consideration on error or appeal, while, if it fell below that, only the questions certified could be examined. *Allen* v. *St. Louis Bank*, 120 U. S. 20; *Dow* v. *Johnson*, 100 U. S. 158. It has always been held that the whole case could not be certified. *Jewell* v. *Knight*, 123 U. S. 426, 433.

In short, under the Revised Statutes, as to civil cases, the danger of the wheels of justice being blocked by difference

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same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

SEC. 652. When a final judgment or decree is entered in any civil suit or proceeding before any Circuit Court held by a Circuit Justice and a Circuit Judge or a District Judge, or by a Circuit Judge and a District Judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagree shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record.

SEC. 693. Any final judgment or decree, in any civil suit or proceeding before a Circuit Court which was held, at the time, by a Circuit Justice and a Circuit Judge or a District Judge, or by the Circuit Judge and a District Judge, wherein the said judges certify as provided by law, that their opinions were opposed upon any question which occurred on the trial or hearing of the said suit or proceeding, may be reviewed and affirmed or reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas.

SEC. 697. When any question occurs on the hearing or trial of any criminal proceeding before a Circuit Court, upon which the judges are divided in opinion, and the point upon which they disagree is certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such Circuit Court, and be there entered of record, and shall have effect according to the nature of the said judgment and order.

of opinion was entirely obviated, and the provision for a certificate operated to give the benefit of review where the amount in controversy was less than that prescribed as essential to our jurisdiction, while as to criminal cases a certificate of division was the only mode in which alleged errors could be reviewed.

The first act of Congress which authorized a criminal case to be brought from the Circuit Court of the United States to this court, except upon a certificate of division of opinion, was the act of February 6, 1889, c. 113, § 6, 25 Stat. 655, by which it was enacted that "in all cases of conviction" of a "capital crime in any court of the United States," the final judgment "against the respondent" might, on his application, be reexamined, reversed or affirmed by this court on writ of error. Up to that time this court had no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction. *United States* v. *Sanges*, 144 U. S. 310, 319; *Cross* v. *United States*, 145 U. S. 571, 574.

By section four of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, it was provided that "the review, by appeal, by writ of error or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States, or in the Circuit Courts of Appeals hereby established, according to the provisions of this act regulating the same."

By section five appeals or writs of error might be taken from the Circuit Court directly to this court in certain enumerated classes of cases, including "cases of conviction of a capital or otherwise infamous crime." And by section six the judgments or decrees of the Circuit Courts of Appeals were made final "in all cases arising under the criminal laws" and in certain other classes of cases, unless questions were certified to this court, or the whole case ordered up by writ of certiorari, as therein provided. *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U. S. 372, 380. Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Courts of Appeals, and in all civil cases by appeal or error without

regard to the amount in controversy, except as to appeals or writs of error to or from the Circuit Courts of Appeals in cases not made final as specified in § 6.

By section fourteen it was provided that "All acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed," and the particular question before us is whether sections 651 and 697 of the Revised Statutes in relation to certificate of division of opinion in criminal cases, though not expressly repealed, still remain in force. If so, and such division of opinion can be certified before final judgment, then all criminal cases, including those in which the judgments and decrees of the Circuit Courts of Appeals are made final, (of which the case at bar is one,) as well as those which may be brought directly to this court, might, at preliminary stages of the proceedings, be brought before us on certificate, and, after judgment, the whole subject be reëxamined on writ of error from one or the other court. This result, in itself, we think could not have been intended, and it is wholly inconsistent with the object of the act of March 3, 1891, which was to relieve this court and to distribute between it and the Circuit Courts of Appeals, substantially, the entire appellate jurisdiction over the Circuit Courts of the United States. *McLish* v. *Roff*, 141 U. S. 661; *Lau Ow Bew's case*, 144 U. S. 47; *Construction Co.* v. *Railway Co.*, 148 U. S. 372.

We are of opinion that the scheme of the act of March 3, 1891, precludes the contention that certificates of division of opinion may still be had under sections 651 and 697 of the Revised Statutes.

Review by appeal, by writ of error or otherwise, must be as prescribed by the act, and review by certificate is limited by the act to the certificate by the Circuit Courts, made after final judgment, of questions raised as to their own jurisdiction and to the certificate by the Circuit Courts of Appeals of questions of law in relation to which our advice is sought as therein provided, and these certificates are governed by the same general rules as were formerly applied to certificates of

Counsel for Parties.

division. *Maynard* v. *Hecht*, 151 U. S. 324; *Columbus Watch Co.* v. *Robbins*, 148 U. S. 266.

It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose, and its terms, the act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error or certificate.

Its provisions and those of the Revised Statutes in this regard cannot stand together, and the argument *ab inconvenienti* that, in cases of doubt below, the remedy by certificate ought to be available, is entitled to no weight in the matter of construction.

The result is that the certificate must be dismissed, and it is so ordered.

Mr. Justice Brewer did not hear the argument and took no part in the decision of this case.

HARRISON *v.* UNITED STATES.

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

No. 294. Argued and submitted May 6, 1896. — Decided May 18, 1896.

A person indicted for robbing a mail-carrier of a registered mail package, and of putting the carrier in jeopardy of his life in effecting it, is entitled under Rev. Stat. § 819 to ten peremptory challenges.

The case is stated in the opinion.

Mr. R. B. Kelly for plaintiff in error. *Mr. John F. Methvin* was on his brief.

Mr. Assistant Attorney General Dickinson, for defendants in error, submitted on his brief.

Opinion of the Court.

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

As stated by counsel for the United States, plaintiff in error was convicted and sentenced to imprisonment for life under an indictment for robbing a mail carrier of the United States of a registered mail package, which charged that in effecting such robbery he put in jeopardy the life of the carrier by the use of dangerous weapons; and was based on the following section of the Revised Statutes:

"SEC. 5472. Any person who shall rob any carrier, agent or other person intrusted with the mail, of such mail, or any part thereof, shall be punishable by imprisonment at hard labor for not less than five years and not more than ten years; and if convicted a second time of a like offence, or if, in effecting such robbery the first time, the robber shall wound the person having custody of the mail, or put his life in jeopardy by the use of dangerous weapons, such offender shall be punishable by imprisonment at hard labor for the term of his natural life."

In the course of impanelling the jury, plaintiff in error challenged three persons peremptorily, and afterwards challenged one Harris peremptorily, but the court held that he was entitled to only three peremptory challenges, which he had exhausted, and overruled the challenge, to which action of the court an exception was duly taken. Harris was then sworn on the jury and sat as a member thereof on the trial. Four other persons were likewise separately challenged peremptorily, the challenges overruled, exceptions taken, and they served on the jury.

If plaintiff in error was entitled to ten peremptory challenges, five persons unlawfully took part as jurors in his conviction. Section 819 of the Revised Statutes provides:

"When the offence charged is treason or a capital offence, the defendant shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all

other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers."

Counsel concedes that at common law "robbery" was a felony and that the word "rob" in the statute was used in its common law sense, and, therefore, admits that the errors assigned in respect of the action of the court in overruling these challenges are well taken. We concur in this view.

Other rulings of the court are questioned in the brief of plaintiff in error, but it is quite improbable that they will occur on another trial and we need not pass upon them.

Judgment reversed and cause remanded with a direction to set aside the verdict and grant a new trial.

ILLINOIS CENTRAL RAILROAD COMPANY *v.* ILLINOIS.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 217. Argued April 14, 15, 1896. — Decided May 18, 1896.

The act of Congress of September 20, 1850, c. 61, granted a right of way, and sections of the public lands, to the State of Illinois, and to States south of the Ohio River, to aid in the construction of a railroad connecting the waters of the Great Lakes with those of the Gulf of Mexico, and over which the mails of the United States should be carried. The State of Illinois accepted the act, and incorporated the Illinois Central Railroad Company, for the purpose of constructing a railroad with a southern terminus described as "a point at the city of Cairo." The company accordingly constructed and maintained its railroad to a station in Cairo, very near the junction of the Ohio and Mississippi Rivers; but afterwards, in accordance with statutes of the United States and of the State of Illinois, connected its railroad with a railroad bridge built across the Ohio River opposite a part of Cairo farther from the mouth of that

Statement of the Case.

river; and put on a fast mail train carrying interstate passengers and the United States mails from Chicago to New Orleans, which ran through the city of Cairo, but did not go to the station in that city, and could not have done so without leaving the through route at a point three and a half miles from the station and coming back to the same point; but the company made adequate accommodation by other trains for interstate passengers to and from Cairo. Cairo was a county seat. *Held*, that a statute of Illinois, requiring railroad companies to stop their trains at county seats long enough to receive and let off passengers with safety, and construed by the Supreme Court of the State to require the fast mail train of this company to be run to and stopped at the station in Cairo, was, to that extent, an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States.

This was a petition for a writ of mandamus, based upon the Revised Statutes of Illinois of 1889, c. 114, § 88, which is as follows:

"Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time, at the railroad station of county seats, to receive and let off passengers with safety."

The petition was filed April 17, 1891, in the circuit court for Alexander county in the State of Illinois, by the county attorney in behalf of the State, alleging that the Illinois Central Railroad Company ran its south-bound fast mail train through the city of Cairo, two miles north of its station in that city, and over a bridge across the Ohio River connecting its road with other roads south of that river, without stopping at its station in Cairo; and praying for a writ of mandamus to compel it to cause all its passenger trains, coming into Cairo, to be brought down to that station, and there stopped a sufficient length of time to receive and let off passengers with safety.

The defendant contended that the statute did not require its fast mail train to be run to and stopped at its station in Cairo; and that the statute was contrary to the Constitution

of the United States, as interfering with interstate commerce, and with the carrying of the United States mails.

By the act of Congress of September 20, 1850, c. 61, entitled "An act granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," the right of way through the public lands, with the right to take earth, stones and timber necessary for the construction of the road, was "granted to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with a branch of the same to Chicago on Lake Michigan, and another via the town of Galena in said State to Dubuque in the State of Iowa;" and a copy of the survey of the road and branches, made under direction of the legislature, was required to be forwarded to the proper land office, and to the general land office in the city of Washington. By §§ 2–4, alternate sections of land on each side of the road were granted to the State of Illinois, "subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroad and branches shall be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." By § 6, "the United States mail shall at all times be transported on the said railroad, under the direction of the Post-Office Department, at such price as the Congress may by law direct." And by § 7, "in order to aid in the continuation of said Central Railroad from the mouth of the Ohio River to the city of Mobile," similar grants of "rights, privileges and liabilities," and of lands, were made "to the States of Alabama and Mississippi respectively, for the purpose of aiding in the construction of a railroad from said city of Mobile to a point near the mouth of the Ohio River." 9 Stat. 466.

The legislature of Illinois, by the statute of February 10, 1851, incorporated the Illinois Central Railroad Company, and empowered it "to survey, locate, construct, complete, alter, main-

tain and operate a railroad, with one or more tracks, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch via the city of Galena to a point on the Mississippi River opposite the town of Dubuque in the State of Iowa;" and by § 15, for that purpose only, ceded and granted to that corporation the right of way and lands granted to the State by the act of Congress of September 20, 1850; and required "the main trunk thereof, or central line, to run from the city of Cairo to the southern termination of the Illinois and Michigan Canal," "and nowhere departing more than seventeen miles from a straight line between" those two points; and required the corporation to mortgage said right of way and lands to the State of Illinois to secure the application of the proceeds of those lands "to the constructing, completing, equipping and furnishing said road and branches, in accordance with the terms of this act, and said act of Congress;" and by § 19, declared "said road and branches to be free for the use of the United States, and to be employed by the Post-Office Department, as provided in said act of Congress." Illinois Private Laws of 1851, pp. 61, 66, 68, 71. And by § 3 of the statute of Illinois of February 17, 1851, that act of Congress was expressly "accepted, and the conditions expressed in said act are hereby agreed to, and made obligatory upon the State of Illinois." Illinois General Laws of 1851, p. 192.

By the statute of Illinois of February 2, 1855, "all railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof; and also to contract for and hold, in fee simple or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property, as shall be necessary and convenient for carrying into effect the object of this act;" and "shall have the right of connecting with each other, and with the railroads of other

States, on such terms as shall be mutually agreed upon by the companies interested in such connection." And by the statute of Illinois of February 25, 1867, "railroads terminating or to terminate at any point on any line of continuous railroad thoroughfare, where there now is or shall be a railroad bridge for crossing of passengers and freight in cars over the same as part of such thoroughfare, shall make convenient connections of such railroads, by rail, with the rail of such bridge; and such bridge shall permit and cause such connections of the rail of the same with the rail of such railroads, so that by reason of such railroads and bridge there shall be uninterrupted communication over such railroads and bridge as public thoroughfares; but by such connections no corporate rights shall be impaired." 2 Starr & Curtis's Statutes of Illinois, pp. 1921, 1922.

By the act of Congress of June 15, 1866, c. 124, entitled "An act to facilitate commercial, postal and military communication among the several States," and having this preamble, "Whereas the Constitution of the United States confers upon Congress, in express terms, the power to regulate commerce among the several States, to establish post-roads, and to raise and support armies: Therefore," it is enacted "that every railroad company in the United States, whose road is operated by steam, its successors and assigns, be and is hereby authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of its destination: Provided, that this act shall not affect any stipulation between the government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road; nor shall it be construed to authorize any railroad company to build any new road, or connection with any other road, without authority from the State in which

said railroad or connection may be proposed;" and "that Congress may at any time alter, amend or repeal this act." 14 Stat. 66.

By the act of Congress of December 17, 1872, c. 4, amended by the supplementary act of February 14, 1883, c. 44, "any person or corporation, having lawful authority therefor, may hereafter erect bridges across the Ohio River, for railroad or other uses, upon compliance with the provisions and requirements of this act," among which are that they shall be built of a certain height above low water mark, and at places and according to plans approved by the Secretary of War; and any bridge constructed under and according to this act is declared to be a lawful structure, to be recognized and known as a post route; and for the transmission over which of the mails, the troops and the munitions of war of the United States, no higher charge is to be made than the rate per mile over the railroads or public highways leading to it; and across which the United States are to have the right of way for postal telegraph purposes. 17 Stat. 398; 22 Stat. 414.

The city of Cairo is situated upon the point of land at the junction of the Mississippi and Ohio Rivers, and is surrounded by high levees to protect it from the river floods; and since 1859 has been a county seat. In 1855, the defendant completed the location and building of its road, and laid and since maintained its track to the bank of the Ohio River, then taking a sharp turn westward, and passing, in the city of Cairo, for the distance of two miles along the Ohio Levee embankment, to a place, less than half a mile from the junction of the waters of the two rivers, and at the intersection of Second and Ohio Levee streets, where its only passenger station in Cairo was established; and until a few months before the filing of the petition ran all its passenger trains to and from that station, and made it the southern terminus of its railroad.

By the statute of Kentucky of March 29, 1886, c. 446, the Chicago, St. Louis and New Orleans Railroad Company and the Illinois Central Railroad Company were authorized "jointly, or either of them separately, to build, erect, construct, and forever maintain, use and operate a railroad bridge

over and across the Ohio River from the Kentucky shore, in Ballard County, opposite the city of Cairo, to any point in the city of Cairo, Illinois," conformably to the conditions and limitations of the acts of Congress of 1872 and 1883, above cited.

Pursuant to that statute, the Chicago, St. Louis and New Orleans Railroad Company, into which various railroad corporations had been consolidated by statutes of the States of Louisiana, Mississippi, Tennessee and Kentucky, and whose line extended from New Orleans to the Ohio River, built a bridge across the Ohio River to low water mark on the Illinois side, to which the jurisdiction of the State of Kentucky extended. *Indiana* v. *Kentucky*, 136 U. S. 479. The north end of this bridge was at that part of Cairo about two miles north of the defendant's station in that city; and the peculiar conformation of the land and water made it impracticable to put it nearer to the junction of the two rivers. The height at which the bridge had to be built, in order to avoid obstructing navigation, required the approaches on both banks to be graded. The approach on the Illinois side was built by the defendant, upon its own land, at the grade of 35 feet to a mile, and beginning a mile and a half off, at Bridge Junction, beyond the corporate limits of Cairo.

After this bridge was built, and the defendant's road was thereby connected with the Chicago, St. Louis and New Orleans Railroad, the defendant put on a daily fast mail train, to run from Chicago to New Orleans, carrying passengers, as well as the United States mail, not going to or stopping at its station in Cairo, but connecting, at a point some nine miles out on the main line, with a short train from that station.

Trains passing over the through route from Chicago to New Orleans, and stopping at Cairo, are obliged to leave the main line at Bridge Junction, and to run down three and a half miles to the Cairo station, and back to the same point on the main line. Six regular passenger trains were so run daily, giving adequate accommodations for passengers to or from Cairo.

The defendant offered to prove that the schedule of run-

ning time of the fast mail train had been fixed by the Post-Office Department of the United States, and could not be changed by the defendant. The court excluded the evidence, "for the reason that it is not competent for the defendant to enter into the contract with the government of the United States, whereby it renders itself incapable of complying with the laws of Illinois;" and allowed an exception to this ruling.

The court granted a writ of mandamus, commanding the defendant to cause its south-bound fast mail train, and all its other passenger trains coming into Cairo, to be run or brought down to its passenger station at the intersection of Ohio Levee and Second streets, and there to be stopped a sufficient length of time to receive and let off passengers with safety.

The defendant appealed to the Supreme Court of the State, which affirmed the judgment; and held that the statute of Illinois concerning the stopping of trains obliged the defendant to cause its fast mail train to be taken into its station at Cairo, and be stopped there long enough to receive and let off passengers with safety; and that the statute, so construed, was not an unconstitutional interference with interstate commerce, or with the carrying of the United States mails. 143 Illinois, 434. The defendant sued out this writ of error.

Mr. William H. Green and *Mr. James Fentress* for plaintiff in error.

Mr. John M. Lansden, (with whom was *Mr. Angus Leek* on the brief,) for defendant in error.

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

The line of railroad communication, crossing the Ohio River at Cairo, and of which the Illinois Central Railroad forms part, has been established by Congress as a national highway for the accommodation of interstate commerce and of the mails of the United States, and as such has been recognized and promoted by the State of Illinois. This will clearly

appear by a brief recapitulation of the acts of Congress and the statutes of Illinois upon the subject.

Congress, in the act of September 20, 1850, c. 61, granted a right of way, and sections of the public lands, to the State of Illinois, to aid in the construction of a railroad in that State from the southern termination of the Illinois and Michigan Canal "to a point at or near the junction of the Ohio and Mississippi Rivers," with branches to Chicago and Dubuque, "to be and remain a public highway, for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," and on which the United States mail should "at all times be transported, under the direction of the Post Office Department, at such price as the Congress may by law direct;" and, in order "to aid in the construction of said Central Railroad," made like grants to the States of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from the city of Mobile "to a point near the mouth of the Ohio River." 9 Stat. 466.

The manifest purpose of Congress was to establish a railroad in the centre of the Continent, connecting the waters of the Great Lakes with those of the Gulf of Mexico, for the benefit of interstate commerce, as well as of the military and postal departments of the government of the United States.

The State of Illinois, by a statute of February 10, 1851, chartered the Illinois Central Railroad Company, and ceded to it the rights and lands granted to the State by the act of Congress, for the purpose of constructing and maintaining within the State such a trunk line and branches, describing its southern terminus as "a point at the city of Cairo," and declaring "said road and branches to be free for the use of the United States, and to be employed by the Post-Office Department, as provided in said act of Congress;" and (as if that were not sufficient) by another statute, a week later, the State expressly accepted the act of Congress, and agreed to be bound by the conditions expressed therein.

By the statute of Illinois of February 2, 1855, all railroad corporations of the State were empowered to make contracts

with each other, and with railroad corporations of other States, for leasing, or running, or connecting their railroads; and by the statute of Illinois of February 25, 1867, railroads terminating at a point at which there was a railroad bridge on a line of continuous railroad thoroughfare were required to be connected by rail, as to make "an uninterrupted communication over such railroads and bridge as public thoroughfares."

By the act of June 15, 1866, c. 124, Congress, for the declared purpose of facilitating commerce among the several States, and the postal and military communications of the United States, authorized every railroad company in the United States, whose road was operated by steam, to carry over its road, bridges and ferries, as well passengers and freight, as government mails, troops and supplies, from one State to another; and to connect, in any State authorizing it to do so, with roads of other States, so as to form continuous lines of transportation. 14 Stat. 66.

By the acts of Congress of December 17, 1872, c. 4, and February 14, 1883, c. 44, bridges were authorized to be built across the Ohio River by any person or corporation, having lawful authority therefor, and with the approval of the Secretary of War; and were declared to be lawful structures and post routes for the transmission of the mails and the troops and munitions of war of the United States. 17 Stat. 398; 22 Stat. 414.

It is not denied that the bridge across the Ohio River from the Kentucky shore to the Illinois shore, opposite the city of Cairo, was constructed by lawful authority, and as permitted by Congress. Nor is it denied that the Illinois Central Railroad Company had the right, under the acts of Congress and the statutes of Illinois, to connect its road with that bridge, and to run its southward bound trains over that bridge as part of a system of interstate communication.

But it is contended, on behalf of the State of Illinois, that the station of the Illinois Central Railroad Company, at the southern terminus of its road in the city of Cairo, having been originally established, and still remaining, at a point some three and a half miles from so much of its main line as forms

part of the through communication by railroad from the State of Illinois across the Ohio River to the State of Kentucky and other Southern States, the corporation is obliged, by a statute of the State of Illinois, to cause all its trains, including the fast mail train from Chicago to New Orleans, to be brought down to that station, and to stop there long enough to receive and let off passengers with safety.

The statute in question is as follows: "Every railroad corporation shall cause its passenger trains to stop upon its arrival at each station, advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety: Provided, all regular passenger trains shall stop a sufficient length of time, at the railroad station of county seats, to receive and let off passengers with safety." Illinois Rev. Stat. of 1889, c. 114, § 88.

It was argued, in behalf of the railroad company, that the whole effect of this section, was to require each train "to stop upon its arrival" at a station, long enough to receive and let off passengers with safety; that the first part of the section only required trains to stop upon arrival "at each station advertised as a place for receiving and discharging passengers upon and from such trains;" that the proviso merely required trains to stop, for a like time, on arriving at "the railroad station of county seats," although not so advertised; and that no part of the section required any train to arrive at, or to go to, any particular station.

The Supreme Court of the State, however, held that the statute not only required every train to stop at every county seat at which it arrived, but that, as Cairo was admitted to be a county seat, the statute required every train passing through the city of Cairo to go to and stop at the station in that city. The construction given to the statute in this particular by the state court does not involve any Federal question, and must be accepted by this court in judging of the constitutionality of the statute. *Chicago &c. Railway* v. *Minnesota*, 134 U. S. 418, 456.

But the decision that the statute, so construed, was not an unconstitutional interference with interstate commerce, or

with the carrying of the mails by the United States, was a decision in favor of the validity of a state statute whose validity was drawn in question on the ground of its being repugnant to the Constitution and laws of the United States, as well as a decision against a right specially set up and claimed under the national Constitution and laws; and is therefore clearly reviewable by this court.

The effect of the statute of Illinois, as construed and applied by the Supreme Court of the State, is to require a fast mail train, carrying interstate passengers and the United States mail, from Chicago in the State of Illinois to places south of the Ohio River, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails, by turning aside from the direct interstate route, and running to a station three miles and a half away from a point on that route, and back again to the same point, and thus travelling seven miles which form no part of its course, before proceeding on its way; and to do this for the purpose of discharging and receiving passengers at that station, for the interstate travel to and from which, as is admitted in this case, the railroad company furnishes other and ample accommodation.

This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States.

Upon the state of facts presented by this record, the duties of the Illinois Central Railroad Company were not confined to those which it owed to the State of Illinois under the charter of the company and other laws of the State; but included distinct duties imposed upon the corporation by the Constitution and laws of the United States.

The State may doubtless compel the railroad company to perform the duty imposed by its charter of carrying passengers and goods between its termini within the State. But so long, at least, as that duty is adequately performed by the company, the State cannot, under the guise of compelling its performance, interfere with the performance of paramount

duties to which the company has been subjected by the Constitution and laws of the United States.

The State may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the State can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic. *Railroad Co.* v. *Richmond*, 19 Wall. 584, 589; *Stone* v. *Farmers' Loan & Trust Co.*, 116 U. S. 307, 334; *Smith* v. *Alabama*, 124 U. S. 465.

It may well be, as held by the courts of Illinois, that the arrangements made by the company with the Post-Office Department of the United States cannot have the effect of abrogating a reasonable police regulation of the State. But a statute of the State, which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States, cannot be considered as a reasonable police regulation.

In *Union Pacific Railroad* v. *Hall*, 91 U. S. 343, cited by the counsel for the State, the writ of mandamus was issued to promote, not to defeat, interstate transportation.

The question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the State, is not presented, and cannot be decided, upon this record.

The result is that the judgment of the Supreme Court of the State, which requires the Illinois Central Railroad Company to cause its fast mail train to be brought into and stopped at its station in Cairo, is erroneous, and must be

Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

WEBSTER *v.* DALY.

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

No. 265. Argued April 30, 1896. — Decided May 18, 1896.

No appeal lies to this court from a decree of a Circuit Court of the United States, ordering that the decree of the Circuit Court of Appeals in a suit for a perpetual injunction against infringement of a copyright be made a decree of the Circuit Court to which it was sent down with a mandate after hearing on appeal from the Circuit Court.

THE case is stated in the opinion.

Mr. A. J. Dittenhoefer for appellant.

Mr. Stephen H. Olin for appellee.

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

Daly filed his bill in the Circuit Court of the United States against George P. Webster and others for the purpose of enjoining and restraining defendants from performing the scene in the play of "After Dark," known as the "railroad scene," on the ground that it was an imitation of a similar scene in complainant's play, "Under the Gaslight," which complainant alleged he had copyrighted August 1, 1867, under the act of February 3, 1831, 4 Stat. 436; and for an accounting. A motion for a temporary injunction was denied by Judge Wallace, June 19, 1889. 39 Fed. Rep. 265.

The cause having been heard on pleadings and proofs by Judge Coxe the former decision was held controlling, and the bill was dismissed. 47 Fed. Rep. 903.

Thereupon complainant carried the case to the Circuit Court of Appeals for the Second Circuit, and the decree of the Circuit Court was reversed, and the cause remanded with instructions to enter the usual decree for account and perpetual injunction. 1 U. S. App. 573.

The mandate of the Circuit Court of Appeals having been sent down to the Circuit Court, that court, Judge Lacombe presiding, entered a decree, November 5, 1892, in accordance therewith, for perpetual injunction and costs, and referred the case to a master to take and state an account of the number of unauthorized performances. Proceedings were had under the references and a report filed January 17, 1893, to which exceptions were taken, and, on April 1, 1893, Judge Lacombe entered a decree overruling the exceptions, confirming the decree, and for costs.

The case was again appealed to the Circuit Court of Appeals and the decree affirmed, June 7, 1893, with costs. 11 U. S. App. 791.

The mandate of the Circuit Court of Appeals was filed in the Circuit Court, June 14, 1893, and that court, Judge Lacombe presiding, entered a decree, which, after referring to the appeal and the mandate, continued thus:

"Now, upon the said mandate and upon all the pleadings and proceedings herein and on motion of Olin, Rives & Montgomery, solicitors for the complainant —

"It is ordered, adjudged and decreed that the decree of the Circuit Court of Appeals be, and the same hereby is, made a decree of this court, and that the final decree of this court, entered herein on the first day of April, 1893, be, and the same hereby is, in all respects affirmed."

July 13, 1893, a petition for the allowance of an appeal was presented, on behalf of defendants below, to Judge Lacombe, who had entered the decrees of the Circuit Court of November 5, 1892, April 1, 1893, and June 14, 1893.

This petition, after setting forth the proceedings in the case from its commencement, concluded:

"Now, therefore, these defendants, George P. Webster and William A. Brady, feeling aggrieved, do hereby appeal to the Supreme Court of the United States from the order and judgment entered on the 14th day of June, 1893, affirming the final decree entered on the first day of April, 1893, and from the order of the United States Circuit Court of Appeals, entered on the 7th day of June, 1893, affirming the final

decree entered April 1, 1893, and directing a mandate to issue affirming the said final decree of April 1, 1893, and also from the mandate issued in accordance therewith, and upon the said appeal defendants intend to bring up for review the order of the United States Circuit Court of Appeals filed on the 5th day of November, 1892, directing that the decree of the United States Circuit Court entered on the 14th day of November, 1891, be reversed, and directing a mandate to issue to the United States Circuit Court accordingly, and also the mandate so issued, and also the decree entered in accordance with the said mandate in the United States Circuit Court on the 5th day of November, 1892, and respectfully pray that the final decree entered on the 1st day of April, 1893, and the interlocutory decree entered on the 5th day of November, 1892, and the bill of complaint, answers, replications, transcript and mandates of the United States Circuit Court of Appeals and decree entered in accordance therewith, and all the pleadings, depositions, evidence, exhibits, proofs and proceedings in the said cause, be sent to the Supreme Court of the United States without delay, duly authenticated; that their appeal may be allowed, and that the Supreme Court may proceed to hear the cause anew, and that the decrees of the Circuit Court entered in accordance with the orders and mandate of the Circuit Court of Appeals may be reversed, and the decree entered herein on the 14th day of November, 1891, dismissing the bill of complaint, may be affirmed or such other decree made as to the said Supreme Court shall seem just."

On the same day Judge Lacombe entered at the foot of the application: "The foregoing appeal is allowed," approved a bond, and signed a citation, on appeal. Among the recitals of the bond was: "And whereas the said defendants, George P. Webster and William A. Brady, appealed to the United States Circuit Court of Appeals from the said final decree entered as aforesaid on the first day of April, 1893, which said Circuit Court of Appeals affirmed the said final decree, and on the 7th day of June, 1893, entered its order directing a mandate to issue affirming the said final decree accordingly

with costs, and a mandate was issued accordingly to the United States Circuit Court, and an order of the United States Circuit Court having been duly made and entered thereon on the 14th day of June, 1893, making the said judgment of the United States Circuit Court of Appeals the judgment of the United States Circuit Court, and awarding to the said complainant and respondent the sum of thirty and $\frac{25}{100}$ ($30.25) dollars costs."

The citation was preceded by a recital that it was issued by "one of the judges of the Circuit Court of the United States for the Southern District of New York, and of the United States Court of Appeals for the Second Circuit," and stated: "Whereas George P. Webster and William A. Brady have appealed to the Supreme Court of the United States from the decree lately rendered in the Circuit Court of the United States for the Southern District of New York made in favor of you, the said Augustin Daly, which decree was affirmed by the United States Circuit Court of Appeals, and the said George P. Webster and William A. Brady have appealed to the said Supreme Court of the United States from the order and mandate directing an affirmance of the said decree and from the decree entered in accordance with the said order and mandate, and filed the security required by law."

These papers, together with an assignment of errors, were filed in the Circuit Court.

Thereafter, and on August 9, 1893, the record was certified by the clerk of the Circuit Court under the seal thereof "to contain a true and complete transcript of the record and proceedings had in said court in the case of Augustin Daly, complainant and appellee, against George P. Webster and William A. Brady, defendants and appellants, as the same remains of record and on file in said office."

This record embraces the pleadings, evidence, master's report, orders, decrees and proceedings in the Circuit Court and the two mandates from the Circuit Court of Appeals, and necessarily does not contain the proceedings in and judgments of the latter court. It does not appear and is

not contended that that court ever entered any order allowing an appeal or that any application and allowance was ever filed therein.

The record was filed in this court August 13, 1893, and the cause docketed as an appeal from the Circuit Court.

The result of all this clearly is that the pending appeal is not an appeal from the Circuit Court of Appeals, and is an appeal from the Circuit Court.

But under the fifth section of the judiciary act of March 3, 1891, appeals will not lie directly to this court except in cases falling within one or the other of the classes of cases therein enumerated, and the case before us is not one of them.

By the sixth section appeals may be taken from the Circuit Courts of Appeals to this court in all cases in which the judgments and decrees of that court are not therein made final, where the matter in controversy exceeds one thousand dollars besides costs, and copyright cases are such cases. But this is not an appeal from the Circuit Court of Appeals. Our appellate jurisdiction is defined by that act and we cannot maintain jurisdiction to review the judgments and decrees of the Circuit Courts except as therein prescribed. It does not help the matter that the Circuit Courts may, by the form of their entries, make the judgments and decrees of the Circuit Courts of Appeals their judgments and decrees. We cannot revise the judgments and decrees of the appellate tribunals except when brought before us by appeal therefrom, writ of error thereto, or by certiorari.

Appeal dismissed.

Mr. Justice Brewer and Mr. Justice Peckham did not hear the argument and took no part in the decision of this case.

PEREGO *v.* DODGE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 273. Argued May 1, 1896. — Decided May 18, 1896.

This complaint being, in effect, a bill to quiet title as against an adverse claim, and the plaintiff having thus voluntarily invoked the equity jurisdiction of the court, he is in no position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law, and such an objection comes too late in the appellate tribunal.

Where a case is one of equitable jurisdiction only, the trial court is not bound to submit issues of fact to a jury; and, if it does so, is at liberty to disregard the verdict and findings of the jury.

By reason of his selection of this form of action, and his proceeding to a hearing and decree without objection, the contention of the appellant in respect of his deprivation of trial by jury comes too late.

The act of March 3, 1881, c. 140, 21 Stat. 505, was not intended to require and does not require all suits under Rev. Stat. § 2326, to be actions at law and to be tried by a jury.

This was a suit brought by William Perego against W. H. Dodge and others in the District Court for the Third Judicial District of the Territory of Utah in pursuance of the provisions of section 2326 of the Revised Statutes. The complaint alleged the title of plaintiff to a mining claim, called the Perego, of which he averred he was in possession; described it; and stated the date of location, existence of the vein and the other facts entitling him to a decree founded upon such title. It was then alleged that defendants had made application for a patent to certain mining claims known as the Mayflower Nos. 4 and 5, and that they had wrongfully surveyed said claims so as to conflict with plaintiff's claim; and, after describing the area in conflict, averred that notice of the application for patent by defendants was published; that within the sixty day period of publication plaintiff filed in the land office his adverse claim, and brought this suit within thirty days thereafter. Plaintiff prayed judgment and relief against defendants, "that the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the said Perego mining

claim and the alleged consolidated claim of Wm. H. Dodge *et al.* upon alleged Mayflower No. 4 and Mayflower No. 5 lode locations and the lodes therein, and quieting and confirming plaintiff's title thereto and possession thereof; that the defendants have no title to or right of possession of said conflict area or the lodes therein or any part thereof; that the defendants be restrained pending the action and upon trial perpetually from entering in or upon said conflict area or the lodes thereon or any part thereof or mining in or extracting any ores or mineral therefrom, and from in any way interfering with the possession thereof; also that the plaintiff have all other and further proper relief, with costs of suit."

Defendants answered denying the material allegations of the complaint, and further affirmatively set up the necessary jurisdictional facts of their location, averred that the required assessment work had been fully performed, claimed a valid location of the Mayflower Nos. 4 and 5, and prayed that defendants be adjudged to be the owners and entitled to the possession of the said Mayflower Nos. 4 and 5 lodes and mining claims, including the area in conflict, and for all other proper relief, and for costs of suit.

The case came on for trial and the parties appeared by their attorneys, as the record states, "present and ready for trial and the case is tried before the court." The trial occupied three days, May 6, 7 and 9, 1891, and on May 11 the following entry was made: "This case having been heretofore tried and submitted to the court, and the court being now fully advised, finds the issues for the defendants, and it is ordered that decree be entered herein in favor of the defendants and against the plaintiff and quieting and confirming the title of the defendants to the area in conflict herein, and plaintiff is allowed thirty days' stay and the same time to file notice of motion and statement on motion for new trial." The District Court made findings of fact and conclusions of law, which commenced as follows: "This cause duly coming on for trial on the merits before the court without a jury, and the court having heard the pleadings, evidence and arguments of the respective counsel, the court now makes and files the following findings of fact and

conclusions of law." The court found the claims of defendants valid and that of plaintiff invalid as against defendants, and that defendants were entitled to a decree "adjudging them to be the owners (subject only to a paramount title of the United States) and in and entitled to the possession of the whole and every part of the said Mayflower No. 4 and Mayflower No. 5 lode mining claims, and as part thereof and belonging thereto the conflict areas described in the complaint and the whole thereof, and adjudging that the plaintiff had not at the time he filed his protest and adverse claim or at any time since, and has not now any right, title or interest in or to said or any part of said conflict areas described in the complaint, and forever enjoining, estopping and debarring the plaintiff and any and all persons claiming by, through or under him from at any time setting up any claim of right or title to said or any part of said mining claim or conflict area, and forever confirming and quieting the defendants' right and title thereto, and awarding the defendants their costs herein as against the plaintiff."

These findings and the decree in accordance therewith were filed and entered on August 18, 1891. On August 5, 1892, plaintiff, acting through other counsel than appeared at the trial, filed a notice of intention to move the court to set aside and vacate the findings and decision and decree, and for a new trial, on the ground: "1st. Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial. 2d. Errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff. 3d. Because the findings and decree are irregular and void as appears by the record." This notice was accompanied by an affidavit that the value of the property exceeded one thousand dollars; that plaintiff had not by himself in person or by attorney, at any time, orally, or in writing, waived his right of trial by jury in said suit, and that he had at all times desired to have the same tried by a jury; that no notice of the decision of the court in the cause had been served upon him or his attorney.

Notice of appeal to the Supreme Court of the Territory of

Utah was filed August 15, 1891, and on August 16, plaintiff was allowed thirty days' time to file an undertaking on appeal. On September 3, a new notice was served of the motion to vacate and set aside the findings and decree and for new trial. On September 10, thirty days was allowed plaintiff for an undertaking on appeal. On September 19, the motion to vacate and set aside the decree and grant a new trial was submitted and overruled, and on October 4, 1892, notice of appeal from that order was given, and an undertaking on appeal was subsequently filed. No statement or bill of exceptions appears in the record. The case was brought to a hearing in the Supreme Court of the Territory of Utah, and the judgment of the District Court was affirmed with costs. 9 Utah, 3. Affidavits of the value of the matter in dispute were submitted and an appeal allowed to this court.

Errors were assigned to the effect that the Supreme Court of Utah erred in affirming the decree of the District Court in that the District Court should have dismissed the complaint because in equity when the remedy was at law; should not have awarded defendants affirmative relief in the absence of a cross complaint; and should not have tried the case without a jury.

Mr. B. F. Lee, (with whom was *Mr. Gerald G. P. Jackson* on the brief,) for appellant.

Mr. Arthur Brown, (with whom was *Mr. William H. Dickson* on the brief,) for appellees.

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

In the Territory of Utah there was but one form of action, legal or equitable, through the intervention of a jury or by the court itself, according to the nature of the relief sought, provided, however, that no party could be "deprived of the right of trial by jury in cases cognizable at common law." Rev. Stat. § 1868; act of April 7, 1874, c. 80, § 1, 18 Stat.

27; Comp. Laws of Utah, § 3126; *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, 513.

By section 3468 of the Code of Civil Procedure of Utah, an action might be brought by any person against another who claimed an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; and this complaint was, in effect, a bill to quiet title, as against an adverse claim, and prayed, accordingly, for a decree quieting plaintiff's title, and adjudicating that defendants had no title or right of possession; for injunction; and for general relief.

We are of opinion that it was competent for the District Court to grant the relief sought, and that it had jurisdiction of the subject-matter. Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law. Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defence at large, is precluded from raising such an objection on appeal for the first time. *Reynes* v. *Dumont*, 130 U. S. 354, 395; *Kilbourn* v. *Sunderland*, 130 U. S. 505; *Brown* v. *Lake Superior Iron Co.*, 134 U. S. 530, 536. Nor did the Supreme Court of Utah err in overruling the contention that affirmative relief was improperly awarded defendants because they had filed no cross complaint. Such relief was sought by the answer, which was treated by the parties and proceeded on by the court as equivalent to a cross pleading. The objection came too late in the appellate tribunal. *Coburn* v. *Cedar Valley Land Co.*, 138 U. S. 196, 221.

Section 2325 of the Revised Statutes points out how patents for mineral lands may be obtained. Application is filed in the proper land office as therein prescribed and notice of such application published, and if no adverse claim is filed at the expiration of sixty days of publication, it is assumed that the applicant is entitled to a patent, and that no adverse claim exists.

Section 2326 provides as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making

the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

It is then provided that after judgment the party shall file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general as to the requisite amount of labor or improvements, and that the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, whereupon a patent shall issue for the claim.

Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession.

In the case before us plaintiff averred that he was in possession, and framed his complaint in that aspect. Having instituted his suit as an equity cause, issues were made up and the case heard and disposed of and went to decree as in equity, and nearly a year afterwards he carried the case to the Supreme Court of the Territory and complained that the decree was fatally erroneous in that a jury trial was not had. But where a case is one of equitable jurisdiction only, the trial court is not bound to submit any issues of fact to a jury, and, if it does so, is at liberty to disregard the verdict and findings of the jury, "either by setting them or any of them aside, or by letting them stand, and allowing them more or less

weight in its final hearing and decree, according to its own view of the evidence in the cause." *Idaho & Oregon Land Improvement Co.* v. *Bradbury*, 132 U. S. 509, 515.

By his selection of this form of action, and his proceeding to a hearing and decree without objection, his present contention in respect of deprivation of trial by jury came too late. Even if the action should have been an action at law, still the court had jurisdiction, and a defective exercise of its power would only amount to an irregularity capable of being waived by the parties and susceptible of correction as any other mere errors are corrected. Indeed, if the case were treated as an action at law, the trial by jury might have been waived, and we think was waived in this instance.

By the fourth section of the act of Congress of March 3, 1865, (13 Stat. 500, c. 86,) carried forward into sections 649 and 700 of the Revised Statutes, it was enacted that "issues of fact in civil cases in any Circuit Court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury."

In *Kearney* v. *Case*, 12 Wall. 275, this statute was considered, and it was held that parties might waive a jury, as they could before the act was passed, without filing a written stipulation, but that in such case no error could be considered in the action of the court on such trial, and that parties would be presumed in this court to have waived their right to trial by jury of issues of fact whenever it appeared that they were present at the trial in person or by counsel and made no demand for a jury. See also *Bond* v. *Dustin*, 112 U. S. 604.

By section 3340 of the Code of Utah, issues of fact in actions at law are required to be tried by a jury, and by section 3378 provision is made for the waiver of a jury as therein prescribed. But, as ruled in *Kearney* v. *Case*, the right may be otherwise waived, and such waiver be sufficient to support the judgment, though not sufficient to authorize the review of the rulings of the court at the trial. Tested by any rule, there can be no question that this record shows such waiver here.

It is true that on the motion to vacate the decree and for a new trial an affidavit was filed that there was no waiver orally or in writing, in person or by attorney, but we suppose that to mean a waiver according to section 3378, and that was not material. Moreover, the Supreme Court held that the notice of intention to move for a new trial, the affidavit and the minutes of the trial court were no part of the record, because not embodied in any statement of case or bill of exceptions, and that appears to be the settled rule in that jurisdiction.

But it is insisted that by force of the act of Congress of March 3, 1881, c. 140, 21 Stat. 505, this class of cases must be disposed of on trial by jury according to the course of the common law, and that either these entire proceedings were absolutely void, not for want of equity but for want of power; or that, at all events, the requirement of trial by jury is imperative and cannot be waived, and that the seventh article of Amendment and the law were violated by proceeding to judgment without it.

The amendatory act provides: "That if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent to the land in controversy until he shall have perfected his title." We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the

object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either, and while the finding by a jury is referred to, we think that, where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure or to prevent the parties from submitting the determination of their controversies to the court.

It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter. *United States* v. *Jones*, 131 U. S. 1; *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U. S. 683, 694.

It was held by Mr. Justice Lamar, when Secretary of the Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the land department to pass on the sufficiency of the proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the government parted with the title. 4 Land Dec. 314, 316. But whatever the extent of the conclusiveness of a judgment under the statute, and granting that the government may be said to be interested in respect to the possessory title, we do not regard the act of March 3, 1881, as intended to require or requiring all suits under section 2326 to be actions at law and to be tried by a jury.

Judgment affirmed.

SINGER MANUFACTURING COMPANY *v.* JUNE MANUFACTURING COMPANY.

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

No. 6. Argued October 16, 17, 1894. — Decided May 18, 1896.

The Singer machines were covered by patents, some fundamental, some accessory, whereby there was given to them a distinctive character and form which caused them to be known as the Singer machines, as deviating and separable from the form and character of machines made by other manufacturers.

The word "Singer" was adopted by Singer & Co. or the Singer Manufacturing Company as designative of their distinctive style of machines, rather than as solely indicating the origin of manufacture.

The patents which covered them gave to the manufacturers of the Singer sewing machines a substantial monopoly whereby the name "Singer" came to indicate the class and type of machines made by that company or corporation, and constituted their generic description, and conveyed to the public mind the machines made by them.

On the expiration of the patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent.

On the expiration of a patent one who uses a generic name, by which articles manufactured under it are known, may be compelled to indicate that the articles made by him are made by him and not by the proprietors of the extinct patent.

Where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; and where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact.

The Singer Manufacturing Company, a corporation organized under the laws of the State of New Jersey, filed its bill

in equity in the Circuit Court of the United States for the Northern District of Illinois against the June Manufacturing Company, an Illinois corporation.

The bill alleged that the complainant was engaged in the manufacture of sewing machines, and had an exclusive right to the word "Singer" as a trade name and "designation" for such sewing machines; it averred that defendant, for the purpose of inducing the belief that sewing machines manufactured and sold by it were made by the complainant, was making and selling machines of the exact size, shape, ornamentation and general external appearance as the machines manufactured by complainant; that the defendant was imitating a described trade-mark which the complainant had for many years placed upon its machines; that it was imitating "devices" cast by complainant in the legs of the stands of the machines manufactured and sold by it; and that the defendant advertised the machines, by it made, by means of cuts and prints, imitations of the cuts and prints made by complainant and representations of the machines manufactured by complainant. An accounting for the profits received by defendant was prayed, as also an injunction to restrain the use by defendant in its business of the word "Singer" as a designation of the machines manufactured by it, and to restrain a continuation of its other alleged wrongful practices.

In its answer, the defendant denied that it had attempted to avail itself of the complainant's "representation" and trade name, or that in anything done by it, it had sought to induce the belief that the machines manufactured and sold by it were manufactured by the complainant, and alleged that the form, size, shape and appearance of its machine were public property, and not the exclusive property of the complainant. It was averred that the defendant constructed its machines on the principles of machines which had been protected by letters-patent, held by the Singer Company, by license or otherwise, but which patents had long since expired, and that the name "Singer" was the generic name of such machines. The defendant admitted that it affixed an oval plate to its machines, but claimed that the device placed by it thereon

was dissimilar to that used by the complainant, and averred that the words "Improved Singer," stamped on such plate, was the correct name of the machine. It was also averred that while formerly an elaborate monogram was placed on said plate, composed of the letters "S. M. Co.," being the initials of the "Standard Manufacturing Company," (a former corporate name of defendant,) that the monogram now placed upon said plate was "J. M. Co." It was also claimed that the device on the legs of the stands of machines manufactured by the defendant was not an imitation of that employed by complainant upon its machines, but that on the contrary the device used by the defendant was adopted by it to prevent confusion in the minds of the public as to the manufacture of the machines.

It appeared from the evidence that the construction of the Singer sewing machines was commenced in 1850, in the latter part of which year the firm of I. M. Singer & Co. was formed. Witnesses testified that the firm named made and introduced the first practical sewing machine. I. M. Singer & Co. continued in the business of manufacturing sewing machines until June, 1863, when that firm transferred all its assets, property, patents and good will to the Singer Manufacturing Company, a corporation formed under the laws of the State of New York, and the manufacture of Singer sewing machines was continued by that corporation. In the year 1873 a new corporation, known also as the Singer Manufacturing Company, was organized under the laws of New Jersey, to which corporation the New York concern transferred its assets. The stockholders in both companies were the same, and the business of the New York corporation has ever since been continued by the New Jersey corporation.

The original members of the firm of I. M. Singer & Co. — I. M. Singer and Edward Clark — were the principal stockholders of both corporations, and on their death, in 1875 and 1882, respectively, their interests passed to their children and grandchildren, who yet are among the principal stockholders of the concern. During the existence of the firm of I. M. Singer & Co., and the life of its successor, the New York

association, the domicil of both was in New York, and after the creation of the New Jersey corporation that company also carried on the business through a general office in New York City.

Machines of various patterns were constructed by the firm and the corporations, intended both for domestic purposes and for use in manufacturing. The differences in the arrangement of varying types of these machines were in some respect essential, and extended to many, but not all, of the mechanical principles employed, although all the machines were in certain particulars covered by a few fundamental patents of which the corporations were owners or licensees. None of the machines, however, were patented as a whole.

The patent to Elias Howe, granted September 10, 1846, and which remained in force until 1867, covered the use of the eye pointed needle in combination with a shuttle and automatic feed. A patent issued to John Bachelder in 1849, and which remained in force until about 1877, covered the principle of a continuous feed. The firm of I. M. Singer & Co. purchased this patent, and it subsequently passed to their corporate successors. A third important patent utilized in the machines was one issued in 1851 to Allen B. Wilson, for a feeding bar. This extended patent expired in 1872. The Singer Manufacturing Company became a part owner of this latter patent.

The use of the patents of Howe and Bachelder were not confined to the Singer machines, but were employed under license by manufacturers of other sewing machines, where an automatic feed was employed.

Nearly one hundred other patents relating to sewing machine mechanism and attachments to sewing machines were owned or controlled from time to time by the Singer firm or its corporate successors, and among those owned by them were "a vibrating presser, thread guide, binders, embroidery attachments," etc. The use of some of these was early discontinued, and others have been and are still in general use by the Singer Company on machines made by it, and some were used under license by other manufacturers.

Whilst it is true that all the patented inventions owned or controlled by the Singer Company were not all used on every type of Singer machine, it is also true that all Singer sewing machines contained some features of some of these inventions which to that extent distinguished them from machines made by others of a similar class. Among the machines made by the Singer corporation, for general domestic use, was one by it styled the "Singer New Family Machine."

These Singer "New Family" machines were intended to take the place of a machine which had theretofore been known as Old Family and letter A machines, and were first sold in the spring or winter of 1866. The New Family machine was essentially different in form and appearance and in some of the mechanical principles employed, from machines of other manufacturers used for similar purposes, and formed a distinctive Singer machine.

Some of its parts were covered by patents. It passed into very general use, and its sale formed a large part of the business of the corporation.

On the front or top of the arm of the machines made by the Singer firm was marked the name "I. M. Singer & Co.," and on those constructed by the corporations the words "The Singer Mfg. Co." At infrequent periods, prior to 1877, the successors of I. M. Singer & Co. marked upon various styles of their machines, sometimes upon the treadle and again on the arm of the machine, the name "Singer" alone, but even where this was done the corporate name of the company was always somewhere affixed to the machines. Some few years before the Bachelder patent expired the Singer Company began, in addition to the name of the corporation, as above stated, to affix to all its sewing machines, of every grade, a trade-mark, which device consisted of a shuttle, two needles crossed with a line of cotton in the form of a letter "S," with a bobbin underneath. This device was placed in the centre of an ellipse. Surrounding the upper half of the device were the words "THE SINGER MFG. CO., N.Y.," and underneath it were the words "Trade Mark;" beneath those words a wreath of flowers. This trade-mark was stamped on a brass

plate of oval shape, which plate was attached at the base of the arm of the machine, so as to be readily seen and to be at once under the eye of a person using or looking at the machine.

The Bachelder patent expired about 1876, and at once on the monopoly which it had created coming to an end, the prices of the Singer machines were very materially reduced, and competitors sprang into existence, who began to manufacture machines which they called Singer sewing machines. Controversies arose between the Singer Manufacturing Company and such persons as to the right of the latter to make machines in the form and appearance of those manufactured by the Singer Company, and their right to style such machines Singer machines. In order to more completely mark the machines made by it, the Singer Company, in 1879, cast their trade-mark on the side of the legs of the stand of each machine, and at the time this was done the following warning was issued:

> *Warning!* To protect the public against the devices of a swarm of counterfeiters every *real* Singer Machine is now being made with our trade-mark *cast into the Stand* as in the above cut.
>
> *Buy No Machine Without It.*

The trade-mark was registered in July, 1885.

As already stated, some of the machines made by the Singer Company before the expiration of the Bachelder and other patents were sporadically marked Singer in addition to the name or initials of the firm or corporation and to the trade-mark. After the expiration of the last of the patents the Singer corporation changed its method and put the word "Singer" on the front and rear of the arm of each machine, unaccompanied with the name of the corporation, except in so far as it appeared on the trade-mark. At all times, also, it was the custom of the Singer Company to mark on its machines the number thereof; these numbers ran consecutively from the beginning, and, therefore, indicated with substantial accuracy the total number of machines made. In

addition all the machines, during the life of the various patents were marked with the numbers of the patents by which the mechanism was in part covered.

The commencement of the Singer business was small. Thus in 1851 the firm of I. M. Singer & Co. employed about twenty-five machinists, and up to that time had only sold about three hundred machines. The proof shows that the business was rapidly pushed, agencies were established in all parts of the world, and the machines became widely known. In the development of the business the Singer Company constantly advertised their machines as "Singers," and they were referred to on the bill-heads, circulars, etc., of the company as "*Singers*," or *Singer* sewing machines. The agents of the company in selling the machines spoke of them as *Singer* machines, and the greater part of the business signs in use by the company and its predecessors at its various offices or agencies, as also its wagons, cards, letter-heads, bill-heads, etc., had upon them the words "Singer Sewing Machines."

The vast increase in the business carried on by the Singer corporation is shown by the fact that in the year 1870, 127,883 Singer machines were sold; in the year 1878, 356,432; whilst in 1882 the sales aggregated 603,292. Of those sold in the year 1882, 451,538 were the New Family Machines.

The defendant started in Chicago in 1879 in the business of manufacturing "sewing machine heads," under the name of the Standard Manufacturing Company, which company purchased a business theretofore carried on by one Hughes, who thereupon entered the employ of the Standard Company as superintendent. A sewing machine head is the mechanical part of a sewing machine ready to be attached to a stand. These heads, thus made, were in all respects similar as to style and pattern to the "New Family Singer."

For some time its entire product was furnished by the Standard Company to one H. B. Goodrich of Chicago, a dealer in sewing machines. In 1880 sales were made to one or two other dealers, and still other customers were supplied in 1881. In the month of June, 1881, the name of the corporation was changed to the June Manufacturing Company.

In the fall of 1881 that company commenced manufacturing the stands as well as heads of machines, and sold its machines direct to dealers throughout the country.

Although the machine heads as stated were in the exact form and shape of the New Family Singer, they contained no mark indicating the source of their manufacture, except an oval brass plate a trifle larger than, but of exactly the same shape as the one found on the Singer machines, and attached at the base of the arm in the same position as the Singer Company placed its plates. Upon this plate the Standard Company stamped in circular form, around the upper half, the words "Improved Singer," with the word "Chicago" at the lower part of the plate, and a monogram, "S. M. Co.," with the words "Trade Mark" above such monogram. The oval plate thus used by the Standard Company continued to be used by the June Company after the change of name; this fact being explained by testimony showing that there was a supply of these plates on hand. When the supply was exhausted, the June Company attached an oval plate of exactly the same description, except that the monogram was "J. M. Co.," and the words "J. Mfg. Co." were placed beneath the monogram. In both of these plates the words "Improved Singer" was cast in prominent lines. The June Company never attempted to register a trade-mark.

On the bed plate of each machine the defendant stamped or cast a number, and on one of these machines put in evidence by complainant the number was 2,543,707. The president of the defendant company gave as an explanation for this method of numbering that he merely followed what he claimed was the custom of other companies, to affix three additional figures to the actual number of the machines manufactured. When the defendant began to make complete machines, that is, including stands, it placed on the latter a device, cast in the legs thereof, in the same relative position as was the trade-mark device cast in the legs of the stand which had been adopted by the Singer Company, as heretofore stated, in lieu of the plain style of stand used during the life of the patents. This device of the defendant consisted of

the word "Singer" alone, in very large letters; the word "I. S." in monogram form above this word "Singer," and the words "J. Mfg. Co.," in small letters underneath. Concerning this stand, the president of the defendant testified as follows: "The stand being the most prominent and more generally noticed by the public, we adopted as a device . . . the word 'Singer' alone, which, never to our knowledge, had been used by the Singer Manufacturing Company, with the letters 'J. Mfg. Co.' under it, and the large letters 'I. S.' in monogram over it." At the time when the right to make Singer machines vested in the public, the complainant also used a device for regulating the tension, called a tension screw, which it placed upon the top of the face plate of its machines. This improvement continued, however, to be protected by a patent. In precisely the same position upon its machines, the June Company placed a "dummy" screw.

The defendant advertised its machines extensively and also issued many circulars concerning them, and furnished with their machines a printed warranty. Their machines were referred to as the "Improved Singer Sewing Machine," "June Improved Singer Sewing Machine," "Genuine Improved Singer," "The Improved Singer," "High Grade Singer Sewing Machines," "Improved Singer New Family Sewing Machine," and "The New Greatly Improved Singer Sewing Machine;" but all the circulars offered in evidence contained substantially the statement that the machines referred to in them were manufactured by the June Manufacturing Company.

After hearing there was a decree dismissing the bill for want of equity, the court below substantially concluding, first, that the sewing machine in the form made by the defendant was public property, and therefore no infringement of the rights of the complainant had resulted from its use; second, that the name "Singer" was also public property, and hence no legal injury was caused to the complainant by the use of the name in the manner and form in which it was employed by the defendant; third, that the defendant had not imitated the trade-mark of the complainant. The opinion is reported in 41 Fed. Rep. 208.

Mr. Lawrence Maxwell, Jr., and *Mr. Charles K. Offield* for appellant.

Mr. John G. Elliott and *Mr. William Henry Browne* for appellee.

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

The facts recapitulated in the statement just made are undisputed. Those which are seriously controverted and upon which the legal issues depend are, first, were the sewing machines made by the Singer Company so, in whole or in part, protected by patents as to cause the name "Singer" to become, during the existence of the monopoly, the generic designation of such machines, as contradistinguished from a name indicating exclusively the source or origin of their manufacture; second, irrespective of the question of patent, was the name "Singer," by the consent and acquiescence of Singer himself and that of the Singer Company, voluntarily used as a generic designation of the class and character of machines manufactured by I. M. Singer & Co. or the Singer Manufacturing Company, so that in consequence of this voluntary action the name became the generic designation of the machines or was the name solely used by the company as a trade name, a trademark, or one exclusively indicating machines made by I. M. Singer & Co. or the Singer Manufacturing Company?

We will consider these two controverted propositions of facts separately. Before doing so we deem it well to say that on both these questions there are many conflicting and confusing statements, in the record, adduced by both parties. Whatever may be their merit, they are not testimony in the proper sense of the word, being rather the expression of the opinion of the witnesses than substantive proof of existing facts. And the testimony of this character in favor of the respective parties, if allowed all possible weight, produces no affirmative result, since it is equally as strong by way of opinion on one side as it is upon the other. We shall, therefore, rest our conclusions on a consideration of the facts themselves,

rather than upon the conflicting and irreconcilable opinions of witnesses.

First. It cannot be denied that the Singer machines were covered by patents, some of which were fundamental, some merely accessory. There can also be no doubt that the necessary result of the existence of these patents was to give to the Singer machines, as a whole, a distinctive character and form which caused them to be known as Singer machines, as deviating and separable from the form and character of machines made by other manufacturers. This conclusion is not shaken by the contention that as many different machines were made by the Singer Manufacturing Company, therefore it was impossible for the name "Singer" to describe them all, because the same designation could not possibly have indicated many different and distinct things. The fallacy in the argument lies in failing to distinguish between genus and species. To say that various types of sewing machines were made by the Singer Manufacturing Company in no way meets the view, borne out by the testimony, that all machines by them constructed were in some particular so made as to cause them all to be embraced under the generic head of Singer, and to be protected in some respects by the patents held by the company. From this fact it resulted that during the life of the patents none of the machines as a whole were open to public competition. Persuasive support of this view is afforded by the fact that in many adjudicated cases, to which we shall have occasion hereafter to advert, where, since the expiration of the patents the right to the exclusive use of the name "Singer" has been asserted, it has, almost without exception, been found that Singer machines, as a whole, were a distinctive class, preserving a general uniformity of nature however varying may have been the types by which their structure was manifested.

It may be assumed that the proof establishes that for certain classes of the general type of Singer machines, that is, the species used only for particular and exceptional manufacturing purposes, an addition of some other word or description to the generic name "Singer" was necessary to completely

convey a perfect indication of the machine referred to, that is, Singer "carpet machine," Singer "leather machine," etc. But this fact does not counter-balance the conclusive proof that, as a whole, the Singer machines represented a general class, and were known to the public under that comprehensive name and no other. Indeed, any probative force which might result from the fact that, as to a particular class of Singer machines, some additional word may have been essential to a perfect designation bears no relation to the variety of the machine which the defendant is averred to have unlawfully imitated. That machine known as the "New Family," intended for general domestic purposes, constituted the larger part of the enormous output of the Singer companies. It was of a uniform type and had no other possible designation, in the mind of the general public, other than the word "Singer." The foregoing views find conclusive support from the unquestioned fact that upon the expiration of the patents held by the Singer Company the price of the machines, made by that company, fell enormously in amount. Thus to adopt the theory advanced by the complainant we should have to deny the inevitable law of cause and effect.

Abundant corroborative proof that the word "Singer" became generically descriptive of the machines manufactured by the Singer Company is afforded by the conduct of that company. From the beginning every machine made by it had conspicuously marked on it the name of the manufacturer, "I. M. Singer & Co." or the "Singer Mfg. Co.;" only occasionally was the word "Singer" alone attached to any of the machines. This continued until the technical trade-mark came into play, which was about the time the patents expired. After this the trade-mark was affixed to the machines, and the name of the manufacturer, except as indicated by the trade-mark, disappeared, and was regularly supplanted by the word "Singer" alone. The trade-mark then adopted could not have been essential to designate the source of manufacture, since from the inception the company had subserved that purpose by marking the name of the firm or corporation plainly upon the machines. The omission of the name, indi-

cating the origin of manufacture and the substitution of the word "Singer," just before the expiration of the patents, suggest a coincident relation of purpose which is not explained by any testimony in the record. This coincidence between the expiration of the patents and the appearance of the trade-mark on the machines and the use of the word "Singer" alone tends to create a strong implication that the company, with the knowledge that the patents, which covered their machines, were about to expire substituted the trade-mark for the plain designation of the source of manufacture theretofore continuously used and added the word "Singer," which had become the designation by which the public knew the machine, as a distinctive and separate mark, in order thereby to retain in the possession of the company the real fruits of the monopoly when that monopoly had passed away.

Second. Irrespective of the patents and the designative significance of the word "Singer," which arose during their life, the proof also clearly establishes that the word "Singer" was adopted by I. M. Singer & Co., or the Singer Manufacturing Company, in their dealings with the general public, as designative of their distinctive style of machines rather than as solely indicating the origin of manufacture. This is demonstrated by the fact that at the inception of the manufacture of the machines the word "Singer" alone was not used on them. The general method then adopted to indicate the source of the manufacture was to mark conspicuously on the machines the name of the firm or corporation. The name "Singer" alone was used by the company on signs, on wagons, on advertisements, on bill-heads, accompanied with the name of the firm or corporation. This could have had no other purpose than to denote to the public the corporation's understanding of the general name of the machines made by it. There is no proof that the name thus adopted by the corporation did not subserve this contemplated purpose of designating all the machines of whatever type, or that its inadequacy compelled the corporation to add to it, in particular cases, the word "carpet" or "leather" to describe machines intended for other than general domestic use. The

conduct of the company in adopting the trade-mark and first affixing the name at the time of the expiration of the patents, to which we have already adverted, is also of great significance in considering the question of the voluntary previous selection by the corporation of the word "Singer" as a designation.

But the proof renders it unnecessary to base our conclusions upon the deductions to which we have just referred, since it contains affirmative testimony as to the purpose of I. M. Singer & Co., or the Singer Manufacturing Company, in their general use of the word "Singer."

William F. Proctor was sworn for the complainant, and his relations with the Singer Company are shown by the following excerpts from his testimony:

"Q. State in detail what connection you have had with the sewing machine business.

"A. I have been connected with the manufacture of sewing machines since 1853 up to the present time. I have been engaged in various capacities, first as a machinist with I. M. Singer & Co. I afterwards went to France for them for the sale of a patent, and established a manufactory of machines there. Since the Singer Manufacturing Company has become established I have been a director since its origin and an officer in various capacities, and am now its vice-president."

Continuing his examination-in-chief, the following questions were asked this witness:

"Q. 72. For what purpose and for what object was the name 'Singer' marked upon the machines of the complainant and its predecessors, and applied to them in advertising them?

"Objected to by defendant's counsel as being merely accumulative and irrelevant to the issue.

"A. To designate them and after the formation of the company to gratify the desire of Mr. Singer to perpetuate his name associated with the machine.

"Q. 73. State what you mean by designating them.

"A. As a Singer machine.

"Q. 74. State whether the name was continued by the

corporate successors of the firm for any other reason than to gratify the desire of Mr. Singer.

"Objected to as suggesting the answer the witness is to make.

"A. It was to continue the name."

It is true that this conclusive statement, made by the vice-president of the company, is followed in the continuation of his testimony by several leading questions, which could not have failed to suggest to him that it was desired that the statement thus made should be materially qualified. But the result of this effort to lead the witness rather strengthens than weakens the force of the testimony just quoted.

We conclude, then, upon the two pivotal and controverted questions of fact, which we proposed at the outset to consider —

1st. That the Singer sewing machines were covered by patents which gave to the manufacturers a substantial monopoly; that in consequence of the enjoyment of this monopoly by the makers, the name "Singer" came to indicate, in its primary sense, to the public, the class and type of machines made by the Singer Company or corporations, and thus this name constituted their generic description; that also as this name applied to and described machines made alone by the Singer firm or corporations, the use also came in a secondary sense to convey to the public mind the machines made by the firm or corporations.

2d. That the word "Singer" was also voluntarily applied by the Singer firm or companies as a designation of the general type of machines made by them, with the intention that such machines should be accepted by the public under that name; thus the course of the business and the purposes for which the name "Singer" was used brought about results identical with those which sprang from the existence of the monopoly, hence that name became not only the description of the machines, but also, in a subordinate sense, the indication of the source of manufacture.

The case, as stated by the appellant in the pleadings and in the argument, fails to discriminate between distinct and dif-

ferent causes of action. The right to relief arising from the wrongful use by the defendant of a specific trade-mark and from the illegal use of a trade name, and also acts asserted to have been done by him which would justify the relief commonly accorded where unfair competition in business has been carried on, are commingled and treated as one. Avoiding, for the sake of brevity, a statement of the elementary grounds upon which rest the law of specific trade-mark, of trade name or of unfair competition in business, and the distinction between them, it is sufficient to say that all the relief which complainant seeks is necessarily embraced in the following classification:

1st. Unfair competition in business, resulting from the form in which the defendant makes its machines, and also from the employment by it of the word "Singer" in connection with the marks and devices on the machines, and the use of the same name in circulars and advertisements; 2d, the alleged violation of the specific trade-mark of the complainant by the devices found on defendant's machines and by the use of the word "Singer." We will examine these contentions.

1st. *Unfair competition in business, resulting from the form in which the defendant makes his machines, and also from the use made by him of the word "Singer" in connection with the marks and devices on his machines, and the use of the same in circulars and advertisements.*

This question subdivides itself into two inquiries: Where the name of a patented machine, whether it be an arbitrary one or the surname of the inventor or manufacturer, has become during the monopoly, flowing from the patent, a generic description of such machine, and at the same time in a secondary and relative sense indicates to the public the source of manufacture, has the manufacturer, on the cessation of the monopoly, the right to prevent the making by another of a like machine in the form in which it was made during the life of the patents, and has he also a right to prevent another from calling such machines, by him made, by the generic name attributed to them during the monopoly, and from placing this name on them, and using it in advertisements, in cir-

culars, and generally for such purposes as his interest may suggest? If no right exist in the original manufacturer to prevent another, under the foregoing circumstances, from making machines of like form and structure and using the name, under the conditions stated, does the one who so makes and uses or sells them enjoy the liberty without any resulting duty whatever, or is it accompanied with the obligation of so exercising the right as not to destroy the property of others, and also in such a manner as not to deceive the public?

It is self evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines. It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard

the public dedication and practically perpetuate indefinitely an exclusive right.

The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent.

Nor is this right governed by different principles where the name which has become generic, instead of being an arbitrary one, is the surname of the patentee or original manufacturer. It is elementary that there is a right of property in a name which the courts will protect. But this right, like the right to an arbitrary mark or any other, may become public property by dedication or abandonment. The latter is defined by De Maragy, in his International Dictionary of Industrial Property, as follows:

"Abandonment in industrial property is an act by which the public domain originally enters or reënters into the possession of the thing, (commercial name, mark or sign,) by the will of the legitimate owner. The essential condition to constitute abandonment is, that the one having a right should consent to the dispossession. Outside of this there can be no dedication of the right, because there cannot be abandonment in the juridical sense of the word."

But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name imports that there is no duty imposed, on the one using it, to adopt such precautions as will protect the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use. This principle is elementary and applies to every form of right, and is generally expressed by the aphorism *sic utere tuo ut alienum non lædas.* This qualification results from the same principle upon which the dedication rests, that is, a regard for the interest of the public and the rights of individuals.

It is obvious that if the name dedicated to the public, either as a consequence of the monopoly or by the voluntary act of the party, has a twofold significance, one generic and the other pointing to the origin of manufacture and the name is availed of by another without clearly indicating that the machine, upon which the name is marked, is made by him, then the right to use the name because of its generic signification, would imply a power to destroy any good will which belonged to the original maker. It would import, not only this, but also the unrestrained right to deceive and defraud the public by so using the name as to delude them into believing that the machine made by one person was made by another.

To say that a person who has manufactured machines under a patented monopoly can acquire no good will, by the excellence of his work, or the development of his business, during the patent, would be to seriously ignore rights of private property, and would be against public policy, since it would deprive the one enjoying the patent of all incentive to make a machine of a good quality, because at its termination all the reputation or good will resulting from meritorious work would be subject to appropriation by every one. On the other hand, to compel the one who uses the name after the expiration of the patent, to indicate that the articles are made by himself, in no way impairs the right of use, but simply regulates and prevents wrong to individuals and injury to the public.

This fact is fully recognized by the well settled doctrine which holds that although "every one has the absolute right to use his own name honestly in his own business, even though he may thereby incidentally interfere with and injure the business of another having the same name. In such case the inconvenience or loss to which those having a common right are subjected is *damnum absque injuria.* But although he may thus use his name, he cannot resort to any artifice or do any act calculated to mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name." *Russia Cement Company* v. *Le Page*, 147 Mass. 206, 208; *Pillsbury*

v. *Pillsbury*, 24 U. S. App. 395, 404; *Croft* v. *Day*, 7 Beavan, 84; *Holloway* v. *Holloway*, 13 Beavan, 209; *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508; *Montgomery* v. *Thompson*, (1891,) App. Cas. 217; *Howard* v. *Henriques*, 3 Sandf. N. Y. 725; *Meneely* v. *Meneely*, 62 N. Y. 427; *Lawrence Manufacturing Company* v. *Tennessee Manufacturing Company*, 138 U. S. 537; *Brown Chemical Company* v. *Meyer*, 139 U. S. 540; *Coats* v. *Merrick Thread Company*, 149 U. S. 562. Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to in the foregoing adjudications.

Indeed, the enforcement of the right of the public to use a generic name, dedicated as the results of a monopoly, has always, where the facts required it, gone hand in hand with the necessary regulation to make it accord with the private property of others and the requirements of public policy. The courts have always, in every such case without exception, treated the one as the co-relative or resultant of the other.

In *Fairbanks* v. *Jacobus*, 14 Blatchford, 337, (1877,) it was sought to restrain the defendant from making or selling an imitation of Fairbanks' scales and from casting the words "Fairbanks' patent" upon scales so made in imitation of scales of the manufacture of the complainant, Johnson, J., held (p. 341) that by reason of the expiration of the patents, under which plaintiff manufactured his scales, there was not, in the acts complained of, any invasion of the plaintiff's rights. The court said:

"Certainly, if the words 'Fairbanks' patent' do not mean to assert the existence of a patent securing the scales, but only that they are made in conformity with, and embody the invention of, the expired Fairbanks' patent, they are free to all the world. What is not free is to pretend that a scale is made by one person, which is, in fact, made by another."

In *Singer Mfg. Co.* v. *Larsen*, 8 Bissell, 151, (1878,) it was sought to restrain the defendant from the use of the name

"Singer" in connection with machines manufactured or sold by him. Drummond, J., observed (p. 152):

"On a machine called 'the Singer Sewing Machine' there were various patents. These patents have all expired, and nothing can, therefore, be claimed under them. Other persons cannot be prevented from manufacturing a machine like the Singer sewing machine, and which may be called, to distinguish it from other machines, 'Singer's Sewing Machine.' If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine."

But in upholding the right a duty was also enjoined, the court adding (p. 153):

"While I hold that the defendant is not prevented from constructing a 'Singer Sewing Machine,' still, he cannot be permitted to do any act the necessary effect of which will be to intimate, or to make any one believe that the machine which he constructs and sells is manufactured by the plaintiff. Neither has he the right to use any device which may be properly considered a trade-mark, so as to induce the public to believe that his machine has been manufactured by the plaintiff; and, therefore, I shall modify the injunction in this case by simply requiring the defendant to refrain from selling any Singer sewing machines manufactured by any person or company other than the plaintiff, without indicating in some distinct manner that the said machines were not manufactured by the Singer Manufacturing Company."

In *Singer Mfg. Co.* v. *Stanage*, 6 Fed. Rep. 279, (1881,) Treat, district judge, said (p. 280):

"The plaintiff and its predecessors had, in connection with others, through patents, a monopoly as to certain sewing machines, known as the 'Singer machines.' When these patents expired every one had an equal right to make and vend such machines. If the patentees or their assignees could assert successfully an exclusive right to the name 'Singer' as a

trade-mark, they would practically extend the patent indefinitely."

The court entered into no discussion of the limitations resting on a party in the use of a name or designation dedicated to public use, because the facts rendered it unnecessary, the court saying (p. 282):

"Sixth. The distinctive names and devices of the plaintiff corporation were not used by the defendant, and no one of ordinary intelligence could suppose that the 'Stewart' manufacture was the manufacture of the plaintiff. Each had its distinctive and detailed names and devices, so that there was no probability that the machine made by one would be mistaken for the manufacture of the other."

In *Singer Mfg. Co.* v. *Riley*, 11 Fed. Rep. 706, (1882,) where a suit was brought to restrain the use of the word "Singer" by the defendant in connection with sewing machines, the preliminary injunction was refused, following the decision in the *Stanage case.* The court called attention to the fact that the word "Singer" was not used on defendant's machines. It made no ruling as to the duty of the defendant to so use the name "Singer" as not to deceive, because it found that the defendant's devices were not calculated to mislead.

In *Brill* v. *Singer Mfg. Co.*, 41 Ohio St. 127, (1884,) it was held (pp. 137, *et seq.*) that as Singer machines had been protected by patents and during the existence of such patents became known and identified in the trade by their shape, external appearance or ornamentation, the patentee could not, after the expiration of the patent, prevent others from using the same modes of identification, in machines of the same kind, manufactured and sold by them. It was also held that the Singer machines had become known to the public by a distinctive name during the existence of the patent, and that any one at the expiration of the patent might make and vend such machines and use such name.

It would appear that the name "Singer" had not been, directly or indirectly, marked upon the machines. It might also be inferred from the report of the case that the designation of defendant's machine was accompanied by a statement as to

who was the manufacturer. At all events, the court did not discuss the obligation of the defendant to avoid misleading, since, under the facts, the question did not arise.

In *Gally* v. *Colt's Patent Firearms Mfg. Co.*, 30 Fed. Rep. 118, (1887,) it was held that the name "Universal," applied by a patentee to his patented printing press, upon the expiration of the patent could not be appropriated by the inventor as a trade-mark, Shipman, J., said (p. 122):

"Any manufacturer, who uses the name now, does so to show that he manufactures the Gally press, which he may rightfully do, and does not represent to the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff."

The machines manufactured by the defendant, upon which was stamped the name "Universal," also bore the name of their maker.

Merriam v. *Holloway Pub. Co.*, 43 Fed. Rep. 450, (1890,) involved the right of the defendants to use the words "Webster's Dictionary" in connection with a reprint of the 1847 edition of that work upon which the copyright had expired. Mr. Justice Miller, in the opinion delivered by him, said (p. 451):

"I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired, may continue that monopoly indefinitely, under the pretence that it is protected by a trade-mark, or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. I may be the first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings

for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book."

And the justice further observed (p. 452):

"The contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

Although the right to use the words was thus adjudged, the duty not to deceive by the method of their employment was upheld and enforced, the court saying (p. 451):

"Now, taking all these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred, the public are deceived and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases where, as the facts are stated in the complaint, the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and facts upon a final hearing."

In *Merriam* v. *Famous Shoe & Clothing Co.*, 47 Fed. Rep. 411, a ruling similar to that announced by Mr. Justice Miller was made. But although the right to use the word "Webster's Dictionary" was sustained, the obligation to so use as not to mislead was again stated, Thayer, J., saying (p. 414):

"It is unnecessary at this time to determine what form of relief should be administered, if the allegations of the bill are proven on final hearing. It may be that some change in the form of defendant's circulars and advertisements will be all the relief that the circumstances of the case fairly warrant; or it may be that the proof will warrant an order that the defendant place a notice in their book that it is a reprint

of the edition of 1847 of Webster's Dictionary, with such additions as they may have made to it. This is a matter, however, to be considered on final hearing, when the exact nature of the injury and the causes that mislead the public, are ascertained. It is sufficient to say at present that, on the showing made, the complainants are entitled to relief, and the demurrer to the bill is accordingly overruled."

The principles thus maintained by the American cases are also supported by the English decisions.

In *Wheeler & Wilson Mfg. Co.* v. *Shakespear*, 39 L. J. Ch. 36, (1869,) Vice-Chancellor James refused to enjoin the use of the name of Wheeler & Wilson as a designation in advertisements of machines dealt in by the defendant. The advertisements of the defendant clearly indicated, however, that the machines in question were not manufactured by the plaintiffs. He said (p. 40):

"I could not restrain the defendant from using the words 'Wheeler & Wilson' as descriptive of any sewing machine other than the sewing machine manufactured by the plaintiffs. It appeared to me that 'Wheeler & Wilson' was really not the name of the manufacturer or the name of the company, either abbreviated or otherwise, but the name of the thing in particular. As the plaintiff's bill represents it, it is called 'The Wheeler & Wilson Sewing Machine,' and there being no other designation for this particular machine, one can easily understand that that was the name of the patentee or the person who at one time had the patent, for I take it that Wheeler & Wilson are not really the patentees' names, because the allegation in the bill is that they became entitled to the letters-patent. It seems to me that the name 'Wheeler & Wilson' machine has come to signify the thing manufactured according to the principle of that patent. That being so, I cannot restrain anybody, after the expiration of the patent, from representing his article as being the article which was so patented. A man cannot prolong his monopoly by saying 'I have got a trade-mark in the name of a thing which was the subject of the patent,' and, therefore, to that extent I think the plaintiffs are not entitled to the relief they ask."

In *Cheavin* v. *Walker*, 5 Ch. Div. 850, (1877,) it was held that the trade-mark or label of the defendant, which fully stated that a filter to which it was attached, upon which the patent had expired, was made by him, did not infringe the trade-mark or label of the complainant, who had succeeded to the rights of the original patentee. In the Court of Appeals James, L. J., said (p. 863):

"It is clear that on the expiration of this patent it was open to all the world to manufacture the article which had been patented; that is the consideration which the inventor gives for the patent; the invention becomes then entirely *publici juris*. The plaintiff, and also the defendants, had a right to tell the world that they were making the article according to the expired patent, and both parties have done this. It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world. In the present case the plaintiff's label was nothing more than a description, and he cannot, therefore, have protection for it as a trade-mark."

Bagalley, L. J., said (p. 865):

"The Vice-Chancellor thought that the words 'Cheavin's patent' were calculated to deceive the public. But 'Cheavin's patent' is a correct description of the principle according to which the article was made, and there follows a distinct statement that it was manufactured by Walker, Brightman & Co. Therefore on this ground also the case made by the plaintiff's claim fails."

In *Linoleum Mfg. Co.* v. *Nairn*, 7 Ch. Div. 834, (1878,) where the right to the exclusive use of the word "Linoleum" was asserted, the substance to which the name was attached having been covered by patents which had expired, Fry, J., said (p. 836):

"In the first place, the plaintiffs have alleged, and Mr. Walton has sworn, that having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of 'Linoleum,' and it does not appear that any other name has ever been given to this substance. It appears that the

defendants are now minded to make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if 'Linoleum' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. . . .

"In my opinion it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article."

As the article manufactured by the defendant was clearly marked with the source of manufacture, the case was not one requiring the enforcement of the duty to designate the origin of the manufacture, but the court also said (p. 837):

"If I found they were attempting to use that name in connection with other parts of the trade-mark, so as to make it appear that the oxidized oil made by the defendants was made by the plaintiffs, of course the case would be entirely different. . . .

"It appears to me, therefore, that there has been neither infringement of any essential part of the plaintiffs' trade-mark nor any attempt on the part of the defendants to represent the goods which they intended to sell as goods made by the plaintiffs." (p. 838.)

Nor is there anything in the Scotch case of the *Singer Mfg. Co.* v. *Kimball & Morton*, 11 Ct. Sess. 3d s. 267, or the English cases of *Singer Machine Manufacturers* v. *Wilson*, 3 App. Cas. 376; 2 Ch. Div. 434; and *Singer Mfg. Co.* v. *Loog*, 8 App. Cas. 15, and 18 Ch. Div. 395; which in any way contravenes the doctrines heretofore stated. In the *Kimball case*, the fact that there had been no patents in England was expressly referred to, the court finding that for many years prior to 1870 machines like Singer machines had been manu-

factured under various names in England and Scotland by other parties than the Singer Company. It was upon these facts that the court based the right of the Singer Company to an exclusive trade-mark in the name. Indeed, Lord Ardmillon (p. 276) expressly declared that he regarded the facts, above stated, as distinguishing the case from the *Shakespear case, supra.*

This distinction is also true of *Singer Mfg. Co.* v. *Wilson*, and *Singer Mfg. Co.* v. *Loog.* In neither was there a claim of a generic description as a consequence of a monopoly, and it becomes, therefore, needless to review these cases at length. It may, however, be said that both these cases recognize the right of a party in his advertising matter to state that his machines were constructed upon the Singer system or model.

The contention advanced by the complainant that his right to the exclusive use in the name "Singer," after the expiration of the patents, although that name became the generic description of the machines during the monopoly, is in accord with the law of France, is without foundation. On the contrary, the French writers and courts recognize the doctrine to be substantially like that which is enforced in America and England. Braun, Marques de Fabrique, sec. 68, p. 232, says:

"The question is not whether an inventor can attribute to his patented invention a particular designation which remains the exclusive property of the patentee by the same title and for as long a time as the invention itself. This is evident, for without this right existing in the patentee his patent would be in certain respects illusory. But at the expiration of the patent does the designation fall into the public domain with the patented invention? Does the patented thing lose the right to be solely individualized in favor of the inventor by the designation which up to that time has served as its mark. Three theories present themselves."

After fully stating these three different points of view the author adds:

"To resume, the three systems may be formulated as follows: 1st. The designation of the thing patented becomes

public property on the expiration of the patent. 2d. The patentee retains in every case the sole use to the designation, after the expiration of his monopoly, if he had deposited the name" (as a legal trade-mark) "before the expiration of the patent. 3d. The designation continues to belong to the patentee in every case but one, if the name given to the product has become the only and necessary designation of the patented article. We think there can be no hesitation in pronouncing in favor of the third proposition, except, however, that it requires to be completed by a second exception, which is that the name is also public property if in the interval which has elapsed between the expiration of the patent and the deposit of the trade-mark the inventor has allowed the designation to become public property."

Pouillet, Brevets d'Invention, Nos. 327, 328, pp. 278, 279, reviews the opinions of the commentators and the decisions of the courts as follows:

"The expiration of a patent has for its natural effect to permit every one to make and sell the object patented; and it has also for effect to authorize every one to sell it by the designation given it by the inventor, but upon the condition in every case not, in so doing, to carry on unfair competition in business" (Concurrence De Loyal) "against him. Without this, say Pecard & Olin, the monopoly would be indefinitely prolonged, because, in commerce one could not recognize the thing produced by the invention under any other designation than that given during the life of the patent. However, the question is not without difficulty, when the name of the inventor enters into the designation of the product, . . . in such case the courts should not allow third persons to employ the name of the inventor, but with extreme caution and by taking the most rigorous measures to prevent a confusion as to the origin of the product, of which it would be very easy to abuse. It has been adjudged conformably to these principles, (Paris, 20th of January, 1844, Trib. comm.; Seine, 22d of December, 1853, Trib. comm.; Seine, 28th of July, 1853.) 1st. That the denomination under which a patented article is designated by the inventor falls into the public domain at

the same time as the invention, at least when this denomination has been drawn from common language and does not reproduce the name of the inventor himself, nevertheless the right to announce the product under the same denomination affixed to it by the inventor, does not go to the extent of allowing its sale with the plates or stamps or metallic paper, or tickets, or the manner of securing it, or the envelopes or form or color analogous to that used in such a way as to cause appearances of deception. (Nancy, 7th of July, 1854, Verly, Sir., 1855, 2 vol. 581.) 2d. That when an invention falls into the public domain, it enters with the name which the inventor has given it, and he cannot prevent a person from employing this designation; thus, the inventor of the 'harmonium' was not allowed after the expiration of his patent to prevent others from making this instrument and selling it under the name which had been given to it. (Paris, 30th December, 1859, Pattaille, 1859, 414.) 3d. That the patented invention falling into the public domain can be advertised and sold by the designation given to it by the inventor, even when the name of this last person figures therein. If by usage and by the act of the inventor his name has become the necessary element to designate the product, it is essential, however, that the competitors of the inventor avoid all confusion which can induce the public into error as to the origin of the products." (Cassation, 31st of January, 1860, Charpentier.)

The same author again says:

"In principle, a surname is inalienable and each one keeps the imprescriptible ownership in it. We know, however, that when the name of the inventor has become the designation of the thing patented, it belongs to every one, at the expiration of the patent, to make use of this designation." (Pouillet, Brevets d'Invention, sec. 329, p. 280.)

The French decision mainly relied on, by the plaintiff in error, is that relating to the use of the surname Bully in a toilet preparation known as the "Vinegar of Bully," but the facts upon which the case was decided are misapprehended. In that case the sole question was whether the surname "Bully" had been either expressly or tacitly dedicated, by

him, to the public by connecting it with his preparation. The Court of Cassation rested its decree upon the finding of fact by the court below, which was conclusive on it, that no such association of the name, by either the express or tacit consent of Bully, had ever taken place. We excerpt, briefly, the language of the Court of Cassation as reported in the Dictionary of De Marafy, vol. 1, p. 11:

"Whereas, without doubt, the methods of manufacture of a patented product fall into the public domain after the expiration of the patent, but it is otherwise as to the name of the inventor, and that this rule suffers no exception, except in the case where, either by long usage or in consequence of a consent either expressly or tacitly given by the inventor, his surname having become the sole usual designation of his invention, it is employed to indicate the mode or the system of manufacture and not the origin of the particular manufacture.

"Whereas, it is declared by the judgment appealed from, that Claude Bully has never manifested an intention to indissolubly bind up or unite his name for the benefit of his invention," etc., etc.

And the same distinction controlled the case of Howe, where the French courts enjoined the use of that name on a sewing machine. There the court, as a basis of its decree, used the following language: "And whereas, they [Howe and his heirs] did not take patents in France for the invention and their improvements, which have therefore fallen into the public domain," and have "never, either expressly or tacitly, abandoned the right to affix his name" (that of Howe) "to the products of the invention."

The result, then, of the American, the English and the French doctrine universally upheld is this, that where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public dedication to make the machine and use the generic designation, he

can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means, subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact.

It remains only to apply these legal conclusions to the facts already recapitulated. Of course, from such application all claim of right, on the part of plaintiff in error, to prevent the use of the name "Singer" is dispelled. This leaves only two questions, first, whether that name as used in the circulars and advertisements of the defendant is accompanied with such plain information as to the source of manufacture of the machines by them made as to make these circulars and advertisements lawful; and, second, whether this also is the case with the use of the word "Singer" on the machines which the defendant makes and sells. As to the first of these inquiries the proof shows that the circulars were so drawn as to adequately indicate to any one in whose hands they may have come that the machines therein referred to were made by the June Manufacturing Company, and not by the Singer Company. We therefore dismiss the circulars from view. As to the advertisements, without going into details, some of those offered in evidence were well calculated to produce the impression on the public that the Singer machines referred to therein were for sale by the June Manufacturing Company, as the agent or representative of the Singer Company.

On the second question the proof also is clear that there was an entire failure on the part of the defendant to accompany the use of the word "Singer," on the machines made and sold by him, with sufficient notice of their source of manufacture, to prevent them from being bought as machines made by the Singer Manufacturing Company, and thus operate an injury to private rights and a deceit upon the public. Indeed, not only the acts of omission in this regard, but the things actually done, give rise to the overwhelming implication that

the failure to point to the origin of manufacture was intentional, and that the system of marking pursued by the defendant had the purpose of enabling the machines to be sold to the general public as machines made by the Singer Company.

The marks on the machines are found on the oval plate and on the device cast in the leg of the stand. On the first of these (the oval plate) the words "Improved Singer" are found in prominent letters, unaccompanied by anything to indicate that the machines were manufactured by the June Company, except the words "J. M. Co." and the monogram "J. Mfg. Co." The shape of the plate, its material, the position in which it was placed upon the machines, its size, its color, the prominence given to the words "Improved Singer," all could have conveyed but one impression to one not entirely familiar with the exact details of the device upon the Singer Company's plates, and that is that the machine was one coming from the factory of the Singer Company. So, in the second (the device cast in the legs of the stand), the word "Singer" alone without any qualification is there found in bold relief, and above this the word "I. S." and in small letters "J. Mfg. Co." The similarity between the letter J. and the letter S., the failure to state in full the name of the manufacturer, the general resemblance to the device of the Singer Company, the place where it was put, which had no necessary connection with the structure or working capacity of the machines, and the prominence of the casting of the word "Singer" in comparison with the other mark, bring out in the plainest way the purpose of suppressing knowledge of the actual manufacturer, and suggesting that it was made by the Singer Company. It is significant of the fraudulent purpose of the defendant that the device which the Singer Company cast in the legs of its machines was only by them adopted after the expiration of the patents and the resulting cessation of the monopoly, and for the avowed purpose of distinguishing their machines from others which had come upon the market, and therefore the colorable imitation which the defendant immediately proceeded to make had no necessary connection with the right to make machines according to the Singer system

and to call and sell them as Singer machines in consequence of their dedication to the public. But there are other circumstances in the record which throw light upon the facts which we have just stated, and lend to them an increased significance. On the plate of the Singer machines there was plainly marked a number, which the proof shows had run with relatively accurate consecutiveness from the beginning. These numbers, as a result of the vast development of the business of the Singer Company and the enormous number of New Family machines sold by them, ran into the millions. The defendant, who was in the commencement of his business, at once began also to number his machines in the millions, thereby conveying the obvious impression that they were the result of a manufacture long established, and as they were marked "Singer" suggesting, by an irresistible implication, that they were machines made by the Singer Company. There is an attempt in the evidence to explain this fact by the statement that it was the habit of sewing machine makers to add three figures to the actual number of machines by them made, but the proof does not sustain the explanation, and if it did, it amounts to but the contention that the commission of a fraud should be condoned because others were guilty of similar attempts to deceive. There is another significant fact. On the machines made by the Singer Company there was a tension screw. This screw on the Singer machines served a useful mechanical purpose, and did not pass into the public domain with the expiration of the fundamental patents, because specially covered by a subsisting patent. The defendant in making his machines placed thereon a dummy screw, serving no mechanical purpose whatever, and which could have had no object but that of producing the impression that his machine was made by the Singer Company.

There remains only for examination the second proposition, that is:

Second. The alleged violation of the specific trade-mark of the complainant by the device found on the defendant's machine and by the use of the word "Singer."

This question is necessarily involved in and determined by

the foregoing considerations. There can be no doubt, if the right to use the word "Singer" did not exist, that the plate and the device cast in the leg of the defendant's machine would be a plain infringement of the specific trade-mark of the Singer Company. There can also be no doubt that the marks used by the defendant would not constitute a specific infringement unless they contained the word "Singer" or a representation equivalent in the public mind to that word. It follows that the marks used by the defendant become only an infringement from the fact that each of them contained and embodied the word "Singer." But the word "Singer," as we have seen, had become public property, and the defendant had a right to use it. Clearly, as the word "Singer" was dedicated to the public, it could not be taken by the Singer Company out of the public domain by the mere fact of using that name as one of the constituent elements of a trade-mark. In speaking of a mark containing composite words, some of which become dedicated to public use, others of which are not, Braun in his Traité des Marques de Fabrique, No. 135, pp. 354–355, says: "The surname, says a judgment of the court of Paris, is property in the most necessary and in the most imprescriptible sense. (Paris, 18th of November, 1875, Pattaille.) Does this mean that a mark composed of a name can never be lost? The courts, on the contrary, have decided that two elements which compose a name, that is, the surname of the individual or the firm upon the one side and its tracing or distinctive form" (in a trade-mark) "are susceptible of falling into the public domain together or separately. In this last case, the exclusive right to the trade-mark may survive the exclusive right to the name and *vice versa*. Thus one may keep the exclusive right to the use of the name, while the remainder of the mark will belong to every one."

The right to use the word "Singer," which caused the imitative infringement in the device, being lawful, it is plain that the infringement only resulted from the failure to plainly state along with the use of that word the source of manufacture, and therefore this branch of the question is covered by the same legal principle by which we have determined the other.

It follows, therefore, that the judgment below, which recognized the right of the defendant to make or vend sewing machines in the form in which they were made by him — that is, like unto the machines made upon the principles of the Singer system — with the use of the word "Singer," without a plain and unequivocal indication of the origin of manufacture, was erroneous.

Therefore the decree below must be

Reversed and the cause remanded, with directions to enter a decree in favor of complainant, with costs, perpetually enjoining the defendant, its agents, servants and representatives: first, from using the word "Singer" or any equivalent thereto, in advertisements in relation to sewing machines, without clearly and unmistakably stating in all said advertisements that the machines are made by the defendant, as distinguished from the sewing machines made by the Singer Manufacturing Company: second, also perpetually enjoining the defendant from marking upon sewing machines or upon any plate or device connected therewith or attached thereto the word "Singer," or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and therefore not the product of the Singer Manufacturing Company. And the decree so to be entered must also contain a direction for an accounting by the defendant as to any profits which may have been realized by it, because of the wrongful acts by it committed.

SINGER MANUFACTURING COMPANY *v.* BENT.

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

No. 7. Argued October 16, 17, 1894. — Decided May 18, 1896.

Singer Manufacturing Company v. *June Manufacturing Company*, *ante*, 169, followed.

THE case is stated in the opinion.

Mr. Lawrence Maxwell, Jr., and *Mr. Charles K. Offield* for appellant.

Mr. Wallace Heckman for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The pleadings here are substantially similar to those in the case of the Singer Manufacturing Company against the June Manufacturing Company, and the testimony in that case, in so far as applicable, was by stipulation used in this. Some additional testimony was, however, introduced bearing upon the particular alleged wrongdoing here complained of. The Circuit Court rendered a decree in favor of the defendant. 41 Fed. Rep. 214.

There is no difference in legal principle between the two cases. The sewing machines sold by the defendant were made by the June Manufacturing Company, and were in form like those generally made and sold by it. These machines contained the oval plate fixed at the base of the arm, a device cast in the leg of the stand of the machine, the plate and the casting being of the same general shape, size and appearance as those used by the Singer Manufacturing Company. There was, however, no exact identity between the words and marks used on the brass plates and in the casting of the Singer Company and those placed on the machines of the defendant. The device, which the defendant styled his trade-mark, con-

tained an eagle surrounded with the wording "NEW YORK, S. M. MFG. CO. WARRANTED." The lettering "New York S. M. Mfg. Co." on the brass plate of defendant corresponded in size and style of letters, with the lettering "The Singer Manfg. Co." on the brass plates of the latter company. It is plain that the position and size as well as the inscription found on these devices were calculated to deceive by creating the impression, on one not familiar with all the details of the marks of the Singer Manufacturing Company, that they were the marks of that company. The defendant argued that there is a difference between his devices and those of the June Manufacturing Company in that he does not, in so many words, employ the name "Singer." In other words, the contention is that a fraudulent device which is tantamount to a certain word, is not equivalent in law to the word for which it stands. The deceptive purpose of the devices and the lettering or words on them are abundantly established by the proof. The principal business office of the Singer Manufacturing Company is in the city of New York. In the so called trademark of the defendant the letters "S. M. Mfg. Co." are preceded by the word "New York," although there was no such company and the defendant had no factory or office there, but did business in Chicago, and bought in that city from the June Manufacturing Company the machines upon which he put the marks in question. There is no doubt that the marks were imitations of those used by the Singer Company and were intended to deceive, and were made only seemingly different to afford a plausible pretext for asserting that they were not illegal imitations, although they were so closely imitative as to deceive the public. The defendant therefore must be treated as if he had actually used the Singer marks. So treating him, however, we should be obliged to allow the use of the name "Singer," since that name, as we have already held in the case just decided, fell into the domain of things public, subject to the condition on the one who used it to make an honest disclosure of the source of manufacture. This rule controls and is applicable to this case, and renders necessary a reversal of the decree below.

Syllabus.

It follows that the decree below must be

Reversed and the cause remanded, with directions to enter a decree in favor of complainant, with costs, perpetually enjoining the defendant, his agents, servants and representatives, from marking upon sewing machines made or sold by him, or upon any plate or device connected therewith or attached thereto, the word "Singer," or words or letters equivalent thereto, without clearly and unmistakably specifying in connection therewith that such machines are the product of the defendant or other manufacturer, and not the manufacture of the Singer Manufacturing Company; and the defendant must be ordered to account as to any profits which may have been realized by him, because of the wrongful acts by him committed.

BACON *v.* TEXAS.

ERROR TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

No. 296. Argued May 6, 7, 1896. — Decided May 18, 1896.

In this case application was made by the defendants below, after judgment, to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals for the second district for the purpose of reviewing the judgment of that court, and the application was denied. *Held*, that this court has jurisdiction to reëxamine the judgment on writ of error to the Court of Civil Appeals.

In case of a change of phraseology in an article in a state constitution, it is for the state courts to determine whether the change calls for a change of construction.

Where there are two grounds for the judgment of a state court, one only of which involves a Federal question, and the other is broad enough to maintain a judgment sought to be reviewed, this court will not look into the Federal question.

When a state court has based its decision on a local or state question, and this court in consequence finds it unnecessary to decide a Federal question raised by the record, the logical course is to dismiss the writ of error.

Statement of the Case.

THE State of Texas commenced this action against the defendants, Bacon, Graves and Gibbs, in the District Court of the county of Mitchell, in the State of Texas, for the purpose of recovering the possession of a large amount of land — nearly 300,000 acres — which it was alleged the defendants had unlawfully entered upon and dispossessed plaintiff from, and the possession of which they continued to withhold from plaintiff, the plaintiff being the owner in fee simple of such land at the time when the defendants dispossessed the State therefrom. Plaintiff also sought to recover damages for the use and occupation of such lands, and judgment was demanded for the possession of the land and for damages and for costs of the suit and for general relief.

The answer of the defendants set up several grounds for specially excepting to the plaintiff's petition, upon all of which the defendants prayed the judgment of the court. Joined with the special exceptions the defendants answered and stated that if the defendants' demurrer and special exceptions should be overruled, then they denied each and every allegation in plaintiff's petition contained. They then alleged that they were citizens of the State of Texas and had been at the time of the passage of the act of July 14, 1879, and the act amendatory thereof passed on the 11th day of March, 1881, in relation to the sale of public lands belonging to the State of Texas; and they alleged that they had performed all the requirements spoken of and provided for in those acts for the purpose of purchasing a portion of the public lands of the State, and that by the performance of such conditions they had purchased the lands in question, and had duly tendered payment therefor to the proper officer which had been refused, and that subsequently they had again tendered payment and that the money had been received, but the plaintiff had refused to convey the title to the defendants as it was under legal obligations to do. They further alleged that having in all respects fully complied with the provisions of the law in respect to the purchase of the lands in question, their rights thereto became and were vested, and the act of the legislature subsequent thereto, passed January 22, 1883, to repeal the law under

which the sales were made, was under article II, section 10, subdivision 1 of the Constitution of the United States, null and void as affecting defendants' vested rights. They prayed for judgment, that the plaintiff take nothing by its suit, and that the defendants have and recover from and of the plaintiff the lands as herein claimed by them, and for further relief.

The State filed its reply to the defendants' answer, and after specially excepting to certain of the allegations of the answer as insufficient, it alleged that the defendants were not entitled or authorized to purchase the lands, and had not complied with the law in reference thereto in any particular, and that if the defendants had tendered the treasurer of the State the money for the lands, as alleged, the treasurer properly refused and declined to receive the same, for that the defendants had not purchased the same from the plaintiff by complying fully with any existing law authorizing the purchase or sale thereof, and that if the defendants or any of them ever paid to the treasurer in January, 1891, the sum of money in said answer stated, the treasurer was not authorized by law to receive it, and this defendants well knew, and that the payment was made after full and explicit notice to defendants that plaintiff repudiated and would vigorously contest the claim of the defendants to said lands, and the defendants paid the same at their peril. The court overruled the defendants' exceptions to the plaintiff's petition and the case came on for trial.

The questions sought to be raised herein by the plaintiffs in error are stated by them to arise under the acts of the State of Texas above mentioned, the one known as chapter 52 of the laws of 1879, and entitled "An act to provide for the sale of a portion of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale," which act was approved July 14, 1879, and the other known as chapter 3 of the laws of the same State, passed in 1883, and entitled "An act to withdraw the public lands of the State of Texas from sale," approved January 22, 1883. The act of 1881, amending that of 1879, is immaterial to the questions herein arising.

Statement of the Case.

Section 1 of the act of 1879 provided for the sale of all the vacant and unappropriated land of the State of Texas in certain named counties thereof. Section 2 provided that any person, firm or corporation desiring to purchase any of the unappropriated lands therein set apart and reserved for sale might do so by causing the tract or tracts which such person, firm or corporation desired to purchase to be surveyed by the authorized public surveyor of the county or district in which said land was situated. By section 3 it was made the duty of the surveyor, to whom application was made by responsible parties, to survey the lands designated in the application within three months from the date thereof, and within sixty days after said survey to certify to, record and map the field-notes of said survey, and within said sixty days to return to and file the same in the general land office, as required by law in other cases. Section 5 provided that within sixty days after the return to and filing in the general land office of the surveyor's certificate, map and field-notes of the land desired to be purchased, it should be the right of the person, firm or corporation who had had the same surveyed to pay or cause to be paid into the treasury of the State the purchase money therefor, at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, the commissioner was bound to issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for.

By section 1, chapter 3, of the laws of 1883, it was enacted "that all the public lands heretofore authorized to be sold under an act entitled 'An act to provide for the sale of the unappropriated public lands of the State of Texas and the investment of the proceeds of such sale,' approved July 14, 1879, be, and the same are hereby, withdrawn from sale." The proviso contained in the section is immaterial. Prior to the adoption of the Revised Statutes of Texas the manner in which surveys of the public domain were to be made had been provided for by law. It was provided that "the courses of the line shall be determined by the magnetic needle, and

care shall be taken to determine its variations from the pole in the district where the surveys are made. Each survey shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning of the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." This was long prior to the year 1879. The Revised Statutes of Texas were passed in 1879 and took effect in September of that year, and by article 3908 it was provided "the field-notes of each survey shall state (1) the county or land district in which the land is situated; (2) the certificate or other authority under or by virtue of which it is made, giving a true description of same by numbers, date, where and when issued, name of original grantee and quantity; (3) the land by proper field-notes, with the necessary calls and connections for identification (observing the Spanish measurement for *varas*); (4) a diagram of the survey; (5) the variation at which the running was made; (6) it shall show the names of the chain-carriers; (7) it shall be dated and signed by the surveyor; (8) the correctness of the survey and that it was made according to law shall be certified to officially by the surveyor who made the same, and also that such survey was actually made in the field, and that the field-notes have been duly recorded, giving book and page; (9) when the survey has been made by a deputy the county or district surveyor shall certify officially that he has examined the field-notes, has found them correct, and that they are duly recorded, giving the book and page of the record."

The case came on for trial in the District Court of Mitchell County in November, 1891. The following among other facts were found by the court: On December 1, 1882, Bacon and Graves made application to the surveyor of the Palo Pinto land district, as such surveyor, to purchase the land in controversy under the above mentioned act of 1879, as amended March 11, 1881, which application was received and recorded by the surveyor on the first above named date. Bacon and Graves paid the fees for filing the field-notes in the general land office entirely within the time required by law. By the

records of the land office the lands in question appeared to have been surveyed at different times, and the field-notes recorded in the surveyor's office in some instances, but not in all. The surveyor of the Palo Pinto land district certified to the respective surveys on the dates the surveys purport to have made. None of the land included in this suit has ever been patented by the State under the Bacon and Graves purchase, and on the 26th of May, 1890, Bacon and Graves transferred by deed of special warranty 579 sections of land to C. C. Gibbs, who holds the same in trust for E. M. Bacon, E. G. Graves and others.

It was further found as a matter of fact "that none of the land in suit was actually surveyed upon the ground by the deputy surveyor who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field-notes of the Elgin survey." That survey was made in July, 1873, for the Houston and Texas Central Railway Company, and the field-notes of such survey were returned to the surveyor's office some time in 1873, and were filed in the general land office November 20 and 26, 1873. These field-notes were "adopted by the surveyor of the Palo Pinto land district and his deputies in making out the field-notes of the land applied to be purchased by Bacon and Graves." The land had been actually surveyed on the ground by Elgin in the manner in which it had been customary for surveyors in Texas to survey large bodies of land, by running the outside boundary lines of the blocks, or parts of them, putting up permanent landmarks, and leaving the interior lines without running. These blocks, in writing up the field-notes, were divided into 640 acre surveys, and the interior surveys were made without actually running the lines, and Elgin did not run all the lines of any section, unless, as he says, it was done by accident. It had been found by deputy surveyors prior to the adoption of the field-notes for Bacon and Graves that the lines run and ascertained by the Elgin survey were as correct as any work of that character in that part of the state, and the deputy surveyors were satisfied as to their substantial accuracy. The deputy survey-

ors were deputies under Joel McKee from December, 1882, to March, 1883, and McKee was the surveyor of the Palo Pinto district in which the land in question lay.

On May 16, 1883, the defendants tendered to the treasurer of the State $80,640, and on May 19, 1883, they tendered him the further sum of $104,640, in payment for these lands. These tenders were refused. In January, 1891, Bacon and Graves paid the treasurer $149,320 for said lands, which was received by him "under protest."

The court as conclusions of law found: (1) That Bacon and Graves were not responsible parties, within the meaning of the statute, at the time they applied to purchase this land and could not purchase under the law; (2) that they did not comply with the law by having the lands surveyed as was required by law, and, therefore, could not purchase it; (3) the survey as adopted was not made in accordance with law — is incorrect, totally so — in having a greater frontage on permanent water than is permitted under the acts of 1879 and 1881; (4) Bacon and Graves have never paid or offered to pay for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of land for which they tendered payment on May 19, 1883, were made after the 50 cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender; (5) at the time Graves entered into an agreement with Bacon to purchase these lands he was an employé of the general land office, and his actions were against the civil and criminal laws of the State; (6) that the State was not bound to return the money paid in January, 1891, to entitle it to judgment for the land.

Judgment for the recovery of the lands was duly entered and the defendants appealed from that judgment to the Supreme Court of Texas, which court duly ordered the same to be transferred to the Court of Civil Appeals for the Second Judicial District, before which the case was heard on appeal. That court adopted the findings of fact filed by the court below, excepting it set aside the finding that the defendants

were not responsible parties, and so could not purchase any land.

The court also gave an explanation as to the finding of the trial court that the money was received by the state treasurer "under protest," such explanation being that "by the word 'protest' as used in the finding is meant that the treasurer of the State had several times refused to accept this money, and at the time he received it in January, 1891, the parties paying fully understood that the State would contest their claim to the land, and the treasurer did not receive the money as a legal payment therefor."

After argument the Court of Civil Appeals in all things affirmed the judgment of the court below. The appellants duly asked for a rehearing for reasons assigned by them in their amended motion therefor. The motion was denied and judgment duly entered affirming in all things the judgment against the defendants for the recovery of the lands in question. The defendants then presented a petition to the Supreme Court of the State of Texas for the allowance of a writ of error to enable that court to review the judgment of the Court of Civil Appeals. The application for this writ of error was refused by the Supreme Court, and an order refusing it was sent to the clerk of the Court of Civil Appeals pursuant to a rule of the Supreme Court.

The assignments of errors by the defendants on their appeal to the Court of Civil Appeals contain an assignment of error in that they had acquired a vested right to the lands by the survey thereof as made for them, under the act of 1879, prior to the repeal of that act by the repealing act of 1883, and which right could not be affected by such repeal. The Court of Civil Appeals held that there was no contract between the parties because of the failure of the defendants to have such surveys made as were called for under the act of 1879.

The assignment of errors filed on the allowance of the present writ of error contains among other grounds of error the failure of the court to hold that the act of the legislature of Texas, approved January 22, 1883, was repugnant to the Constitution of the United States, in that said act impaired the

obligation or validity of the contract for the purchase of said lands between the State of Texas and said appellants arising under and created by said acts of the legislature of Texas, approved July 14, 1879, and March 11, 1881.

Mr. J. Hubley Ashton, (with whom was *Mr. Thomas D. Cobbs* on the brief,) for Gibbs, trustee, plaintiff in error.

Mr. M. M. Crane, Attorney General of the State of Texas, for defendant in error.

Mr. William M. Walton (with whom were *Mr. Charles W. Ogden* and *Mr. John W. Maddox* on the brief,) for Bacon and Graves, plaintiffs in error.

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

The first question which arises in this case is in regard to our jurisdiction to review the judgment of the Court of Civil Appeals of the State of Texas. Some question was made in regard to the regularity and sufficiency of the writ of error from this court to the Court of Civil Appeals, as that court is not the highest court in the State. We think, however, the criticism is not well founded. So far as this case is concerned that court is the highest court of the State in which a decision in this suit could be had. An application was made to the Supreme Court of the State of Texas for a writ of error to the Court of Civil Appeals for the Second District by the defendants in the court below after judgment in the latter court, for the purpose of reviewing the judgment of that court, but the Supreme Court denied the application and thus prevented by its action a review by it of the judgment of the Court of Civil Appeals. The judgment of that court has, therefore, become the judgment of the highest court of the State in which a decision in the suit could be had, and this court may, so far as this point is concerned, reëxamine the same on writ of error under the provisions of section 709,

Revised Statutes of the United States. *Gregory* v. *McVeigh*, 23 Wall. 294; *Fisher* v. *Perkins*, 122 U. S. 522; *Stanley* v. *Schwalby*, 162 U. S. 255.

Assuming that the record is properly brought here by virtue of the writ of error granted by this court, the question arises as to what, if any, jurisdiction we have to review the judgment of the state court. Our only right to review it depends upon whether there is a Federal question in the record, which has been decided against the plaintiffs in error. Rev. Stat. § 709.

Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the State which has been upheld or effect given it by the state court. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 109. As stated in the case reported in 125 U. S., *supra*, it is not necessary that the law of a State, in order to come within this constitutional prohibition, should be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the Constitution of the United States.

If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract. The above cited cases announce this principle.

The case of *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, decides nothing that is repugnant to it. In that case the jurisdiction of this court was questioned on the ground that the contract of exemption mentioned in the act of 1834 was acknowledged to be valid by the Supreme Court of North Carolina, and it simply denied that particular property was embraced by its terms, and as a consequence it was claimed that the decision did not involve a Federal question. To which this court replied, speaking by Mr. Chief Justice Fuller, as follows: "In arriving at this conclusion, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry, whether it did or not, was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed."

So in *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486. In that case it was contended that this court had no jurisdiction to review the judgment of the Supreme Court of Tennessee, because the decision of that court proceeded upon the ground that there was no contract in existence between the railroad company and the State to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In truth, however, the court in its decree gave effect to the subsequent statute of Tennessee, which it was claimed impaired the obligation of the contract entered into between the State and the railroad company, and under those circumstances this court exercised jurisdiction to review the decision of the state court on the question as to whether there was a contract or not, and as to the meaning of the contract if there were one, and whether it had been impaired by the subsequent legislation to which effect had been given.

Both these cases have been cited by the counsel for plaintiffs in error as authorities for the jurisdiction of the court in this case. Inasmuch as the judgments of the state courts, in both cases, gave effect to the later statutes, they are governed by the principle set forth in 125 and 159 U. S., *supra*. It

becomes necessary therefore in the examination of this case to inquire whether the Federal question has been raised in the courts of the State, and, if so, whether the judgment of the state court is founded upon or in any manner gives the slightest effect to the subsequent act of 1883.

The statement of facts already given shows that the only allusion made to the act of 1883 in the pleadings was made by the defendants. No claim was made by the plaintiff, the State of Texas, by either of its pleadings of any right accruing to it by virtue or under the provisions of the last named act. The trial court in its findings sets forth at length and in detail the various times in which the surveys were made and the field-notes filed of the lands in question, and then states that none of the land in suit was actually surveyed upon the ground by the deputy surveyors who purported to have done so, but they merely copied in the office of the surveyor of the Palo Pinto land district the field-notes of the Elgin survey. What that Elgin survey was is also set forth in the foregoing statement, and upon these facts the court found as a conclusion of law that the defendants did not comply with the law by having the land surveyed as was required by it, and therefore could not purchase such land. Assuming there was a Federal question properly raised, we also find in the record a broad and comprehensive holding that the defendants never complied with the act of 1879, and never made the surveys necessary to be made under the law of Texas in order to vest them with any rights whatsoever under that act. This ground of judgment is founded upon a matter of state law and makes no reference whatever to any subsequent act of the legislature, and in no way upholds that act or treats it as of the least force or virtue any more than if the act had never been passed. If it never had been passed, and the defendants had made this same claim of having a contract for the purchase of the lands by reason of the things done under the act of 1879, and the court had decided upon their claim in the same way it has done in this case, it is beyond question that this court would have no jurisdiction to review that decision of the state court however erroneous it might be regarded by us.

The case is not altered by the fact that the State has passed an act which the defendants assert impairs the obligation of their contract, so long as the court, in deciding their case, holds that they never had a contract because they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act, and without upholding or in any manner giving effect to any provision thereof.

Whether the statute of 1879 permitted a survey to be adopted from a survey which had previously been made in the field, or whether it did not, was a case of construction of a state statute by the state court. It is not one of those cases where this court will construe the meaning of a state statute for itself. This court, even on writ of error to a state court, will construe for itself the meaning of a statute as affecting an alleged contract where it is claimed that a subsequent statute passed by the State has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has by the judgment of the state court in some way been brought into play and effect been given to some or all of its provisions. In such a case this court construes the contract in order to determine whether the later statute impairs its obligation. *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697. This is not such a case. The later statute is not given effect to by the judgment of the court.

The State of Texas by the act of 1883 withdrew its public lands from sale. The prior act of 1879 had offered them for sale. Whether the act of 1883 withdrew them or not could have no bearing upon the question whether these defendants had complied with the act of 1879 in relation to having the surveys made of the lands which they applied to purchase. If the lands had not been withdrawn, the parties' rights in them would depend upon whether they had been surveyed, and if they had not, they had no right to them. Whether they had or had not complied with the act of 1879 was not a Federal question. If the court had decided that the survey actually made was a sufficient compliance with the act,

but that defendants obtained no vested rights in the land by virtue of such survey, and that the act of 1883 was effectual in withdrawing such lands from market, that decision would have been reviewable here, and in that case this court would determine for itself what rights the parties obtained under the act of 1879, and whether by what they had done they had obtained any rights which could not be unfavorably affected by the act of 1883.

It is, however, urged that the Texas courts for many years had construed the acts passed by the State relating to surveys of its public lands as permitting what are termed "adoptive surveys," *i.e.*, surveys adopted from those which had once been made in the field, and that the act of 1879 in simply providing for surveys of lands for which applications to purchase might be made left it to the general law, which provided the details and manner of carrying out such survey. The construction of the general law which had been thus given by the courts upon the question of what was a sufficient survey, it is claimed, had become a rule of property which parties were entitled to rely upon, and which no court could overturn, and if it did so, a contract was impaired, and the judgment was reviewable by this court. The proposition cannot be maintained as a basis for giving this court jurisdiction upon writ of error to the state court. It ignores the limits to our jurisdiction in this regard, which, as has been seen, is confined to legislation which impairs the obligation of a contract. 125 and 159 U. S., *supra*.

The argument involves the claim that jurisdiction exists in this court to review a judgment of a state court on writ of error when such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Such a foundation for our jurisdiction does not exist.

It has been held that where a state court has decided in a series of decisions that its legislature had the power to permit municipalities to issue bonds to pay their subscriptions to rail-

road companies, and such bonds had been issued accordingly, if in such event suit were brought on the bonds in a United States court, that court would not follow the decision of the state court rendered after the issuing of the bonds and holding that the legislature had no power to permit a municipality to issue them, and that they were therefore void. Such are the cases of *Gelpcke* v. *City of Dubuque*, 1 Wall. 175, and *Douglass* v. *County of Pike*, 101 U. S. 677. In cases of that nature there is room for the principle laid down that the construction of a statute and admission as to its validity made by the highest court of a State prior to the issuing of any obligations based upon the statute, enters into and forms a part of the contract and will be given effect to by this court as against a subsequent changing of decision by the state court by which such legislation might be held to be invalid. But effect is given to it by this court only on appeal from a judgment of a United States court and not from that of a state court. This court has no jurisdiction to review a judgment of a state court made under precisely the same circumstances, although such state court thereby decided that the state legislation was void which it had prior thereto held to be valid. It has no such jurisdiction, because of the absence of any legislation subsequent to the issuing of the bonds which had been given effect to by the state court. In other words, we have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract. When a case is brought in the United States court, comity generally requires of this court that in matters relating to the proper construction of the laws and constitution of its own State, this court should follow the decisions of the state court; yet in exceptional cases, such as *Gelpcke and others*, *supra*, it is seen that this court has refused to be bound by such rule, and has refused to follow the later decisions of the state court. A writ of error has been dismissed in this court, *Railroad Company* v. *McClure*, 10 Wall. 511, where the judgment sought to be reviewed was that of a state court, holding

that certain bonds were void upon precisely the same facts that this court in the *Gelpcke case* held were valid. There was no subsequent legislative act impairing their obligation, and hence this court had no jurisdiction to review the judgment of the state court.

Considerable stress has been laid upon the case of *Louisiana* v. *Pilsbury*, 105 U. S. 278, as an authority for the proposition that this court has jurisdiction even though the judgment of the state court gives no effect to the subsequent state legislation, and also for the proposition that the obligation of a contract may be impaired by a change in the construction given to it by the courts of a State, and that a Federal question under the contract impairment clause of the Constitution is thus presented which may be reviewed in this court. It is stated that the Supreme Court of Louisiana in that case confined its decision to the unconstitutionality of the act of 1852, under which the bonds were issued, and that its judgment proceeded wholly without reference to the subsequent acts of the legislature which were claimed to impair the obligations of the contract based upon the act of 1852; and it is argued that unless a Federal question were presented, even where no effect was given to subsequent legislation, or by the fact that the state court, in holding the act of 1852 unconstitutional, varied from its former decisions in that regard and thereby impaired the obligation of a contract, this court would have had no jurisdiction to hear and decide the case as it did. A portion of the opinion of one of the judges of the Supreme Court of Louisiana is quoted, in which it is stated that they find it unnecessary to pass upon the subsequent statute which was alleged to have impaired the contract of 1852, because the views which had already been expressed declaring the act of 1852, under which the bonds were issued, unconstitutional, were sufficient to dispose of the case. An examination of the record in that case shows neither proposition for which it is cited is therein decided.

When the case was brought to this court by writ of error, a motion was made to dismiss the writ on the ground that the case was decided by the state court upon a question of state

law and without reference to any statute which plaintiffs in error alleged impaired their contract. The decision of the motion was postponed to the argument upon the merits, and upon that argument counsel for plaintiffs in error, clearly recognizing the necessity they were under of showing that the state court did give effect to the subsequent legislation in order to show the existence of a Federal question, claimed that it appeared in that record that no judgment could have been given for the defendant in error in the court below without necessarily giving effect to some of the subsequent legislation, and they claimed that an examination of the whole record would show such fact, notwithstanding the statement contained in one of the opinions of the state court, already alluded to. They also alleged there was no question of state law passed on by the court below sufficiently broad to have sustained the decision without passing on this Federal question. The argument in favor of the jurisdiction, as thus placed by the counsel for the plaintiffs in error, seems to have been sufficient to convince the court, for in its opinion the question of jurisdiction is not adverted to in any way and is assumed to exist. Of course, having jurisdiction to review the state court in regard to this Federal question, it then became proper for this court to determine for itself what was the contract and whether it had been impaired by any subsequent legislation of the State. In determining what the contract was, the opinion cites many cases in the state court which had been decided regarding the constitution of that State of 1845, which was in existence at the time the act of 1852 was passed; and it was stated that the exposition made by the courts of the State in regard to its constitution or laws in existence at the time when the obligations were issued under them was to be treated as a part of the contract and formed a basis for determining what that contract was.

There is no decision in the case which gives the least support to the proposition that jurisdiction exists in this court to review on writ of error to a state court, its holding as to what the contract was, simply because it had changed its construc-

tion thereof, nor that the obligation of a contract may be impaired within the contract clause of the Federal Constitution, unless there has been some subsequent act of the legislative branch of the government to which effect has been given by the judgment of the state court. The case may, therefore, be regarded as in entire harmony with the later cases on the subject mentioned in 125 and 159 U. S., *supra*. The opinion proceeds upon the assumption that effect had been given to this subsequent legislation, and it proves that such legislation impaired the contract as construed here.

This case, however, is not in its facts within the claim made by the counsel for the plaintiffs in error. In this case there has in truth been no change in the construction of the state statute regarding what constitutes a sufficient survey under its provisions as claimed by counsel. The sales act of 1879 provided that surveys should be made, and at that time it is said a statute was in force which provided for making surveys of public lands as follows:

"SEC. 19. The surveyors shall make oath before the respective commissioners, truly and faithfully to discharge the duties of their office.

"SEC. 20. The course of the lines shall be determined by the magnetic needle, and care shall be taken to determine its variations from the pole in the district where the surveys are made.

"SEC. 21. The surveys shall be made with great caution, with metallic chains made for the purpose, and care shall be taken that the place of beginning the survey of each parcel of land be established with certainty, taking the bearing and distance of two permanent objects at least." (Sayles' Early Laws, vol. 1, p. 100.)

Under that act and acts similar thereto the Supreme Court of Texas, as has been stated, had for many years recognized the adoption of surveys previously made as being a legal survey within the spirit of those laws. These surveys were, however, not made under the provisions of the act just quoted. Soon after the passage of the act of 1879, and in that same year, the Revised Statutes of Texas were adopted,

article 3908 of which has already been given in the above statement of facts, and subdivision 8 of that article may be here again set forth. It reads that "the correctness of the survey and that it was made according to law shall be certified to officially by the surveyor who made the same, *and also that such survey was actually made in the field*, and that the field-notes have been duly recorded, giving the book and page." Thus it will be seen that the old law had been altered at least three years previous to the application for the purchase of these lands made by the defendants, and the Court of Civil Appeals of Texas in this case has stated in the course of its opinion with reference to section 3908 as follows: "We think the principal object of the legislature in requiring such strictness in the certificate to be made by the surveyor was to correct the abuse to which the previous law had been subjected, as above indicated, and we think it must be conceded, if the legislature had the power to condemn what is commonly known as an office survey or office work, and to require its officer, before parting with the public lands of the State, to have the survey actually done in the field; it has done so by the passage of this statute." The plaintiffs in error claim, however, that the Revised Statutes were but a simple revision of the laws of Texas, not meant to work any change therein, and that the different language in which this article is couched from that existing in the former law ought to be regarded as working no alteration in the meaning of the law, and that it should be construed in the same manner as the law whose place it took. Whether this article in question was or was not a mere revision and continuation of existing law, and whether the changed phraseology properly called for a change of construction, were questions entirely for the state court to determine. The state court, while acknowledging that under the old law an adoptive survey was good, held that under the new law a survey in the field was necessary. This is no change of construction of the same act, and cannot, therefore, form a basis for the argument of counsel for plaintiffs in error, that a change of construction of the same statute may work an impairment of the obligations of the contract

so that a judgment of the state court thereon may be reviewable here. The court is under no obligation to put the same construction upon a later statute that it has placed upon an earlier one, though the language of the two may be similar. *Wood* v. *Brady*, 150 U. S. 18. But it is unnecessary to dwell upon this difference between the two statutes, because under such circumstances as exist in this case, the decision of the state court regarding it is not reviewable here on a writ of error to that court.

We have thus far treated this case as if the sole question arising in it were not of a Federal nature. It will be seen, however, that certain tenders were made to the treasurer of the State of Texas in payment for lands claimed by the defendants to have been purchased by them, and some of those tenders were held by the trial court to have been insufficient, because they included tenders of payment for some lands where the surveys had been made after the passage of the act of 1883 repealing the act of 1879, as well as for surveys made before that time, and the defendants did not separate or offer to separate in their tenders the surveys made before the repeal from those made after, and there was consequently, as the trial court held, no legal tender for any of the surveys, and upon these facts the court founded a conclusion of law, (No. 4,) which is as follows: "Bacon and Graves have never paid, or offered to pay, for said land until long after the expiration of the time allowed and required by law. The purported surveys of many of the sections of the land for which they tendered payment on May 19, 1883, were made after the fifty cent act was repealed, and Bacon and Graves did not separate or offer to separate in their tender the surveys made before the repeal from those made after, and there was consequently no legal tender." That was one of five different grounds upon which the trial court held that the defendants had not complied with the law and were not entitled to purchase the lands in question. This particular finding is in no way dependent upon the others, and they are all entirely separate and distinct from one another. The finding No. 2, that "they did not comply with the law by having the lands

surveyed, as was required by law, and therefore could not purchase it," is distinct and separate ground for the judgment of the court to rest upon to the same extent, as if none other had been stated, and it is entirely sufficient in itself upon which to rest the judgment.

If the fourth finding, above set forth, had alone been made by the court below, this court, upon writ of error, would have had jurisdiction to review the whole question, because by that finding some effect is given to the subsequent act of the legislature which, it is claimed, impaired the obligation of defendants' alleged contract with the State; but where there are two grounds for the judgment of the state court, one only of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reviewed, it is now settled that this court will not look into the Federal question, inasmuch as there is another ground upon which the judgment can rest, and it will dismiss the writ for that reason. *Eustis* v. *Bolles*, 150 U. S. 361. In the course of the opinion in that case, which was delivered by Mr. Justice Shiras, the case, of *Beaupré* v. *Noyes*, 138 U. S. 397, 401, is cited, and the opinion in the latter case contains the following statement: "Whether the state court so interpreted the territorial statute as to deny such writ to plaintiffs in error we need not inquire, for it proceeds in part upon another and distinct ground, not involving a Federal question, and sufficient in itself to maintain the judgment without reference to that question." The opinion, after stating what that ground was, thus continues: "That view does not involve a Federal question; whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment without reference to the Federal question."

In *Rutland Railroad* v. *Central Vermont Railroad*, 159 U. S. 630, it is stated "that where a state court, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, this court will dismiss the writ of error without considering the Federal question." To same effect are *Gillis*

v. *Stinchfield*, 159 U. S. 658, 660, and *Seneca Nation of Indians* v. *Christy*, 162 U. S. 283.

In such cases as this it has sometimes been the practice of this court to affirm the judgment and sometimes to dismiss the writ. "An examination of our records will show that in some cases this court has affirmed the judgment of the court below and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the questions presented. However that may be, we think that when we find it unnecessary to decide any Federal question, and that when the state court has based its decision on a local or state question, our logical course is to dismiss the writ." *Eustis* v. *Bolles*, *supra*. Accordingly the judgment in the case last cited was one of dismissal. The same judgment was given in the two cases in 159 U. S., *Rutland R. R. Co.* v. *Central Vermont R. R. Co.* and *Gillis* v. *Stinchfield*, and also in the very latest case on the subject, that of the *Seneca Nation* v. *Christy*, 162 U. S. 283.

The proper judgment in this case should, therefore, be one of dismissal, and the writ is accordingly

Dismissed.

WONG WING *v.* UNITED STATES.

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

No. 204. Argued April 1, 2, 1896. — Decided May 18, 1896.

Detention or temporary confinement, as part of the means necessary to give effect to the exclusion or expulsion of Chinese aliens is valid.

The United States can forbid aliens from coming within their borders, and expel them from their territory, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials; but when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

Opinion of the Court.

On July 15, 1892, Wong Wing, Lee Poy, Lee Yon Tong and Chan Wah Dong were brought before John Graves, a commissioner of the Circuit Court of the United States for the Eastern District of Michigan, by virtue of a warrant issued upon the complaint of T. E. McDonough, deputy collector of customs, upon a charge of being Chinese persons unlawfully within the United States and not entitled to remain within the same. The commissioner found that said persons were unlawfully within the United States and not entitled to remain within the same, and he adjudged that they be imprisoned at hard labor at and in the Detroit house of correction for a period of sixty days from and including the day of commitment, and that at the expiration of said time they be removed from the United States to China.

A writ of *habeas corpus* was sued out of the Circuit Court of the United States, directed to Joseph Nicholson, superintendent of the Detroit house of correction, alleging that said persons were by him unlawfully detained; the superintendent made a return setting up the action of the commissioner; and, after argument, the writ of *habeas corpus* was discharged, and the prisoners were remanded to the custody of said Nicholson, to serve out their original sentence. From this decision an appeal was taken to this court.

Mr. Frank H. Canfield for appellants. *Mr. Frederick W. Fielding* was on his brief.

Mr. Assistant Attorney General Dickinson for appellees.

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

By the thirteenth section of the act of September 13, 1888, c. 1015, 25 Stat. 476, 479, it was provided as follows: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States or its Territories, may be arrested upon a warrant issued upon a complaint under oath, filed by any party on behalf of the United States, by any justice,

judge, or commissioner of any United States Court, returnable before any justice, judge or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

The first section of the act of October 1, 1888, c. 1064, 25 Stat. 504, was in the following terms: "That from and after the passage of this act it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States."

The validity of these acts was assailed because they were alleged to be in conflict with existing treaties between the United States and China, and because to deport a Chinaman who had, under previous laws, a right to return to the United States, was a punishment which could not be inflicted except by judicial sentence.

But these contentions were overruled and the validity of the legislation sustained by this court in the case of *Chae Chan Ping* v. *United States*, 130 U. S. 581. In this case it was held, in an elaborate decision by Mr. Justice Field, that the act excluding Chinese laborers from the United States was a constitutional exercise of legislative power; that, so far as it conflicted with existing treaties between the United States and China, it operated to that extent to abrogate them as part of the municipal law of the United States; and that a right conferred upon a Chinese laborer, by a certificate issued in pursuance of previous laws, to return to the United States could be taken away by a subsequent act of Congress.

On May 5, 1892, by an act of that date, c. 60, 27 Stat. 25, Congress enacted that all laws then in force, prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent, should be continued in force for a period of ten years from the passage of the act. The sixth

section of the act was, in part, in the following terms: "And it shall be the duty of all Chinese laborers within the limits of the United States, at the time of the passage of this act, and who are entitled to remain in the United States, to apply to the collector of internal revenue of their respective districts, within one year after the passage of this act, for a certificate of residence, and any Chinese laborer, within the limits of the United States, who shall neglect, fail or refuse to comply with the provisions of this act, or who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States as hereinbefore provided."

As against the validity of this section, it was contended that, whatever might be true as to the power of the United States to exclude aliens, yet there was no power to banish such aliens who had been permitted to become residents, and that, if such power did exist, it was in the nature of a punishment, and could only be lawfully exercised after a judicial trial.

But this court held, in the case of *Fong Yue Ting* v. *United States*, 149 U. S. 698, that the right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation; that the power of Congress to expel, like the power to exclude, aliens or any class of aliens from the country may be exercised entirely through executive officers; and that the said sixth section of the act of May 5, 1892, was constitutional and valid.

The act of August 18, 1894, c. 301, 28 Stat. 372, 390, made provision for expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation,

and contained the following enactment: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the Secretary of the Treasury."

One Lem Moon Sing, a person of the Chinese race, who claimed to have had a permanent domicil in the United States, and to have carried on business therein as a merchant before the passage of the act of August 18, 1894, and to have gone on a temporary visit to his native land with the intention of returning and continuing his residence in the United States — during which temporary absence the said act was passed — was, on his return, prevented from landing, and was confined and restrained of his liberty by the collector of the port of San Francisco. He filed in the District Court of the United States for the Northern District of California a petition for a writ of *habeas corpus*, wherein he alleged that he had not been apprehended and was not detained by virtue of the judgment, order, decree or other judicial process of any court, or under any writ or warrant, but under the authority alleged to have been given to the collector of the port of San Francisco by the act of August 18, 1894, and that his detention was without jurisdiction and without due process of law, and against his rights under the Constitution and laws of the United States. The writ of *habeas corpus* was denied by the court below, and from this judgment an appeal was prosecuted to this court.

The contention on behalf of the appellant in the case was thus stated by Mr. Justice Harlan, who delivered the opinion of the court:

"The contention is that while, generally speaking, immigration officers have jurisdiction under the statute to exclude an alien who is not entitled under some treaty or statute to come into the United States, yet if the alien is entitled, of right, by some law or treaty, to enter this country, but is, nevertheless, excluded by such officers, the latter exceed their jurisdiction, and their alleged action, if it results in restraining

the alien of his liberty, presents a judicial question, for the decision of which the courts may intervene upon a writ of *habeas corpus*."

In considering this position the court said:

"That view, if sustained, would bring into the courts every case of an alien who claimed the right to come into the United States under some law or treaty, but was prevented from doing so by the executive branch of the government. This would defeat the manifest purpose of Congress in committing to subordinate immigration officers and to the Secretary of the Treasury exclusive authority to determine whether a particular alien seeking admission into this country belongs to the class entitled by some law or treaty to come into the country, or to a class forbidden to enter the United States. Under that interpretation of the act of 1894 the provision that the decision of the appropriate immigration or customs officers should be final, unless reversed on appeal to the Secretary of the Treasury, would be of no practical value.

"The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

Accordingly the judgment of the court below denying the application for the writ of *habeas corpus* was affirmed. *Lem Moon Sing* v. *United States*, 158 U. S. 538.

The present appeal presents a different question from those heretofore determined. It is claimed that, even if it be competent for Congress to prevent aliens from coming into the country, or to provide for the deportation of those unlawfully within its borders, and to submit the enforcement of the provisions of such laws to executive officers, yet the fourth section of the act of 1892, which provides that "any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United

States," inflicts an infamous punishment, and hence conflicts with the Fifth and Sixth Amendments of the Constitution, which declare that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

It is argued that, as this court has held, in *Ex parte Wilson*, 114 U. S. 417, and in *Mackin* v. *United States*, 117 U. S. 348, that no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court, and that imprisonment at hard labor for a term of years is an infamous punishment, the detention of the present appellants, in the house of correction at Detroit, at hard labor for a period of sixty days, without having been sentenced thereto upon an indictment by a grand jury and a trial by a jury, is illegal and without jurisdiction.

On the other hand, it is contended on behalf of the Government that it has never been decided by this court that in all cases where the punishment may be confinement at hard labor the crime is infamous, and many cases are cited from the reports of the state Supreme Courts, where the constitutionality of statutes providing for summary proceedings, without a jury trial, for the punishment by imprisonment at hard labor of vagrants and disorderly persons has been upheld. These courts have held that the constitutional guarantees refer to such crimes and misdemeanors as have, by the regular course of the law and the established modes of procedure, been the subject of trial by jury, and that they do not embrace every species of accusation involving penal consequences. It is urged that the offence of being and remaining unlawfully within the limits of the United States by an alien is a political offence, and is not within the common law cases triable only by a jury, and that the Constitution does not apply to such a case.

The Chinese exclusion acts operate upon two classes — one

consisting of those who came into the country with its consent, the other of those who have come into the United States without their consent and in disregard of the law. Our previous decisions have settled that it is within the constitutional power of Congress to deport both of these classes, and to commit the enforcement of the law to executive officers.

The question now presented is whether Congress can promote its policy in respect to Chinese persons by adding to its provisions for their exclusion and expulsion punishment by imprisonment at hard labor, to be inflicted by the judgment of any justice, judge or commissioner of the United States, without a trial by jury. In other words, we have to consider the meaning and validity of the fourth section of the act of May 5, 1892, in the following words: "That any such Chinese person, or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be and remain in the United States, shall be imprisoned at hard labor for a period of not exceeding one year, and thereafter removed from the United States, as hereinbefore provided."

We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense.

So, too, we think it would be plainly competent for Congress to declare the act of an alien in remaining unlawfully within the United States to be an offence, punishable by fine or imprisonment, if such offence were to be established by a judicial trial.

But the evident meaning of the section in question, and no other is claimed for it by the counsel for the Government, is that the detention provided for is an imprisonment at hard labor, which is to be undergone before the sentence of depor-

tation is to be carried into effect, and that such imprisonment is to be adjudged against the accused by a justice, judge or commissioner, upon a summary hearing. Thus construed, the fourth section comes before this court for the first time for consideration as to its validity.

It is, indeed, obvious, from some expressions used by the court in a previous opinion under the exclusion acts, that it was perceived that the question now presented might arise; but care was taken to reserve any expression of opinion upon it. Thus, in the case of *Fong Yue Ting* v. *United States*, 149 U. S. 730, Mr. Justice Gray used the following significant language:

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

There is an evident implication, in this language, of a distinction between those provisions of the statute which contemplate only the exclusion or expulsion of Chinese persons and those which provide for their imprisonment at hard labor, pending which their deportation is suspended.

Our views, upon the question thus specifically pressed upon

our attention, may be briefly expressed thus: We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by Congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused.

No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial. It is not consistent with the theory of our government that the legislature should, after having defined an offence as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents.

In *Ex parte Wilson*, 114 U. S. 428, this court declared that for more than a century imprisonment at hard labor in the state prison or penitentiary or other similar institution has been considered an infamous punishment in England and America, and that imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, "involuntary servitude for crime," spoken of in the provision of the Ordinance of 1787, and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished, and which declares

that such slavery or involuntary servitude shall not exist within the United States or any place subject to their jurisdiction, except as a punishment for crime whereof the party shall have been duly convicted.

And in the case of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws." Applying this reasoning to the Fifth and Sixth Amendments, it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.

Our conclusion is that the commissioner, in sentencing the appellants to imprisonment at hard labor at and in the Detroit house of correction, acted without jurisdiction, and that the Circuit Court erred in not discharging the prisoners from such imprisonment, without prejudice to their detention according to law for deportation.

The judgment of the Circuit Court is reversed and the cause remanded to that court with directions to proceed therein in accordance with this opinion.

Mr. Justice Field, concurring in part and dissenting in part.

The majority of the justices, in this case, hold that whatever might be true as to the power of the United States to exclude aliens, yet there was no power to punish such aliens who had been permitted to become residents, and that, if such power did exist, it could only be lawfully exercised after a

judicial trial, and therefore that the accused were entitled to be discharged from their arrest and imprisonment. To that extent their opinion is concurred in.

But I do not concur, but dissent entirely from what seemed to me to be harsh and illegal assertions, made by counsel of the Government, on the argument of this case, as to the right of the court to deny to the accused the full protection of the law and Constitution against every form of oppression and cruelty to them.

Wong Wing, one of the petitioners on proceedings to be released from the alleged unlawful imprisonment, is a subject of the Chinese Government, with which the Government of the United States has relations of peace and amity. This Chinaman and three other persons of the same race and country were in the month of July, 1892, found within the city of Detroit, in the Eastern District of Michigan, and upon the complaint of the deputy collector of customs at that place, made to a United States Circuit Court commissioner for that district, that they were unlawfully within the limits of the United States, a warrant for their arrest was issued by the commissioner, and they were accordingly arrested and taken before him for inquiry into the correctness of the charge.

Upon examination before the commissioner upon the charge it was held by him that the Chinese persons named were unlawfully within the United States, and his judgment was that they should be imprisoned at hard labor in the house of correction at Detroit, in the Eastern District of Michigan, for a period of sixty days from and including that date, and that at the expiration of that period they should be removed from the United States to China.

The Chinese thus arrested and committed immediately applied to the judges of the United States court for the Eastern District of Michigan, for a writ of *habeas corpus*, to be released from their imprisonment and restraint of their liberty, alleging that the same were unlawful, without warrant of law and contrary to the Constitution and laws of the United States; and that they were made under the act of Congress

approved May 5, 1892, entitled "An act to prohibit the coming of Chinese persons into the United States."

The petitioners alleged that the proceedings and conviction were wholly without jurisdiction on the part of the commissioner and without warrant and authority of law. They therefore prayed that the writ might issue commanding the superintendent of the Detroit house of correction to forthwith bring the petitioners before the court and show cause, if any there be, why they should be further detained and deprived of their liberty. The writ was immediately issued and served upon the superintendent, commanding him to have the bodies of the arrested and imprisoned Chinese upon a day and hour designated before the court, together with the time and cause of such imprisonment and detention.

The superintendent immediately appeared before the court and produced the arrested and imprisoned persons with a copy of the commitment issued by the commissioner at a session of the Circuit Court of the United States for the Eastern District of Michigan, held pursuant to adjournment in the District Court room in the city of Detroit on Friday, the 22d day of July, 1892, Honorable Henry H. Swan, District Judge, being present, and after arguments of counsel were heard, the court ordered that the writ of *habeas corpus* be discharged, and that the persons arrested be remanded to the custody of Nicholson, the keeper of the District house of correction, to serve their original sentences.

The prisoners now allege that they are aggrieved by the decision of the court, and are advised that the judgment and order are erroneous upon the following, among other grounds:

First, because the commitment and imprisonment of the petitioners in the house of correction are unlawful and without warrant of law, and contrary to the Constitution and laws of the United States; that the proceedings and conviction of the petitioners before the commissioner were wholly without jurisdiction on his part, and without warrant or authority of law; that for these and other reasons appearing upon the face of the proceedings the petitioners, feeling themselves aggrieved by the judgment and decision of the Circuit Court,

appeal therefrom to the Supreme Court of the United States, and pray that the appeal may be allowed, and, in accordance with the rules and practice of that court, pending the appeal they may be admitted to bail, which prayer was granted.

The question involved is whether a Chinese person can be lawfully convicted and sentenced to *imprisonment at hard labor* for a definite period by a commissioner without indictment or trial by jury. The question involves the constitutionality of section 4 of the act of 1892.

It is submitted that this section is invalid because it conflicts with the Fifth Amendment of the Constitution, which declares that "no person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, . . . nor be deprived of life, liberty or property without due process of law," and also conflicts with the Sixth Amendment of the Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

It does not follow that, because the Government may expel aliens or exclude them from coming to this country, it can confine them at hard labor in a penitentiary before deportation or subject them to any harsh and cruel punishment. If the imprisonment of a human being at hard labor in a penitentiary for any misconduct or offence is not punishment, it is difficult to understand how anything short of the infliction of the death penalty for such misconduct or offence is punishment. It would seem to be not only punishment, but punishment infamous in its character, which, under the provisions of the Constitution of the United States, can only be inflicted upon a person after his due conviction of crime pursuant to the forms and provisions of law.

Section 4 of the act of 1892 provides: "That any Chinese person or person of Chinese descent, convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labor for a period not exceeding one year, and thereafter removed from the United

States, as hereinbefore provided," and whenever the law provides that imprisonment shall follow a trial and conviction of the offender, it necessarily intends that such imprisonment shall be inflicted as *punishment* for the offence of which the person has been convicted. Imprisonment at hard labor for a definite period is not only punishment, but it is punishment of an infamous character.

Imprisonment at hard labor in a state prison is also *servitude*, to which no person under the Constitution can be subjected except as a punishment for crime, whereof he shall have been duly convicted.

In *Ex parte Wilson*, 114 U. S. 417, the court said: "Imprisonment at hard labor, compulsory and unpaid, is, in the strongest sense of the words, 'involuntary servitude for crime,' spoken of in the Ordinance of 1787 and of the Thirteenth Amendment of the Constitution, by which all other slavery was abolished."

In 2 Story on the Constitution, § 1924, it is said that this amendment "forbids not merely the slavery heretofore known to our laws, but all kinds of involuntary servitude not imposed in punishment for a public offence."

The provisions of the Fifth, Sixth and Thirteenth Amendments of the Constitution apply as well to Chinese persons who are aliens as to American citizens.

The term "person," used in the Fifth Amendment, is broad enough to include any and every human being within the jurisdiction of the republic. A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws.

This has been decided so often that the point does not require argument. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369; *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Carlisle* v. *United States*, 16 Wall. 147; *In re Lee Tong*, 18 Fed. Rep. 253; *In re Wong Yung Quy*, 6 Sawyer, 237; *In re Chow Goo Pooi*, 25 Fed. Rep. 77.

The contention that persons within the territorial jurisdic-

tion of this republic might be beyond the protection of the law was heard with pain on the argument at the bar — in face of the great constitutional amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French Cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. "For fifteen years," such were his words, "while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice."

It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our republican institutions and laws a vain and idle proceeding.

But whilst remarking upon and denouncing in the strongest language every form of cruelty and barbarity in the legislation or proceedings adopted for the expulsion or exclusion of Chinese from the country, who do not enter by the permission of the Government, in order to avoid a misconception of its authorized action in that respect the declarations of the court with regard to the aliens named as to their entrance and as to the time and manner of their departure are adopted.

And the statement of the court in the present case that the United States can, as a matter of public policy, by Congressional legislation, forbid aliens or classes of aliens from their territory, and can, in order to make effectual such legislation for their exclusion or expulsion, devolve the power and duty of identifying and arresting them, and causing their deportation upon executive or subordinate officials, is accepted as sound.

And the further views announced by the court that when Congress sees fit to promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation to be valid must provide for an arrest and trial to establish the guilt of the accused, are also accepted and adopted. "It is not consistent," as truly said by the court, "with the theory of our government that the legislature should after having defined an

offence as an infamous crime provide that the fact of infamy shall be established by one of its own agents."

MR. JUSTICE BREWER took no part in the decision of this case.

UNITED STATES *v.* WINCHESTER AND POTOMAC RAILROAD COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 195. Argued March 31, April 1, 1896. — Decided May 18, 1896.

The Court of Claims had no jurisdiction over this case, as the claim of the defendant in error is a "War Claim," growing out of the appropriation of property by the army while engaged in the suppression of the rebellion.

THIS appeal brought up for review a judgment in favor of the Winchester and Potomac Railroad Company for the sum of thirty thousand three hundred and forty dollars, the value of certain iron rails removed in 1862 from the track of that railroad by the military authorities of the United States.

It seems necessary to a clear understanding of the questions presented that the history of this claim and the circumstances attending its prosecution against the United States should be fully stated.

In 1862 and for many years prior thereto the appellee, a corporation of Virginia, owned and operated the railroad extending from Harper's Ferry to Winchester in the State of Virginia. Its capital stock was largely owned by citizens of loyal States.

In March of that year the military authorities of the United States took possession of the road, which at the time was operated by the company for the use and benefit of the Confederate States in the transportation of troops, munitions of war, and other subjects under a contract made September 11, 1861, between an officer of the Confederate States Army and the president of the railroad company.

Statement of the Case.

The possession of the United States covered substantially the whole time from March, 1862, to the 20th day of January, 1866, and during that period the Government had the exclusive use of the road for military purposes, receiving all tolls and revenues and applying the same to its benefit.

The United States, while in possession, repaired the road, and removed from it a quantity of strap rails and substituted T rails taken by it from the Manassas Gap Railroad Company. These T rails were upon the Winchester and Potomac Railroad up to the time possession was surrendered by the United States in 1866. The strap rails or iron so removed from the Winchester and Potomac Railroad were stored at Alexandria, Virginia.

The United States has never paid or accounted to the claimant for the revenues of its road which it collected and appropriated, nor for the rails so removed.

Immediately upon the restoration of the roads of the above companies to their respective owners, the Manassas Gap Railroad Company brought suit against the Winchester and Potomac Railroad Company for the iron taken from its own road and put upon the latter road, or its value, and obtained judgment, which was compromised in 1873 or 1874 by the payment by the Winchester and Potomac Railroad Company of $25,000.

The circumstances under which the appellee's road was surrendered by the United States are fully disclosed in the findings below, and, so far as pertinent to the present inquiry, may be thus summarized:

On the 19th day of May, 1865, the Quartermaster General submitted to the Secretary of War a scheme for the disposition of the railroads in the States then lately in rebellion. That scheme was as follows:

"1. The United States will, as soon as it can dispense with the military occupation and control of any road of which the Quartermaster's Department is now in charge, turn it over to the parties asking to receive it who may appear to have the best claim, and be able to operate it in such manner as to secure the speedy movement of all military stores and troops;

the Quartermaster General, upon the advice of the military commander of the department, to determine when this can be done, subject to the approval of the Secretary of War. 2. No charge to be made against the railroad for expense of material or expense of operation. 3. All materials for permanent way used in the repair and construction of the road, and all damaged material of this class which may be left along its route, having been thrown there during the operation of destruction or repair, to be considered as part of the road and given up with it. 4. No payment or credit to be given to the railroad for its occupation or use by the United States during the continuance of the military necessity which compelled the United States to take possession of it by capture from the public enemy. The recovery of the road from the public enemy and its return to loyal owners, and the vast expenditure of defence and repair, are a full equivalent and more than an equivalent for its use. 5. All movable property, including rolling stock of all kinds, the property of the United States, to be sold at auction, after full public notice, to the highest bidder. 6. All rolling stock and material, the property before the war of railroads, and captured by the forces of the United States, to be placed at the disposal of the roads which originally owned it, and to be given up to these roads as soon as it can be spared, and they appear by proper agents authorized to receive it. 7. When a State has a board of public works able and willing to take charge of its railroads, the railroads in the possession of the Quartermaster's Department to be given up to this board of public works, leaving it to the state authorities and the judicial tribunals to regulate all questions of property between said boards, agents or stockholders. 8. Roads not being operated by the United States Quartermaster's Department not to be interfered with unless under military necessity. Such roads to be left in possession of such persons as may now have possession, subject only to the removal of every agent, director, president, superintendent or operator who has not taken the oath of allegiance to the United States, which rule should be rigidly enforced. 9. When the superintendents in actual possession decline to take

such oath, some competent person to be appointed as receiver of the railroad, who shall administer the affairs of the road and account for its receipts to the board of directors who may be formally recognized as the legal and loyal board of managers. This receiver to be appointed, as in the case of other abandoned property, by the Treasury Department. . . ."

The Secretary of War approved that scheme, and the Quartermaster General was directed to turn over the roads.

Certain regulations were established by the War Department, and promulgated August 8, 1865, and October 14, 1865, for the guidance of the military authorities in relinquishing the control of railroads in the occupancy of the United States.

In reply to an oral application made November 16, 1865, by the Winchester and Potomac Railroad Company to have its road restored upon the terms accorded to other companies, the matter was referred by the Secretary of War to the Quartermaster General for such arrangement and recommendation as he deemed proper. The Quartermaster General recommended that the application be granted, and the officer in charge of military roads was directed to surrender possession — "all rolling stock and railroad materials upon that road, which the company may not elect to purchase, to be sold, as soon as preparation can be made, at public auction."

This order not having been immediately executed, the president of the Winchester and Potomac Railroad Company, December 5, 1865, made a request in writing that his company's road be delivered up to its board of directors. Thereupon, on the 15th of December, 1865, an order for the surrender of the road was issued. That order was executed by the delivering the road, on the 16th day of January, 1866, to the Baltimore and Ohio Railroad Company, as lessees of the Winchester and Potomac Railroad Company.

The facts in relation to the disposition of the iron removed by the military authorities of the United States from the Winchester and Potomac Railroad and stored at Alexandria are as follows:

On the same day on which the president of the Winchester

and Potomac Railroad Company made verbal application for the restoration of the road to his company, he addressed to the director and general manager of military railroads a communication in which he said: "We are informed that a quantity of the iron from our road — flat or strap bar — is now in possession of your department at Alexandria, Va., which we are anxious to recover, as we hope the road is about to be returned to the company. We respectfully request that the fact may be inquired into, and, if proper, an order made to return the said iron to my order, as president of the company."

No answer was returned to this application, nor were any affidavits or other proof of the ownership or value of the iron mentioned, nor of any of the other facts therein alleged, offered to or filed in any Executive Department, prior to May 11, 1885, on which day the Baltimore and Ohio Railroad Company made a written application, to which reference will be presently made. But at or about the date of the above communication of November 16, 1865, the president of the Winchester and Potomac Railroad Company made an application to the Quartermaster General for this iron.

A large quantity of iron, stored at Alexandria and in the possession of the United States, and aggregating more than $2,000,000 in value, was sold at public auction on December 13, 1865. The iron taken in 1862 from the appellee's road was part of the iron so disposed of. It sold for $30,340, and was paid for January 9, 1866, the proceeds being used, through the War Department, for the benefit of the United States.

On the 2d day of December, 1875, the president of the Baltimore and Ohio Railroad Company addressed to the Quartermaster General a communication, saying: "Subsequent to the termination of the late war the United States military railroad authorities sold a quantity of old rails in Alexandria, Va., which had been taken from the line of the Winchester and Potomac Railroad. I have the honor to request that you will furnish me with the dates the said rails were sold, the quantity sold, the price per ton, the amount realized from the sale of the rails taken from the line of the Winchester and Potomac Railroad, and the disposition made by the U. S. M. R. R'd

managers of the proceeds. You will further oblige me by stating the date on which the Winchester and Potomac Railroad was surrendered by the War Department to its owners."

The Quartermaster General replied, under date of December 11, 1875, giving him exact information touching all the matters about which inquiry was made.

Nothing seems to have been done by the claimant or by any one in its name, until May 11, 1885, when the Baltimore and Ohio Railroad Company, by its president, made to the Quartermaster General a written application or claim for the proceeds of the sale of said iron, as follows:

"*The United States to the Baltimore and Ohio Railroad Company, lessee of the Winchester and Potomac Railroad Company, Dr.*

"For 507 tons 1940 pounds (2240 pounds to the ton) of iron rails appertaining to the Winchester and Potomac Railroad Company, and the property of that company, which once formed a part of its superstructure when taken by the United States authorities, and was subsequently sent to Alexandria, Va., and sold at auction by the United States Military Railroad Department in December, 1865, for the sum of $30,340."

This application was forwarded to the Secretary of War, and was by him returned to the Quartermaster General. The latter officer made an elaborate report, under date of December 7, 1885, in which, among other things, he said: "The only reason which can be given for the failure of the company to secure possession of its old iron is the fact that the company was not in condition to receive it before its sale. If the transfer of the road to the Winchester and Potomac Railroad Company had been authorized and effected before the sale of the iron it is believed that the company would have been permitted to take possession of it. A denial of this privilege or right would have involved an unjust discrimination by the Government between the treatment of this company and that of all other companies whose roads were used for military purposes during the war, and would have been a marked departure from the policy and practice of the Government toward such companies upon the restoration of their roads. . .

But it is not believed to be in the power of the Executive Department to afford relief at this time without the intervention of Congress. . . . It is, therefore, respectfully recommended, if this report be approved, that this claim, with the papers accompanying it, be referred to the Third Auditor for adjudication by the accounting officers of the Treasury, with recommendation for such action as the law and facts of the case require."

The Secretary of War approved this report, and "the accompanying papers in the claim of the Baltimore and Ohio Railroad Company for the proceeds of railroad iron, stated by the company at $30,340," were "referred (through the office of the Quartermaster General) to the Third Auditor of the Treasury for settlement from the appropriation 'Transportation of the Army and its supplies,' the amount found due to be reported to Congress for appropriation."

On the 4th day of March 1887 the Third Auditor reported against the claim, but without expressing an opinion on its merits if such claim should ever be presented by the Winchester and Potomac Railroad Company.

Thereupon the Winchester and Potomac Railroad Company was substituted as claimant in interest in place of the Baltimore and Ohio Railroad Company, its lessee, claiming on its behalf.

On the 18th day of April, 1887, the Third Auditor again recommended the disallowance of the claim and certified the matter to the Second Comptroller of the Treasury.

The Second Comptroller, March 9, 1889, sent the claim, with accompanying papers, to the Secretary of the Treasury as one involving disputed facts and controverted questions of law, with a recommendation that the case, vouchers, etc., be transmitted to the Court of Claims for trial and adjudication. The Secretary, March 12, 1889, sent the claim, with the papers, to the Court of Claims, under section 1063 of the Revised Statutes, for trial and adjudication, expressing, however, doubt whether the Department had jurisdiction of it, but submitting that question to that court for its determination.

Mr. Assistant Attorney General Dickinson for appellant.

Mr. Frank P. Clark for appellee.

The whole argument of the appellant is based upon the assumption that this claim is a "War Claim."

It is nothing of the kind; it is a claim founded upon a contract, and one entered into after the war had ended.

I venture the proposition that were the United States to *make a contract*, express or implied, with an enemy in arms, the Court of Claims would have jurisdiction of a case instituted to recover damages for its breach.

In the *Sinking Fund cases*, 99 U. S. 700, 719, this court, speaking through its late lamented Chief Justice, have said: "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."

Can there be any question, as between individuals, that the same state of facts as have been certified up to this court in this case would be held by any court to constitute a contract for the breach of which either party thereto would be entitled to damages, and that the amount of damages would be the value of the iron?

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

The United States contends that the claim in question is not one of which the Court of Claims could take cognizance for purposes of final adjudication; that the case is not one of implied contract; and that the Government is protected from any judgment against it by the statutory limitation of six years. The first of these questions does not seem to have been raised in the court below.

The act of February 24, 1855, c. 122, by which the Court of Claims was constituted, gave it jurisdiction to hear and determine all claims against the United States "founded upon

any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States." 10 Stat. 612. But by a subsequent act passed July 4, 1864, c. 240, it was declared "that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof." 13 Stat. 381.

By the act of February 21, 1867, c. 57, it was provided that the act of 1864 should "not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of, or used by the armies of the United States, nor for the occupation of, or injury to, real estate, nor for the consumption, appropriation or destruction of, or damage to, personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the Southern rebellion, in a State, or part of a State, declared in insurrection." 14 Stat. 397.

The Revised Statutes omitted the provisions of the acts of 1864 and 1867. Whether that omission was intentional or not, we need not inquire; for, by the act of February 18, 1875, c. 80, which was passed to correct errors and supply omissions in the Revised Statutes, section 1059, enumerating the matters or cases of which the Court of Claims could take cognizance, was amended by adding to its fourth paragraph the following additional proviso: "*Provided, also*, That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion." 18 Stat. 318.

The Tucker act of March 3, 1887, c. 859, expressly withholds from the Court of Claims, and from the District and Circuit Courts of the United States, "jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'War Claims.'" 24 Stat. 505.

It thus appears that at the time the appellee, by its president, made application to the military authorities to have its road, as well as the iron rails in question, restored to its possession, the Court of Claims was without authority to adjudicate any claim against the United States "growing out of" the destruction or "appropriation" of or damage to property by the army or navy engaged in the suppression of the rebellion; further, that at the time the appellee's claim was transmitted by the Secretary of the Treasury to the Court of Claims for adjudication that court was without jurisdiction to hear and determine claims "growing out of the late civil war and commonly known as 'War Claims.'" Of course, the "War Claims" to which the act of 1887 referred included those described in the previous acts as claims growing out of the destruction or appropriation or damage to property by the army or navy engaged in the suppression of the rebellion.

Is the claim of the appellee a "War Claim" within the meaning of the act of 1887? Light will be thrown upon this question by the decisions construing the act of 1864, which excluded from the jurisdiction of the Court of Claims any claim "growing out of" the destruction or "appropriation" of property, by the army or navy engaged in the suppression of the rebellion.

In *Filor* v. *United States*, 9 Wall. 45, 48, 49, it appeared that a certain wharf and its appurtenances at Key West, Florida, were in the use and occupation of the United States during the civil war under an agreement as to rental between an acting assistant quartermaster, stationed at that place, and the owner of the property, but the agreement was not approved by the Quartermaster General. This court said: "No lease of the premises for the use of the Quartermaster's Department, or any branch of it, could be binding upon the Government until approved by the Quartermaster General. Until such approval the action of the officers at Key West was as ineffectual to fix any liability upon the Government as if they had been entirely disconnected from the public service. The agreement or lease was, so far as the Government is concerned, the work of strangers. The obligation

of the Government for the use of the property is exactly what it would have been if the possession had been taken and held without the existence of the agreement. Any obligation of that character cannot be considered by the Court of Claims." Referring to the provisions of the above act of July 4, 1864, the court proceeded: "The premises of the petitioners were thus appropriated by a portion of the army. It matters not that the petitioners, supposing that the officers at Key West could bind the Government to pay a stipulated rent for the premises, consented to such appropriation. The manner of the appropriation, whether made by force or upon the consent of the owner, does not affect the question of jurisdiction. The consideration of *any* claim, whatever its character, growing out of such appropriation is excluded. The term appropriation is of the broadest import; it includes all taking and use of property by the army and navy, in the course of the war, not authorized by contract with the Government. . . . If the petitioners are entitled to compensation for the use of the property they must seek it from Congress."

The case of *United States* v. *Russell*, 13 Wall. 623, 632, was somewhat different in its facts. That was a suit to recover for the use of certain steamboats used in the public service by the military authorities at St. Louis, Missouri, in 1863. It appeared from the findings of the Court of Claims that the military officers did not intend to "appropriate" the steamboats to the United States, nor even their services, although they did intend to compel the masters and crews, with the steamers, to perform the services needed, and that the United States should pay a reasonable compensation for such services; that such was the understanding of the owner; and that the steamers, as soon as the services for which they were required had been performed, were returned to the exclusive possession and control of the owner. The steamers were equipped, victualled and manned by the owner, and he, or persons by him appointed, continued in their command throughout the entire period of the service. "He yielded at once," this court said, "to the military order, and entered into the service of

the Government, and the court here fully concur with the Court of Claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the Court of Claims show that the employment and use of the steamboats were such as raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the Court of Claims. Valuable services, it is conceded, were rendered by the appellee, and it is not pretended that the amount allowed is excessive. Neither of the steamers was destroyed, nor is anything claimed as damages, and inasmuch as the findings show that an appropriation of the steamers was not intended, and that both parties understood that a reasonable compensation for the services was to be paid by the United States, the court is of the opinion that the objection to the jurisdiction of the Court of Claims cannot be sustained, as the claim is not for 'the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion.'"

Another case is that of *Pugh* v. *United States*, 13 Wall. 633, 634, 635. In the petition in that case the claimant averred "that the United States, during the late civil war, illegally, violently and forcibly took possession of his plantation, in the State of Louisiana, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States, and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of $42,508; and that the United States, during the same period, rented the plantation to sundry persons, who made large crops, worth $15,000 or $30,000." Chief Justice Chase, speaking for the court, said: "The destruction of the property complained of was during the war and in one of the States engaged in the rebellion, and the presumption, in the absence of inconsistent allegations, is that it was by the military forces of the United States. It is clear that a petition for compensation for injuries of this character

could not be sustained in the Court of Claims, for the demand plainly grows "out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion,' and is excluded from the cognizance of that court by the express terms of the act of July 4, 1864. . . . It is plain, therefore, that the petition does not state a case within the jurisdiction of the Court of Claims. If the petitioner has any claim upon the Government he must seek relief from Congress."

The present case is controlled by the decisions in *Filor* v. *United States* and *Pugh* v. *United States*. It is not a case, like that of *United States* v. *Russell*, of the use of property under a valid implied agreement that the owner should be compensated; but is one of the actual appropriation by the military authorities of the United States, engaged in the suppression of the rebellion, of property which, at the time of such appropriation, was being employed by the Confederate Government in hostility to the Union. The transaction had no element of contract, but was wholly military in character. In *Russell's case*, the owner of the property acquiesced in its use by the Government, and there was such an understanding between the Government and himself as made it, in the opinion of this court, the duty of the former under the Constitution to make just compensation to the latter. In the case now before us, the road and its appurtenances were seized without regard to the assent of the owner and without any understanding that compensation was to be made. Indeed, it would not have been competent for the military authorities of the United States to have bound the Government to make compensation to the appellee for the use or for the return of property which, when seized, was being actively employed, under a contract with its owner, to advance the cause of the rebellion. If the appellee's road and the iron upon it were not, under the circumstances which attended their seizure, "appropriated" by the military authorities engaged in the suppression of the rebellion, it is difficult to conceive of a case of an appropriation of property within the meaning of the acts of 1864 and 1875. The road and its appurtenances hav-

ing been thus seized and appropriated, for military purposes, during the war, what was done by the military authorities of the United States is to be regarded as an act of war, and the claim of the appellee, for the proceeds of the property appropriated, must be deemed a "War Claim" within the meaning of the act of 1887, and, therefore, expressly excluded from the jurisdiction of the Court of Claims at the time it was transmitted to that court for adjudication. Jurisdiction could not attach by reason simply of the claim having been certified to that court by an Executive Department under section 1063, as one involving controverted questions of fact and law; for, in *United States* v. *New York*, 160 U. S. 598, 615, the various statutes relating to the jurisdiction of the Court of Claims were examined, and it was held, upon full consideration, that notwithstanding the passage of the Bowman and Tucker acts, a claim described in section 1063 of the Revised Statutes could be transmitted to the Court of Claims 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."

The appellee insists that its claim is not a "War Claim," but is one founded upon contract made after the civil war ended. But in whatever light the matter be viewed, and even if it were held that the military authorities of the United States, after actual hostilities ceased, agreed to return the iron in question to the appellee, its claim is one "growing out of" the appropriation of property by the army engaged in the suppression of the rebellion, and therefore a "War Claim" within the meaning of the above act of March 3, 1887. It could not be divested of that character by anything done or omitted to be done by any officer or Department of the Government. After the suppression of the rebellion the military authorities had no such relations to property appropriated by them during the war as enabled them, by contract or otherwise, to turn a claim growing out of such appropriation into a claim based upon contract, and thereby give to the Court of Claims a jurisdiction denied to it by Congress. We do not

mean to say that this claim might not have been allowed by the proper Executive Department, and paid out of moneys at its disposal for such purposes. No such question is now presented, and we therefore express no opinion upon it. We adjudge nothing more than that the Court of Claims could not take judicial cognizance of this claim because it was and is a "War Claim," that is, one growing out of the appropriation of property by the army while engaged in the suppression of the rebellion, and not one arising upon a valid contract, express or implied, made when such appropriation occurred.

These views render it unnecessary to consider any other question in the case, and require a reversal of the judgment.

The judgment is reversed and the cause remanded with directions to dismiss the action for want of jurisdiction in the Court of Claims.

Mr. Justice Shiras dissented.

UNITED STATES *v.* LAWS.

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

No. 248. Submitted April 28, 1896. — Decided May 18, 1896.

A contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana, and his expenses paid by the defendant, is not such a contract to perform labor or service as is prohibited in the act of Congress passed February 26, 1885.

The case is stated in the opinion.

Mr. Solicitor General for plaintiff in error.

Mr. Lawrence Maxwell, Jr., for defendant in error.

Mr. Justice Peckham delivered the opinion of the court.

Opinion of the Court.

This case comes here upon a certificate from the United States Circuit Court of Appeals for the Sixth Circuit. The case came before that court by writ of error to the judgment of the Circuit Court of the United States for the Southern District of Ohio, Western Division. Upon being presented to the Circuit Court of Appeals it appeared from the record that the following question or proposition of law arose in the case concerning which the court desired the instruction of this court as to the proper decision thereof. The following is the question as stated:

"Is a contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana, and his expenses paid by the defendant, a contract to perform labor or service as prohibited in the act of Congress passed February 26, 1885?"

The court certified the following as being a summarized statement of the facts appearing in the bill of exceptions made under the direction of the judges of the court, viz.:

"*Statement of Facts.*

"A. Seeliger was, on or about July 22, 1889, a citizen of the German Empire, residing at Dormangen, Germany. At that date it is claimed that the defendant made a contract with him to come to the United States as a chemist on a sugar plantation in Louisiana, and that Seeliger agreed to come to the United States for that purpose, and that the defendant paid his expenses to the United States; that Seeliger paid his expenses to the United States; that Seeliger came to the United States and went to Louisiana, and was there employed on a sugar plantation as chemist under the direction of the defendant."

It will be noticed that in the foregoing statement of facts there is a plain contradiction as to which party paid Seeliger's expenses; whether he paid them himself or whether the defendant paid them, it being stated both ways. This is unquestionably a mere clerical error, because in the question which

is certified to this court the statement is plainly made that the expenses of Seeliger were paid by the defendant. We must assume, therefore, that such is the fact.

The act of Congress under which the question arises, passed February 26, 1885, c. 164, 23 Stat. 332, is entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories and the District of Columbia." The first and second sections thereof read as follows:

"SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act it shall be unlawful for any person, company, partnership or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

"SEC. 2. That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect."

The third and fourth sections are not material here. The fifth section, after providing for certain exceptions to the provisions of the first two sections, further enacts that the act shall not apply "to professional actors, artists, lecturers or singers, nor to persons employed strictly as personal or domestic servants."

Opinion of the Court.

While this act was in force a suit was brought in the Circuit Court for the Southern District of New York in favor of the United States against the Rector, etc., of the Church of the Holy Trinity in the city of New York. It was brought to recover the penalty of $1000, as provided for in the act, and in the course of the trial it appeared that the defendant was a religious corporation, and had engaged a Mr. Warren, an alien residing in England, to come to the city of New York and take charge of its church as pastor. It was claimed on the part of the United States that the church corporation in making that contract with Mr. Warren had violated the first section of the act in question. It was held by the Circuit Court that the contract was within the statute, and that the defendant was liable for the penalty provided for therein. *United States* v. *Rector &c. of the Church of the Holy Trinity*, 36 Fed. Rep. 303.

In the course of his opinion the learned Circuit Judge said, p. 304:

"It was, no doubt, primarily the object of the act to prohibit the introduction of assisted immigrants, brought here under contracts previously made by corporations and capitalists to prepay their passage and obtain their services at low wages for limited periods of time. It was a measure introduced and advocated by the trades union and labor associations, designed to shield the interests represented by such organizations from the effects of the competition in the labor market of foreigners brought here under contracts having a tendency to stimulate immigration and reduce the rates of wages. Except from the language of the statute there is no reason to suppose a contract like the present to be within the evils which the law was designed to suppress; and, indeed, it would not be indulging a violent supposition to assume that no legislative body in this country would have advisedly enacted a law framed so as to cover a case like the present."

Nevertheless the Circuit Court felt bound by what it regarded the plain terms of the statute to hold that the defendant had violated the act and was therefore amenable to its penalties.

The court was strengthened in its construction of the statute in question by the terms of the proviso above alluded to, contained in the fifth section, which excepted from the act professional actors, artists, lecturers and singers. The Circuit Judge said: "If, without this exemption, the act would apply to this class of persons, because such persons come here under contracts for labor or service, then clearly it must apply to ministers, lawyers, surgeons, architects and all others who labor in any professional calling. Unless Congress supposed the act to apply to the excepted classes, there was no necessity for the proviso. . . . Giving effect to this well settled rule of statutory interpretation the proviso is equivalent to a declaration that contracts to perform professional services, except those of actors, artists, lecturers or singers, are within the prohibition of the preceding sections." (page 305.)

The defendant in the action brought the case to this court for review, where the judgment of the Circuit Court was reversed, and it was held that the statute did not apply to such a contract. The opinion of this court was delivered by Mr. Justice Brewer, and is reported in 143 U. S. 457. In the course of that opinion the title of the act in question was referred to and commented upon, and it was stated, in speaking of the title, that "obviously the thought expressed in this reaches only to the work of the manual laborer as distinguished from that of the professional man. No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain."

It was further stated in the opinion as follows:

"Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. *United States* v. *Union Pacific Railroad*, 91 U. S. 72, 79. The situation which called for this statute was briefly but fully stated by Mr. Justice Brown when, as District Judge, he decided the case of *United States* v. *Craig*, 28 Fed. Rep. 795, 798: 'The motives and history of the act

are matters of common knowledge. It had become the practice for large capitalists in this country to contract with their agents abroad for the shipment of great numbers of an ignorant and servile class of foreign laborers, under contracts, by which the employer agreed, upon the one hand, to prepay their passage, while, upon the other hand, the laborers agreed to work after their arrival for a certain time at a low rate of wages. The effect of this was to break down the labor market, and to reduce other laborers engaged in like occupations to the level of the assisted immigrant. The evil finally became so flagrant that an appeal was made to Congress for relief by the passage of the act in question, the design of which was to raise the standard of foreign immigrants, and to discountenance the migration of those who had not sufficient means in their own hands, or those of their friends, to pay their passage.' "

Allusion is then made to the petitions and testimony presented before the committees of Congress, from which it appears "that it was this cheap, unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition."

Summing up the matter on this branch, it was said in the opinion as follows: "We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

Beyond that, the opinion proceeded with the statement that no purpose of action against religion could be imputed to any legislation, state or national, because of the fact that this is a religious people, not Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men, as was stated in *Updegraph* v. *The Commonwealth*, 11 S. & R. 394, 400.

Upon the basis, therefore, that it could not be imputed as the intention of Congress, notwithstanding the language used in the act, to prevent the introduction of religious teachers, it was held that the act did not apply to the case before the court. Both grounds were covered in the opinion; the one that the act was clearly intended to apply only to cheap, unskilled labor, and the other that in no event could it be construed as applying to a contract for the services of a rector or a pastor of a religious corporation. The first ground covers the case in hand. The construction given to the words "labor or service" by this court in the above case was neither forced, unnatural nor unusual. Considering the clear purpose of the act, the construction adopted was a natural and proper one.

The same construction has been adopted in the courts in the State of New York in relation to statutes providing for claims of laborers. In *Ericsson* v. *Brown*, 38 Barb. 390, one of the sections of the act of incorporation rendered the stockholders individually liable for all the debts due and owing by the company to its "laborers and apprentices." The plaintiff, being a consulting engineer, rendered services to the company as such, and he was held not to be within the meaning of the statute, and hence could not recover from a stockholder. The statute was held to refer to unskilled labor, where the individual earned his wages more by the labor of his hands than of his head.

In *Aikin* v. *Wasson*, 24 N. Y. 482, the plaintiff contracted with a railroad company to construct part of its road. Defendant was a stockholder in the company, which became insolvent. It was indebted to plaintiff for the services of himself and his laborers and servants under his contract. Section 10 of the railroad act enacted that "all the stockholders of every such company shall be jointly and severally liable for all the debts due or owing to any of its laborers and servants for services performed for such corporation." It was held that the plaintiff was neither a laborer nor a servant within the meaning of the act.

In *Coffin* v. *Reynolds*, 37 N. Y. 640, the statute read: "The stockholders of a company organized under the provisions of

this act shall be jointly and severally individually liable for all debts that may be due and owing to all their laborers, servants and apprentices for services performed for such corporation." The plaintiff was the secretary of the company and commenced an action against the defendant as a stockholder to recover the amount of his salary, the company being insolvent. It was held that he could not recover. He was not a laborer or a servant within the meaning of the statute.

In *Wakefield* v. *Fargo*, 90 N. Y. 213, under the same statute it was held that one who was employed at a yearly salary as book-keeper and general manager was not a laborer, servant or apprentice within the meaning of the act, and hence that he could not recover against the stockholders for a balance of salary due him from the insolvent corporation.

These statutes were passed for the protection of laborers, servants, apprentices and the like, and the opinions of the courts in relation to the class of individuals that would be included within the meaning of those terms are somewhat relevant although not entirely analogous to the case before this court.

Congress, however, a short time after and probably in consequence of the decision of the Circuit Court in the Southern District of New York, amended the fifth section of the statute in question by adding to the proviso therein mentioned the words "nor to ministers of any religious denomination, nor persons belonging to any recognized profession, nor professors for colleges and seminaries," so that the proviso would read that the provisions of this act should not "apply to professional actors, artists, lecturers or singers, nor to persons employed strictly as personal or domestic servants, nor to ministers of any religious denomination, nor to persons belonging to any recognized profession, nor professors for colleges and seminaries." Act of March 3, 1891, c. 551, 26 Stat. 1084.

This amendment to the statute of 1885, although passed subsequently to the decision in the Circuit Court and prior to the decision of the same case in this court, was not mentioned in the opinion in this court, because the review was had upon the record based upon the act as originally passed in 1885.

If by the terms of the original act the provisions thereof applied only to unskilled laborers whose presence simply tended to degrade American labor, the meaning of the act as amended by the act of 1891 becomes if possible still plainer. Now by its very terms it is not intended to apply to any person belonging to any recognized profession. We think a chemist would be included in that class. Although the study of chemistry is the study of a science, yet a chemist who occupies himself in the practical use of his knowledge of chemistry as his services may be demanded may certainly at this time be fairly regarded as in the practice of a profession. One definition of a profession is an "employment, especially an employment requiring a learned education, as those of divinity, law and physic." (Worcester's Dictionary, title profession.) In the Century Dictionary the definition of the word "profession" is given, among others, as "A vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly, theology, law, and medicine were specifically known as *the professions;* but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes." There are professors of chemistry in all the chief colleges of the country. It is a science the knowledge of which is to be acquired only after patient study and application. The chemist who places his knowledge acquired from a study of the science to the use of others as he may be employed by them, and as a vocation for the purpose of his own maintenance, must certainly be regarded as one engaged in the practice of a profession which is generally recognized in this country.

The question presented to us assumes that the individual is

a chemist, and that he has come to this country for the purpose of pursuing his vocation as a chemist on a sugar plantation in Louisiana. It may be assumed that the branch of chemistry which he will practice will be that which relates to and is connected with the proper manufacture of sugar from the sugar cane, or possibly from sorghum or beets. He is none the less a chemist, and none the less occupied in the practice of his profession because he thus limits himself to that particular branch, which is to be applied in the course of the scientific manufacture of sugar any more than a lawyer would cease to practice his profession by limiting himself to any particular branch thereof or a doctor by confining his practice to some speciality which he particularly favored and was eminent in.

It is not stated what the particular duties of a chemist on a sugar plantation are, but it is quite plain, even to one not engaged in the business, that there would be a necessity for the services of one skilled in the science of chemistry in order to enable a manufacturer to make the most out of his materials and produce a commodity up to the proper standard and of a marketable nature. All sugar cane, for example, is not alike in quality or in the proportions of the ingredients which enter into its composition, and in the course of manufacture these differences must be discovered and determined, and the material must be treated accordingly so that the finished product shall be a commodity which is up to the standand set with reference to the particular grade of sugar which it is claimed to be. In order to determine this difference and to reach this standard, analyses of the different samples of the cane at some period of the process of manufacture ought to and must be made, and these analyses it is the province of a chemist to make. Upon their results depend the future treatment of the article. The samples analyzed will of course differ, to some extent, in their qualities from each other, and each will require different treatment, depending upon the result of the analysis and the directions of the chemist founded thereon. There can be, therefore, no regular or formal rule or method adopted for all cases. It becomes necessary to examine each

sample and decide after such examination what treatment is necessary for that particular lot thus examined. Learning in the science, skill in its practice, experience in results, are all factors going to make up the competent chemist in this particular branch.

The fact that the individual in question, by this contract, had agreed to sell his time, labor and skill to one employer, and in one prescribed branch of the science, does not in the least militate against his being a professional chemist, nor does it operate as a bar to the claim that while so employed he is nevertheless practising a recognized profession. It is not necessary that he should offer his services to the public at large nor that he should hold himself ready to apply his scientific knowledge and skill to the business of all persons who applied for them before he would be entitled to claim that he belonged to and was actually practising a recognized profession. As well might it be said that the lawyer who enters into the service of a corporation and limits his practice to cases in which the corporation is interested thereby ceases to belong to the profession. The chemist may confine his services to one employer so long as the services which he performs are of a professional nature. It is not the fact that the chemist keeps his services open for employment by the public generally which is the criterion by which to determine whether or not he still belongs to or is practising a recognized profession. So long as he is engaged in the practical application of his knowledge of the science, as a vocation, it is not important whether he holds himself out as ready to make that application in behalf of all persons who desire it, or that he contracts to do it for some particular employer and at some named place.

We have no doubt that the individual named comes within one of the exceptions named in the statute.

The question certified to this court by the Circuit Court of Appeals for the Sixth Circuit should be answered in the negative.

EDWARDS *v.* BATES COUNTY.

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

No. 259. Submitted April 29, 1896. — Decided May 18, 1896.

In determining the jurisdictional amount in an action in a Circuit Court of the United States to recover on a municipal bond, the matured coupons are to be treated as separable independent promises, and not as interest due upon the bond.

On October 5, 1891, plaintiff in error filed his petition to recover from the defendant an aggregate alleged indebtedness, consisting of the following items:

1. The principal of two bonds for one thousand dollars each, issued by the defendant on January 18, 1871, with interest from the date of maturity of the bonds (January 18, 1886);

2. The amount of interest coupons on said bonds, due and payable on the eighteenth day of January, in the years 1873 to 1886, both inclusive, with interest from the maturity of each coupon; and,

3. The principal of seven funded bonds of said county, each for the sum of one hundred dollars, dated October 1, 1885, and payable October 1, 1905.

The petition alleged that due notice had been given by the county, pursuant to an option reserved by it, that it would redeem said last named bonds at a place named, on the 1st of July, 1891, and that on that date and at the place designated said bonds had been duly presented and payment thereof demanded and refused.

A plea to the jurisdiction was filed on behalf of the defendant, based upon the claim that the matter in controversy, exclusive of interest and costs, did not exceed the sum or value of $2000. It was alleged, among other things, that each of the funded bonds provided on its face that the said county of Bates, for and on behalf of the township of Mount Pleasant, reserved the right at its option to redeem the bonds at any time after five years from the 1st day of October, 1885, in accordance

Counsel for Plaintiff in Error.

with the conditions printed on the back, which conditions, among other things, provided for the giving of notice, by advertisement, of the intention to redeem, and further provided that "if any bond be not presented as required in such notice, or within thirty days after the date therein fixed, interest thereon shall cease from said date, but said bond, with interest accrued to said date, shall be payable upon presentment at the office of the treasurer of Bates County at any time thereafter."

It was further alleged that the funding bonds in question had not been presented for payment, and that the purpose of including them in the suit at bar was merely in aid of an attempt to confer jurisdiction upon the court over the claim of plaintiff upon the two one thousand dollar bonds. The plaintiff filed a reply to the plea to the jurisdiction, and the issue thereby raised was heard upon an agreed statement of facts and certain documentary evidence unnecessary to be specifically stated.

In the agreed statement of facts it was admitted that the funding bonds in question had never been presented for payment at the place designated by the contract for the redemption of the same, though said county had on deposit at the depository named in the advertised notice of intention to redeem, on said 1st day of July, 1891, and for more than thirty days thereafter, sufficient funds to pay said bonds, which funds had been deposited for such special purpose, and that the county of Bates had in the hands of its county treasurer money sufficient belonging to said township to pay said bonds at any and all times after said thirty days from said first day of July, 1891, if they had been presented for payment by the holder thereof.

The trial court sustained the plea, and dismissed the case for want of jurisdiction. 55 Fed. Rep. 436. The case was then brought to this court by writ of error.

Mr. T. K. Skinker for plaintiff in error.

No appearance for defendant in error.

Opinion of the Court.

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

We are solely concerned in this case in determining whether or not the Circuit Court possessed jurisdiction over the claim asserted in the petition. Act of March 3, 1891, c. 517, § 5.

From the facts heretofore detailed the following questions arise:

First. Should the Circuit Court have taken into consideration, for the purpose of ascertaining the adequacy of the jurisdictional amount, the claim of plaintiff upon the interest coupons attached to the two one thousand dollar bonds?

Second. Did the court rightly hold that the amount of the claim upon the funding bonds was not an item "in dispute" between the parties, and therefore not proper to be taken into account in determining whether the court possessed jurisdiction?

As to the first point. By the act of Congress of March 3, 1887, c. 373, as amended August 13, 1888, c. 866, 25 Stat. 434, original jurisdiction was conferred upon Circuit Courts of the United States, "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, . . . in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars."

It is contended that an indebtedness for the face amount of coupons is an indebtedness for "interest" within the meaning of the statute.

The nature of a coupon was thus defined in *Aurora* v. *West*, 7 Wall. 82, where this court said (p. 105):

"Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form and mode for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds to which they were attached."

Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or other coupons, and gives rise to a separate cause of action. *Nesbit* v. *Riverside Independent District*, 144 U. S. 610. In that case this court said (p. 619):

"Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments upon different paper."

Not only may a suit be maintained upon an unpaid coupon, in advance of the maturity of the principal debt, but the holder of a coupon is entitled to recover interest thereon from its maturity. *Amy* v. *Dubuque*, 98 U. S. 470, 473. The logical effect of these rulings is that when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation. Clearly, such would be the nature of the claim of one who as owner of the coupons and not of the bonds, brought his action to enforce payment of the indebtedness evidenced by the coupons. So, also, before maturity of the bonds, their holder could still have sued upon the matured coupons as an independent indebtedness, and not as a mere accessory to a demand for a recovery of the face of the bonds. No good reason, therefore, exists for creating a distinction between such cases and the case at bar in which there is coupled with the demand to recover upon the coupons a demand for judgment upon the bonds. The confusion of thought to which we alluded in the case of *Brown* v. *Webster*, 156 U. S. 328, is also involved in the decision below, that is, the failure to

distinguish between a principal and accessory demand. The claim made by the plaintiff on the coupons was in no just sense accessory to any other demand, but was in itself principal and primary. In ascertaining, therefore, the jurisdictional sum in dispute, the sum of the coupons should have been treated as an independent, principal demand and not as interest; and in holding otherwise the lower court erred to the prejudice of the plaintiff in error.

As the face of the bonds amounted to the sum of two thousand dollars, the addition of the demand based upon the coupons brought the sum in dispute within the jurisdiction of the Circuit Court. It is, therefore, unnecessary to consider whether the controversy as to the funding bonds did not involve a real matter "in dispute" between the parties.

The judgment is reversed and the cause is remanded with directions to set aside the order dismissing the action for want of jurisdiction, and for further proceedings in conformity to law.

HANFORD *v.* DAVIES.

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

No. 260. Argued and submitted April 29, 30, 1896. — Decided May 18, 1896.

The constitutional prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments, of a State, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.

When it is the purpose to present a case under the clause of the Constitution relating to due process of law, and both parties are citizens of the same State, the grounds upon which a Federal court can take cognizance of a suit of that character and between such parties must be clearly and distinctly stated in the bill.

Jurisdiction in such case cannot be inferred argumentatively from averments in the pleadings, but the averments must be positive.

Statement of the Case.

THIS cause was determined in the court below upon a demurrer to the bill. The grounds of demurrer were: 1. That the bill did not set forth any case entitling the plaintiff to relief. 2. That the Circuit Court had no jurisdiction.

It was adjudged that the bill did not state a case within the jurisdiction of the Circuit Court, and the question of jurisdiction alone has been certified. 51 Fed. Rep. 258.

Taking the case to be as made by the bill, it is substantially as follows:

On October 14, 1878, the Territory of Washington, for a valuable consideration, executed to Thaddeus Hanford a deed conveying to him, his heirs and assigns, certain lands in what is now King County, State of Washington. The deed was duly recorded on November 25, 1878. It was executed by the Territory in pursuance of a sale made by it of those lands as the property of one Lumley Franklin, for the nonpayment of taxes due from him. The deed contained what the bill describes as "the following contract and agreement" between the parties, namely: "Now therefore the said party of the first part by virtue of the statute in such case made and provided, for the consideration of the sum of money above mentioned paid to the county treasurer of said county, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm unto the said Thaddeus Hanford, his heirs and assigns, the said described real estate, together with all and singular the tenements and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits thereof, as well in law as in equity, and the right, title and interest of the said Lumley Franklin and all owners known or unknown, of, in or to the above described premises."

Thaddeus Hanford immediately entered into possession of the premises, paid the taxes thereon and improved the same, remaining in possession until the 17th day of September, 1885.

The statutes of Washington Territory in force at the date of the above tax sale, as well as at the date of the execution of the above deed, prohibited the bringing of any suit or proceeding for the recovery of land sold for taxes after the

expiration of three years from the recording of the tax deed of sale, except in cases where the tax had been paid or the land redeemed, or where such suit was brought by the purchaser at the tax sale. The statute also provided that the tax deed should be presumptive evidence of the regularity of all former proceedings.

On September 17, 1885, Thaddeus Hanford being in possession executed to Frank Hanford a deed of the premises, conveying a title in fee. That deed was duly recorded on the 13th day of March, 1886.

Frank Hanford purchased the premises in good faith for a valuable consideration and without notice of a claim by any other person than his grantor. In making his purchase he relied, the bill alleges, upon the "express contract entered into between the Territory of Washington and the said Thaddeus Hanford, above set forth, by virtue of which said land was conveyed to said Thaddeus Hanford and title thereto confirmed in him by said Territory and the laws thereof then existing."

Immediately after his purchase the plaintiff entered into possession of and improved the premises, paying taxes, and also erecting a dwelling-house in which the property of his agent and employé were kept.

The bill then alleges: "That on the 26th day of July, 1887, the said Territory of Washington, by W. Finley Hall, its agent, presented the petition of the said W. Finley Hall to the probate court of King County, alleging the death of said Lumley Franklin above named; that he left no property in Washington Territory except real estate; that there were no general creditors; that said Franklin was a resident of Victoria, British Columbia, and that he died without the Territory of Washington, and prayed that letters of administration be granted to said W. Finley Hall upon the estate of said Lumley Franklin, but said W. Finley Hall was not of kin to said Lumley Franklin, neither was he a creditor of said Franklin, nor did he act in presenting said petition at the request of any one of kin to said Lumley Franklin or at the request of any of the creditors of said Lumley Franklin.

That on the 8th day of August said probate court assumed to appoint said W. Finley Hall administrator of said estate, and on the 26th day of said month he filed his inventory showing there were no debts against said estate, no personal assets, and that the said land constituted the sole assets of said estate. That thereafter, to wit, on the 26th day of March, 1888, the said Territory of Washington, by its agent and organ, the probate court of King County, in violation of the contract above mentioned, entered into between said Territory and Thaddeus Hanford, the grantor of your orator, ordered said land above described to be sold as the property of Lumley Franklin to pay a tax claimed by said Territory from said Lumley Franklin, and thereafter, in pursuance of said order, made a pretended sale of said land and caused to be executed a deed purporting to convey the same to the defendant Griffith Davies, in violation of the contract above set forth between the said Territory of Washington and the said Thaddeus Hanford and the obligation thereof, and in violation of article I, section 10, of the Constitution of the United States and of sections 1851 and 1891 of the Revised Statutes of the United States. That in all of his actions the said W. Finley Hall acted as the agent and instrument of said Territory of Washington, and in all of its proceedings the said probate court acted as the agent and organ of said Territory for the purpose of collecting said tax claimed by said Territory from said Lumley Franklin; that in all of its said proceedings the said probate court acted entirely without jurisdiction and without color of authority save as the agent and organ of said Territory, and said probate court and said W. Finley Hall as the agents and organs of said Territory were at the time of their said proceedings fully aware that said land had in good faith and for valuable consideration been sold by said Territory to said Thaddeus Hanford as the property of said Lumley Franklin for the non-payment of taxes thereon by said Lumley Franklin, and that upon the faith of said sale and the deed executed in pursuance thereof your orator had purchased said land in good faith for valuable consideration and without notice of any claim on the part

of said Territory or any person whomsoever from the said Thaddeus Hanford."

The sections of the Revised Statutes above referred to are as follows: "§ 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. . . ." "§ 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

The deed executed in pursuance of the sale ordered by the probate court was taken in the name of the defendant Griffith Davies, but it was in fact for the benefit of himself and his co-defendants.

The defendants purchased at the sale ordered by the probate court and received the deed made to Griffith Davies with actual and constructive notice of the plaintiff's title, and of all the facts and circumstances connected therewith. Nevertheless, it is alleged, with the intent to create a cloud upon the plaintiff's title and to force him to buy off their adverse claim, they conspired together to make their said purchase, and in pursuance of that conspiracy bought in the land and procured a deed for it. Subsequently, February 25, 1881, they forcibly entered upon and maintained forcible possession of the land until the first day of April, 1891, at which time the premises were vacated and are not now in the actual possession of any one, except so far as the abandonment of possession by the defendants restores the prior possession of the plaintiff.

The bill alleges that the pretended deed of the defendants is of no validity in law or equity and is a cloud upon the title of the plaintiff, and that the defendants have no estate, right, title or interest in the lands or the possession thereof.

The relief asked is a decree that the defendants have no title, interest or estate in or about the land or any part thereof, and that the title of the plaintiff is good and valid; that the defendants and each of them be forever enjoined from assert-

ing any title or claim adverse to the plaintiff; that said administrator's deed may be declared invalid and the record thereof of no effect; and that the plaintiff have such other and further relief as the equity of the case may require.

Mr. James B. Howe, (with whom was *Mr. George Donworth* on the brief,) for appellant.

Mr. James Hamilton Lewis, *Mr. L. A. Stratton* and *Mr. L. C. Gilman* for appellees submitted on their brief.

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

As it appears from the bill that the plaintiffs and the defendants are all citizens of the State of Washington, the Circuit Court was without jurisdiction unless the suit was one arising under the Constitution or laws of the United States.

The bill proceeds upon the ground that the orders of the probate court, resulting in the sale of the lands in controversy as the property of Lumley Franklin, and in the conveyance of 1888 to the defendant Davies, impaired the obligation of the alleged contract with the Territory as evidenced by the deed of 1878 to Thaddeus Hanford. But it was not alleged in the bill that the proceedings in the probate court were had under any statute that was repugnant to the Constitution of the United States, or which was enacted after the sale and conveyance of these lands by the Territory to Thaddeus Hanford. The prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments, of a State, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract the obligation of which is alleged to have been impaired. *Railroad Co.* v. *Rock*, 4 Wall. 177; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388; *Wood* v. *Brady*, 150 U. S. 18; *Central Land Co.* v. *Laidley*, 159 U. S. 103. Therefore, even if it be assumed that the plaintiff had a contract with the Territory, and even if it were

further assumed that the constitutional provision in question applied to the legislative enactments of a Territory, the court below was without jurisdiction, so far as it depended upon the application of the clause of the Constitution protecting the obligation of contracts against impairment by state laws.

But it is contended that the proceedings in the probate court did not constitute due process of law, and for that reason this suit is one arising under the Constitution of the United States. No such thought was intended to be expressed in the bill, and it is apparent that no such proposition was presented to the Circuit Court when it determined the question of jurisdiction. The suggestion of the want of due process of law in the proceedings in the probate court, first distinctly appears in the assignment of errors filed in the court below long after the final decree was entered.

It is true the bill alleges that the probate court in all of its proceedings acted "entirely without jurisdiction and without color of authority save as the agent and organ of said Territory." But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal court could take cognizance of a suit of that character between citizens of the same State should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings, but the averments should be positive. *Brown* v. *Keene*, 8 Pet. 112; *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283, and authorities cited. These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground

of diverse citizenship. But they are equally applicable where its original jurisdiction of a suit between citizens of the same State is invoked upon the ground that the suit is one arising under the Constitution or laws of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer, in words, to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance. *Ansbro* v. *United States*, 159 U. S. 695.

Without expressing any opinion as to the effect of the proceedings in the probate court and the sale by the administrator Hall upon the rights acquired by the plaintiff under the tax sale at which Thaddeus Hanford purchased, we adjudge that the court below properly sustained the demurrer for want of jurisdiction, and, therefore, did not err in dismissing the bill.

Judgment affirmed.

RIO GRANDE WESTERN RAILWAY COMPANY *v.* LEAK.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 285. Argued and submitted May 4, 1896. — Decided May 18, 1896.

It is no error to refuse to give an instruction when all its propositions are embraced in the charge to the jury.

It is no error in an action like this to refuse an instruction which singles out particular circumstances, and omits all reference to others of importance.

This case was fairly submitted to the jury with no error of law to the prejudice of the defendant.

This writ of error brought up for review a judgment of the Supreme Court of the Territory of Utah, affirming a judg-

ment of the District Court of the Third Judicial District in that Territory in favor of the defendant in error, based upon the verdict of a jury against the Rio Grande Western Railway Company for the sum of $13,370.

It is averred in the complaint that on or about the 11th day of July, 1891, the plaintiff Leak was engaged in his business of hauling ore to cars of the defendant situated on its track, and was travelling with his team of horses and wagon on a wagon road usually travelled, and provided by defendant to be travelled, in the business of the hauling of ores to its cars; that when he had reached the place or crossing where the wagon road crossed the railroad track, the defendant carelessly and negligently caused a train of cars to approach the crossing and then and there to pass rapidly over its track, and negligently and carelessly omitted its duty whilst approaching that crossing to give any signals or warning whatever of the approach of its cars or to stop or to slacken the speed thereof, by reason whereof the plaintiff, without any fault on his part, was unaware of their approach; that in consequence of this negligence and carelessness of defendant the train of cars struck the plaintiff and his horses and wagon and overset the wagon, whereby he was thrown with great force and violence upon the ground and underneath said wagon and cars, and thereby greatly bruised, crushed and maimed, insomuch that it became necessary to amputate, and the left leg of the plaintiff was amputated, inflicting upon him lasting and permanent bodily injuries, causing him great bodily pain and mental anguish, damaging him in the sum of twenty thousand dollars, and compelling him to lay out and expend for doctors' medical attendance one hundred and five dollars.

The complainant also asserted a claim for the value of his horses and wagon alleged to have been killed and destroyed by reason of the carelessness and negligence of the defendant company as above alleged.

The answer puts in issue the allegations of the complaint and, in addition, states: "If the plaintiff sustained any injuries or damages whatsoever the same were caused and occasioned solely by reason and because of his own negligence

and carelessness in driving into and remaining in a dangerous place, knowing of the danger, and in negligently and carelessly failing to observe the approach of the cars referred to in the complaint, when the means and opportunity of observation were open to him, and in not removing himself from the place of danger after he knew of the existence thereof and after he had been warned thereof, and not because or by reason of any negligence or carelessness on the part of the defendant, its officers, agents or servants."

The court, after stating that the action was not to recover damages in consequence of any other negligence than that described in the complaint, and that the negligence complained of was that the defendant carelessly and negligently caused its cars to approach the crossing, and failed to give any signal or warning whatever of their approach, or to stop or to slacken their speed before the injury, said: "The defendant in its answer denies the allegations of the complaint and alleges that the plaintiff was also guilty of negligence that contributed to the injury, and it is for the gentlemen of the jury, in the light of all the evidence, after carefully considering it, to determine, first, whether the defendant was guilty of the negligence described in the complaint; second, if you should find that defendant was guilty of the negligence described in the complaint, it is then your duty to consider and determine whether the plaintiff himself was guilty of negligence that contributed to the injury. In determining the question of negligence, both on the part of the plaintiff and defendant, you should consider all the circumstances under which the defendant caused the acts to be performed, as alleged in the complaint, and under which its agents or servants failed to act, if you find they did fail in such respect. You have a right to take into consideration the conditions surrounding the injury, the situation of the parties, the location of both the railroad tracks and the wagon road, if you believe there was a wagon road from the evidence, and their location with respect to each other, and the fact that the plaintiff was hauling ore, if you believe that he was (as to that, I presume, there is no dispute). You have a right to take into

consideration the cars of the defendant and their situation and location upon the ore track. You have a right to take into consideration the crossing, as to whether the defendant placed the crossing there for the plaintiff and others to travel over and upon the wagonway, if you believe there was a wagon [way] on which persons usually travelled, and that the plaintiff at the time of the injury was travelling upon the wagonway. You have a right to take into consideration the fact that the train of cars, one of which struck plaintiff's wagon (as to that, I presume, there is no dispute) — you have a right to take into consideration the fact that it came down grade without an engine attached to it, and then passed up a slight grade at the time it struck the plaintiff's wagon, if [you] believe from the evidence that it did so pass down and up. It is your duty to take into consideration all of the evidence bearing upon the question of negligence, and, in the light of it all, you must determine whether the defendant was guilty of the negligence charged or whether the plaintiff was guilty of negligence contributing to the injury."

The defendant excepted to that portion of the above instruction in which the court said that the jury "should consider all the circumstances under which the defendant caused the acts to be performed as alleged in the complaint."

The court properly instructed the jury in relation to the degree of care required at the hands of the defendant and its servants, as well as to their right to judge of the credibility of the witnesses. It further said: "It is your duty to weigh the evidence carefully, candidly and impartially, and in so weighing it you should be careful to draw reasonable inferences, not to pick out any particular fact and give it undue weight, but you should give it such weight as you think it is entitled to as reasonable men looking at it impartially. You should consider the evidence all together. Where there is a conflict in the testimony you should reconcile it if you can upon any reasonable hypothesis. If you cannot reconcile their testimony, then you must determine whom you will believe. You are the sole judges of the facts. If you find the issues for the plaintiff you should consider the extent of the injury

as it appears from the evidence, whether it is permanent or temporary. You have a right also to take into consideration the physical pain and mental anguish caused by the injury and the extent which the plaintiff has been deprived of the capacity to earn a living or to accumulate money or other property. You have a right to take into consideration the injury to his property, the fact that his horse was killed, the injury to the wagon and the harness, if you believe from the evidence that they were injured, and, so considering all the evidence with respect to the injury of the plaintiff and his property as described in the complaint, you should give him such compensation as will remunerate him for the injury sustained. You must look at it in a pecuniary point of view, estimating his loss in money."

Mr. C. W. Bennett for plaintiff in error submitted on his brief.

Mr. Orlando W. Powers for defendant in error.

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

1. At the trial the defendant asked the court to instruct the jury that "it was the duty of the plaintiff before he crossed the line of defendant's railway, or approached it so closely that he might be injured by cars passing thereon, to look and listen up and down the track for approaching cars, and if he failed to so look and listen just prior to and up to the time of the accident, and if by so doing he could have discovered the approaching cars in time to have avoided the accident, his failure to so look and listen was negligence contributing to his injury, and your verdict must be for defendant, unless you believe defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

The refusal to give this instruction was not error, for the reason that all the propositions in it were embraced in the charge to the jury, and it was not necessary to repeat them

in special instructions asked by either party. The court had previously charged the jury as follows: "That though the defendant may have been guilty of negligence that contributed to the injury, yet if the plaintiff was also guilty of negligence that contributed to the injury he cannot recover, and in determining whether he acted with due care you may take into consideration the circumstances under which he was acting. You have a right to take into consideration he was travelling upon the travelled way usually travelled by persons hauling ore to this train. You have a right to take into consideration the observation that he made, so far as the evidence shows it — whether he looked out, as he should have done, for the danger of coming cars or whether he listened. You should take into consideration all of the circumstances — all that he did and all that he failed to do — in order to determine whether he acted with due care or was guilty of negligence. The court further charges you that if the plaintiff attempted to cross defendant's line of railway or to approach so near it as injury might have resulted to him, where he should, by the exercise [of] ordinary care, see that it was especially dangerous, it was plaintiff's duty to use an amount of care proportionate to the danger. Of course, when persons are acting under dangerous circumstances and conditions, it is their duty to act with respect to the danger that surrounds them and to use a greater degree of care where there is much danger than where there is but little."

The jury were also instructed that it was their duty to take into consideration all the evidence bearing upon the question of negligence, and, in the light of it all, determine whether the defendant was guilty of the negligence charged, or whether the plaintiff was guilty of negligence contributing to the injury.

Thus the jury were distinctly told that, taking into consideration all the circumstances, all that the plaintiff did or failed to do, including such observation as the plaintiff made, so far as the evidence showed it, they must determine whether "he looked out, *as he should have done*, for the danger of coming trains, or whether he listened." This is a distinct affirma-

tion of the duty to look out for the coming of trains. When to this specific reference to the duty of looking and listening for approaching trains was added the general instruction that the plaintiff must have used such care as was proportionate to the danger of injury resulting from the crossing of a railroad track, otherwise he could not recover, no foundation is left upon which to rest the charge of error in refusing the particular instruction asked by the defendant.

2. It is assigned for error that the trial court refused to give the following instruction asked by the defendant: "If before crossing defendant's line of railway or approaching the same so closely that he might be injured by cars passing thereon, the plaintiff did look and listen for approaching cars and ascertained that such cars were approaching, or might have so ascertained if he had looked and listened with ordinary care, then it was negligence for the plaintiff to drive so close to such railway as to be injured by passing cars, although the plaintiff may have believed that he could succeed in crossing said line before the cars reached the place of collision, and your verdict must be for defendant unless you believe that defendant's servant in charge of said cars discovered plaintiff's danger in time to have avoided the accident by the use of ordinary care."

The only distinct thought in favor of the defendant embodied in this instruction, not covered by the charge of the court, was that it was negligence in the plaintiff to drive so close to the railroad as to be injured by passing cars. But upon this point the charge of the court was full and abundantly explicit; for, the jury were told that they must look at all the circumstances in determining whether the plaintiff acted with due care or was guilty of negligence; that if he attempted to cross the railroad or to approach so near to it that injury might have resulted, he was under a duty to use such care as was proportionate to the danger; and, generally, that all persons acting under dangerous circumstances and conditions must have due regard to the danger that surrounds them, and use a greater degree of care where there was much danger than where the danger was but little.

3. It is next assigned for error that the trial court refused the following instruction asked by the defendant: "If the defendant licensed the plaintiff to go with his team in that portion of its yard where plaintiff was injured, yet defendant would not be liable to plaintiff for any injury resulting to him from any condition of the premises known to the plaintiff from the ordinary nature of the business carried on by it there."

This instruction might well have been refused as inapplicable to any issue made by the pleadings. The plaintiff did not ground his action upon any defective condition of the defendant's premises, nor upon the manner in which its business on such premises was ordinarily carried on. His claim for damages was placed solely on the ground of the defendant's negligence in running its cars over its track. Nevertheless, the court, out of abundant caution, distinctly charged the jury that the defendant was not liable to the plaintiff for any defect in the manner of locating or in the construction of its tracks or switches; that the location or construction of the switches was not alleged as a cause of action; and that it was the duty of the jury, in order to determine whether the plaintiff or the defendant acted negligently or with due care, to take into consideration the location of the tracks and the whole situation as shown by the evidence in order to determine whether they did act prudently and with good care or, on the contrary, whether they acted with negligence. These instructions meet any possible objection to the refusal of the trial court to give the above instruction asked by the defendant.

4. Another assignment of error relates to the refusal of the trial court to give the following instructions: "If the plaintiff saw the cars coming and knew that there was danger of a collision, or by the use of ordinary care could have so seen and known in time to escape therefrom by leaving his wagon, and if, notwithstanding such danger, he remained in his wagon for the purpose of attempting to save his wagon or horses, then you should not find a verdict in favor of the plaintiff in respect to any injury to his person unless you believe from the evidence that the brakeman in charge of said cars saw plain-

tiff's danger in time to have avoided the accident by the use of ordinary care."

It was not an error to refuse this instruction. It was liable to the objection that it singled out particular circumstances and omitted all reference to others of importance. In *Grand Trunk Railway* v. *Ives*, 144 U. S. 408, 433, it was said that "in determining whether the deceased was guilty of contributory negligence, the jury were bound to consider *all* the facts and circumstances bearing upon that question, and not select one particular prominent fact or circumstance as controlling the case to the exclusion of all the others." If the question of the ability of the plaintiff to have escaped personal injury "by leaving his wagon" was involved in the issue as to contributory negligence, the jury were entitled to consider the evidence relating to that matter under the general direction to look at all the circumstances in determining whether the plaintiff was injured without fault or negligence on his part. The charge upon that subject was ample for all the purposes of a fair trial, and no injustice was done to the defendant by the refusal of the court to single out the fact that the plaintiff did not jump from or leave his wagon as the defendant's train approached, and take the chances of being personally injured in that way. Besides, the instruction asked by the defendant was so framed as to leave out of view any element of personal danger to the plaintiff by attempting to leave his wagon, provided, by getting out of it or by jumping from it, he could have escaped injury by coming into collision with the defendant's cars. The jury might well have understood the instruction to mean that the possibility or probability of personal injury to the plaintiff by leaving his wagon was an immaterial circumstance if, by adopting that course, he could have escaped injury by actual collision with the cars of the defendant. The railway company could not escape responsibility for the negligence of its servants, resulting in personal injury to the plaintiff, by showing that the latter might not have been so seriously injured if he had left or jumped from his wagon. In the very nature of things it would have been impossible for the jury, under the circumstances of the accident, to have

determined with any certainty whether the plaintiff could have left his wagon without risk of being injured.

Upon a careful examination of the record, we have no reason to doubt that the case was fairly submitted to the jury; and no error of law to the prejudice of the defendant's rights having occurred, the judgment of the Supreme Court of the Territory of Utah affirming the judgment of the trial court is

Affirmed.

KNIGHTS OF PYTHIAS *v.* KALINSKI.[1]

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

No. 268. Argued May 1, 1896. — Decided May 18, 1896.

A society extending throughout the country, which was divided into lodges, whose members were subject to an annual lodge assessment and had also the right to become members of a separate assessable organization, within the society, called the endowment fund, having had some differences with a member who had paid all his endowment assessments but was in arrear for his dues to his lodge, the supreme head, (called the board of control,) after careful consideration, decided that in view of the fact that the keeper of records and seals of the lodge to which he belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to his lodge and that the lodge had failed to suspend him in accordance with the law, and that his section of the endowment rank had received his monthly assessments up to the date of his death, the endowment rank was liable for the full amount of the endowment. *Held*, that while the courts are not bound by this construction of the organization, the association has no right to complain if its certificate holders act upon such interpretation, and is not in a position to claim that the ruling was more liberal than the facts of the case or a proper construction of the rules would warrant; and that whether the ruling was right or wrong it established a course of business on the part of the society, upon which its certificate holders had a right to rely.

The continued receipt of assessments upon an endowment certificate up to the day of the holder's death is, under the circumstances of this case, a waiver of any technical forfeiture by reason of non-payment of lodge dues.

[1] The docket title of this case is "The Supreme Lodge Knights of Pythias of the World, plaintiff in error, *v.* Mrs. Eugenie Kalinski."

Statement of the Case.

THIS was an action originally begun in the Civil District Court of the parish of Orleans, in the State of Louisiana, by the defendant in error, Eugenie Kalinski, to recover of the Supreme Lodge Knights of Pythias of the World, an association incorporated under an act of Congress, and domiciled in Washington, the amount of a certain certificate of membership, whereby the defendant contracted and bound itself to pay to petitioner on the death of her husband, Achille Kalinski, the sum of $3000 — the said certificate being in effect a life insurance policy.

The case was removed, upon the petition of the defendant, to the Circuit Court of the United States for the Eastern District of Louisiana, upon an allegation that the defendant was created by and organized under an act of Congress, approved May 5, 1870 ; that it was domiciled in Washington, and that the controversy arose under and was to be determined by such act of Congress; that the suit was based upon a beneficial or life certificate issued under authority of such act of Congress, and the defence to said suit arose under the laws of the United States.

The answer admitted that during his lifetime the said Achille Kalinski became a member of the endowment rank of the order of Knights of Pythias, in section 363 thereof, paid the initiation fee, and that there was issued to him the certificate mentioned in the petition. But it denied that Kalinski, during his lifetime, complied with the obligations imposed upon him under such certificate, and averred that, under the terms of his application for membership in said endowment rank, and in the said certificate, and the constitution and by-laws of said endowment rank Knights of Pythias of the World, all being and forming parts of the contracts between them, it was provided that any failure or neglect on the part of said Kalinski to pay assessments or dues, as provided by the laws of the rank or order, should work a forfeiture of all his rights and the rights of his heirs and beneficiaries, in the premises, to all benefits and privileges accruing to members of said rank. That by said laws it was, among other things, especially provided that when a member of the endowment rank became in

arrears to his lodge, for an amount equal to one year's dues, he should forfeit his membership in the endowment rank, and his endowment certificate should thereupon become void.

The answer further averred that, at the time of his death, May 24, 1891, Kalinski was in arrears for, owed and was indebted to Syracuse Lodge, No. 50, of said order, of which he was a member, or to which he belonged, in an amount in excess of one year's dues, and that he had, at the time of his death, forfeited his membership in the said section and rank, and the said certificate became null and void. It further averred that, after being so in arrears, and the forfeiture of all rights as aforesaid, of which forfeiture, however, your respondent was then, without its fault or negligence, unaware, said Kalinski paid certain assessments under such certificate; but that, as soon as made aware of the forfeiture, heretofore mentioned, respondent made legal tender to the plaintiff of the amount of such assessments so paid, and that she refused the same.

In a supplemental answer defendant deposited in court and tendered back to plaintiff the amount of assessments so paid, namely, $16.20, with 5 per cent interest thereon from April 1, 1891, to date.

The case came on for trial before the District Judge and a jury, was tried twice, and resulted each time in a verdict and judgment for plaintiff for the full amount of her certificate or policy, and upon writ of error to the Circuit Court of Appeals that judgment was affirmed. Whereupon defendant sued a writ of error from this court.

Mr. J. Z. Spearing for plaintiff in error. *Mr. C. S. Rice* was on his brief.

Mr. M. Marks for defendant in error. *Mr. William Armstrong* was on his brief.

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

It seems that during his lifetime Achille Kalinski became

a member of section 363 of what is termed the endowment rank of the Knights of Pythias, paid his admission fee, and in consideration thereof, and in compliance with a written application made by him, the defendant, the supreme lodge of the order, issued to him a certificate which is in substance a policy of life insurance, wherein it was certified that Kalinski was a member in good standing in the endowment rank, and in consideration of the representations made in his application, which was made a part of the contract, and the payment of the prescribed admission fee, and in consideration of the payment thereafter to said endowment rank of all assessments as required, and "*the full compliance with all the laws governing this rank now in force or that may hereafter be enacted*, and shall be in good standing under said laws," the sum of $3000 will be paid, etc., to Eugenie Kalinski, his wife, etc. "And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render the certificate and all claims null and void, and that the said supreme lodge shall not be liable for the above sum, or any part thereof." In his application Kalinski agreed that he would punctually pay all dues and assessments for which he might become liable, and would be governed, "and this contract shall be controlled by all the laws, rules and regulations of the order governing this rank now in force or that may hereafter be enacted, or submit to the penalties therein contained." One of the laws and regulations adopted by the board of control was that "when a member of the endowment rank becomes in arrears to his lodge for an amount equal to one year's dues he shall forfeit his membership in the section and said rank, and render void his endowment certificate."

It further appeared that Kalinski was a member of Syracuse Lodge, No. 50, and that the books of said lodge, which were produced in evidence, showed that he was indebted to the lodge on the 31st day of March, 1891, and at the date of his death, May 24, 1891, in the sum of $12.50, for dues owing by him to his said lodge, under a by-law, which said sum was in excess of one year's dues he was required to pay, but that

he had not been suspended by his lodge for that reason before his death, under the provisions of sec. 5 of article 16 of the constitution of the lodge, and sec. 3 of article 14 of the by-laws, although he had received notice from the proper officer of the lodge to pay the same, and had been told to pay the same *before the next meeting of the lodge*, but that he died *before such meeting* without having paid the same.

It further appeared, and was not disputed, that the keeper of the records and seal of Syracuse Lodge, No. 50, had under sec. 6, article 4 of the constitution of the lodge, failed to notify the section of the endowment rank to which Kalinski belonged that he was in arrears, and that the assessments due by Kalinski to the endowment rank were received in ignorance of the fact that he was so in arrears, and had been tendered back after his death, and several months subsequent to the application of his widow for payment of the policy. In this connection the defendant requested the court to charge the jury as follows: "If you find that Kalinski was in arrears and indebted to his lodge for dues at the date of his death in an amount equal in amount to one year's dues, you must find as a conclusion from the fact that he had forfeited his membership in the endowment rank, and that the plaintiff is not entitled to recover in this suit. And the receipt of assessments by the officers of said endowment rank (which dues it is admitted have been tendered back, as hereinbefore set forth) previous thereto, if in ignorance of the fact that he was so in arrears, was not a waiver of said forfeiture."

But the court refused to give the charge as requested, and in lieu thereof charged the jury as follows:

"As to the construction of the meaning as matter of law, of the fundamental law, and of the orders of defendants' organizations, I adopt the views of the board of control of the defendants' orders in case of John A. Manikheim, and I instruct the jury that if the jury finds as a fact that the keeper of records and seal of the order to which Mr. Kalinski belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to said lodge, and also that said lodge failed to suspend Mr. Kalinski in accordance with law,

and also the section of the endowment rank had received the monthly assessments of said Kalinski up to the date of his death, then the verdict will be for the plaintiff and against the defendant for the sum of $3000, with interest from judicial demand."

From a comparison of the instruction as requested with that as given, it is apparent that the case turns upon the question whether the mere non-payment of lodge dues was sufficient to work a forfeiture of the certificate in view of the fact that the insured kept up his assessment, which the supreme lodge received without inquiring whether the insured was indebted for his lodge dues or not. Broadly construed, the application required that the contract should be controlled by the laws, rules and regulations of the order governing the rank. The certificate also required "a full compliance with all the laws governing this rank now in force or that may hereafter be enacted," and that the insured should be in good standing under said laws. What other laws governing this rank must have been complied with to prevent a forfeiture of the insurance does not appear; but if the application and certificate be literally construed, it is evident that a breach of any one of the regulations governing the rank, however numerous or unimportant they may have been, or a failure of the insured to remain in good standing under the laws of the order, which certainly opens a wide door to differences of opinion, could be seized upon as an excuse for non-payment.

It will be observed, however, that the endowment rank or insurance feature of this order was in reality a separate scheme, and had no other apparent connection with the order than in the fact that no one who was not a member of the order could become a member of the endowment rank. Entirely separate accounts were kept with each member, as belonging to the lodge, and as a member of the endowment rank or policy holder. The fees that were due to the lodge as a condition of membership in it do not seem to have formed any part of the consideration for the certificate or policy, which consideration consisted of certain assessments, that appear in this case to have been promptly paid. The provision that the

applicant should comply fully with all the laws governing the endowment rank then in force, or which might thereafter be enacted, and should also maintain a good standing under such laws, is one of a very elastic nature, and one which could not be fully complied with without a thorough knowledge of such laws, and of the requisites of good membership. In this case it is alleged to have been violated by the fact that on March 31, Kalinski became indebted to the lodge of which he was a member in the sum of $12.50, which was an amount in excess of one year's dues. His attention was called to this by the proper officer of the lodge, who told him to pay the sum before the next meeting of the lodge. He died, however, on May 24th, and before such meeting was held, leaving this amount unpaid. It might be argued with great plausibility that, in view of the fact that the officers of the lodge told him to pay before the next lodge meeting, the defendant was bound thereby, and must have been held to waive its right to a prompt payment of the lodge dues, and that as Kalinski died before the time allowed had expired, he was not even technically in fault.

But, however, this may be, the officials of the order appear to have been guilty of delinquencies of their own, which ought to estop them from insisting upon the failure of Kalinski to comply with the letter of his agreement to abide by the laws and regulations of the rank. Under the laws, rules and regulations for the government of sections of the endowment rank, it was the duty of the secretary of each section to keep a financial account with each member of the section, and in January of each year to furnish to the master of finance of the lodge to which the members of the section belonged, a list of the names of such members, and to request the officer to promptly inform him whenever a member on said list became in arrears for an amount equal to one year's dues. It was also the duty of the master of finance of Syracuse Lodge, No. 50, to notify in writing all members who were about to become in arrears, and to again notify them on the eve of suspension. It was also his duty to notify his lodge when a member owed to the amount of

twelve months' dues, or its equivalent, after which notification it became the duty of the chancellor commander to suspend him in open lodge, and to keep a record of the same in the minutes. It seems to have been also the duty of the keeper of records and seal of each lodge to notify the proper section of the endowment rank, whenever a member became in arrears for dues to the lodge, when, and not until then, the certificate of membership in the endowment rank became the subject of forfeiture. Indeed, the failure to do this, and the continued receipt of the monthly assessments upon the policy of endowment, appear to have been treated by the board of control as a waiver of the right to insist upon the forfeiture of the certificate or policy.

By the constitution of the endowment rank, the entire charge and full control was put in a board of control, which had power to hear and determine all appeals, their findings being final unless reversed by the supreme lodge in session. They also had authority to enact general laws, rules and regulations, in conformity with the constitution, for the government of sections and the membership of the endowment rank, and to alter and amend such laws at their discretion. It seems that, in the case of Manikheim, a member of the endowment rank at Washington, the board of control was called upon, in 1887, to give a construction to the rules and regulations of the endowment rank, upon a state of facts similar in all respects to the facts in this case. From the journal of the supreme lodge, which was put in evidence in this case, it appeared that, at the time of his death, Manikheim was in arrears to his lodge for one year's dues, but had paid all his assessments to his section of the endowment rank.

Upon receipt of this information the supreme secretary refused to furnish a blank proof of death, and instructed the secretary of said section to return to the beneficiaries the monthly assessments, which were erroneously collected from said Manikheim. This was refused by the beneficiaries, who demanded payment in full of the certificate of membership.

Upon the matter being laid before the board of control, it decided, after a very careful consideration of the facts in the

case, that in view of the fact that the keeper of records and seal of the lodge to which Manikheim belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to his lodge, and that the lodge had failed to suspend him in accordance with the law, and that his section of the endowment rank had received his monthly assessments up to the date of his death, the endowment rank was liable for the full amount of the endowment, and the supreme secretary was instructed to pay the beneficiaries the amount due.

In compliance with this ruling, the supreme chancellor of the order appears to have issued a circular letter to the subordinate chancellors to the effect that, in order to carry out the provisions of the law that "when a member of the endowment rank becomes in arrears to his lodge on account of dues for more than six months" (changed from one year) "he shall forfeit his membership in the section and said rank, and render void the endowment certificate," it was necessary that the secretaries of the various sections of the endowment rank be duly notified when members of such rank became in arrears for dues to their respective lodges. And he therefore requested the grand chancellors to instruct their subordinate lodges to forward to the secretary of such sections of the endowment rank as were tributary to their lodges, an official notice of the fact that any member was in arrears for dues, said notice of arrears to be signed by the master of finance and attested by the keeper of the records and seal, with the seal of the lodge attached. And to properly carry this into effect the secretaries of the various sections of the endowment rank were instructed to officially certify to the keeper of records and seal of the respective lodges, to which the members of a section belonged, a full and complete list of the members of said section, etc.

While it is entirely true, as claimed by the plaintiff in error, that this was *res inter alios acta*, and, therefore, not available by way of estoppel, it is none the less true that it was an interpretation put by the supreme authority of the order upon their somewhat ambiguous and complicated system of rules and regulations, and that it would be unjust to the board of control to assume that Kalinski, who was an ordinary member

of the endowment rank and apparently an unlearned man, was wiser than they, and was bound to put a construction upon these regulations more unfavorable to himself than the board of control had construed them. Upon the contrary, we think that the certificate holders were entitled to rely upon the construction given to these rules and regulations by the highest tribunal of the order, and to presume that the supreme lodge would not enforce a forfeiture under circumstances which the board of control had held did not create one. Although we would not be understood as saying that we should feel bound by the construction put upon the rules and regulations of a private order by the board of control or supreme council of such order, we think that the association has no right to complain if its certificate holders act upon such interpretation, and that it is not in a position to claim that this ruling in their favor was more liberal than the facts of the case or a proper construction of these rules would warrant. Whether the decision were right or wrong it established a course of business on the part of the defendant, upon which its certificate holders had a right to rely. *Insurance Co.* v. *Eggleston*, 96 U. S. 572.

Aside from this, however, we think the continued receipt of assessments upon Kalinski's certificate up to the day of his death was a waiver of any technical forfeiture of the certificate by reason of the non-payment of the lodge dues. Granting that the continued receipt of premiums or assessments after a forfeiture has occurred will only be construed as a waiver when the facts constituting a forfeiture are known to the company, *Insurance Co.* v. *Wolff*, 95 U. S. 326; *Bennecke* v. *Insurance Co.*, 105 U. S. 355, this is true only of such facts as are peculiarly within the knowledge of the assured. If the company ought to have known of the facts, or with proper attention to its own business, would have been apprised of them, it has no right to set up its ignorance as an excuse. In the ordinary course of business between the lodges and the sections of the endowment rank, and under the instructions contained in the circular of the supreme chancellor of May 20, 1887, it became the duty of the keeper of the records and seal

of the lodge to which Kalinski belonged to notify the secretary of the proper section of the endowment rank of the fact that he was in arrears for dues, and his failure to do this should be imputed to the defendant, as representing the order, rather than to Kalinski. It is more than possible that, as the endowment rank was a separate and distinct feature from the lodges, Kalinski was wholly ignorant of the fact that a failure to pay his lodge dues promptly forfeited his certificate; and while, as matter of law, he might be chargeable with notice of this fact, his beneficiary has a perfect right to insist that the defendant was guilty of a technical dereliction of its own duty in the premises. The defence in any aspect does not commend itself highly to one's sense of natural justice, and, for the reasons above stated, we are of the opinion that the decision of the court below was right, and it is, therefore,

Affirmed.

HENNINGTON *v.* GEORGIA.

ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

No. 150. Argued March 17, 18, 1896. — Decided May 18, 1896.

The legislation of the State of Georgia, contained in §§ 4578 and 4310 of the Code of 1882, forbidding the running of freight trains on any railroad in the State on Sunday, and providing for the trial and punishment, on conviction, of the superintendent of a railroad company violating that provision, although it affects interstate commerce in a limited degree, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation, designed to secure the well-being, and to promote the general welfare of the people within the State, and is not invalid by force alone of the Constitution of the United States; but is to be respected in the courts of the Union until superseded and displaced by some act of Congress, passed in execution of the power granted to it by the Constitution.

There is nothing in the legislation in question in this case that suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State.

Opinion of the Court.

THE case is stated in the opinion.

Mr. Edward Colston for plaintiff in error. *Mr. George Hoadly, Jr.*, was on his brief.

Mr. J. M. Terrell for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

The plaintiff in error, Hennington, superintendent of transportation, and having charge of the freight business of the Alabama Great Southern Railroad Company, was indicted in the Superior Court of Dade County, Georgia, for the offence of having, on the 15th day of March, 1891 — that being the Sabbath day — unlawfully run a freight train on the Alabama Great Southern Railroad in that county.

The statute under which the prosecution was instituted is as follows: "Code of Georgia, 1882, Sec. 4578. If any freight train shall be run on any railroad in this State on the Sabbath day (known as Sunday), the superintendent of transportation of such railroad company, or the officer having charge of the business of that department of the railroad, shall be liable for indictment for a misdemeanor in each county through which such train shall pass, and, on conviction, shall be for each offence punished as prescribed in section 4310 of this code. On such trial it shall not be necessary to allege or prove the names of any of the employés engaged on such train, but the simple fact of the train being run. The defendant may justify himself by proof that such employés acted in direct violation of the orders and rules of the defendant: *Provided, always*, That whenever any train on any railroad in this State, having in such train one or more cars loaded with live stock, which train shall be delayed beyond schedule time, shall not be required to lay over on the line of road or route during Sunday, but may run on to the point where, by due course of shipment or consignment, the next stock pen on the route may be, where said animals may be fed and watered, according to the facilities usually afforded for such transportation. And it shall be lawful for all freight trains on the different

railroads in this State, running over said roads on Saturday night, to run through to destination: *Provided*, The time of arrival, according to the schedule by which the train or trains started on the trip, shall not be later than eight o'clock on Sunday morning."

Section 4310, referred to in the section just quoted, is as follows:

"Accessories after the fact, except where it is otherwise ordered in this code, shall be punished by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain-gang on the public works, or on such other works as the county authorities may employ the chain-gang, not to exceed twelve months, and any one or more of these punishments may be ordered in the discretion of the judge: *Provided*, That nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor."

The defendant pleaded not guilty. He also pleaded specially certain facts which, he averred, showed that the statute of Georgia, as applied to this case, was in conflict with the provision of the Constitution of the United States giving Congress power to regulate commerce among the States.

At the trial the defendant admitted that he was superintendent of transportation of the Alabama Great Southern Railroad, the property of the Alabama Great Southern Railroad Company, a corporation of Alabama; that the line of that railroad began at the city of Chattanooga, Tennessee, extended nine miles through that State, when it entered the county of Dade, Georgia, and ran through that county and over the line of road constructed and operated originally by the Wills Valley Railroad Company, into Alabama; thence through Alabama two hundred and forty-five miles, and into Mississippi, to the city of Meridian, where it connected with other roads; that said company was acting as a common carrier of passengers and freight along its line, using engines and cars propelled by steam; that on the day mentioned in the in-

dictment the company, by its superintendent of transportation, the defendant, ran over its line of road from Chattanooga, Tennessee, through Georgia and Alabama to Meridian, Mississippi, a train of cars laden with freight for points beyond the limits of Georgia, the train having been loaded in Tennessee with freight destined for points outside and beyond the limits of Georgia.

The defendant contended that the statute, if applied to these facts, was repugnant to the Constitution of the United States. This contention was overruled and the jury were instructed that, under the facts admitted, the defendant was guilty. The jury accordingly found him guilty as charged in the indictment.

The case was taken to the Supreme Court of Georgia, and it was assigned for errror that the trial court refused to adjudge section 4578 of the Code of Georgia, when applied to the admitted facts, to be repugnant to the commerce clause of the Constitution.

The Supreme Court of Georgia held the statute, under which the prosecution was instituted, to be a regulation of internal police and not a regulation of commerce; that it was not in conflict with the Constitution of the United States even as to freight trains passing through the State from and to adjacent States, and laden exclusively with freight received on board before the trains entered Georgia and consigned to points beyond its limits.

As the judgment of the Supreme Court of Georgia denied to the defendant a right or immunity specially set up and claimed by him under the Constitution of the United States, no question is or can be made as to the jurisdiction of this court to review that judgment.

If the statute in question forbidding the running in Georgia of railroad freight trains, on the Sabbath day, had been expressly limited to trains laden with domestic freight, it could not be regarded otherwise than as an ordinary police regulation established by the State under its general power to protect the health and morals, and to promote the welfare, of its people.

From the earliest period in the history of Georgia it has been the policy of that State, as it was the policy of many of the original States, to prohibit all persons, under penalties, from using the Sabbath as a day for labor and for pursuing their ordinary callings. By an act of the Colonial legislature of Georgia, approved March 4, 1762, it was provided: "No tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's day, or any part thereof (works of necessity or charity only excepted), and that every person being of the age of fifteen years or upwards, offending in the premises, shall, for every such offence, forfeit the sum of ten shillings. And that no person or persons whatsoever shall publicly cry, show forth, or expose to sale, any wares, merchandise, fruit, herbs, goods or chattels whatsoever upon the Lord's day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried or showed forth, or exposed to sale, or pay ten shillings." 2 Cobb's New Dig. Laws, Georgia, 853. This act is substantially preserved in section 4579 of the Code of Georgia. And by an act approved February 11, 1850, it was provided: "That from and after the 1st day of March next it shall not be lawful for any company or individual to run any freight train or any car carrying freight upon any railroad now existing, or that may hereafter be made, in this State, on the Sabbath day; and any conductor or other person so running or assisting in running any train or car carrying freight on the Sabbath day shall each be guilty of a misdemeanor, and on conviction thereof each conductor shall be fined in a sum not exceeding five hundred dollars." 1 Cobb's New Dig. Laws, Georgia, 399. This act was amended by substituting "superintendent of transportation" for "conductor," and in other particulars, not important to be mentioned, and as amended it constitutes section 4578 of the Criminal Code, under the heading of "Offences against public morality, health, police," etc. Code of Georgia, 1882.

In what light is the statute of Georgia to be regarded? The well settled rule is, that if a statute purporting to have

been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler* v. *Kansas*, 123 U. S. 623, 661; *Minnesota* v. *Barber*, 136 U. S. 313, 350.

In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was "of admirable service to a State considered merely as a civil institution." 4 Bl. Com. * 63. The same view was expressed by Mr. Justice Field in *Ex parte Newman*, 9 California, 502, 519, 528, when, referring to a statute of California relating to

the Sabbath day, he said: "Its requirement is a cessation from labor. In its enactment, the legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessation from labor. One day in seven is the rule, founded in experience and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

So, in *Bloom* v. *Richards*, 2 Ohio St. 387, 391, Judge Thurman, delivering the unanimous judgment of the Supreme Court of Ohio, said: "We are, then, to regard the statute under consideration as a mere municipal or police regulation, whose validity is neither strengthened nor weakened by the fact that the day of rest it enjoins is the Sabbath day. Wisdom requires that men should refrain from labor at least one day in seven, and the advantages of having the day of rest fixed, and so fixed as to happen at regularly recurring intervals, are too obvious to be overlooked. It was within the constitutional competency of the general assembly to require the cessation of labor, and to name the day of rest."

To the same general effect are many cases: *Specht* v. *Commonwealth*, 8 Penn. St. 312, 322; *Commonwealth* v. *Has*, 122 Mass. 40, 42; *Frolickstein* v. *Mobile*, 40 Alabama, 725; *Ex parte Andrews*, 18 California, 678, in which the dissenting opinion of Mr. Justice Field in *Ex parte Newman*, 9 California, 502, was approved; *State* v. *Railroad*, 24 W. Va. 783; *Scales* v. *State*, 47 Arkansas, 476, 482; *State* v. *Ambs*, 20 Missouri, 214; *Mayor &c.* v. *Linck*, 12 Lea, 499, 515.

The same principles were announced by the Supreme Court of Georgia in the present case. As the contention is that that court erred in not adjudging the statute in question to be unconstitutional, it is appropriate that the grounds upon which it proceeded should fully appear in this opinion. That court, speaking by Chief Justice Bleckley, said: "There can be no

well founded doubt of its being a police regulation, considering it merely as ordaining the cessation of ordinary labor and business during one day in every week; for the frequent and total suspension of the toils, cares and strain of mind or muscle incident to pursuing an occupation or common employment, is beneficial to every individual, and incidentally to the community at large, the general public. Leisure is no less essential than labor to the well-being of man. Short intervals of leisure at stated periods reduce wear and tear, promote health, favor cleanliness, encourage social intercourse, afford opportunity for introspection and retrospection, and tend in a high degree to expand the thoughts and sympathies of people, enlarge their information, and elevate their morals. They learn how to be, and come to realize that being is quite as important as doing. Without frequent leisure, the process of forming character could only be begun; it could never advance or be completed; people would be mere machines of labor or business — nothing more. If a law which, in essential respects, betters for all the people the conditions, sanitary, social and individual, under which their daily life is carried on, and which contributes to insure for each, even against his own will, his minimum allowance of leisure, cannot be rightfully classed as a police regulation, it would be difficult to imagine any law that could."

That court further said: "With respect to the selection of the particular day in each week which has been set apart by our statute as the rest day of the people, religious views and feelings may have had a controlling influence. We doubt not that they did have; and it is probable that the same views and feelings had a very powerful influence in dictating the policy of setting apart any day whatever as a day of enforced rest. But neither of these considerations is destructive of the police nature and character of the statute. If good and sufficient police reasons underlie it, and substantial police purposes are involved in its provisions, these reasons and purposes constitute its civil and legal justification, whether they were or not the direct and immediate motives which induced its passage, and have for so long a

time kept it in force. Courts are not concerned with the mere beliefs and sentiments of legislators, or with the motives which influence them in enacting laws which are within legislative competency. That which is properly made a civil duty by statute is none the less so because it is also a real or supposed religious obligation; nor is the statute vitiated, or in anywise weakened, by the chance, or even the certainty, that in passing it the legislative mind was swayed by the religious rather than by the civil aspect of the measure. Doubtless it is a religious duty to pay debts, but no one supposes that this is any obstacle to its being exacted as a civil duty. With few exceptions, the same may be said of the whole catalogue of duties specified in the Ten Commandments. Those of them which are purely and exclusively religious in their nature cannot be, or be made civil duties, but all the rest of them may be, in so far as they involve conduct as distinguished from mere operations of mind or states of the affections. Opinions may differ, and they really do differ, as to whether abstaining from labor on Sunday is a religious duty; but whether it is or is not, it is certain that the legislature of Georgia has prescribed it as a civil duty. The statute can fairly and rationally be treated as a legitimate police regulation, and thus treated, it is a valid law. There is a wide difference between keeping a day holy as a religious observance and merely forbearing to labor on that day in one's ordinary vocation or business pursuit." *Hennington* v. *Georgia*, 90 Georgia, 396, 397–399.

Assuming, then, that both upon principle and authority the statute of Georgia is, in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people, we proceed to consider whether it is in conflict with the Constitution of the United States.

The defendant contends that the running on the Sabbath day of railroad cars, laden with interstate freight, is committed exclusively to the control and supervision of the National Government; and that, although Congress has not taken any affirmative action upon the subject, state legislation interrupt-

ing, even for a limited time only, interstate commerce, whatever may be its object and however essential such legislation may be for the comfort, peace and safety of the people of the State, is a regulation of interstate commerce forbidden by the Constitution of the United States. Is this view of the Constitution and of the relations between the States and the General Government sustained by the former decisions of this court? Is the admitted general power of a State to provide by legislation for the health, the morals and the general welfare of its people, so fettered that it may not enact any law whatever that relates to or affects in any degree the conduct of commerce among the States? If the people of a State deem it necessary to their peace, comfort and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that State shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, is that result, so far as interstate freight traffic is concerned, attainable only through an affirmative act of Congress giving its assent to such legislation?

The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the State under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and, therefore, is valid, at least until Congress interferes.

The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced by this court. In *Gibbons* v. *Ogden*, 9 Wheat. 1, 203, 210, this court recognized the possession by each State of a general power of legislation, that "embraces everything within the territory of a State, not surrendered to the General Government; all which can be most advantageously exercised by the States themselves." Inspection laws, although having, as the court said in that case, "a remote and considerable influence on

commerce," are yet within the authority of the States to enact, because no direct, general power over the objects of such laws was granted to Congress. So, also, quarantine laws of every description, if they have real relation to the objects named in them, are to be referred to the power which the States have to make provision for the health and safety of their people. But neither inspection, quarantine nor health laws enacted by a State have been adjudged void, by force alone of the Constitution and in the absence of Congressional legislation, simply because they remotely, or even directly, affected or temporarily suspended commerce among the States and with foreign nations. Of course, if the inspection, quarantine or health laws of a State, passed under its reserved power to provide for the health, comfort and safety of its people, come into conflict with an act of Congress, passed under its power to regulate interstate and foreign commerce, such local regulations, to the extent of the conflict, must give way in order that the supreme law of the land — an act of Congress passed in pursuance of the Constitution — may have unobstructed operation. The possibility of conflict between State and national enactments, each to be referred to the undoubted powers of the State and the Nation, respectively, was not overlooked in *Gibbons* v. *Ogden*, and Chief Justice Marshall said: "The framers of our Constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the state legislatures as do not transcend these powers, but, though enacted in the execution of acknowledged state powers, interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

These principles are illustrated in numerous decisions of this court, to some of which it is proper to refer.

In *Willson* v. *Black Bird Creek Marsh Company*, 2 Pet. 245, 251, 252, it appeared that that company claimed the right, under a statute of Delaware, to place a dam across a navigable creek, up which the tide flowed for some distance, and thereby abridge the rights of those accustomed to use the stream. This court, after observing that the construction of the dam would enhance the value of the adjoining land and probably improve the health of the inhabitants, and that such an abridgment of private rights, unless it came in conflict with the Constitution or a law of the United States, was an affair between the government of Delaware and its citizens, of which this court could not take cognizance, said: "The counsel for plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States; we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." Notwithstanding that case has been sometimes criticized, its authority has never been questioned in this court. On the contrary, it was declared in *Pound* v. *Turck*, 95 U. S. 459, 463, that it had never been overruled, but had always been sustained.

In *Gilman* v. *Philadelphia*, 3 Wall. 713, 729, the question was as to the validity of an act of the legislature of Pennsylvania, authorizing the construction of a bridge over the Schuylkill, "an ancient river and common highway of the State." It appeared that the bridge, if constructed, would prevent the passage up the river of vessels having masts, interfere with commerce and materially injure the value of certain wharf and dock property on the river. Congress had not passed any act on the subject, but the contention was that such an interference with commerce on a public navigable water was inconsistent with the Constitution of the United States. The court said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress, whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation."

In *Cooley* v. *Board of Wardens, etc.*, 12 How. 299, 320, it was adjudged that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots on the public navigable waters of the United States.

In *Owners of Brig James Gray* v. *Owners of Ship John Fraser*, 21 How. 184, 187, the court held to be valid two ordinances of the city of Charleston, one providing that no vessel should be in the harbor of that city for more than twenty-four hours, and inflicting certain penalties for every disobedience of the ordinance; the other requiring all vessels anchored in the harbor to keep a light burning on board from

dark until daylight, suspended conspicuously midships, twenty feet high from the deck. The court said: "The power of the city authorities to pass and enforce these two ordinances is disputed by the libellants. But regulations of this kind are necessary and indispensable in every commercial port for the convenience and safety of commerce. And the local authorities have a right to prescribe at what wharf a vessel may lie and how long she may remain there, where she may unload or take on board particular cargoes, where she may anchor in the harbor and for what time, and what description of light she shall display at night to warn the passing vessels of her position, and that she is at anchor and not under sail. They are like to the local usages of navigation in different ports, and every vessel, from whatever part of the world she may come, is bound to take notice of them and conform to them. And there is nothing in the regulations referred to in the port of Charleston which is in conflict with any law of Congress regulating commerce, or with the general admiralty jurisdiction conferred on the courts of the United States."

In *Railroad Company* v. *Fuller*, 17 Wall. 560, 567, 570, the question was as to the validity of a statute of Iowa requiring that each railroad company should, in the month of September, annually, fix its rates for the transportation of passengers and of freights of different kinds; that it should put up a printed copy of such rates at all its stations and depots, and cause a copy to remain posted during the year; and that a failure to fulfil these requirements, or the charging of a higher rate than was posted, should subject the offending company to the payment of the penalty prescribed. The court said: "In all other respects there is no interference. No other constraint is imposed. Except in these particulars the company may exercise all its faculties as it shall deem proper. No discrimination is made between local and interstate freights, and no attempt is made to control the rates that may be charged. It is only required that the rates shall be fixed, made public and honestly adhered to. In this there is nothing unreasonable or onerous. The public welfare is promoted without wrong or injury to the company. The statute was

doubtless deemed to be called for by the interests of the community to be affected by it, and rests upon a solid foundation of reason and justice. It is not, in the sense of the Constitution, in any wise a regulation of commerce." Again: "If the requirements of the statute here in question were, as contended by the counsel for the plaintiff in error, *regulations of commerce*, the question would arise whether, regarded in the light of the authorities referred to, and of reason and principle, they are not regulations of such a character as to be valid until superseded by the paramount action of Congress. But, as we are unanimously of opinion that they are merely police regulations, it is unnecessary to pursue the subject."

In *Railroad Co.* v. *Husen*, 95 U. S. 465, 470–473, the court, while holding to be invalid under the Constitution of the United States a statute of Missouri, which met at the borders of the State a large and common subject of commerce, and prohibited its crossing the line during two thirds of each year, except subject to onerous conditions, which obstructed interstate commerce and worked a discrimination between the property of citizens of one State and that of citizens of other States, said that "the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power;" that the power extended "to making regulations of domestic order, morals, health and safety," but could not be exercised over a subject confided exclusively in Congress, nor invade the domain of the National Government, nor by any law of a police nature interfere with transportation into or through the State, "beyond what is absolutely necessary for its self protection." The court, in that case, concluded with these words: "The police power of a State cannot obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise;* and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any *needless intrusion*."

A leading case upon the subject is that of *Morgan* v. *Louisiana*, 118 U. S. 455, 463–465, which related to certain quarantine laws of Louisiana, the validity of which were questioned partly upon the ground that they were inconsistent with the power of Congress to regulate commerce among the States. This court said: "Is the law under consideration void as a regulation of commerce? Undoubtedly it is in some sense a regulation of commerce. It arrests a vessel on a voyage which may have been a long one. It may affect commerce among the States when the vessel is coming from some other State of the Union than Louisiana, and it may affect commerce with foreign nations when the vessel arrested comes from a foreign port. This interruption of the voyage may be for days or weeks. It extends to the vessel, the cargo, the officers and seamen and the passengers. In so far as it provides a rule by which this power is exercised, it cannot be denied that it regulates commerce. We do not think it necessary to enter into the inquiry whether, notwithstanding this, it is to be classed among those police powers which were retained by the States as exclusively their own, and, therefore, not ceded to Congress. For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, even where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210; *Henderson* v. *The Mayor*, 92 U. S. 259, 272; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, 661. But it may be conceded that whenever Congress shall undertake to provide for the commercial cities of the United States a general system of quarantine, or shall confide the execution of the details of such a system to a National Board of Health, or to local boards, as may be found expedient, all state laws on the subject will be abrogated, at least so far as the two are inconsistent. But, until this is done, the laws of the State on the subject are valid." Again: "Quarantine laws belong to that class of state legislation which, whether passed with intent to

regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress."

Upon the subject of legislation enacted under the police power of a State, and which, although affecting more or less commerce among the States, was adjudged to be valid, until displaced by some act of Congress, the case of *Smith* v. *Alabama*, 124 U. S. 465, 474, 479, 482, is instructive. A statute of Alabama made it unlawful for an engineer on a railroad train in that State to operate an engine upon the main line of the road used for the transportation of passengers or freight, without first undergoing an examination and obtaining a license from a State Board of Examiners. The point was made that the statute, in its application to engineers on interstate trains, was a regulation of commerce among the States, and repugnant to the Constitution. This court referred to and reaffirmed the principle announced in *Sherlock* v. *Alling*, 93 U. S. 99, 102, where it was said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." Referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the States, the court, in *Smith* v. *Alabama*, said that the power of Congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they

are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States. No objection to the statute, as an impediment on the free transaction of commerce among the States, can be found in any of its special provisions." Again: "We find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so indirectly, incidentally and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence."

So in *Nashville etc. Railway* v. *Alabama*, 128 U. S. 96, 99, 101, which involved the validity of a state enactment which, for the protection of the travelling public, declared any one disqualified from serving on railroad lines within the State who had color blindness and defective vision, and which statute was equally applicable to domestic and interstate railroad trains, the court said: "It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will

supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and Federal courts that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable." Referring to some observations made in *Smith* v. *Alabama*, *supra*, the court said: "The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce."

These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover

the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their callings, the transportation of freight shall be suspended.

We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States.

The judgment is

Affirmed.

The Chief Justice, with whom concurred Mr. Justice White, dissenting:

Intercourse and trade between the States by means of railroads passing through several States, is a matter national in its character and admitting of uniform regulation. The power of Congress to regulate it is exclusive and under the Constitution it is free and untrammelled except as Congress otherwise provides. This statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce, and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of commerce but a mere regulation of police, and that the so called police power of a State is plenary. The result, however, is the same. When a power of a State and

a power of the General Government come into collision, the former must give way; and as the freedom of interstate commerce is secured by the Constitution, except as Congress shall limit it, the act is void because in violation of that freedom.

MR. JUSTICE BREWER did not hear the argument in this case, and took no part in its decision.

HUNTINGTON *v.* SAUNDERS.

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

No. 928. Submitted May 4, 1896. — Decided May 25, 1896.

The objections of a creditor to the discharge of a bankrupt being dismissed for want of prosecution, the creditor filed his petition for revision in the Circuit Court of the United States. Issues were made up and the case heard. The Circuit Court held that the petition must be dismissed and an order to that effect was entered. Thereupon the creditor appealed to the Circuit Court of Appeals, which court dismissed the appeal for want of jurisdiction. Appeal was taken to this court. *Held*, that this court had jurisdiction of such an appeal, when it appeared affirmatively that the amount in controversy exceeded $1000, besides costs, which did not appear in this case.

MOTION to dismiss.

The case is stated in the opinion.

Mr. William B. Durant for the motion.

Mr. Bancroft Gherardi Davis opposing.

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

William A. Saunders was adjudicated bankrupt by the District Court of the United States for the District of Massachusetts, October 1, 1875, on petition of creditors filed July 13, 1875. Saunders applied for a discharge by petition filed

July 19, 1876, of which notice was given returnable May 25, 1877. James Huntington objected to the granting of the discharge and, on June 4, 1877, filed written specifications of his objections. Several hearings were had thereon before the register, and the hearing was closed in 1878. December 22, 1893, Saunders made an application that the objections to his discharge might be dismissed or heard at an early day. December 23, 1893, the court dismissed Huntington's objections for want of prosecution, and on December 30, 1893, granted the bankrupt's discharge. On January 1, 1894, Huntington gave notice of an application to the Circuit Court for a review of the dismissal of objections and the granting the discharge, and on January 3, 1894, filed his petition for revision in the Circuit Court of the United States for the First Circuit. Issues were made up and the case heard. The Circuit Court held that the petition must be dismissed, 64 Fed. Rep. 476, and on January 16, 1895, an order to that effect was entered. Thereupon Huntington appealed to the Circuit Court of Appeals for the First Circuit, which court dismissed the appeal for want of jurisdiction, February 3, 1896. 33 U. S. App. 416.

It was stipulated that Huntington was a creditor of Saunders, "and that the amount of his claim against the bankrupt, which will be discharged if the discharge granted to the bankrupt shall stand, amounts to over five thousand dollars ($5000), exclusive of any interest or costs."

From the final decree of the Circuit Court of Appeals Huntington prayed an appeal to this court, which was allowed, and having been docketed here, a motion to dismiss was made.

This appeal is prosecuted under the last clause of section six of the judiciary act of March 3, 1891, providing: "In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

This is not one of the cases in which the decrees or judgments of the Circuit Courts of Appeals are made final by that section, but in our opinion the matter in controversy does not exceed one thousand dollars besides costs. The proof of Hunt-

ington's claim was not in controversy nor the amount of it. Whether Saunders was entitled to a certificate of discharge was in controversy, but even assuming that the value of this certificate was susceptible of an estimate in money, there was no evidence whatever in the record tending to show this value. *South Carolina* v. *Seymour*, 153 U. S. 353, 358. Huntington was entitled to share in whatever assets passed to the assignee, and whether Saunders had acquired new assets after he was put into bankruptcy did not appear.

The matter in controversy must have actual value, and that cannot be supplied by speculation on the possibility that if a discharge were refused something might be made out of the bankrupt. *Durham* v. *Seymour*, 161 U. S. 235.

Appeal dismissed.

BURFENNING *v.* CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 277. Submitted May 1, 1896. — Decided May 18, 1896.

While it is well settled that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final, it is equally true that when, by act of Congress, a tract of land has been reserved from homestead and preëmption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title; and the patent questioned in this case comes within that general rule of invalidity.

On March 20, 1890, plaintiff in error commenced his action in the District Court of Hennepin County, Minnesota, to recover possession of certain islands situated in the Mississippi River and within the territorial limits of the city of Minneapolis. After answer and trial had in that court, which resulted in a judgment for the defendant, and which judgment was affirmed by the Supreme Court, this writ of error was sued out.

Mr. James W. Lawrence for plaintiff in error.

Mr. Thomas Wilson for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The title of plaintiff in error, plaintiff below, rests on a patent from the United States, of date June 13, 1884. This patent was issued under Rev. Stat. § 2306, granting additional homestead lands to soldiers and sailors who served in the war of the rebellion. The record discloses that on April 7, 1873, John Van Anker entered as a homestead at Cawker City, Kansas, the E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ section 12, T. 3, R. 12, and W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ section 7, T. 3, R. 11, containing $155\frac{11}{100}$ acres. Under the statute referred to he was entitled to enter $4\frac{89}{100}$ acres as an additional homestead, and this without any previous settlement or occupancy thereof. On August 19, 1882, a certificate of this right was issued to him by the acting Commissioner of the General Land Office. On March 27, 1883, he applied under that section to enter these islands, containing $1\frac{95}{100}$ acres, and paid therefor the sum of $5.20, total of fees and compensation. This application being sustained, the patent was issued. Under a power of attorney, dated June 7, 1882, a date prior to that of the certificate of his right to the additional entry, a deed was made by his attorney in fact, B. M. Smith, to the plaintiff. The averment in the complaint, which was supported by the testimony offered at the trial, was that the value of the land was $20,000.

The invalidity of this patent is alleged, under the second clause of section 2258 and section 2289, Revised Statutes, by which are excluded from preëmption and homestead "lands included within the limits of any incorporated town or selected as the site of a city or town." Counsel for plaintiff in error insists that the patentability of all public lands is one for the Land Department of the United States to determine, and that its determination in this case, evidenced by the issue of the patent, is conclusive upon the question that these

lands were not at the time that the patentee's rights were initiated within the limits of any city and were subject to homestead.

It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reëxamined. *Johnson* v. *Towsley*, 13 Wall. 72; *Smelting Company* v. *Kemp*, 104 U. S. 636; *Steel* v. *Smelting Company*, 106 U. S. 447; *Wright* v. *Roseberry*, 121 U. S. 488; *Heath* v. *Wallace*, 138 U. S. 573; *McCormick* v. *Hayes*, 159 U. S. 332.

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preëmption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 646; *Wright* v. *Roseberry*, 121 U. S. 488, 519; *Doolan* v. *Carr*, 125 U. S. 618; *Davis's Admr.* v. *Weibbold*, 139 U. S. 507, 529; *Knight* v. *U. S. Land Ass'n.*, 142 U. S. 161.

The case of *Morton* v. *Nebraska*, 21 Wall. 660, is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. The preëmption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declared that "no lands on which are situated any known salines or mines shall

be liable to entry." Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: "It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In that case it will be observed that the records disclosed that the lands were saline lands when the proceedings in the Land Department were had. So the case was not one in which the department determined a fact upon parol evidence, but one in which it acted in disregard of an established and recorded fact. In *Root* v. *Shields*, 1 Woolworth, 340, decided by Mr. Justice Miller, at the circuit, it was held that a patent for lands within the limits of the city of Omaha was void. It is true that case was one in equity and not in law, but so far as respects the decision that the patent was void, it is exactly in point.

Now, applying these authorities to the case at bar, the city of Minneapolis was incorporated by an act of the legislature of that State, declared in its terms to be a public act, which took effect on March 8, 1881. The record of the Land Department shows that the right of the patentee was initiated on March 27, 1883, for on that date he made his application to enter the lands. This is not a case in which the patent was founded upon actual occupancy for homestead purposes, or in which nothing appearing but the patent itself there might be uncertainty as to the time at which the patentee's rights were initiated — whether before or after the incorporation of the city. It is one where, affirmatively and by the record, it is disclosed that there was no pretence or semblance of claim on the part of the patentee until two years subsequent to the organization of the city, and in that respect differs from *Texas*

& Pacific Railway v. *Smith*, 159 U. S. 66, in which, on account of the absence of all testimony, there was suggested an uncertainty as to the time at which, by way of relation, the patentee's rights took effect. The case, therefore, comes within the general rule announced as to the invalidity of a patent issued in defiance of the expressed will of Congress.

The judgment of the Supreme Court of Minnesota was right, and it is

Affirmed.

UNION NATIONAL BANK *v.* LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 254. Submitted April 29, 1896. — Decided May 18, 1896.

The ruling of the Supreme Court of Illinois, on the issues in this case that the statutes of Illinois contain both a prohibition and a penalty, that the prohibition makes void *pro tanto* every contract in violation thereof, and that while section 11, prohibiting corporations from pleading the defence of usury, may prevent any claim to the benefits of the penalty, it does not give to the other party a right to enforce a contract made in violation of the prohibition, brings the case within the settled law that, where the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

On September 17, 1890, plaintiff in error, plaintiff below, loaned the defendant $150,000, taking its note therefor, secured by collateral. The note was discounted at the rate of six per cent. The note having been paid, the plaintiff, on October 12, 1891, commenced its action in the Circuit Court of Cook County to recover upon a parol agreement for further compensation. The case came on for trial in that court, and a jury being waived the following facts were admitted by stipulation:

Statement of the Case.

"On or about September 17, 1890, William L. Breyfogle, then president of the Louisville, New Albany and Chicago Railway Company, verbally arranged with the Union National Bank of Chicago for a loan of one hundred and fifty thousand dollars to said railway company, the repayment thereof to be secured by collateral security in the form of three hundred bonds, of the general gold bonds of the Louisville, New Albany and Chicago Railway Company, said bonds being in the denomination of one thousand dollars each.

"It was verbally agreed in this arrangement that the bank should discount from this one hundred and fifty thousand dollars interest at the rate of six per cent per annum, and that Mr. Breyfogle, president of the railway company, should endeavor to secure the Chicago and Western Indiana Railway Company as a depositor with said Union National Bank, and in case he failed so to do the said bank should have in lieu of such deposit a commission of two and one half per cent upon said $150,000 in addition to said six per cent thereon. The deposits of the Chicago and Western Indiana Railway Company would have been valuable to the said bank as a part of its business and it declined to make the said loan, except upon the terms above stated."

The Chicago and Western Indiana Railway Company failed to become a depositor, as contemplated, and the claim of the plaintiff was for the two and one half per cent, called in such parol agreement "a commission." The plaintiff asked the court to hold these two propositions of law:

"1. The court finds as a matter of law that no corporation organized under the laws of Illinois can interpose the defence of usury in any action, even though the plaintiff in such action (the lender) be a national bank organized under the act of Congress establishing national banks.

"2. The court finds as a matter of law that if, in consideration of the making of the loan in controversy by the plaintiff to the defendant, the defendant agreed that, in addition to paying six per cent interest on said loan, it would secure the Chicago and Western Indiana Railway Company as a depositor of plaintiff, which said deposit account would have been

of value to plaintiff, or, failing to secure such account, would pay plaintiff a commission of two and one half per cent on said loan, in addition to said six per cent interest, this would not constitute usury or defeat a recovery by plaintiff, unless it should appear by a preponderance of the evidence that such arrangement was a mere shift or cover or device to evade the statute against usury or the provisions of the national banking act, or that such was the intent or purpose of the parties or one of them."

But it refused to hold either of them, and, on the contrary, ruled at the instance of defendant as follows:

"The court holds as a matter of law that a national bank in Illinois has no legal right or authority to charge or receive interest in this State to exceed the rate of eight per cent, and that the statute of this State which denies to corporations the right to plead usury cannot expand the authorities of national banks touching this subject as conferred by and fixed in the national banking act."

And thereupon it entered judgment in favor of the defendant. The Appellate Court of the State affirmed the judgment, on the ground that to sustain a recovery in favor of the plaintiff would involve the admission of a cotemporaneous parol agreement to modify and add to the terms of a written contract. The Supreme Court of the State, while recognizing fully the proposition that no parol agreement could be admitted in evidence to vary the terms of a written contract, referred to the claim that the stipulation waived defendant's right to object to the introduction of such evidence, and declining to express its opinion as to the effect of such stipulation affirmed the judgment on the ground that the contract, as thus modified by the parol agreement, was forbidden by the laws of Illinois, and could not be enforced.

The plaintiff is a national bank, and section 5197, Rev. Stat., authorizes such bank to charge and receive "interest at the rate allowed by the laws of the State, Territory or district where the bank is located, and no more." The laws of Illinois in force at the time of this contract authorized parties to stipulate and agree for eight per cent in all written con-

tracts, and forbade the acceptance or receiving of any greater rate. Sections 6 and 11 of the statute, Ill. Rev. Stat. 1889, c. 74, are as follows:

"SEC. 6. If any person or corporation in this State shall contract to receive a greater rate of interest or discount than eight per cent, upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation; and all contracts executed after this act shall take effect, which shall provide for interest or compensation at a greater rate than herein specified, on account of non-payment at maturity, shall be deemed usurious, and only the principal sum due thereon shall be recoverable."

"SEC. 11. No corporation shall hereafter interpose the defence of usury in any action."

The Supreme Court held that, while the defendant corporation might not interpose the defence of usury and so avoid the payment of any interest, the contract was, nevertheless, within the prohibitions of the statute, and could not be enforced at the instance of the plaintiff, because it provided for more than eight per cent. In its opinion it said:

"The theory seems to be that because a corporation cannot set up usury as a defence any person or corporation dealing with a corporation may lawfully exact such rate of interest as may be agreed upon, whether in excess of the statutory limit or not, so that where a corporation is the debtor no rate of interest is fixed by the laws of this State. To this view we are totally unable to yield our assent.

* * * * *

"Nor does it follow that because the debtor who has agreed to pay more than the legal rate of interest is a corporation, and therefore incapable of interposing the defence of usury, the law will treat the contract as valid and enforce it according to its terms.

* * * * *

"In the present case, then, the section of the statute imposing a penalty may be left out of view as inapplicable, but

still the prohibitory part of the statute remains, making it unlawful for any person or corporation to directly or indirectly accept or receive for the loan or forbearance of money any greater rate than six per cent by oral agreement or greater than eight per cent where the contract is in writing.

* * * * *

"In the present case six per cent interest was reserved in the note. Eight per cent might have been lawfully reserved in such written contract, but it was not. After the reservation, however, of six per cent by the writing the additional two per cent or any other rate could not be lawfully reserved or agreed to be taken or paid by parol. The written agreement having provided for the reservation of all that could be lawfully reserved or agreed to be taken by parol, an oral agreement for any further interest was manifestly in violation of the statute.

* * * * *

"The loan was only for six months, and two and one half per cent upon the amount loaned was equivalent to interest at the rate of five per cent for six months; that added to the interest reserved in the note made eleven per cent, a rate forbidden by the statute of this State and by the act of Congress as well. We are of the opinion that the legal conclusion from the admitted facts is that the agreement to pay the money now sought to be recovered is usurious and void."

To reverse the judgment thus affirmed by the Supreme Court of the State plaintiff sued out a writ of error from this court.

Mr. Henry S. Robbins for plaintiff in error.

Mr. G. W. Kretzinger for defendant in error.

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

At the outset we are met with the question whether this court has jurisdiction. In *Eustis* v. *Bolles*, 150 U. S. 361, 366, it was held:

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

Plaintiff in error does not challenge the rule as thus laid down, but insists that the single question decided by the Supreme Court of the State was that of usury under the Federal statute; that such decision was that a national bank could not recover from a corporation interest in excess of the statutory rate, although an individual could; or, in other words, that the decision was one making a discrimination against national banks in Illinois.

With this construction of that decision we are unable to concur. If language has any force the opinion of the Supreme Court is a clear declaration that the statutes of Illinois contain both a prohibition and a penalty; that the prohibition makes void *pro tanto* every contract in violation thereof, and that while section 11, prohibiting corporations from pleading the defence of usury, may prevent any claim to the benefits of the penalty, it does not give to the other party a right to enforce a contract made in violation of the prohibition. Counsel for plaintiff insists that prior decisions of that court in the case of individual creditors are inconsistent with this, and that the language of the court in this opinion is not clear. Even if it be true that a different opinion has been expressed heretofore by that court in reference to individual creditors, (and in respect to that matter we have no comments to make,) it is obvious that the present decision is that under and by virtue of the statutes of that State the plaintiff, whoever he or it may be, cannot enforce a contract forbidden by the terms of those statutes, and this irrespective of any rights that the defendant may have in respect thereto. Such a decision is one depending solely upon the statutes of the State.

Syllabus.

It may be said that the rights of a national bank as to interest are given by the Federal statute; that the reference to the state law is only for a measure of those rights; that a misconstruction of the state law really works a denial of the rights given by the Federal statute, and thus creates a Federal question. *Miller's Executors* v. *Swan*, 150 U. S. 132. A sufficient answer is that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks. The decision here was not against any equality of right, but only a determination of the meaning of the state law as applied to all creditors. It therefore denied no rights given by the Federal statute and involved no judgment adverse to plaintiff as to its meaning and effect. It assumed that the plaintiff's interpretation of that statute was correct, and ruled nothing against it. It presents no Federal question. It is broad enough to cover this case. It was relied upon by the Supreme Court, and, therefore, the case is, by the settled law as heretofore announced, one which does not come within the jurisdiction of this court.

The writ of error is

Dismissed.

WEBSTER *v.* LUTHER.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 161. Submitted March 19, 1896. — Decided May 18, 1896.

Persons entitled under Rev. Stat. § 2304 to enter a homestead, in case an entry is made for less than 160 acres, may, under § 2306, make an additional entry for the deficiency, which right is transferable.

The instrument executed by Mrs. Robertson through which the defendants in error claim was not forbidden by any act of Congress, and was valid.

The case is stated in the opinion.

Mr. J. L. Washburn and *Mr. Daniel H. Toomey* for plaintiff in error.

Mr. Cushman H. Davis, *Mr. Frank B. Kellogg*, *Mr. Cordenio A. Severance*, *Mr. George P. Wilson* and *Mr. John R. Vanderlip* for defendants in error. *Mr. A. Jaques*, and *Mr. J. J. Hudson* for Rouchleau, and *Mr. D. G. Cash* and *Mr. J. G. Williams* for Luther.

Mr. Justice Harlan delivered the opinion of the court.

This action involves the title to lots one and two, section eighteen, in township sixty-two, of range fourteen west, situated in St. Louis County, Minnesota.

At the trial below, the plaintiff Webster read in evidence, without objection —

1. The application of Mary Robertson, widow of James A. Robertson, deceased, of Benton County, dated April 7, 1887, (together with the receipt of the register of the local land office showing the payment of the fee and commissions prescribed by law,) to enter the lands here in dispute, under section 2306 of the Revised Statutes, granting *additional* lands to soldiers and sailors who served in the war of the rebellion. 2. The receipt of the proper land office, dated April 7, 1887, showing the payment in full of the balance required by law for the entry of the above lots, under section 2291 of the Revised Statutes of the United States. 3. A patent from the United States to Mary A. Robertson for these lands, issued September 21, 1888, recorded February 11, 1889, in the office of the register of deeds in St. Louis County, Minnesota, and purporting to have been issued pursuant to the act of Congress, approved May 20, 1862, "to secure homesteads to actual settlers on the public domain," 12 Stat. 392, c. 75, and the acts supplemental thereto. This patent recited that the claim of the patentee to the lots in controversy had been established and duly consummated in conformity to law. 4. A quitclaim deed of bargain and sale of these premises

from Mary A. Robertson, widow, to the plaintiff Webster, dated October 7, 1890, acknowledged October 17, 1890, and recorded October 22, 1890.

The defendants read in evidence a power of attorney, dated April 28, 1880, and duly recorded April 8, 1887, from Mary A. Robertson to James A. Boggs. This instrument authorized and empowered Boggs, as attorney for his principal, "to sell, upon such terms as to him shall seem meet," any lands which the principal then owned, either in law or equity, and obtained by her as "an additional homestead" under the provisions of section 2306 of the Revised Statutes; to sell any such lands as she might thereafter acquire under said acts; to receive the purchase money or other consideration therefor, and to deliver in the name of the principal such deeds or other assurance in the law therefor as to the agent seemed meet and necessary. It contained these additional clauses: "And my said attorney is hereby authorized to sell said lands, or my interest therein, and to make any contract in relation thereto which I might make if present, and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto, and I hereby release to my said attorney all claim to any of the proceeds of any such sale, lease, contract or damages. And I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers, hereby ratifying and confirming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents."

The admission of this power of attorney in evidence was objected to by the plaintiff upon the ground, among others, that it tended to prove a transaction in fraud of and in contravention of the laws of the United States, and that upon its face it was contrary to law, against public policy, fraudulent and void. This objection was overruled and the plaintiff excepted.

The defendants next read in evidence: 1. Two warranty deeds, each for an undivided one half of these lands, from Mary A. Robertson, by James A. Boggs, her attorney in

fact, one to the defendant Louis Rouchleau and the other to the defendant, Milo J. Luther, each dated April 7, 1887, and recorded April 15, 1887. 2. A warranty deed executed subsequently to the above deeds, by Louis Rouchleau to the defendant Luther, for an undivided one fourth of the lands.

The court adjudged that the title was in the defendants, freed from any claim of the plaintiff.

The question before us is whether the instrument of writing given to Boggs by Mary A. Robertson, under date of April 28, 1880, and which authorized the former to sell upon such terms as he deemed meet, and to convey the title to, and to receive for his own use and benefit the proceeds of the sale of, any lands obtained by the latter as an "additional homestead" under section 2306 of the Revised Statutes, was consistent with the acts of Congress relating to such matters. This is a question merely of statutory construction, and is within a very narrow compass.

By the act of May 8, 1862, 12 Stat. 392, c. 75, certain persons were given the right, under specified conditions, to enter one quarter section or a less quantity of unappropriated public lands. The sections of that act, so far as they bear upon the present case, were preserved in sections 2289, 2290 and 2291 of the Revised Statutes, which are as follows:

"SEC. 2289. Every person who is the head of a family or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preëmption claim, or which may, at the time the application is made, be subject to preëmption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the

land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

"SEC. 2290. The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the army or navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified.

"SEC. 2291. No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she or they will bear true allegiance to the government of the United States; then, in such case, he, she or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law. That the proof of residence, occupation or cultivation, the affidavit of non-alienation, and the oath of allegiance, required to be made by section twenty-two hundred and ninety-one of the Revised Statutes, may be made before the judge, or, in his absence, before the clerk, of any court of record of the county

and State, or district and Territory, in which the lands are situated; and if said lands are situated in any unorganized county, such proof may be made in a similar manner in any adjacent county in said State or Territory; and the proof, affidavit and oath, when so made and duly subscribed, shall have the same force and effect if made before the register or receiver of the proper land district; and the same shall be transmitted by such judge, or the clerk of his court, to the register and the receiver, with the fee and charges allowed by law to him; and the register and receiver shall be entitled to the same fees for examining and approving said testimony as are now allowed by law for taking the same. That if any witness making such proof, or the said applicant making such affidavit or oath, swears falsely as to any material matter contained in said proof, affidavits or oaths, the said false swearing being wilful and corrupt, he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register."

On the 4th day of April, 1872, Congress passed an act entitled "An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States." 17 Stat. 49, c. 85. The second section of that act declared that any person entitled under the provisions of the first section "to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter under the provisions of this act so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." This section, it will be observed, did not require that the additional land allowed to be entered should adjoin or be contiguous to the land originally entered.

But by the act of June 8, c. 338, 1872, 17 Stat. 333, the act of April 4, 1872, was amended, no substantial change, however, being made in the first section of the last named act. In place of the second section of the act of April 4, 1872, the following section was substituted: "That any person entitled, under the provisions of the foregoing section, to enter a home-

stead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter, under the provisions of this act, so much land contiguous to the tract embraced in the first entry as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." The words "contiguous to the tract embraced in the first entry" clearly indicate that the person who drew the section had in mind to cut off the right to enter additional lands that were not contiguous to those originally entered under the homestead laws.

But the policy indicated by the second section of the act of June 8, 1872, was soon reversed. For, by the act of March 3, 1873, 17 Stat. 605, c. 274, section two of the act of June 8, 1872, was amended so as to read as follows: "That any person entitled under the provisions of the foregoing sections to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." This act, it will be observed, omitted the words "under the provisions of this act" and the words "contiguous to the tract embraced in the first entry," that were in the previous act. The effect and, as is manifest, the object of the last act, were to eliminate from the legislation of Congress allowing additional lands to those who had entered less than one hundred and sixty acres under the homestead laws, the requirement that the additional lands should be contiguous to those originally entered.

This view is not at all affected by the revision, for the sections under which the lands in question were entered make no substantial change in the previous law. Those sections are as follows:

"Sec. 2304. Every private soldier and officer who has served in the Army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February

thirteen, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States, or in the Marine Corps, during the rebellion, for ninety days, and who was honorably discharged, and has remained loyal to the government, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work, not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead, and filing his declaratory statement, within which to make his entry and commence his settlement and improvement.

"SEC. 2305. The time which the homestead settler has served in the Army, Navy or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

"SEC. 2306. Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

As the lands in controversy are not contiguous to those originally entered, there would be some ground to contend that the entry made by Mrs. Robertson in 1887 was invalid, but for the omission *ex industria* from the statute of the

requirement, first introduced by the act of June 8, 1872, that the additional lands entered should be contiguous to those entered under the act of 1862, or under the first section of the act of June 8, 1872.

If, then, Congress did not burden the right to additional lands with the condition that they should be contiguous to those originally entered, it would seem necessarily to follow that the grant of additional lands was without restrictions, and, consequently, there was no purpose to interfere with the disposition by the homesteader of such additional lands, or of his interest in them, in any mode he deemed proper or that might be adopted in respect of other property owned by him. Any other construction of section 2306 would, we apprehend, defeat the purpose that Congress had in view when it gave additional lands to those who had made entries under the homestead laws of less than one hundred and sixty acres. We cannot see that any sound policy could have been subserved by restricting the bounty of Congress to those who were able to find additional lands contiguous to those previously entered by them; and we entirely concur in the views expressed by the Supreme Court of Minnesota. Speaking by Chief Justice Gilfillan, in the present case, it said: "There being nothing in the terms of the section requiring the things specified in the act of 1862, to wit, the making of proofs, affidavits, etc., is there anything in the policy of the government in respect to the subject-matters of the various acts referred to which raises the presumption that Congress intended any of the requirements of the act of 1862 to apply to the 'additional right?' or intended the feature of inalienability impressed on the homestead entered under the act of 1862, or the first section of the act of 1872, should attach to the 'additional right?' The purpose of Congress in giving the right to enter and acquire a homestead under the act of 1862, and the first section of the act of 1872, was not merely to confer a benefaction on the citizen, or discharged soldier or sailor. There was also the purpose to secure, so far as possible, a *bona fide* settler on the public lands, to promote the peopling and cultivation of those lands.

It was to prevent the evasion of this result that the person applying to enter a homestead is required to make affidavit that the application is made for his or her exclusive use and benefit, for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person, and on applying for the patent to make proof of residence on, and cultivation of, the land for five years, and an affidavit that no part of the land has been alienated; and it is provided that the land shall not be taken for debts, and that upon any change of residence or abandonment of the land for more than six months the land shall revert. The end in view was the peopling of vacant public lands with settlers owning and cultivating their own homes. To secure settlers or require residence or cultivation was no part of the end in view in giving the additional right under the section as amended in 1872. No residence on or cultivation of the land as a condition of securing the additional right was intended. It was a mere gratuity. There was no other purpose but to give it as a sort of compensation for the person's failure to get the full quota of one hundred and sixty acres by his first homestead entry. There is no reason to suppose it was intended to hamper the gift with conditions that would lessen its value, nor that it was intended to be made in any but the most advantageous form to the donee. After the right was conferred it was immaterial to the government whether the original donee should continue to hold it, or should transfer it to another. Or, rather, as policy requires the peopling of the vacant public lands, and as it could not be expected or desired that the homesteader should abandon his first entry to settle upon the additional land, it would be more for the interest of the government that he should be able to assign his additional right, so that it might come to be held by some one who would settle upon the lands." 50 Minnesota, 77, 83.

Subsequently, the same questions were carefully examined in the Circuit Court of Appeals for the Eighth Circuit in *Barnes* v. *Poirier*, 27 U. S. App. 500. In that case it was held that the right given by section 2306 of the Revised

Statutes to a soldier who had theretofore entered, under the homestead laws, less than one hundred and sixty acres to enter enough more to make up that quantity, was assignable before entry, there being no restriction as in the homestead act. The judgment of the Circuit Court for the District of Minnesota, delivered by Judge Nelson, 57 Fed. Rep. 956, was affirmed. Judge Sanborn, speaking for the Circuit Court of Appeals, well said: "The beneficiary was left free to select this additional land from any portion of the vast public domain described in the act, and free to apply it to any beneficial use that he chose. It was an unfettered gift in the nature of compensation for past services. It vested a property right in the donee. The presumption is that Congress intended to make this right as valuable as possible. Its real value was measured by the price that could be obtained by its sale. The prohibition of its sale or disposition would have made it nearly, if not quite, valueless to a beneficiary who had already established his home on the public domain. Any restriction upon its alienation must decrease its value. We are unable to find anything in the acts of Congress or in the dictates of an enlightened public policy that requires the imposition of any such restraint. On the other hand, the general rule of law which discourages all restraints upon alienation, the marked contrast between the purpose and the provisions of the grant of the right to the original homestead, and the purposes and provisions of the grant of the right to the additional land, and the history of the legislation which is codified in the existing homestead law, leave us without doubt that the assignment before entry of the right to this additional land granted by section 2306 of the Revised Statutes contravenes no public policy of the nation, violates no statute, and is valid as against the assignor, his heirs and assigns." To the same effect were the following cases: *Knight* v. *Leary*, 54 Wisconsin, 459; *Mullen* v. *Wine*, 26 Fed. Rep. 206; *Rose* v. *Nevada &c. Wood & Lumber Co.*, 73 California, 385; *Montgomery* v. *Pacific Coast Land Bureau*, 94 California, 284.

Much stress is placed by the plaintiff in error upon the

practice of the land department during a certain period, based upon the idea that the right of entry given by the statute of additional lands was entirely personal, and not assignable or transferable. We cannot give to this practice in the land office the effect claimed for it by the plaintiff in error. The practical construction given to an act of Congress, fairly susceptible of different constructions, by one of the Executive Departments of the government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 34; *United States* v. *Healey*, 160 U. S. 136, 141. But this court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute. In the present case it is our duty to adjudge that the right given by the statute in question to enter "additional" lands was assignable and transferable; consequently the instrument of writing given by Mary J. Robertson to Boggs was not forbidden by any act of Congress.

It results that the judgment below must be and is

Affirmed.

HILBORN *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 267. Submitted May 1, 1896. — Decided May 18, 1896.

Fees allowed by the court to the district attorney for his services in defending *habeas corpus* cases, brought to release from the custody of masters of vessels Chinese emigrants, whom the collector of the port had ordered detained, should be accounted for by him in the returns made by him to the government, of the fees and emoluments of his office.

It would require a strong case to show that services, for which the district attorney is entitled to charge the government a fee, are not also services for the earnings of which he should make return to the government in his emolument account.

Counsel for Appellant.

THIS was a petition by the district attorney for the District of California for certain fees for services rendered by direction of the Attorney General, in connection with various *habeas corpus* cases of Chinamen desiring to enter this country; the total amount of disallowances in this connection being in the vicinity of $7000. Defendants filed a counterclaim for moneys claimed to be erroneously and illegally allowed and paid by the accounting officers of the Treasury Department in the sum of $930, in excess of the fees and compensation prescribed by law.

In this connection the Court of Claims made a finding of facts to the effect that the claimant appeared and resisted certain proceedings in cases prosecuted in the proper court of the United States, wherein writs of *habeas corpus* had been issued on behalf of subjects of the Emperor of China, to masters of certain vessels arriving at the port of San Francisco, by whom persons were detained by order of the collector of said port, acting under color of the authority of the act of Congress of May 6, 1882, c. 126, 22 Stat. 58, and of July 5, 1884, c. 220, 23 Stat. 115. Judgment was rendered without a jury in each case. For these services, the judge, upon approving claimant's accounts under the act of February 22, 1875, taxed and allowed him an assimilated fee of $10 in each case, certified it to be a just and reasonable compensation, and that it had been assimilated to such fee as is prescribed by section 824 of the Revised Statutes for similar services in cases in which the United States are a party, and where judgment is rendered without a jury.

The case involved several other points, not questioned upon this appeal, and resulted in a judgment in favor of the petitioner for $594.60 and a dismissal of the counterclaim. From this judgment petitioner appealed, assigning as error that the Court of Claims erred in holding that the assimilated fees, earned by him in resisting the *habeas corpus* proceedings, were to be included in his emolument return or counted in making up his maximum compensation, and that the judgment of the court should have been for the sum of $8230.

Mr. Charles King and *Mr. William B. King* for appellant.

Mr. Assistant Attorney General Dodge for appellees.

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

The only question presented by this appeal is whether the assimilated fee of ten dollars allowed by the court to the district attorney for his services in defending a large number of *habeas corpus* cases, brought to release from the custody of masters of vessels certain Chinese emigrants, whom the collector of the port had ordered detained, should be accounted for by him in the returns made by him to the government, of the fees and emoluments of his office. No showing was made of any special employment of the district attorney in these cases, either by the court or by the Attorney General, or any other officer; and apparently his appearance for the United States, and his defence of these proceedings, was construed as a proper part of his duties as district attorney, and was voluntary. The question is whether these services were so far a part of the official duties of the district attorney as to require him to make return to the government of the fees earned therefor as emoluments of his office, within the meaning of Rev. Stat. 833, which directs the district attorney to make a return on the first days of January and July of each year of all fees and emoluments of his office, and of all the necessary expenses. By sec. 834 "the preceding section shall not apply to fees and compensation allowed to district attorneys by section eight hundred and twenty-five," (a percentage upon moneys collected in suits under the revenue laws,) "and eight hundred and twenty-seven," (compensation certified by the court and approved by the Secretary of the Treasury in actions against officers of the revenue). "All other fees, charges and emoluments to which a district attorney or a marshal may be entitled, by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the

semi-annual return required of said officers by the preceding section."

In determining whether the fees in these cases were earned by reason of the discharge of the duties of his office, we are referred to section 771, in which it is enacted that "it shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offences cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits and proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury."

It is argued by the petitioner in this connection that these fees were earned not in the prosecution, but in the defence of civil actions in which the United States were concerned, and as, at the time when this statute was originally enacted, the United States could not be sued in the Circuit or District Courts, it was never contemplated that the district attorney would be called upon to defend the United States, except, of course, in suits against officers of the revenue; and hence that the law only imposed on him the duty of prosecuting suits in which the United States were concerned as a party plaintiff. This precise question, however, was considered and passed upon by this court in *Smith* v. *United States*, 158 U. S. 346, in which we held that the fact that the government was interested as defendant in some of the cases in which fees were claimed was immaterial, and that the words "to prosecute all civil actions" were not to be interpreted in any technical sense, but should be construed as covering any case in which district attorneys are employed to prosecute the interests of the government, whether such interests be the subject of attack or defence. We only desire to add in this connection that it would require a strong case to show that services, for which the district attorney is entitled to charge the government a fee, are not also services for the earnings of which he

should make return to the government in his emolument account. In section 834 there are two express exceptions to this rule, and the implication from these is that no others should be permitted. We do not mean to say that there may not possibly be others, but we think it should appear by a clear inference that they were not intended to be included. The government can only be called upon to pay for services earned by the district attorney in his official capacity, and for the fees earned in the performance of these services he should account to the government in his fee and emolument returns, unless there be some express exception taking them out of the general rule.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Field took no part in the consideration of this case.

STEAMER COQUITLAM *v.* UNITED STATES.

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

No. 804. Submitted April 20, 1896. — Decided May 18, 1896.

The District Court of Alaska is to be regarded as the Supreme Court of that Territory, within the meaning of the 15th section of the act of March 3, 1891, c. 517, 26 Stat. 826, and of the order of this court assigning Alaska to the Ninth Circuit; and the decree of the District Court of Alaska is subject to review by the Circuit Court of Appeals of that circuit.

The case is stated in the opinion.

Mr. Calderon Carlisle for appellant. *Mr. James Hamilton Lewis*, *Mr. J. A. Stratton*, *Mr. L. C. Gilman*, *Mr. E. C. Hughes*, *Mr. H. G. Struve*, *Mr. J. B. Allen* and *Mr. Maurice McMicken* were on briefs for claimants.

Mr. Solicitor General for appellees.

Opinion of the Court.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a suit in admiralty brought by the United States in the District Court of Alaska for the forfeiture of the steamer Coquitlam, because of an alleged violation of the revenue laws of the United States.

A decree having been rendered for the United States on the 18th day of December, 1893, an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit.

By the sixth section of the act of March 3, 1891, c. 517, the Circuit Courts of Appeals are given jurisdiction to review by appeal or writ of error the "final decision in the District Court and the existing Circuit Courts in all cases" other than those provided for in the fifth section of the act, "unless otherwise provided by law." And by the 15th section of the same act it is declared: "That the Circuit Court of Appeal in cases in which the judgment of the Circuit Courts of Appeal 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." 26 Stat. 826, 830. In execution of the duty imposed by that section, this court, by an order promulgated May 11, 1891, assigned the Territory of Alaska to the Ninth Judicial Circuit.

The jurisdiction of the Circuit Court of Appeals for the Ninth Circuit to hear and determine this cause was disputed by the United States upon these grounds: 1. That the District Court of Alaska is not a District Court within the meaning of the sixth section of the above act of 1891, and was not a District Court belonging to that circuit. 2. That the District Court of Alaska is not a Supreme Court of a Territory within the meaning of that act and the above order or rule of this court.

The cause is now before us upon a certificate from the

Circuit Court of Appeals as to its jurisdiction to entertain an appeal from the decree of the District Court of Alaska.

By the act of July 27, 1868, c. 273, the laws of the United States relating to customs, commerce and navigation were extended to and over all the mainland, islands and waters of the Territory ceded to the United States by the treaty with Russia of March 30, 1867, so far as the same were applicable thereto. 15 Stat. 240. The provisions of that act were reproduced in sections 1954 to 1976 inclusive of the Revised Statutes under the title of "Provisions relating to the unorganized Territory of Alaska." Section 1957 provides: "Until otherwise provided by law, all violations of this chapter, and of the several laws hereby extended to the Territory of Alaska and the waters thereof, committed within the limits of the same, shall be prosecuted in any District Court of the United States in California or Oregon, or in the District Courts of Washington; and the collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and the other laws extended over the Territory, and to keep and deliver the same to the marshal of some one of such courts; and such courts shall have original jurisdiction, and may take cognizance of all cases arising under this act and the several laws hereby extended over the Territory, and shall proceed therein in the same manner and with the like effect as if such cases had arisen within the district or Territory where the proceedings are brought."

By the first section of the act of May 17, 1884, c. 53, providing a civil government for Alaska, it was declared that the Territory ceded to the United States by the treaty with Russia should constitute a civil and judicial district, to be organized and administered as provided in that act. The same act established "a District Court for said district, with the civil and criminal jurisdiction of District Courts of the United States and the civil and criminal jurisdiction of District Courts of the United States exercising the jurisdiction of Circuit Courts, and

such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district, who shall during his term of office reside therein and hold at least two terms of said court therein in each year," etc. 23 Stat. 24.

The fifth section provided for the appointment by the President of four commissioners for the District of Alaska, who should have the jurisdiction and powers of commissioners of the United States Circuit Courts, and exercise all the duties and powers, civil and criminal, then conferred on justices of the peace under the general laws of Oregon, so far as such laws might be applicable in that district, and not inconsistent with the laws of the United States. They were also given jurisdiction, subject to the supervision of the district judge, of testamentary and probate matters, powers to grant writs of *habeas corpus*, and keep a record of deeds and other instruments of writing relating to the title or transfer of property.

The seventh section declared that the general laws of Oregon then in force should be the law in said district, so far as the same were applicable and not in conflict with the provisions of that act or the laws of the United States, and that the District Court so established "shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land or mining rights or the constitutionality of a law, and in all criminal offences which are capital." From the judgment of a commissioner in civil or criminal cases of a particular kind a right of appeal was given to the District Court. Further, that "writs of error in criminal cases shall issue to the said District Court from the United States Circuit Court for the District of Oregon in the cases provided in chapter one hundred and seventy-six of the laws of eighteen hundred and seventy-nine; and the jurisdiction thereby conferred upon Circuit Courts is hereby given to the Circuit Court of Oregon. And the final judgments or decrees of said Circuit and District Court may be reviewed by the Supreme Court of the United States as in other cases." 23 Stat. 24, 25, 26. By the act of March 3, 1879, c. 176, referred to, the Circuit Courts for each judicial district were given jurisdiction "of writs of error in

all criminal cases tried before the District Court where the sentence is imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars." 20 Stat. 354, c. 176, § 1.

Referring to these and the other provisions of the above act of 1884, it was held in *McAllister* v. *United States*, 141 U. S. 174, 179, that "the District Court for Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States." See also *In re Cooper*, 143 U. S. 472, 494.

The act of March 3, 1891, c. 517, created in each circuit a Circuit Court of Appeals. 26 Stat. 826.

The fourth section provides: "That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts, but all appeals by writ of error or otherwise from said District Courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing Circuit Courts shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this act regulating the same;" the fifth section, that "appeals or writs of error may be taken from the District Courts or from the existing Circuits Courts direct to the Supreme Court" in certain enumerated cases; the sixth section, "that the Circuit Courts of Appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law." The fifteenth section, we have seen, gives the Circuit Courts of Appeals, in cases in which their judgments are final,

the same jurisdiction to review the judgments of the Supreme Courts of the Territories assigned to the respective circuits as they have "to review the judgments, orders and decrees of the District Courts and Circuit Courts."

The District and Circuit Courts mentioned in the act of 1891, and whose final judgments may be reviewed by the Circuit Courts of Appeals, manifestly belong to the class of courts for which provision is made in the third article of the Constitution, namely, constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited, and the judges of which are entitled, by the Constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of Congress to provide otherwise, during good behavior. *American Ins. Co.* v. *Canter*, 1 Pet. 511, 546; *Benner* v. *Porter*, 9 How. 235, 242; *Clinton* v. *Englebrecht*, 13 Wall. 434, 447; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 655; *Good* v. *Martin*, 95 U. S. 90, 98; *Reynolds* v. *United States*, 98 U. S. 145, 154; *The City of Panama*, 101 U. S. 453, 465. And it was adjudged in *McAllister* v. *United States*, 141 U. S. 174, 181, that the District Court established in Alaska, although invested with the civil and criminal jurisdiction of a District Court of the United States, was a legislative court, created "in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States." It was because the Alaska court was of the latter class that we held in *McAllister's case* that the judge of the District Court of that Territory could be suspended from office by the President under the authority conferred by section 1768 of the Revised Statutes.

It necessarily results that the Circuit Court of Appeals for the Ninth Circuit cannot review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the District and Circuit Courts mentioned in the act of March 3, 1891.

But we are of the opinion that such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the act of 1891 upon the Circuit Court of Appeals to review the judgments of the Supreme Court of any Territory assigned to such circuit by this court. That act was necessarily so interpreted by this court when, by its order of May 11, 1891, 139 U. S. 707, Alaska was assigned to the Ninth Circuit. Alaska is one of the Territories of the United States. It was so designated in that order and has always been so regarded. And the court established by the act of 1884 is the court of last resort within the limits of that Territory. It is, therefore, in every substantial sense the Supreme Court of that Territory. No reason can be suggested why a Territory of the United States, in which the court of last resort is called a Supreme Court, should be assigned to some circuit established by Congress that does not apply with full force to the Territory of Alaska, in which the court of last resort is designated as the District Court of Alaska. The title of the territorial court is not so material as its character. Looking at the whole scope of the act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized Territories of the United States — by whatever name those courts were designated in legislative enactments — should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective Territories among the existing circuits. The only limitation upon the exercise of this power by this court is found in section thirteen of the act of 1891, authorizing appeals and writs of error to be taken and prosecuted to the Circuit Court of Appeals of the Eighth Circuit from the decisions of the United States court in the Indian Territory. But this exception rests upon grounds peculiarly applicable to the Indian Territory, because of the character of its population, and its relation to the Eighth Circuit, and does not at all militate against the conclusion that Congress meant by the words "the Supreme Courts of the several Territories," in the fifteenth section of the act of 1891, the highest courts or the courts of last resort in the Territories, by what-

ever name they happen to be designated in the acts creating them.

Our answer, therefore, to the question certified is, that

The District Court of Alaska is to be regarded as the Supreme Court of that Territory within the meaning of the fifteenth section of the act of March 3, 1891, and of the order of this court assigning Alaska to the Ninth Circuit; and, consequently, that the decree of the District Court of Alaska is subject to review by the Circuit Court of Appeals of that circuit.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* GENTRY.

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

No. 258. Argued April 29, 1896. — Decided May 18, 1896.

In this case, while there was in form a separate judgment, in favor of each of the persons for whose benefit the action was brought, the statute of Texas creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children and parents of the persons whose death was caused in any of the specified modes.

A decree or judgment by the Circuit Court of Appeals, affirming a decree or judgment of a Circuit Court, without specifying the sum for which it is rendered, is a final decree or judgment, from which an appeal or writ of error will lie to this court.

This case was one peculiarly for the jury, under appropriate instructions from the court as to the principles of law by which they were to be guided in reaching a conclusion as to the liability of the railroad company for the death of its employé; and the positions taken to the contrary have no merit.

The law presumes in the entire absence of evidence, that a railroad employé, in crossing the track of the railroad on foot at night to go to his duty, looks and listens for coming trains before crossing.

It is only when facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court.

THE case is stated in the opinion.

Mr. John F. Dillon, (with whom were *Mr. Winslow F. Pierce* and *Mr. David D. Duncan*, on the brief,) for plaintiff in error.

Mr. R. C. Garland for defendant in error. *Mr. A. H. Garland* and *Mr. Charles I. Evans* were on the brief.

Mr. Justice Harlan delivered the opinion of the court.

This is an action to recover damages alleged to have been sustained by reason of the negligence of the defendant railway company, the present plaintiff in error, resulting in the death of Louis D. Gentry. It was brought in the Circuit Court of Dallas County, Texas, and was removed into the Circuit Court of the United States for the Northern District of Texas on the petition of the defendant, a corporation created under acts of Congress.

The deceased left surviving him his mother, the plaintiff Mary A. Gentry, seventy-five years old, and dependent upon him for support; his wife, the plaintiff May Gentry, twenty-six years of age; and two children, the plaintiffs Olive Lee Gentry and Thomas M. Gentry, six and two years of age, respectively.

By the statutes of Texas, in force when the alleged injuries were received, it was provided:

"Art. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: 1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents. 2. When the death of any person is caused by the wrongful act, negligence, unskilfulness or default of another.

"Art. 2900. The wrongful act, negligence, carelessness, unskilfulness or default mentioned in the preceding article must be of such a character as would, if death had not ensued,

have entitled the party injured to maintain an action for such injury.

"ART. 2901. When the death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered.

"ART. 2902. The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

"ART. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

"ART. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all.

"ART. 2905. If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

"ART. 2906. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled.

"ART. 2907. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

"ART. 2908. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment as though such defendant had con-

tinued alive. The judgment in this case, if rendered in favor of the plaintiff, shall be paid in due course of administration.

"ART. 2909. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." Sayles' Tex. Civ. Stat.

There was a verdict in favor of the plaintiffs as follows:

"We, the jury, find for the plaintiffs ($10,166.66) ten thousand one hundred and sixty-six dollars and sixty-six cents, apportioned among plaintiffs as follows:

"May Gentry, four thousand one hundred and sixty-six dollars and sixty-six cents;

"Olive Lee Gentry, two thousand five hundred dollars;

"Thos. M. Gentry, two thousand five hundred dollars;

"Mary A. Gentry, one thousand dollars."

Separate judgments were rendered in favor of each plaintiff for the respective sums awarded by the verdict and for costs, for which execution was directed to issue.

A motion for a new trial having been made and overruled, the case was taken to the Circuit Court of Appeals, and by that court the judgment of the Circuit Court was affirmed with costs to the plaintiffs.

It was alleged in the complaint and there was evidence tending to show (although this evidence was weakened by that introduced on behalf of the railroad company) —

That the deceased was an engineer on the regular passenger train of the defendant running between Big Springs, in Howard County, Texas, and Toyah, in Reeves County, Texas, and was paid for the number of miles actually run by him as such engineer;

That he had brought his train into Big Springs from Toyah about six o'clock on the morning of March 13, 1890, and was off duty that day, the schedule time for his going on duty again being twenty-five minutes past nine o'clock in the evening of the day when his train would leave Big Springs for Toyah;

That at fifteen minutes after eight o'clock on that evening the deceased left his residence for the purpose of going to and taking charge of his engine;

That his train was standing at its usual and customary place on a switch on the north side of the defendant's yards at Big Springs, and in order to reach his engine he was compelled to pass over and across several switches and the main track;

That while so passing across and over the defendant's yards, as he and other employés had been in the habit of doing for the previous nine or ten years, along the usual and customary path, and between the hours of twenty minutes after eight o'clock and nine o'clock, he was run down and killed by a flat car coupled in front of a locomotive used by the defendant for switching purposes, and while moving westward on the main track of defendant's road in said yards;

That the defendant failed to place any headlight, lantern or lights of any kind, or any other signal of danger, or any person to watch for employés on said flat car, to give warning of its character or to sound a whistle or to ring the bell of the locomotive as it approached the crossing where the deceased was struck down;

That the headlight on the locomotive was so arranged that the rays of light from it passed entirely over and beyond the flat car in front of such locomotive;

That the defendant failed to have any lanterns or lights of any kind in or about its yards or along that crossing;

That the engine used by the company for switching purposes on the occasion referred to was an ordinary heavy road engine with a pilot on in front, and was wholly unsuitable and unfit for such purposes, and that in order to make it useful the defendant coupled an ordinary flat car in front of the engine; and —

That the deceased, not knowing of such use of an ordinary road engine, with a flat car coupled in front of it, for switching purposes, and while passing along said usual and customary crossing through the defendant's yards, unable to see the flat car on account of the darkness of the night, and being blinded

by the headlight on the engine, and not hearing the whistle or bell of the locomotive, and not knowing anything of the use and danger of the locomotive and flat car as an appliance for switching purposes, was run over by the flat car and immediately killed.

The action proceeded on the general ground that the railway company failed in its duty to supply and furnish proper and suitable machinery for switching purposes, so guarded by lights and otherwise as to give warning to its employés who, in the discharge of their duties, were compelled to cross the tracks of the defendant's yards.

At the close of the evidence the company made six requests for instructions, one of which was that, as the plaintiffs had failed to prove their case, and had shown no right to recover, the jury should find for the defendant. These requests were all denied, and the defendant excepted to the action of the court in respect of each request.

The court then charged the jury as follows:

"In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1890, was run over and killed by a flat car of the defendant, propelled by a switch engine in its yards at Big Springs, Texas; at the time of his death he was an engineer of defendant, 35 years old, and earning from $150 to $160 per month; that he left surviving him his wife, May Gentry, 26 years old, and two children, Thomas Gentry, now three years old, and Olive Lee, now seven years old, and his mother, Mary A. Gentry, who is a widow and to whose support he contributed $15 to $25 per month; that his mother was about 75 years old at the time of Louis D. Gentry's death.

"Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose. You are further instructed that defendant in switching the cars where said Gentry was killed was not required to furnish absolutely safe machinery to do switching at that place, but only to use reasonably safe machinery to do said switching, and if you find from the evidence that

the road engine and flat car used on the occasion when said Gentry was killed were reasonably safe and were fairly adapted for switching purposes at Big Springs, then you will find for defendant.

"If, however, you find from the evidence that said road engine and flat car used by the defendant in switching when said Gentry was killed were not adapted to switching purposes, and that as appliances for that purpose they were unsafe by reason of the way the light from the headlight struck the flat car and track of the road or from other defects disclosed by the evidence, and that said Gentry's death was directly occasioned by said defects, without any fault or negligence on his part, then you will find for plaintiffs.

"In considering whether the road engine and flat car used on defendant's road at the time said Gentry was killed were safe or unsafe appliances to be used in switching, your attention is asked to all the evidence *pro* and *con* on that subject, such as the opinion of the witnesses, the custom of this particular railroad, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, the effect of the pilot.

"A corporation is liable in damages to its employé who is injured by the use of defective machinery or machinery not adapted to the purposes for which it is used. The master, however, is not responsible if the employé had full knowledge of such defect or want of adaptability of the machinery used to the purpose for which it was used, nor is he liable if deceased contributed by his own neglect to his death.

"Louis D. Gentry was a fellow-servant of the employés of defendant operating the switching train that killed him. The defendant is, therefore, not responsible for any negligence that caused his death, but if responsible at all, it must be under the 3d and 5th charges above."

At the request of the plaintiffs the court gave this special instruction: "The law does not exact of an employé the use of diligence in ascertaining defects in the appliances or instruments furnished by a railroad company, but charges him with knowledge of such only as are open to his observation. Be-

yond that he has a right to presume without inquiry or investigation that his employer has discharged its duty of furnishing safe and proper instruments and appliances."

The court then instructed the jury, at the request of the defendant, as follows: "You are further instructed that railway companies are not required to furnish the best and latest appliances, but the appliances and machinery used by them in the carrying out of their business must be reasonably safe, and they are only required to exercise ordinary care to select and keep their appliances and machinery in safe condition. By 'ordinary care' is meant such care as a person of ordinary prudence would exercise under like circumstances. You are therefore instructed that if you find and believe from the evidence that the engine and flat car used for switching purposes were reasonably safe, and that the Texas and Pacific Railway Company exercised ordinary care in the selection of the same, and the injury complained of was not the result of a failure on the part of the Texas and Pacific Railway Company to exercise such ordinary care, then you will find for the defendant."

1. The plaintiff Mary A. Gentry, the mother of the deceased, has moved to dismiss the writ of error as to her upon the ground that, her cause of action being separate and distinct from that of her co-plaintiffs, and a separate judgment in her favor for only $1000 having been entered in the Circuit Court, this court is without jurisdiction under the sixth section of the act of March 3, 1891, c. 517, which declares that in all cases not by that section made final "there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs." 26 Stat. 826.

This motion is overruled. While there was in form a separate judgment in favor of each of the persons for whose benefit the action was brought, the statute of Texas creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children and parents of the persons

whose death was caused in any of the specified modes. The final order in the Circuit Court was, in legal effect, a judgment for the whole amount of the damages found by the jury. Such an action as this can be brought by all the parties interested, or by any one of them for the benefit of all. If the parties entitled to bring suit fail to do so within the time prescribed, it becomes the duty of the personal representative of the deceased to commence and prosecute it. By whomsoever brought the jury may give such damages as they think proportioned to "the injury" resulting from the death. It is one injury for which damages may be recovered, and "the amount" so recovered is to be "divided" among the persons entitled to the benefit of the action, or such of them as shall then be alive, "in such shares" as the jury shall find by their verdict. The jury found that the damages sustained by the deceased were $10,166.66. That was the amount in dispute. The "matter in controversy" was the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum — and such liability was fixed upon it by the verdict and final judgment thereon — it was of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed.

The case is determined by *Shields* v. *Thomas*, 17 How. 3, 4, 5. In a proceeding in one of the courts of Kentucky a decree was rendered against the defendant for a large sum of money, "the shares of the respective complainants being apportioned to them in the decree," and the defendant being directed "to pay to each the specific sum to which he was entitled, as his proportion of the property misappropriated." A suit was brought in Iowa to enforce the decree of the Kentucky court, and the relief asked was a decree that Shields might be compelled to pay to the plaintiffs, respectively, "the several sums decreed in their favor." A decree of that kind was rendered. This court, speaking by Chief Justice Taney, said: "The whole amount recovered against Shields, in the proceedings in Iowa, exceeds two thousand dollars. But the sum allotted to each representative who joined in the bill was less. And

the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him; and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable. And if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the court, and the appeal must be dismissed. But the court think the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. . . . This being the controversy in Kentucky, the decree of that court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part, and the amount exceeds two thousand dollars. We think the court, therefore, has jurisdiction on the appeal."

In *Ex parte Baltimore & Ohio Railroad*, 106 U. S. 5, 6, after referring to certain cases in which it had been held that when in admiralty distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal, it was said: "The cases of *Shields* v. *Thomas*, 17 How. 3; *Market Com-*

pany v. *Hoffman*, 101 U. S. 112; and *The Connemara*, 103 U. S. 754, relied on in support of the present application, stand on an entirely different principle. There the controversies were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not with those against whom the claim was made. The distinction between the two classes of cases was clearly stated by Chief Justice Taney in *Shields* v. *Thomas*, and that case was held to be within the latter class. It may not always be easy to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has been long established."

The rule announced in *Shields* v. *Thomas* has been recognized in later cases. *Estes* v. *Gunter*, 121 U. S. 183, 185; *Gibson* v. *Shufeldt*, 122 U. S. 27, 33; *Clay* v. *Field*, 138 U. S. 464, 479; *New Orleans Pacific Railway* v. *Parker*, 143 U. S. 42, 51.

Another ground of the motion to dismiss is that a decree of affirmance without specifying the sum for which it is rendered is not a final decree or judgment from which an appeal or writ of error will lie. This position is not tenable. For the purpose of a writ of error to the Circuit Court of Appeals the judgment of the Circuit Court was final, because it terminated the litigation between the parties. The judgment of affirmance in the Circuit Court of Appeals involved the same matter in dispute that was determined by the judgment of the Circuit Court, and was final for the purposes of a writ of error to this court. Upon the affirmance in the Circuit Court of Appeals of the judgment of the Circuit Court, the latter court would have nothing to do except to execute its own judgment. And so, upon the affirmance by this court of the final judgment of the Circuit Court of Appeals, the matters in controversy between the parties are concluded, and nothing will stand in the way of the execution of the judgment of the Circuit Court.

2. On the part of the defendant it is contended that the plaintiff utterly failed to prove that Gentry was killed by a flat car coupled in front of a locomotive, as they alleged in their petition, or that his death was due to any negligence of the defendant; consequently, that the court should have directed a verdict for the defendant; that the undisputed facts of the case not only did not establish any actionable negligence on the part of the defendant, but, on the contrary, negatived such negligence; and that the court erred in instructing the jury that there was no dispute as to the cause of Gentry's death, and in allowing testimony to be introduced on that assumption.

The court did not err to the prejudice of the defendant, in saying to the jury that there was no dispute that Gentry was run over and killed by a flat car of the defendant propelled by a switch engine in its yards at Big Springs. Although no one saw the deceased, at the moment of his being run over, yet, under the evidence, all of which is before us, it was not possible for the jury to have doubted that the deceased was killed in the way stated by the court. If the jury had returned a verdict upon the theory that the evidence did not show that the deceased was killed by being run over by defendant's flat car coupled to one of its engines, it would have been the duty of the court, on motion, to set aside the verdict and grant a new trial. The fact of death in that mode was so clearly established that, if the case had turned alone upon that point, the court would have been authorized to direct a verdict for the plaintiffs. We think the court meant nothing more than that the fact of death being caused in the mode stated by it was placed by the evidence beyond dispute. If more was intended; if the court erroneously assumed that the defendant admitted the fact to be as stated, no error was committed to the substantial prejudice of the defendant; for, as already said, the evidence authorized a peremptory instruction that Gentry was killed by being run over by a flat car attached to one of defendant's engines.

Equally untenable is the proposition that the evidence did not tend to show actionable negligence on the part of the

defendant, and that the jury should have been so instructed. Whether the road engine and flat car used by the defendant on the occasion of Gentry's death were reasonably safe and fairly adapted for switching purposes, or were unsafe by reason of the way in which the light from the headlight on the engine struck the flat car and track of the road; whether, if the appliances used by the defendant for switching were found to be unsafe for such purposes, the deceased had full knowledge that they were not reasonably adapted to the uses to which they were put; whether the deceased, by his own negligence, contributed to his death — these matters were all submitted to the jury. And they were submitted with the direction to consider all the evidence in the case, and under an injunction that the defendant was not responsible for any negligence on the part of the fellow-servants of Gentry operating the switching train that killed him, and was only responsible in the event the jury found from all the evidence on the subject — "such as the opinion of the witnesses, the custom of this particular road, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, the effect of the pilot" — that the switching machinery or appliances furnished and used by the company were unsafe to be used. If, looking at all the evidence and drawing such inferences therefrom as were just and reasonable, the court could have said, as matter of law, that the plaintiffs were not entitled to recover, an instruction to find for the defendant would have been proper. *Pleasant* v. *Fant*, 22 Wall. 116, 121; *Montclair* v. *Dana*, 107 U. S. 162; *Randall* v. *Baltimore & Ohio Railroad*, 109 U. S. 478. If the evidence had been so meagre as not, in law, to justify a verdict for the party upon whom the burden of proof rested, the court would have been in the line of duty if it had so instructed the jury. *Sparf & Hansen* v. *United States*, 156 U. S. 51, 109. No such course was proper in this case, which was one peculiarly for the jury under appropriate instructions as to the principles of law by which they were to be guided in reaching a conclusion.

3. One of the assignments of error relates to the refusal of the court to give the following special instructions asked by

the defendant: "You are instructed that it is the duty of an employé or any other party, about to cross a railroad track, to look and listen for passing engines, cars or trains, to ascertain whether or not same are approaching before going upon the track, and if the party fails to exercise such care, he cannot recover. You are, therefore, instructed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car and in time to have kept off the track and prevented the injury to himself, and that he failed to do so, you will find for defendant."

It is undoubtedly true, as claimed by the defendant, that the deceased was under a duty not to expose himself recklessly when about to cross the track of a railroad. In *Railroad Co.* v. *Houston*, 95 U. S. 697, 702, this court, after referring to certain acts of negligence upon the part of a railroad company which were alleged to have caused personal injuries, said: "Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger." To the same effect are *Scholfield* v. *Chicago, Milwaukee & St. Paul Railway*, 114 U. S. 615, 618, and *Aerkfetz* v. *Humphreys*, 145 U. S. 418. But the present case did not admit of or require an instruction upon this special subject. There was no evidence upon which to rest such an instruction. As already stated, no one personally witnessed the crossing of the track by the deceased, nor the running of the flat car over him. Whether he did or did not stop, and look and listen for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track.

In *Continental Improvement Co.* v. *Stead*, 95 U. S. 161, 164, the court, speaking by Mr. Justice Bradley, upon the subject

of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said : "Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care." This principle was approved in *Baltimore & Ohio Railroad* v. *Griffith*, 159 U. S. 603, 609. Manifestly it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased by his own neglect contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part.

The counsel for the defendant in their elaborate brief say: "Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car. We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear, hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence.

In this case the deceased was not blind. He could see the engine with its headlight illuminating fifteen or twenty feet of the flat car next to the deceased, and lighting up the track for some distance ahead."

It is sufficient to observe that the evidence touching the matters referred to by counsel was not so clear and satisfactory as to justify the taking of the case from the jury upon the issue whether the deceased exercised due care under the circumstances which attended the occasion. It was properly left to the jury to determine whether, under all the circumstances, the effect of the headlight and flat car combined was to make the situation secure and safe to one who saw the headlight, but did not see the flat car in front of the locomotive. "What may be deemed ordinary care in one case," this court has said, "may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." *Grand Trunk Railway* v. *Ives*, 144 U. S. 408, 417.

We find no error of law to the prejudice of the plaintiff in error, and the judgment is affirmed.

SOUTHERN PACIFIC COMPANY *v.* TOMLINSON.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 251. Argued April 28, 1896. — Decided May 25, 1896.

In an action under Title 36 of the Revised Statutes of the Territory of Arizona to recover for injuries causing death, brought in the name of the widow of the deceased, for the benefit of herself and of his children and parents, she has no authority to lessen or alter the shares awarded by the jury to the other beneficiaries; and if the jury return a verdict for excessive damages, and she files a remittitur of a large part of the whole verdict, lessening the share awarded to each beneficiary, and reducing to nominal damages the shares of the parents of the deceased, and the court thereupon renders judgment according to the verdict, as reduced by the remittitur, the defendant, upon writ of error, is entitled to have the judgment reversed and the verdict set aside.

This was an action brought in the district court of the second judicial district of the Territory of Arizona in and for the county of Pima, by Bertha, widow of Thomas Tomlinson, against the Southern Pacific Company, a railroad corporation, under Title 36 of the Revised Statutes of Arizona of 1887, entitled "Injuries Resulting in Death."

The complaint alleged that, while Thomas Tomlinson was walking along a public passageway where it crossed the defendant's railroad, the defendant caused one of its locomotive engines and a train of cars to approach the crossing at a great and unusual rate of speed, negligently and carelessly omitting to give any signal of warning by bell, signal or otherwise, by reason whereof he was unaware of the approach of the train, and, without any fault or negligence on his part, the cars ran against him, and knocked him down, and wounded and lacerated his head and body, so that he immediately died; and further alleged as follows:

"That the said Thomas Tomlinson left surviving him the plaintiff, who is his widow, and the following children, to wit, Alice Tomlinson, Fenton Tomlinson, Howard Tomlinson and Baby Tomlinson; and the said Thomas Tomlinson left

Fenton Tomlinson, his father, and Mary Tomlinson, his mother, surviving parents.

"That this action is brought by the said plaintiff, Bertha Tomlinson, for the benefit of herself and her said children, Alice, Fenton and Howard and Baby, and Fenton Tomlinson, Sen., and Mary Tomlinson, his parents.

"That by reason of the death of the said Thomas Tomlinson, caused and occasioned as aforesaid, damages have resulted to the said parents, surviving widow and children of the said Thomas Tomlinson, to the sum of $50,000.

"Wherefore plaintiff prays judgment, in favor of herself and the other parties for whose benefit this suit is prosecuted, for the sum of $50,000, and for costs of suit."

The defendant answered, denying the allegations of the complaint, and alleging that the accident was caused by the negligence of Thomas Tomlinson.

At the trial, the evidence, (except that as to negligence on the part of the defendant, and on the part of the plaintiff,) was as follows:

Several witnesses testified that Thomas Tomlinson was knocked down by the defendant's engine, and rendered insensible, his skull broken, and one heel cut off; and that he died two hours afterwards.

The plaintiff testified that Thomas Tomlinson was her husband, and was forty-one years old and in good health at the time of his death, and her own age was thirty-three; that there were living, the issue of the marriage, four children, Alice, aged nine years; Fenton, aged seven years; Howard, aged five years; and Baby, seven months; that her husband's father and mother, Fenton and Mary Tomlinson, were also living; that her husband was a merchant, and that the usual expenses of maintaining their household were perhaps a thousand dollars a year.

The defendant put in evidence Carlisle's Life Tables, according to which the mean duration of human life at the age of forty years is twenty-seven years and seven months; and at fifty years is twenty-one years and one month.

The jury returned the following verdict, signed by their foreman:

Statement of the Case.

"We, the jury duly empanelled and sworn in the above entitled action, find for the plaintiff, and assess damages against the defendant in the sum of $50,000, to be divided as follows: Bertha Tomlinson, $8000; Fenton Tomlinson (father), $5000; Mary Tomlinson (mother), $5000; Alice Tomlinson (child), $8000; Fenton Tomlinson (child), $8000; Howard Tomlinson (child), $8000; Baby Tomlinson (child), $8000."

The defendant moved the court to set aside the verdict and to grant a new trial, because the verdict was against the law and the evidence, and because the damages assessed by the jury were excessive, unsupported by the evidence, and given under the influence of passion and prejudice.

The plaintiff thereupon filed a remittitur in the following terms:

"Comes now Bertha Tomlinson, on behalf of herself and others interested herein, and remits from the verdict heretofore rendered herein in the sum of $50,000, the following sums:

"Bertha Tomlinson	$8000,	remitted	to	$6000
"Alice Tomlinson	8000,	"	"	3000
"Fenton Tomlinson	8000,	"	"	3000
"Howard Tomlinson	8000,	"	"	3000
"Baby Tomlinson	8000,	"	"	3000
"Fenton Tomlinson, father	5000,	"	"	1
"Mary Tomlinson, mother	5000,	"	"	1

"thereby making a total remittance of $31,998, and allowing the verdict to stand at $18,002."

The court allowed the remittitur, denied the motion for a new trial, and gave judgment for the plaintiff against the defendant for the sum of $18,002, apportioned as in the remittitur.

The defendant excepted, among other things, to the overruling of the motion, and appealed to the Supreme Court of the Territory, which affirmed the judgment, and held that the plaintiff had a right to file the remittitur; and dealt with the question of the damages as follows:

"While the record does not affirmatively show that the

trial court made a remission of a portion of the damages awarded a condition precedent to overruling the motion for a new trial, the damages awarded being clearly excessive, we think it quite evident that, had the remittitur not been filed, the court would have granted the motion. A trial court has the power, where excessive damages have been allowed by the jury, and where the motion to set aside the verdict is based upon this ground, to make a remission a condition precedent to overruling the motion. The exercise of this power rests in the sound discretion of the trial court. This doctrine is affirmed in the case of *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 74; also in *Northern Pacific Railroad* v. *Herbert*, 116 U. S. 642. Of course, if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question, the court should look not alone to the amount of the damages awarded, but to the whole case, to determine the existence of passion or prejudice, and to determine how far such passion or prejudice may have operated in influencing the finding of any verdict against the defendant. When the circumstances, as they may appear to the trial court, indicate that the jury deliberately disregarded the instructions of the court, or the facts of the case, a remittitur should not be allowed, but a new trial should be granted. If they do not so indicate, and the plaintiff voluntarily remits so much of the damages as may appear to be excessive, the court, in its discretion, may allow the remission, and enter judgment accordingly. *Arkansas Cattle Co.* v. *Mann*, cited above. From a review of the whole case, we cannot say that the jury, in finding for the plaintiff, in this action, in a sum largely in excess of the damages proven, deliberately disregarded the facts, or the instructions of the court. We rather incline to the view that the jury, having found the issues in favor of plaintiff, was then prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted." 33 Pacific Rep. 710. The defendant sued out this writ of error.

Opinion of the Court.

Mr. J. Hubley Ashton for plaintiff in error.

Mr. R. C. Garland for defendant in error.

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

This action is brought under provisions of a statute of the Territory of Arizona, copied from a statute of Texas upon the same subject. Arizona Rev. Stat. of 1887, tit. 36, §§ 2145–2155; Texas Rev. Stat. of 1879, §§ 2899–2909.

By this statute, an action, on account of injuries causing the death of any person, may be brought against a railroad company, or other carrier of goods or passengers, for actual damages, when the death is caused by its negligence, or by the unfitness or gross negligence of its servants or agents; and for exemplary damages also, when the death is caused by the wilful act or omission or gross negligence of the defendant. Arizona Rev. Stat. §§ 2145–2147.

The statute provides that "the action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused;" and "may be brought by all the parties entitled thereto, or by one or more of them for the benefit of all;" and that, if they fail to bring it within six months after the death, "it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same." §§ 2149–2151.

If the sole plaintiff dies pending the action, and is the only person entitled to the benefit thereof, the action abates. But if any person so entitled survives, the action does not abate by the death of the plaintiff, but any one or more of the persons so entitled may be made plaintiff, "and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled." §§ 2153, 2154.

The statute further provides that "the jury may give such damages as they may think proportioned to the injury result-

ing from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict." § 2155.

The obvious intent and effect of these provisions is that the action is to be brought once for all; that it is to be prosecuted for the benefit of all the relatives mentioned, the husband or the wife, the children and the parents, of the deceased; and that any damages recovered are to belong to all those relatives, and to be shared among them in the proportions determined by the verdict of the jury. By the express terms of the statute, the action may be brought by all or any of them, but for the benefit of all; no one or more of them, less than all, can excuse the executor or administrator from bringing and prosecuting the action, if they do not; the action does not abate by the death of the one suing, but may be prosecuted by the survivors, if there are any; and the damages recovered are to be divided among all of them, in such shares as the jury shall fix by their verdict. The authority given for bringing and prosecuting the action, in the name of any one or more of the persons entitled, for the benefit of all, avoids multiplicity of actions, and difficulties arising from nonjoinder of plaintiffs; but it gives the nominal plaintiff or plaintiffs no power to compromise or to release the rights of the other beneficiaries, or to lessen or alter the shares awarded by the jury.

This construction of the statute is in accord with the construction which, before its passage, had been given by the Supreme Court of Texas to the similar statute of that State. *Houston & Texas Central Railway* v. *Bradley*, 45 Texas, 171, 176, 179; *March* v. *Walker*, 48 Texas, 372, 376, 377; *Houston & Texas Central Railway* v. *Moore*, 49 Texas, 31, 45, 46; *Galveston &c. Railroad* v. *Le Gierse*, 51 Texas, 189, 201; *Houston & Texas Central Railway* v. *Cowser*, 57 Texas, 293; *East Line & Red River Railway* v. *Culberson*, 68 Texas, 664. See also *St. Louis &c. Railway* v. *Needham*, 10 U. S. App. 339.

In the present case, the deceased left a widow, four children, and a father and mother. The jury returned a verdict for the plaintiff for $50,000, of which they awarded $8000 to the widow,

$8000 to each child, and $5000 to either parent of the deceased. After the defendant had moved for a new trial, the widow, in whose name alone the action was brought, filed a remittitur, by which she undertook to reduce her share to $6000, the share of each child to $3000, and the shares of the parents to one dollar each, and the whole verdict to $18,002.

According to the decisions of the Supreme Court of Texas, in *Houston & Texas Central Railway* v. *Bradley* and *Galveston &c. Railroad* v. *Le Gierse*, above cited, the widow could not compromise or release the rights even of her own minor children. She certainly could not release, in whole or in part, the rights of her father in law and mother in law.

The statute, indeed, as has been seen, creates but a single liability; the matter in controversy, as between the defendant, on the one side, and the plaintiff and the other persons for whose benefit the action is brought, on the other, is the whole amount of the damages found by the jury; and the defendant has no concern in the apportionment of damages among the persons entitled, provided that is done as the statute requires. *Texas & Pacific Railway* v. *Gentry*, *ante*, 353.

But the defendant has the right to object to a judgment apportioning the damages, not as lawfully divided by the jury, but as unlawfully fixed by the plaintiff of record, reducing to nominal damages the sums awarded by the jury to some of the persons entitled, and thereby leaving the defendant open to the danger of another suit by those persons to obtain the damages of which the present plaintiff has undertaken to deprive them. *Northern Pacific Railroad* v. *Lewis*, 162 U. S. 366, 379.

The opinion of the Supreme Court of the Territory of Arizona, which, as required by section 949 of the Revised Statutes of the Territory, was in writing and recorded, shows that that court not only "inclined to the view that the jury was prompted, through sympathy for the widow and children, and out of the enlarged liberality of which juries in such cases are usually possessed, to award damages largely in excess of what the proofs warranted;" but that it considered that the damages awarded were clearly excessive and that it was

manifest from the record that, but for the remittitur, the judge before whom the trial was had would have ordered a new trial.

As this court now holds the remittitur to have been unauthorized and invalid, the proper order, without considering other questions argued at the bar, will be

Judgment reversed, and case remanded to the Supreme Court of the Territory, with directions to cause the verdict to be set aside and a new trial had.

TALTON *v.* MAYES.

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

No. 227. Argued April 16, 17, 1896. — Decided May 18, 1896.

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States, but an offence against the local laws of the Cherokee nation; and the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application.

The Fifth Amendment to the Constitution does not apply to local legislation of the Cherokee nation, so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury in accordance with the provisions of that amendment.

The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, is solely a matter within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States.

On February 15, 1893, a petition for *habeas corpus* was filed in the District Court of the United States for the Western District of Arkansas, setting forth that the plaintiff therein (who is the appellant here) was, on the 31st day of December,

1892, convicted, on a charge of murder, in a special Supreme Court of the Cherokee nation, Cooweeskoowee District, and sentenced to be hanged on February 28, 1893, and that petitioner was then held, awaiting the time of execution, in the national jail at Tahlequah, Indian Territory, by Wash. Mayes, high sheriff of the Cherokee nation. It was further alleged that the petitioner was deprived of his liberty without due process of law; that he was in confinement in contravention to the Constitution and laws of the United States, and also in violation of the constitution and laws of the Cherokee nation. These contentions rested upon the averment that the indictment under which he had been tried and convicted was void because returned by a body consisting of five grand jurors, which was not only an insufficient number to constitute a grand jury under the Constitution and laws of the United States, but also was wholly inadequate to compose such jury under the laws of the Cherokee nation, which, it was alleged, provided for a grand jury of thirteen, of which number a majority was necessary to find an indictment. The petitioner, moreover, averred that he had not been tried by a fair and impartial jury, and that many gross irregularities and errors to his prejudice had been committed on the trial. The district judge issued the writ, which was duly served upon the high sheriff, who produced the body of the petitioner and made return setting up the conviction and sentence as justifying the detention of the prisoner. Incorporated in the return was a transcript of the proceedings in the Cherokee court had upon the indictment and trial of the petitioner. In the copy of the indictment contained in the original transcript, filed in this court, it was recited that the indictment was found by the grand jury on the 1st day of December, 1892, while the offence therein stated was alleged to have been committed "on or about the 3d day of December, 1892." The evidence contained in the transcript, however, showed that the offence was committed on November 3, 1892, and in a supplement to the transcript, filed in this court, it appears that said date was given in the indictment. No motion or demurrer or other attack upon the sufficiency of the indictment was made upon the trial in

the Cherokee court based upon the ground that the offence was stated in the indictment to have been committed on a date subsequent to the finding of the indictment, nor is there any specification of error of that character contained in the petition for the allowance of the writ of *habeas corpus*. After hearing, the district judge discharged the writ and remanded the petitioner to the custody of the sheriff, and from this judgment the appeal now under consideration was allowed.

Mr. Leonidas D. Yarrell for appellant. *Mr. Elijah V. Brookshire* and *Mr. Benjamin T. Duval* were on his brief.

Mr. R. C. Garland for appellee. *Mr. A. H. Garland* and *Mr. William M. Cravens* were on his brief.

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

Prior to May, 1892, a law enacted by the legislature of the Cherokee nation made it the duty of the judges of the Circuit and District Courts of the nation, fourteen days before the commencement of the first regular term of said courts, to furnish to the sheriff a list of the names of five persons, who should be summoned by the sheriff to act as grand jurors for that district during the year. The first regular term of the courts named commenced on the second Monday in May. On November 28, 1892, a law was enacted providing for the summoning and empanelling of a grand jury of thirteen, the names of the persons to compose such jury to be furnished to the sheriff, as under the previous law, fourteen days before the commencement of the regular term of the Circuit and District Courts. There was no express repeal of the provisions of the prior law. Under the terms of the act of November 28, 1892, a grand jury could not have been empanelled before the term beginning on the second Monday of May, 1893. The indictment in question was returned in December, 1892, by a grand jury consisting of five persons, which grand jury had been empanelled under the prior law, to serve during the year 1892.

Opinion of the Court.

The right of the appellant to the relief which he seeks must exist, if at all, by virtue of section 753 of the Revised Statutes of the United States, which is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

Appellant and the person he was charged with having murdered were both Cherokee Indians, and the crime was committed within the Cherokee territory.

To bring himself within the statute, the appellant asserts, 1st, that the grand jury, consisting only of five persons, was not a grand jury within the contemplation of the Fifth Amendment to the Constitution, which it is asserted is operative upon the Cherokee nation in the exercise of its legislative authority as to purely local matters; 2d, that the indictment by a grand jury thus constituted was not due process of law within the intendment of the Fourteenth Amendment; 3d, even if the law of the Cherokee nation providing for a grand jury of five was valid under the Constitution of the United States such law had been repealed, and was not therefore in existence at the time the indictment was found. A decision as to the merits of these contentions involves a consideration of the relation of the Cherokee nation to the United States, and of the operation of the constitutional provisions relied on upon the purely local legislation of that nation.

By treaties and statutes of the United States the right of

the Cherokee nation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized. And from this fact there has consequently been conceded to exist in that nation power to make laws defining offences and providing for the trial and punishment of those who violate them when the offences are committed by one member of the tribe against another one of its members within the territory of the nation.

Thus, by the fifth article of the treaty of 1835, 7 Stat. 478, 481, it is provided:

"The United States hereby covenant and agree that the lands ceded to the Cherokee nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: Provided always that they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission according to the laws and regulations established by the government of the same."

This guarantee of self government was reaffirmed in the treaty of 1868, 14 Stat. 799, 803, the thirteenth article of which reads as follows:

"Article XIII. The Cherokees also agree that a court or courts may be established by the United States in said territory, with such jurisdiction and organized in such manner as may be prescribed by law: *Provided*, That the judicial tribunals of the nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their country in which members of the nation, by nativity or

adoption, shall be the only parties, or where the cause of action shall arise in the Cherokee nation, except as otherwise provided in this treaty."

So, also, in "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May 2, 1890, c. 182, 26 Stat. 81, it was provided, in section 30, as follows:

"That the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties; and as to all such cases the laws of the State of Arkansas extended over and put in force in said Indian Territory by this act shall not apply."

And section 31 of the last mentioned act closes with the following paragraph:

"The Constitution of the United States and all general laws of the United States which prohibit crimes and misdemeanors in any place within the sole and exclusive jurisdiction of the United States except in the District of Columbia, and all laws relating to national banking associations, shall have the same force and effect in the Indian Territory as elsewhere in the United States; but nothing in this act shall be so construed as to deprive any of the courts of the civilized nations of exclusive jurisdiction over all cases arising wherein members of said nations, whether by treaty, blood or adoption, are the sole parties, nor so as to interfere with the right and powers of said civilized nations to punish said members for violation of the statutes and laws enacted by their national councils where such laws are not contrary to the treaties and laws of the United States."

The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is, therefore, clearly not an offence against the United States, but an offence against the local laws of the Cherokee nation. Necessarily, the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have

no application, for such statutes relate only, if not otherwise specially provided, to grand juries empanelled for the courts of and under the laws of the United States.

The question, therefore, is, does the Fifth Amendment to the Constitution apply to the local legislation of the Cherokee nation so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury organized in accordance with the provisions of that amendment. The solution of this question involves an inquiry as to the nature and origin of the power of local government exercised by the Cherokee nation and recognized to exist in it by the treaties and statutes above referred to. Since the case of *Barron* v. *Baltimore*, 7 Pet. 243, it has been settled that the Fifth Amendment to the Constitution of the United States is a limitation only upon the powers of the General Government, that is, that the amendment operates solely on the Constitution itself by qualifying the powers of the National Government which the Constitution called into being. To quote the language of Chief Justice Marshall, this amendment is limitative of the "powers granted in the instrument itself and not of distinct governments framed by different persons and for different purposes. If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the General Government, not as applicable to the States." The cases in this court which have sanctioned this view are too well recognized to render it necessary to do more than merely refer to them. *Fox* v. *Ohio*, 5 How. 410, 424; *Withers* v. *Buckley*, 20 How. 84; *Twitchell* v. *The Commonwealth*, 7 Wall. 321; *Edwards* v. *Elliott*, 21 Wall. 532, 557; *Pearson* v. *Yewdall*, 95 U. S. 294, 296; *Davis* v. *Texas*, 139 U. S. 651.

The case in this regard therefore depends upon whether the powers of local government exercised by the Cherokee nation are Federal powers created by and springing from the Constitution of the United States, and hence controlled by the Fifth Amendment to that Constitution, or whether they are local powers not created by the Constitution, although subject to its general provisions and the paramount authority of Con-

gress. The repeated adjudications of this court have long since answered the former question in the negative. In *Cherokee Nation* v. *Georgia*, 5 Pet. 1, which involved the right of the Cherokee nation to maintain an original bill in this court as a foreign State, which was ruled adversely to that right, speaking through Mr. Chief Justice Marshall, this court said (p. 16):

"Is the Cherokee nation a foreign State in the sense in which that term is used in the Constitution?

"The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a State, and the courts are bound by those acts."

It cannot be doubted, as said in *Worcester* v. *The State of Georgia*, 6 Pet. 515, 559, that prior to the formation of the Constitution treaties were made with the Cherokee tribes by which their autonomous existence was recognized. And in that case Chief Justice Marshall also said (p. 559):

"The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights. . . . The very term 'nation,' so generally applied to them, means a 'people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Ind-

ian nations, and consequently admits their rank among those powers who are capable of making treaties."

In reviewing the whole subject in *Kagama* v. *United States*, 118 U. S. 375, this court said (p. 381):

"With the Indians themselves these relations are equally difficult to define. They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union, or of the State within whose limits they resided."

True it is that in many adjudications of this court the fact has been fully recognized, that although possessed of these attributes of local self government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States. *Cherokee Nation* v. *Kansas Railway Co.*, 135 U. S. 641, where the cases are fully reviewed. But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee nation shall be exercised does not render such local powers Federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which, as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government. The fact that the Indian tribes are subject to the dominant authority of Congress, and that their powers of local self government are also operated upon and restrained by the general provisions of the Constitution of the United States, completely answers the argument of inconvenience which was pressed in the discussion at bar. The claim that the finding of an indictment by a grand jury of less than thirteen violates the due process clause of the Fourteenth Amendment is conclusively answered by *Hurtado* v. *California*, 110 U. S. 516, and *McNulty* v. *California*, 149

U. S. 645. The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, were solely matters within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States. Such has been the decision of this court with reference to similar contentions arising upon an indictment and conviction in a state court. *In re Duncan*, 139 U. S. 449. The ruling in that case is equally applicable to the contentions in this particular arising from the record before us.

The counsel for the appellant has very properly abandoned any claim to relief because of alleged errors occurring subsequent to the finding of the indictment. As to the point raised in reference to the date of the commission of the offence as stated in the indictment, the record as corrected shows that the error in question did not exist. It is, therefore, unnecessary to notice the argument based upon the assumption that the indictment charged the offence to have been committed subsequent to the finding of the true bill.

The judgment is

Affirmed.

Mr. Justice Harlan dissented.

MEYER *v.* RICHARDS.

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

No. 39. Submitted October 25, 1894. — Decided May 25, 1896.

A., an alien, sold to B. in New Orleans thirteen bonds of the State of Louisiana, delivered them to him, and received from him payment for them in full. Both parties contemplated the purchase and delivery of valid and

lawful obligations of the State, and both regarded the bonds so delivered as such valid and lawful obligations. It turned out that the bonds were absolutely void, having never been lawfully put into circulation. B. thereupon sued A. in the Circuit Court of the United States for the Eastern District of Louisiana, to recover the purchase money paid for them. *Held*,

(1) That as the sale was a Louisiana contract, the rights and obligations of the parties must be determined by the laws of that State;

(2) That by the civil law, which prevails in Louisiana, warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is implied in every such contract, unless there be a stipulation to the contrary;

(3) That by the rule of the common law, both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels; and that the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold;

(4) That whilst the civil law enforces in the contract of sale generally the broadest obligation of warranty, it has so narrowed it, when dealing with credits and incorporeal rights, as to confine it to the title of the seller and to the existence of the credit sold, and, *e converso*, the common law, which restricts warranty within a narrow compass, virtually imposes the same duty by broadening the warranty as regards personal property so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract or by implication of warranty as to the identity of the thing sold; and thus, by these processes of reason the two great systems, whilst apparently divergent in principle, practically work substantially to the same salutary conclusions;

(5) That B. is entitled to recover the sum so paid by him, with interest from the time of judicial demand.

Plaintiffs below (plaintiffs in error here) commenced their action to recover the sum of $8383.75, with interest from judicial demand, the facts averred in the petition being substantially as follows: In February, 1889, the defendant sold to plaintiffs thirteen bonds of the State of Louisiana, which

were described in and annexed to the petition; that the price paid for these bonds was the amount sought to be recovered, and the bonds were (we quote from the petition) "sold and delivered to your petitioners as good, valid and legal bonds of the State of Louisiana. . . . Petitioners aver that the said Richards delivered to them the above described bonds . . . as good and legal bonds of the State of Louisiana, and represented them to be such; that petitioners received them as such, and paid for them the market price for valid bonds, and held them for several months without any knowledge or suspicion that the bonds were not such as they were represented to be." The petition then averred that after the sale and delivery of the bonds in September, 1889, it was discovered that they were not valid, that they had never been lawfully issued by the State, and were at the time of the sale declared by the constitution of the State of Louisiana to be null and void, and that the State through its officials treated them as wholly invalid. The prayer was, as already stated, for a judgment for the amount which had been paid as the purchase price of the bonds.

The answer of the defendant denied all the material allegations contained in the petition, except in so far as the same were admitted or confessed. It averred that on the day of the sale, the 27th of February, 1889, the defendant was the owner of the bonds described in the petition; that they were payable to bearer, and were on the face thereof bonds and obligations of the State of Louisiana, and purporting to be issued under valid acts of the legislature, sanctioned by the constitution of the State of Louisiana; that when sold to the plaintiff the bonds were not mature according to their terms, and were so drawn that the title thereof passed by delivery. The answer, moreover, averred that the defendant acquired the bonds long prior to the date of the sale to the plaintiffs, "by purchase in open market, for a full and valuable consideration in money, before the maturity thereof, in full and exact good faith, and with no knowledge, suspicion or belief of any defect in the title or obligation of said bonds or any outstanding equity relating thereto, to change, modify or

destroy the obligation as written and contained in said bonds severally." After admitting the sale as alleged in the petition for the price therein stated, the answer declared "that it is true that at the time of the delivering of said bonds to the plaintiffs as aforesaid this defendant did represent the same to be good and legal obligations and bonds of the State of Louisiana, and believed then and still believes that the same are in all things valid and legal obligations of the State in the hands of all good-faith holders thereof, and that it is true, as stated in said petition, that the plaintiffs received said bonds, believing the same valid, and paid therefor the full market value thereof in open market of that day." After making the admission, "that if the plaintiffs are entitled to recover anything from this defendant, the amount of such is correctly stated in the prayer of petition herein," the answer concluded by the following: "But as to all other matters and obligations set forth and contained in said petition this defendant specially denies and traverses the same, and avers that the said several bonds so by him sold and delivered to the said plaintiffs are, each and all of them, in the hands of said plaintiffs, good, valid, complete and existing obligations of the State of Louisiana to pay to the said plaintiffs the sums of money named in said bonds at the time and on the terms and conditions written in the bonds, and that there is and has been no breach of warranty of the title thereof by this defendant."

The cause was submitted to the court without the intervention of a jury, the parties having previously entered into a stipulation in writing, commencing with the following recital: "That the following shall be taken as the statement of facts in this cause, and shall stand and be taken as a special verdict in the cause." The facts embraced in the stipulation relate, on the one hand, to the sale and the title held by the defendant (the vendor) to the bonds at the time of the sale and the representations made when the sale took place, and, on the other hand, to the nature and validity of the bonds sold. As to the first of these questions the stipulation declares:

"1. The defendant, prior to the sale of the bonds to the plaintiffs, as averred in the petition, was the *bona fide* holder

of each and all of the bonds described in said petition, having acquired each and all of said bonds in open public market for full market value, with no notice whatsoever of any alleged vice or alleged illegality of the bonds, and the statements in that respect, as set forth in defendant's answer herein, are true.

"2. The defendant so acquired said bonds long before he or the public knew that it was charged by any person that said bonds were illegally issued, and the impress of the seal of the State and the signatures of the several officers of the State, whose names appeared on said bonds, are each and all of them genuine and true, and in no manner forgeries."

The facts stated in the stipulation, with reference to the authority under which the bonds were issued and their validity, we summarize as follows:

Under two acts of Congress, the one passed March 3, 1827, c. 97, 4 Stat. 244, the other July 2, 1862, c. 130, 12 Stat. 503, the State of Louisiana received from the United States public lands to be applied, as directed in the act first mentioned, to the use of such seminary of learning as the legislature of the State might direct, and in the other to the establishment and support of an agricultural and mechanical college. From the sale of the lands thus received by the State, sums of money came under its control. These sums to the credit of the two educational purposes, that is, the seminary and the agricultural and mechanical college, were invested in bonds of the State of Louisiana, which bonds were held in trust by the State as the property of the two funds in question.

In 1874 the State of Louisiana, by act No. 3 of the session of 1874, adopted a general funding plan for all its outstanding bonds and for certain designated warrants. The law in question provided for the issue of new bonds for the said bonds and debts at the rate of sixty cents on the dollar of new bonds for every dollar of fundable debt. The bonds thus provided to be issued were commonly called consolidated bonds, were negotiable in form, and were all without reference to the debt for which they were exchanged, of like tenor, except as to the serial numbers and amount of the bond, and contained on

their face no indication whatever of the particular debt to retire which they were issued. The statement of facts recites "that the holder or purchaser of such consolidated bonds who purchased the same in the market had no means of ascertaining for what prior obligation of the State said bonds had been given in exchange." The execution of the act of 1874 was confided to a board called the funding board or board of liquidation. The funding law was ratified by a constitutional amendment, which hence made that law a part of the constitution of the State of Louisiana.

The board of liquidation, at the request of the proper state officers, issued consolidated bonds in exchange for the state bonds held by the State as above stated, in trust for the seminary and the agricultural and mechanical college funds. By this exchange, the sum of money received by the State from the proceeds of the land granted by Congress for the two purposes aforesaid was curtailed forty per cent, as the bonds issued to replace those previously held were in amount equal to only sixty per cent of the retired bonds. The consolidated bonds which were thus issued to retire those theretofore held for account of the two trust funds went into the hands of the state treasurer for the benefit of the respective funds, and these bonds bore on their face no indication of the debt for which they were issued; indeed, they were in form like any other of the bonds issued under the act of 1874.

By the terms of an ordinance adopted by a constitutional convention held in the State of Louisiana in 1879, (which ordinance was approved by the same popular vote which ratified the constitution,) it was provided: "That the interest on the consolidated bonds of the State be reduced from seven per centum to two per centum per annum for five years, from the first of January, 1880, three per centum for fifteen years, and four per centum per annum thereafter, the ordinance moreover requiring that the bonds should be presented to the state treasurer or an authorized agent of the State in order to have stamped thereon interest reduced in accordance with the ordinance." The holders of the consolidated bonds were, however, given the right, instead of accepting this reduction,

of applying to the state treasurer to obtain new bonds at the rate of seventy-five cents on the dollar.

An act of the legislature of the State of Louisiana, passed to execute this provision of the constitution, provided for the printing of the new bonds and for their issue, upon request, in exchange for outstanding consolidated bonds at the reduced rate, and further provided for the cancellation of the consolidated bonds when surrendered for exchange by the following provision found in section 8 of the act in question: "That the governor shall furnish to the state treasurer a large stamp, having on it the words: 'Cancelled by the issue of new bonds under the ordinance of the constitution relative to state debt.' And the treasurer shall stamp the same upon each consolidated bond as soon as it is surrendered to him."

In order to make good the loss to the seminary fund which had been produced by issuing consolidated bonds to that fund, the second paragraph of article 233 of the constitution of the State of Louisiana provided as follows:

"The debt due by the State to the seminary fund is hereby declared to be one hundred and thirty-six thousand dollars, being the proceeds of the sales of lands heretofore granted by the United States to the State for the use of a seminary of learning, and said amount shall be placed to the credit of said fund on the books of the auditor and treasurer of the State as a perpetual loan, and the State shall pay an annual interest of four per cent on said amount from January 1, 1880, for the use of said seminary of learning; and the consolidated bonds of the State now held for use of said fund shall be null and void after the 1st day of January, 1880, and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct."

A like provision as to the agricultural and mechanical college fund was made by the third paragraph of the same article of the constitution. After fixing the amount of the fund, and directing the credit of the same on the books of the State, and the payment of an annual interest for the use of the agricultural and mechanical college, the paragraph provides:

"The consolidated bonds of the State now held by the State

for the use of said fund shall be null and void after the 1st day of January, 1880, and the general assembly shall never make any provision for their payment, and they shall be destroyed in such manner as the general assembly may direct."

At the time of the adoption of the constitution of 1879, the consolidated bonds, which belonged to the seminary and to the agricultural and mechanical college, were held by the state treasurer for account of the funds in question, and they continued to be so held by him certainly up to the end of June, 1882. In a report made to the governor for the year 1878, Antoine Dubuclet, state treasurer of the State of Louisiana, stated that he had in his possession, representing the investment of the agricultural and mechanical college fund, consolidated bonds of the State numbered from 710 to 905 inclusive. On January 1, 1880, E. A. Burke, the state treasurer of Louisiana, in his official report to the governor, made the following statement of the two funds:

"Mechanical and Agricultural College.

196 bonds of $1000 each, issued by the State of Louisiana under act No. 3 of 1879, Nos. 710 to 905, inclusive	$196,000
2 bonds of $500 each, issued by the State of Louisiana under act No. 3 of 1879, Nos. 42 and 43	200
	$196,200"

The same report also stated the following as regards the seminary fund:

"Louisiana State University or Seminary Fund.

164 bonds of $500 each, issued by the State of Louisiana under act No. 3 of 1879, Nos. 1902 to 2065, inclusive	$82,000
2 bonds of $500 each, issued by the State of Louisiana under act No. 3 of 1879, Nos. 4184 and 4185	200
1 bond of $1000, consolidated debt city of New Orleans, dated July 1, 1852, No. 492	1000
	$83,200"

Statement of the Case.

To the extent that these official publications afforded means of ascertaining the particular consolidated bonds which had been issued to and were held by the state treasurer for account of the two trust funds in question, they necessarily qualify the previous statement that there was nothing from which the public could ascertain the particular consolidated bonds which had been issued to and were held by these trust funds. The thirteen bonds covered by the sale from which the controversy results were as follows: Six bearing serial numbers between 710 to 905 were consolidated bonds issued to the mechanical and agricultural college fund. Six bearing numbers between 1902 and 2065 were consolidated bonds issued to the seminary fund. One of the bonds was a consolidated bond issued under the funding act of 1874, which had been surrendered to the state treasurer, E. A. Burke, for exchange for a new bond at the rate of seventy-five cents on a dollar and reduced interest. At the time of this surrender the new bond at the reduced rate was issued, and the bond in question was returned into the treasury for cancellation under the provisions of the constitution of the State. The whole of the thirteen bonds were fraudulently issued by the state treasurer, who put them on the market surreptitiously and without authority. The precise date at which the bonds were acquired by the defendant below (defendant in error here) is not mentioned in the statement of facts. They must have been so acquired, however, after the end of June, 1882, and before the 27th of February, 1889, since the statement of facts discloses that the bonds were held by the state treasurer up to the first named date, and that they were sold to the plaintiffs on the second named date. E. A. Burke, the state treasurer, by whom these acts were done, was treasurer from 1878 to 1888. The statement of facts discloses that during his term of office legislative committees examined his books and made a favorable report, and that at the end of his term of office a committee also examined them with like result. The statement establishes that the public were unaware that the treasurer had unlawfully issued the bonds in question, and after their issue until the discovery of that fact the coupons therefrom were regu-

larly paid by the State, including the coupons falling due on the 1st day of July, 1889, and after that date, in consequence of the discovery of the wrong, the state officers declined further to pay the coupons of said bonds, and the auditor and treasurer of the State, in September, 1889, gave notice to the world that the bonds above described and issued as above stated were null and void and not legal debts of the State. It was further admitted that E. A. Burke, who was treasurer of the State as above mentioned, and who was charged with the custody of the bonds, had been indicted for their conversion to his own use, and that he is now, and has been since 1889, a fugitive from justice, and that the governor has been authorized by the legislature to issue a reward for his apprehension.

There was judgment for defendant, 46 Fed. Rep. 727, and the present writ of error was prosecuted.

Mr. E. H. Farrar, *Mr. B. F. Jonas* and *Mr. E. B. Kruttschnitt* for plaintiffs in error.

Mr. Henry L. Lazarus for defendant in error.

I. When a political body or State enters the markets of the world to borrow money or to pay its debts, in bonds or commercial paper of any form transferable by indorsement or delivery, it becomes subject to the same rules of the law merchant that affect or operate on private persons or merchants dealing in the same class of paper, by which any "innocent holder before maturity" is exempt from inquiries into the circumstances under which the obligation of the maker was first put into circulation.

II. The rights of innocent good-faith holders of the commercial paper of the State of Louisiana, acquired before maturity, are not affected nor are their rights to be determined by the provisions of the Civil Code of Louisiana relating to warranty in case of sale of property moveable or otherwise.

III. The general commercial law, or the law merchant of the United States, relating to the rights and obligations of makers and holders of commercial and negotiable paper obtains and is in force in Louisiana.

Opinion of the Court.

IV. Under the accepted law merchant, as it obtains in the United States, commercial paper, if actually the paper of the maker, if put on the market even through theft or embezzlement from the maker or owner, and in circulation passes into the hands of a *bona fide* third holder before maturity, confers a good title on such good-faith holder against the maker or former owner.

V. If a State, by legislation, attempts to take away the negotiable character from any of its commercial paper in circulation at the time of such legislation, such action to be effective must be both so public and specific as to the paper or obligations sought to be affected that there can be no doubt concerning the particular and specific obligations sought to be affected. There must be such specific designation or description that the restriction of negotiability will be apparent to dealers in that class of securities upon inspection of the obligation itself, or by certain indications including it in the restrictive legislation.

VI. When it is alleged as a defence against the payment of negotiable securities or obligations to a good-faith holder before maturity, that the obligation had been cancelled by the maker, such cancellation, to be effective, must appear by an inspection of the obligation itself, and must be an unequivocal cancellation. In all commercial dealings of States, resulting in the emission of commercial paper or obligations, the acts and omissions of the fiscal officers of the State, whereby obligations of the State, binding on their face as obligations, are emitted and put into circulation so as to reach the hands of *bona fide* holders in the due course of trade and commerce, are the acts or omissions of the State itself as to all such obligations.

VII. The vendor of commercial paper or public securities negotiable by delivery is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him, and are not forgeries. Where there is no express stipulation, there is no liability beyond this.

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

A strict construction of the pleadings would create the impression that the sale out of which the controversy arose was made upon an express oral warranty of the validity of the bonds sold. As, however, the case was submitted upon an agreed statement of facts which does not declare this to be a fact, and as both parties, as well as the court below, assumed such not to be the case, we will pretermit this aspect of the subject and consider the case upon the theory that the only warranty, if any, is one to be implied from the nature of the contract.

It is obvious from the facts just detailed that the thirteen bonds which were sold by the defendant in error to the plaintiff in error were at the time of the sale absolutely void. The twelve which originally belonged to the two college funds were in express terms declared by the constitution of the State to be "null and void," and the general assembly was forbidden to make any provision "for their payment," and they were ordered to be "destroyed in such manner as the general assembly may direct." This provision of the constitution was in existence while the bonds were in the hands of the State, and before they were fraudulently and surreptitiously sold. Indeed, these bonds were never lawfully put into circulation, because, having been originally issued to represent trust funds belonging to the State, they were held by officers of the State for its account. The remaining bond was also void under the constitution of the State, since it had been, under the express terms of that instrument, surrendered to the state treasurer for cancellation and another bond issued in its stead.

The bonds were undoubtedly sold by the defendant in error as lawful obligations of the State. Both parties to the contract of sale so considered. The pleadings and the statement of facts leave no question on this subject. The controversy here presented is wholly between the vendor and vendee as to the nature and extent of the obligation of warranty resulting from the sale. We are therefore not concerned with whether the defendant at the time of the sale stood in the attitude of a third holder of negotiable paper for value before maturity. Even if he were in such a condition, and at the time of the sale

there was a constitutional provision which rendered the bonds void and incapable of enforcement, it is clear that the delivery by the vendor to the vendee of bonds stricken with constitutional nullity was not the delivery of an existing obligation within the meaning of the contract if it imported a warranty of the existence of the bonds which it covered. The admission being that both parties contemplated the delivery of valid obligations, bonds of that character being outstanding, if warranty of existence was implied by law, such purpose was not fulfilled by the delivery of a mere equity, which one of the parties, the seller, claims was existing in his behalf. Valid bonds and not the mere claim by the seller to enforce invalid bonds was the object of the contract. This is especially true in view of the fact just referred to that at the date of the sale the constitution of the State in express terms forbade the enforcement of twelve of the bonds and practically stipulated to the same effect as to the other.

The sale was a Louisiana contract. We must consequently determine the rights and obligations of the parties by the law of that State. By the civil law, which prevails in Louisiana, warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is, therefore, implied in every such contract unless there be an express stipulation to the contrary. *Bayon* v. *Vavasseur*, 10 Martin, 61; *Strawbridge* v. *Warfield*, 4 Louisiana, 20. The following provisions on the subject of warranty are found in the Louisiana code: "The seller is bound to two principal obligations, that of delivery and that of warranting the thing which he sells." C. C. 2475. "Although at the time of the sale no stipulations have been made respecting the warranty, the seller is obliged, of course, to warrant the buyer against the eviction suffered by him from the totality or part of the thing sold and against the charges claimed on such thing which were not declared at the time of the sale." C. C. 2501. "Even in case of stipulation of no warranty, the seller in case of eviction is liable to a restitution of the price, unless the buyer was aware, at the time of the sale, of the danger of the eviction, and purchased at his peril and risk." C. C. 2505.

These articles of the Louisiana Civil Code, which do but formulate the principles of the civil law as to warranty, are not wholly in accord with the doctrines of the common law. The distinction between the two systems may be briefly summed up by saying that the one, the civil law doctrine, finds its expression in the maxim *caveat venditor*, whilst the rule of the common law is conveyed by the aphorism *caveat emptor*. It is unnecessary to determine the scope, under the Louisiana law, of the obligation of warranty as to property generally, since we are in this case concerned only with its limit when arising from the sale of a credit or other incorporeal right. The code of that State contains express provisions defining the extent of the obligations arising in such case. "He who sells a credit or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be mentioned in the deed." C. C. 2646. "The seller does not warrant the solvency of the debtor unless he has agreed so to do." C. C. 2647. These provisions, instead of causing the obligation of warranty in a sale of an incorporeal right to be broader than in the case of tangible property, on the contrary make it narrower.

As then, under the law of Louisiana, the seller under the contract of sale was obliged to warrant the existence of the thing sold, the case of the defendant in error involves the practical contention that a bond which at the time of the sale was declared by the constitution of the State to be non-existing, is yet for the purposes of the sale to be treated as an existing obligation. This proposition is an obvious contradiction in terms, and of course refutes itself. In *Knight* v. *Lanfear*, 7 Rob. (La.) 172, where a treasury note had been sold without recourse, and it was found that the note had been redeemed and cancelled and thereafter had been purloined and reissued, and the word "cancelled" erased, the court held that the seller was bound to return the price.

In *Pugh* v. *Moore, Hyams & Co.*, 44 La. Ann. 209, the plaintiff sought to recover the purchase price of five bonds identical in character with the bonds embraced in the sale here in controversy, four of them being Mechanical and Agri-

cultural College bonds unlawfully issued under similar circumstances to those here presented, and one being a consolidated bond unlawfully issued after its surrender in exchange for another bond. The Supreme Court of Louisiana, after elaborate consideration, held, for one among other reasons, that the seller having been obligated to the warranty of the existence of the bonds at the time of the sale, and the bonds being void under the constitution, he was obliged to return the price. This implied obligation to warrant the existence of the claim at the time of the sale has also been frequently recognized in a collateral way by the court of last resort of the State of Louisiana. Thus, where the owner of several notes, secured by one mortgage, has transferred some of the notes, and where on a sale of the mortgage property, to pay the debt, the proceeds have proven inadequate to pay all the notes, the settled doctrine in Louisiana is that in consequence of the obligation of the seller to warrant the existence of the debt, he cannot take a part of the proceeds of the mortgaged premises to pay the notes retained by him and thus frustrate the right of his transferee to take the entire amount of the security to the extent necessary to pay the notes transferred. *Salzman* v. *Creditors*, 2 Rob. 241.

The provision of the civil law of Louisiana, imposing upon the seller of a credit or incorporeal right the obligation of warranting the existence of the debt at the time of the sale is not original in the code of that State, but was drawn in so many words from the Code Napoleon, article 1693. It was not new in that code, and but expressed the settled rule of the Roman and ancient law. L. L. 4, 5, 7, 10, 11, ff. de Hæredit. vel act. vendit.; L. 68, sec. 1; L. 74, ff. de Evictionib.; L. 30, ff. de Pignor et hyp. Merlin Rep. vol. 13, Verbo Garantie des Créances.

Where the provisions of the Louisiana Code and the Code Napoleon are identical the expositions of the civil law writers and the adjudications of the French courts are persuasive as to the proper construction of the Louisiana Code. *Viterbo* v. *Friedlander*, 120 U. S. 707, 728; *Groves* v. *Sentell*, 153 U. S. 465, 478.

Marcadé, in his Commentary on the Law of Sale, thus states the rule:

"All sales of a credit subject the seller, unless there be a stipulation to the contrary, to a guarantee of the existence and the validity of the credit, as also of his right of ownership to it. Article 1693 speaks, it is true, only of the guarantee of the existence of the credit. But as the credit existing to-day, if subsequently declared to have been void, would in contemplation of law have never existed, and also as it would be equally immaterial for the buyer if the credit had a real existence, if that existence was available only to some one else, it is evident that by an existing credit is to be understood one which validly exists as the property of him who transfers it. The one who transfers, then, is held to guarantee in three cases: 1. If at the time of the sale the credit did not exist, either because it had never existed or because it was extinguished by compensation, by prescription or otherwise. 2. If the credit should be declared to have been void or the obligation be rescinded. 3. If it belonged to another person than the transferrer." Marcadé, De la Vente, 335.

Troplong, in his learned treatise on the same subject, thus expounds the doctrine:

"In the sale of a credit, as in that of every other object, legal warranty is always understood. The vendor guarantees to the vendee the existence of the credit at the moment of the transfer, although there should be no expression in the contract to that effect. It is this which caused Ulpian to say: 'When a credit is sold, Celsus writes in the ninth book of the Digest, that the seller is not obliged to guarantee that the debtor is solvent but only that he is really a debtor, unless there has been an express agreement between the parties on this subject.' This guarantee is more strictly obligatory in the sale of a credit than in other matters, because the right to a credit is neither visible or palpable as it is in the case of other movable or immovable property. . . . And here let there be no misunderstanding. Do not confound the credit with the title by which it is established. Both law and reason exact that the credit should exist at the time

of the sale, and it is not sufficient that a title should have been delivered to the buyer. The title is not the credit. It can materially subsist, whilst the credit is extinguished. Thus, if the credit had been annihilated by compensation or by prescription it would serve no purpose to deliver to the buyer a title which would have nothing but the appearance of life. The buyer in such case would have a right to avail himself of the warranty." 2 Troplong, De la Vente, §§ 931, 932.

And Laurent, the latest and fullest commentator, says:

"Article 1693 says 'that the seller guarantees the existence of the credit.' We must understand this word 'existence' in the sense given to it by tradition. 'Whoever,' says Loyseau, 'sells a debt or a rent, guarantees that it is due and lawfully constituted, because, without distinction in all contracts of sale, the seller is bound to three things by the very nature of the contract, (1) that the thing exists; (2) that it belongs to him; and (3) that it had not been engaged to another.' Pothier resumes this doctrine by saying 'that the guarantee of a right consists in the undertaking that the right sold is really due to the vendor;' and the code is yet more brief since it speaks only of the existence of the debt. We must, therefore, see what the existence of the debt signifies according to the explanation of Loyseau. Firstly, the vendor is held to guarantee that the debt exists and subsists ('*soit et subsiste*'). If the debt has never existed because one of the conditions necessary for the existence of the contract makes default, the vendor has sold nothing; there is no object; he is held by the guarantee; this is obvious. The same rule would apply if the debt had existed, but was extinguished at the time of the transfer, because it is as if it had never existed. Such would be the case of a credit which was prescribed, or which had been extinguished by compensation. . . . It is necessary, in the second place, that the credit should be as constituted, says Loyseau; if it is stricken with a vice which renders it void, the vendee has a right to the warranty. This is not doubtful, since the right is really annulled or rescinded, because the judgment which has an-

nulled the credit destroys it as if it had never existed." Laurent, vol. 24, Nos. 540–41–42.

The views thus expressed by the foregoing writers are substantially concurred in by the French commentators. Duranton, vol. 9, p. 183; Aubrey & Rau, vol. 5, p. 442. The courts of France from an early day have applied the same principle.

In *Prat* c. *Dervieux* the facts were these: Dervieux transferred the amount of a claim against the government, which by a subsequent liquidation of accounts was compensated by a claim held by the government which resulted from another matter. The Court of Cassation held that under article 1693 of C. N. the obligation to guarantee the existence of the claim at the time of the sale compelled the seller to restore the price Journal du Palais, 1807, p. 311.

In *Revel* c. *Lippman* a transfer was made of a claim against the government, which was stated to be subject to a future settlement of accounts. On the ultimate liquidation it was found that nothing was due, and the Court of Cassation held that the obligation, therefore, arose to return the price paid on the sale. Journal du Palais, 1825, p. 963.

Of course, this warranty of existence, as established by the law of Louisiana and as found in France and other civil law countries, does not govern a contract of sale when the object contemplated by a sale is a thing whether existing or not existing; in other words, where the parties buy, not an existing obligation, but the chance of there being one. This is illustrated by *Knight* v. *Lanfear*, *supra*, where the court, per Martin, J., said, in speaking of the thing sold: "Whatever may be its value, if it be not in substance what the purchaser believed he was receiving, his error must invalidate the sale, because it prevented his consent; *non videtur, qui errat, consentire.*"

And, in speaking of a sale of doubtful or non-existing things, this great judge said: "This claim was a fair object of sale if its nature had been disclosed, but that was concealed and was probably unknown to them, and what was offered for sale was something quite different from this claim."

The same distinction has been considered and applied by the courts of France. *Dulac* c. *Clusel et Cie.*, Lyons, Nov. 30, 1849, Journal du Palais, 1, 1852, 32.

The defendant in error does not dispute that the foregoing principles exist in and are controlling under the Louisiana law, under the law of France, and also under the civil law generally from which the law of Louisiana is derived. But whilst thus admitting, he denies that the contract of sale, involved in this case, was governed either by the Louisiana code or the general principles of the civil law. This proposition rests on the contention that when the Civil Code of Louisiana was compiled, its framers contemplated the simultaneous enactment of a Commercial Code which was then drafted, and therefore omitted from the former code the necessary provisions to govern commercial contracts under the hypothesis that the latter would also be enacted; that in consequence of the failure to adopt the Commercial Code, the courts of Louisiana have held that cases arising under the law merchant are governed by that law in the absence of an express statutory requirement to the contrary. From this premise the conclusion is drawn that as the contract in question involved the sale of negotiable bonds, the obligations resulting from the sale are commercial in their nature, and are controlled by the law merchant, by which it is asserted the vendor in such a case, when selling in good faith, warrants only that the signatures to the paper sold are not forgeries. In a restricted sense the part of the proposition relating to the operation of the law merchant, in the State of Louisiana, is well founded. *Harrod* v. *Lafayre*, 12 Martin, 29; *Wagner* v. *Kenner*, 2 Rob. La. 122; *Barry* v. *Insurance Co.*, 12 Martin, 498; *McDonald* v. *Milloudon*, 5 Louisiana, 403. Whilst this is true, the contention is yet erroneous in a twofold sense; first, in presupposing that a mere contract of sale of commercial paper, without recourse, is governed as to the obligations, between the vendor and vendee, by the law merchant; second, in assuming that in such a sale, either under the principles of the civil law or what the argument presumes to be the law merchant, the only warranty resting

upon the vendor is that of the genuineness of the signatures to the paper sold.

In *Pugh* v. *Moore, Hyams & Co., supra*, the Supreme Court of Louisiana expressly held that the contract of sale there considered (which was similar to the one here involved) was governed and controlled by the provisions of the Civil Code of Louisiana, and like rulings were previously expressed in *Sun Mutual Insurance Co.* v. *Board of Liquidation*, 31 La. Ann. 176, and in *State ex rel. Durant* v. *Board*, 29 La. Ann. 77. A like rule is maintained in the jurisprudence of France, where, in addition to the Code Napoleon or Civil Code, there is a Commercial Code regulating mercantile contracts. This is shown by the decision in a case where the vendor transferred certain notes without recourse, and in consequence of the forgery of some of them was held liable to return the price. Laurent, vol. 24, p. 535 thus states the case:

"The Court of Cassation has applied the same principle to commercial matters. The case is worthy of citation. Exchange dealers sold a certain number of notes of the Austrian bank of one hundred florins each. These notes having been presented to the bank of Vienna, by the transferees, twenty-six among them were declared to be forged. From this arose an action in warranty, which was defeated in the first instance by the tribunal of the Seine. The claim was recognized on appeal. When the case came before the Court of Cassation it was contended that the Paris court had made an erroneous application of article 1693, in declaring an exchange dealer, a guarantor of the value of false bank notes which he had delivered in good faith, to a particular person by way of sale or transfer. The guarantee, it was said, by those who transferred a forged bank note, is not different in fact from that which is incurred by a merchant, an exchange broker or banker, who has without intention and without knowledge negotiated in good faith commercial effects, such as bills of exchange or notes to order upon which there are false signatures, the guarantee in such cases is regulated by the commercial law. And it results from articles 140 and 187 of the Commercial Code that he who has not endorsed but

who has delivered from hand to hand, as he has received them, commercial paper is subject to no guarantee, because the absence of his signature indicates that he has no intention to become the guarantor of the sale, and that the buyer has dealt on the faith of the apparent title which he has accepted, and as a consequence he has a right to no guarantee. But the Court of Cassation rejected this contention, and decided that the guarantee is of the nature of the sale, and that it would be contrary to both law and equity to hold that the delivery of a forged bank bill, although made in good faith, did not give rise to recovery on the part of him who had paid the price."

None of the authorities referred to by counsel for defendant in error sustain the proposition heretofore stated with reference to the supposed existence and applicability of the law merchant, and the results which it is claimed flow therefrom. On the contrary, both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels. So, also, the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be sold, and in this country being generally termed an implied warranty of identity of the thing sold.

Benjamin on Sales, (4th Am. ed.) sec. 600, says: "When the vendor sells an article by a particular description, it is a condition precedent to his right of action" (to recover the price agreed to be paid by the vendee) "that the thing which he offers to deliver, or has delivered, should answer the description;" and, in sec. 607, the author says:

"Under this head may also properly be included the class of cases in which it has been held that the vendor who sells

bills of exchange, notes, shares, certificates and other securities, is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit or not marketable by the name or denomination used in describing it."

It is upon this general principle of the common law, not upon any peculiar doctrine of commercial law, that the cases in the common law courts proceed. Thus, in *Jones* v. *Ryde*, 5 Taunt. 488, (1814,) where an action was brought to recover the damage sustained by a discount of an altered bill, Gibbs, C. J., said (p. 492):

"Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description; the other in taking it to be such. Upon its afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. The ground of the defendant's resistance is, that the bill is not endorsed; and that whensoever instruments are transferred without indorsement, the negotiator professes not to be answerable for their validity. This question was much mooted in *Fenn* v. *Harrison*, 3 T. R. 757, and it is true to a certain extent, viz., that in the case of a bill, note or other instrument of the like nature, which passes by indorsement, if he who negotiates it does not endorse it, he does not subject himself to that responsibility which the indorsement would bring on him, viz., to an action to be brought against him as endorser, but his declining to endorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description which turns out not to be such as he represents it. The defendant has in the present case put off this instrument as a navy bill of a certain description; it turns out not to be a navy bill of that amount, and, therefore, the money must be recovered back."

Chambre, J., said (p. 494):

"I really cannot entertain a doubt on the question; if the defendant's doctrine could prevail it would very materially

impair the credit of these instruments. They are not in practice endorsed, (or not beyond the first taker). A man takes this security looking to the persons who are to pay it; he takes it on the presumption that it is a navy bill; it was once a navy bill, but from the moment wherein it was altered it became of no value whatsoever. It is unnecessary to go into the authorities."

In *Wilkinson* v. *Johnson*, 3 B. & C. 428, (1824,) one who had taken up a bill for honor, subsequently discovered that the signatures were forgeries. He was held entitled to recover, upon the general doctrine of the common law relating to contracts.

In *Young* v. *Cole*, 3 Bing. N. C. 724, (1827,) recovery was sought for the amount of certain Guatemala bonds which had been sold for account of the defendant, and which after the sale were discovered not to be a marketable commodity on the stock exchange, because not stamped, as required by an advertised notice of the government of Guatemala, given prior to the sale, but subsequent to the time when the bonds had been issued and put into circulation. The claim of the plaintiff was adjudged to be well founded, although there was no question of forgery or alteration, upon the common law principle already stated.

Lamert v. *Heath*, 15 M. & W. 486, (1846,) was an action to recover from the defendant the amount paid him for certain Kentish Coast Railway scrip, which, after delivery to the plaintiff, turned out to have been issued without authority. The defendant was a stock broker, and was employed by the plaintiff to purchase the scrip. A verdict having been returned for the plaintiff a new trial was granted, on the ground that as the proof showed that the article purchased was the only article known in the market as Kentish Coast Railway scrip, the question for the jury was not whether the scrip was genuine scrip, but whether it was the identical thing which the plaintiff contracted to buy. This ruling, therefore, accords with the principles of the former cases and illustrates the distinction between an implied condition of the sale as the essence of the thing sold and the ascertainment of whether the con-

tract of sale in the purview of the parties embraced a particular object, just as it appeared to be whether existing or not, whether valid or invalid. In this respect this case is entirely in harmony with the opinion of Martin, J., heretofore referred to. It, moreover, very pointedly refutes the contention that a particular state of the law of warranty applies to the transaction of a sale and purchase of negotiable paper without recourse, since the scrip in question was non-negotiable.

In *Gompertz* v. *Bartlett*, 2 El. & Bl. 849, (1853,) an unstamped bill of exchange endorsed in blank, purporting to be a foreign bill, was sold, without recourse, by the holder, who was not a party to the bill. It proved to have been drawn in England, and was, in consequence, invalid for want of a stamp, and could not be enforced against the parties. The vendor and purchaser at the time of sale were both alike ignorant of this defect. It was held that the purchaser was entitled to recover back the price from the vendor, on the ground that the article sold as a foreign bill, although not forged or altered, did not answer the description by which it was sold. Counsel for defendant contended that "as the bill was sold without recourse, nothing turned on the peculiar character of a bill of exchange, and the case was the same as if the sale had been of any other specific chattel, sold without a warranty, when the maxim *caveat emptor* applies." Lord Campbell, C. J., replied (p. 850):

"If the purchaser receives what answers the description of the article sold, he cannot, in the absence of a warranty, recover for a defect in its quality. In such case, *caveat emptor*. But it will be put against you here, that you sold a foreign bill, and that the thing delivered was not a foreign bill at all."

The counsel for plaintiff stated his case in the following words, which, in view of the language previously quoted from the defendant's counsel, makes clear the fact that it was not disputed that the transaction was governed by the common law applicable to sales:

"The plaintiff's proposition is, that if a thing was sold as being an article of a specific description, and if, from a latent defect unknown to both parties, it was in substance not an article of that specific description, but an article of no value,

the purchaser is entitled to recover back the price he has paid for it, not on the ground of a breach of warranty, but because he has paid for the thing sold, and what he has received is not the thing sold, but of a different kind."

In *Gurney* v. *Womersley*, 4 El. & Bl. 133, (1854,) an action was brought by a firm of bill brokers to recover the amount paid on the discount of a bill transferred by mere delivery, where the signatures, with one exception, were forgeries. It was held that, though there was no indorsement or guaranty, and, therefore, no warranty, of the solvency of the parties to the bill, there was a total failure of consideration, and plaintiffs were entitled to recover back the money paid for the bill from the party with whom the transaction was had. Coleridge, J., observed (p. 141):

"The vendor of a specific chattel, it is not disputed, is responsible if the article be not a genuine article of that kind of which the seller represents it to be. And the question raised really is, what is the extent of the want of genuineness for which he is responsible? Without laying down the limits, it is clear to me that this case fell much within them. In effect here the defendants said to the plaintiffs, will you take, without recourse to us, this bill which purports to bear the acceptance of P. & C. Van Notten? By doing so they represented it to be their acceptance, as it purported to be, and sold it, as answering that description."

Wightman, J., said (p. 142):

"In considering whether a defect in an article renders it not an article of the kind of which it was represented to be on the sale, or is merely a breach of a collateral warranty, much must depend upon the special circumstances and terms of the rule. Here I think that the bill, not being an acceptance of P. & C. Van Notten, fails in what was the substance of the description by which it was held."

Lord Campbell, C. J., said (p. 143):

"I am of opinion that though the defendants, by not endorsing or guaranteeing the bill, preserved themselves from warranting the solvency of any of the parties, yet they did undertake that the instrument was what it purported to be.

It is not disputed that in fact the discount of their bill by the plaintiffs was solely on the faith of its being an acceptance of P. & C. Van Notten, which it was not; and in consequence of its being so it was valueless. The possibility of recourse against the estate of Anderson, a convict and a bankrupt, did not prevent there being a total failure of consideration."

The cases in the American courts, whilst declaring the same rule as that recognized in England, place it upon a theoretical basis differing somewhat from that announced by the English courts; that is, instead of pronouncing it a condition of the principal contract that the thing sold, in its essence and substance, must be delivered, declare that there is an implied warranty of identity, or, in other words, that the thing sold is what it purports to be. Daniels, in his treatise on Negotiable Paper, § 733*a*, calls attention to the different definitions given to the same obligation by the American and English courts, and indicates the view that the form of expression used by Benjamin in the passage already quoted is the more accurate one.

Aside, however, from the mere garb in which the thought is clothed, the American and English courts are in full accord. This is shown by the case of *Utley* v. *Donaldson*, 94 U. S. 29, 45, where Benjamin on Sales is approvingly referred to, as also *Flynn* v. *Allen*, 57 Penn. St. 482, and *Webb* v. *Odell*, 49 N. Y. 583, both of which cases, as also the line of American adjudications which enforce the same doctrine, are noted in the margin of this opinion.[1]

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[1] *Thrall* v. *Newell*, 19 Vt. 202, 206, (1847); *Lyons* v. *Miller*, 6 Grat. 427, 439, (1849); *Aldrich* v. *Jackson*, 5 R. I. 218, (1858); *Barton* v. *Trent*, 3 Head, 167, 169, (1859); *Delaware Bank* v. *Jarvis*, 20 N. Y. 226, 229, (1859); *Merriam* v. *Wolcott*, 3 Allen, 258, (1861); *Bell* v. *Cafferty*, 21 Ind. 411, 413, (1863); *Swanzey* v. *Parker*, 50 Penn. St. 441, 450, (1865); *Morrison* v. *Lovell*, 4 W. Va. 346, 350; *Webb* v. *Odell*, 49 N. Y. 583, (1872); *Worthington* v. *Cowles*, 112 Mass. 30, (1873); *Snyder* v. *Reno*, 38 Iowa, 329, 333, (1874); *Giffert* v. *West*, 33 Wis. 617, (1873); 37 Wis. 115, 117, (1875); *Hannum* v. *Richardson*, 48 Vt. 508, (1875); *Hussey* v. *Sibley*, 66 Maine, 192, (1876); *Hurst* v. *Chambers*, 12 Bush. (Ky.) 155, 158, (1876); *Allen* v. *Clark*, 49 Vt. 390, (1877); *Bankhead* v. *Owen*, 60 Ala. 457, 461, (1877); *Smith* v. *McNair*, 19 Kan. 330, (1877); *Challiss* v. *McCrum*, 22 Kan. 157, 161, (1879); *Rogers* v. *Walsh*, 12 Neb. 28, (1881); *Milliken* v. *Chapman*, 75 Maine, 306, 317,

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Many of the controversies covered by the cases referred to arose in consequence of the sale of a forged note, but the principles upon which all the authorities proceed do not confine the right of recovery to such a case, but rest upon the general doctrine to which we have already referred. In fact, no case is reported wherein the obligation, as between vendor and vendee, in the sale of negotiable paper, is claimed to be controlled other than by the general principles of the common law, though in three cases, *Baxter* v. *Duren*, 29 Maine, 434, *Fisher* v. *Rieman*, 12 Maryland, 497, and *Ellis* v. *Wild*, 6 Mass. 321, the deduction was made from the law respecting the sale of goods that on a sale of negotiable paper there was under the principle of *caveat emptor* no implied warranty even that the signatures to the paper were not forged. *Ellis* v. *Wild* was, however, expressly overruled in *Merriam* v. *Wolcott*, 3 Allen, 258, 260; and from the allusions to *Baxter* v. *Duren*, contained in the later Maine decisions previously noted in the margin, it is doubtful whether the early ruling in Maine would now be followed there. The three cases referred to, it is needless to say, are practically disregarded by the entire current of American and English authority, and stand alone. They are disavowed by the defendant in error here, since his argument admits that there is a warranty of the genuineness of the signatures, to an apparent negotiable instrument, thereby conceding the subsistence of the obligation to warrant the existence or identity of the thing sold, and yet seeking to avoid its consequences by limiting it to non-existence resulting from a particular nullity. There is an exceptional case, *Littauer* v. *Goldman*, 72 N. Y. 506, (1878,) which holds that the common law obligation, as to the implied warranty of identity in the thing sold, in the case of commercial paper, extends only to the genuineness of the instrument. The case was one involving the nullity of a usurious note, and, if correctly decided, would be authority for the proposition that there was a peculiar species of warranty in the sale of commercial paper,

(1883); *Daskam* v. *Ullman*, 74 Wis. 474, 476, (1889); *Palmer* v. *Courtney*, 32 Neb. 773, (1891); *Ware* v. *McCormack*, (Ky.) 28 S. W. 157, (1894); *Brown* v. *Ames*, (Minn.) 61 N. W. 448, (1894).

differing from all others ; in other words, that there was a law merchant of warranty where there was no commercial contract. The opinion in this case illustrates the same contradictory position presented here by the argument of the defendant in error, to which we have just called attention, that is, that it admits the common law rule and then denies its essential result by eliminating conditions of non-existence which are necessarily embraced by it. It follows that this New York decision leads logically to the view expressed in the Maine and Maryland cases just referred to, for either the principle of warranty of identity must be accepted or rejected ; it cannot be accepted and its legitimate and inevitable results be denied. The rule there announced was in conflict with previous decisions in New York, and the decision is strongly criticised by the Court of Errors and Appeals of New Jersey in *Wood* v. *Sheldon*, 42 N. J. Law, 421, 425.

In *Giffert* v. *West*, 33 Wisconsin, 617, (1873,) where a note was sold which was void for usury, the vendee was allowed to recover the consideration paid by him, and his right to do so was based upon the general doctrine that one making a sale is bound as a condition of the principal contract to an implied warranty of the existence of the thing sold.

In *Hannum* v. *Richardson*, 48 Vermont, 508, (1875,) a very clear statement of the doctrine is found. There an indorser sold a negotiable promissory note without recourse. The note had been given for intoxicating liquors sold in Vermont in violation of law, and on that account was void at its inception. It was claimed that the defendant knew of the invalidity of the note when he transferred it. The court, however, held that knowledge on the part of the seller was not necessary to fix his liability, saying (p. 510) :

"By indorsing the note 'without recourse,' the defendant refused to assume the responsibility and liability which the law attaches to an unqualified indorsement, so that, in respect to such liability, it may perhaps be regarded as standing without an indorsement. If it be so regarded, then in what position do these parties stand in respect to the transaction? The principle is well settled, that where personal property of any

kind is sold, there is on the part of the seller an implied warranty that he has title to the property, and that it is what it purports to be, and is that for which it was sold, as understood by the parties at the time, and in such case knowledge on the part of the seller is not necessary to his liability."

On p. 511 the court further observed:

"The note in question was not a note, it was not what it purported to be, or what it was sold and purchased for; it is of no more effect than if it had been a blank piece of paper for which the plaintiff had paid his fifty dollars. In this view of the case we think the defendant is liable upon a warranty that the thing sold was a valid note of hand."

Nor is there any foundation for the assertion that *Otis* v. *Cullum*, 92 U. S. 447, and the cases of *Orleans* v. *Platt*, 99 U. S. 676, and *Ætna Life Ins. Co.* v. *Middleport*, 124 U. S. 534, both of which cite *Otis* v. *Cullum*, support the doctrine that a sale of commercial paper without recourse is not, as between the vendor and vendee, governed by the ordinary rule of the common law. On the contrary, that case expressly rested its conclusion on the decision in *Lamert* v. *Heath*, *supra*, which latter case, as we have seen, whilst enforcing the principles of the common law, considered that under the particular facts there presented it was a question for the jury to determine whether the scrip delivered was the kind of scrip which the defendant had ordered purchased. That case not only, as has already been stated, concerned non-negotiable paper, but its decision involved no question of the scope of the warranty, but solely what was the thing bought. Nor does the case of *Otis* v. *Cullum* justify the assumption that this court laid down the rule that a mere sale of commercial paper, as between vendor and vendee, when the sale was made without recourse, created some peculiar and exceptional warranty to be considered in this particular as the law merchant. It is true that in expressing the general doctrine, Mr. Justice Swayne said: "The seller is liable *ex delicto* for bad faith, and *ex contractu* there is an implied warranty on his part that they belong to him and are not forgeries. Where there is no express stipulation there is no liability beyond this." But in

using this language, as to the extent of the warranty, the mind was directed to that form of non-existence which more commonly obtains, and the expression is a mere illustration of the rule *de eo quod plerumque fit.* If this were a case where a vendee claimed to recover back the price paid by him on a purchase of negotiable securities, which pass by delivery from hand to hand, on the averment that after the sale it had developed that they were not valid (although not forgeries), because the law under which they had been issued was constitutionally void or *ultra vires*, the claim of implied warranty of existence would be without merit, for the reason that such a state of fact would present a case of a sale of securities whether valid or invalid, hence engendering no implication of warranty of existence. Under the state of facts thus supposed, the purpose of the parties to make a contract of that nature would legally result from the fact that they were both necessarily equally chargeable with notice of want of power, and therefore would be both presumed to have acted with reference to such knowledge. This is *Otis* v. *Cullum.* But it is not the case at bar, since it is here admitted that both parties, in entering into the contract of sale, contemplated valid securities, of which there were many outstanding, and those delivered were void, not because of a want of power to enact the law under which they were issued, or because they were *ultra vires* for some other legal cause, but because they were stricken with nullity by a constitutional provision adopted after the act authorizing the issue of the securities, and where nothing on the face of the bonds indicated that they were illegal. The distinction pointed out by the foregoing statement not only illustrates the correctness of the decision in *Otis* v. *Cullum*, but also demonstrates the error of attempting to extend it to the state of facts presented in the case under consideration. Indeed, in examining and applying *Otis* v. *Cullum* the fact that it does not control a case like this has been recognized. Daniel, Neg. Inst. § 734*a*; *Rogers* v. *Walsh*, *supra*; *Cincinnati, New Orleans &c. Railway* v. *Citizens' National Bank*, 24 Week. Law Bull., (Ohio) 198, 211.

The foregoing analysis of the principles and review of the

authorities governing the law of sale of negotiable paper, transferred without recourse, as between vendor and vendee, clearly demonstrates the unsoundness of the positions upon which the defendant in error relies, since it affirmatively establishes that there is no peculiar warranty, in a sale of commercial paper, and that the reasoning by which it is attempted to prove its existence is a mere misconception of the principles of the common law relating to the sale of goods and chattels.

In passing, however, it is worthy of note that whilst the civil law enforces in the contract of sale generally the broadest obligation of warranty, it has so narrowed it, when dealing with credits and incorporeal rights, as to confine it to the title of the seller and to the existence of the credit sold, and, *e converso*, the common law, which restricts warranty within a narrow compass, virtually imposes the same duty by broadening the warranty as regards personal property so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract or by implication of warranty as to the identity of the thing sold. By these processes of reasoning the two great systems, whilst apparently divergent in principle practically work substantially to the same salutary conclusions.

There are many questions discussed in the brief of counsel which we do not notice, and which we content ourselves with saying are without merit. The views above stated are controlling and decisive of the case and lead necessarily to the reversal of the judgment. As the case was heard upon a stipulation waiving a jury and upon an agreed statement of facts, it is our duty, in reversing, to direct that the proper judgment be entered below. *Fort Scott* v. *Hickman*, 112 U. S. 150, and cases there cited.

It follows that

The judgment of the Circuit Court must be reversed, and the case be remanded with directions to enter judgment for plaintiffs for eight thousand three hundred and eighty-three dollars and seventy-five cents ($8383.75) *with interest from judicial demand and costs.*

BANK OF COMMERCE *v.* TENNESSEE, *for the use of* MEMPHIS.

BANK OF COMMERCE *v.* TENNESSEE AND SHELBY COUNTY.

PETITION FOR REHEARING.

Nos. 668, 669. Received May 7, 1896. — Decided May 25, 1896.

The mandates in these cases (161 U. S. 134,) are recalled, and so much of the judgment of the state court as permits a recovery against the holders of the old stock in the bank is reversed; and the judgment, so far as it permits a recovery for taxes assessed against the holders of the new shares in the bank, is affirmed.

PETITIONS for rehearing. The case is stated in the opinion.

Mr. S. P. Walker and *Mr. C. W. Metcalf* for petitioners.

Mr. R. J. Morgan, *Mr. T. B. Turley* and *Mr. William H. Carroll*, opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is a petition for a rehearing of some of the questions heretofore decided in these cases. A decision was rendered in them a short time ago, and a portion of the judgment in each case was reversed, and the cases remanded to the Supreme Court of Tennessee for further proceedings therein. 161 U. S. 134. Application is now made on the part of the defendants in error in each case for a rehearing of the same upon the question of the jurisdiction of this court to review the decision of the state court in regard to the exemption from taxation of the so called new stock, being stock that was issued since the adoption of the constitution of 1870. Leave was given both parties to submit briefs upon the question of jurisdiction, as also upon the merits of the question sought to be reviewed.

Such briefs have been received, and we proceed to decide the question.

The bank was chartered in 1856 under the name of the Chattanooga Savings Institution, which name was subsequently changed to the Bank of Commerce, and its place of business moved to Memphis. In the charter was contained the following clause: "Said institution shall have a lien on the stock for debts due it by the stockholders before and in preference to other creditors, except the State for taxes, and shall pay to the State an annual tax of one half of one per cent on each share of the capital stock, which shall be in lieu of all other taxes." On the day of the adoption of the new constitution, May 5, 1870, the capital stock of this institution was $200,000. The second section of the charter contains this provision: "The capital stock of said company shall be divided into shares of $50 each, and when 200 shares have been subscribed and the sum of one dollar per share paid therein, the shareholders may meet and elect five directors." By section 4 it is provided that "it may receive on deposit any and all sums not less than one dollar per week offered as stock deposits; . . . and when such deposits amount to $50 it may at the option of the depositor become stock in the institution."

It appears that on sundry days prior to June 1, 1887, the capital stock of the bank had been regularly increased under this provision in its charter to $600,000, and on the 17th of March, 1890, and on sundry days prior to June 1, 1890, it was again regularly increased to $1,000,000. There was no maximum capital fixed in the charter. In 1870, while the capital stock of the bank stood at $200,000, the new constitution of the State was adopted, which provided for the taxation of all property, which provision would include the shares issued since 1870, if they are not protected by the exemption clause in the charter above quoted.

These suits were brought by the defendants in error against the bank and the shareholders for the purpose of recovering the amount of taxes which had been assessed for several years then last past against the parties defendant, the bank and the

shareholders. In the actions it was sought to recover either against the bank on its capital stock or against the shareholders by virtue of their ownership of the shares of the capital stock. It was not contended that both were liable to pay the tax, but that one or the other should be held liable. A single stockholder was chosen to represent the stockholders generally, and he was one of the holders of what may be termed the new shares — that is, shares issued since the adoption of the constitution of 1870. This was done under an arrangement between the parties so that all the stockholders need not be made parties to the action.

The answer of the plaintiffs in error, the bank and the stockholders, claimed a total exemption from all taxation, both on the part of the bank and shareholders excepting the tax provided for in the charter. Thus the claim of the State was that the bank or all the shareholders were taxable under the provisions of the general tax laws of the State, and it left it to the court to say which were thus taxable. But the State also claimed that if the old shares of stock were not taxable, the new shares issued after 1870 were taxable, as they came into existence after the constitution provided for the taxation of all property, and they were not subject to the exemption clause contained in the charter of the bank. So the question submitted to the state court was, which of these two classes shall be taxed; or, if the old shareholders are not to be taxed, can the new shareholders be taxed. The Supreme Court of the State held that all the shareholders, both old and new, were proper subjects of taxation; that the exemption clause in the charter did not apply to either, but it applied to the capital stock of the bank, and judgment was therefore decreed for a recovery against all the shareholders of both old and new stock for taxes assessed under the general taxation laws of the State. In the course of the opinion delivered by one of the learned judges of the state court, which was concurred in by the majority, it was stated that there was no difference between the rights of the shareholders of the old and the new stock with reference to the right of exemption from taxation under the charter clause; that if the old shares were exempt

the new shares were also exempt, and that the contract covered both classes of stock in the same way and to the same extent; but the judgment of the court was that neither class of stockholders was exempt from taxation on account of the shares of stock held by it, that the exemption clause applied entirely to the capital stock, and that hence the shares of stock were liable to taxation under the general laws of the State, and judgment was ordered against all the shareholders, both of the old and the new stock accordingly. Judgment at the same time went in favor of the bank decreeing its exemption from taxation under those laws of the State.

The bank and the shareholders through Mr. Omberg, their representative, sued out a writ of error from this court, and the judgment of the state court was thereby brought here for review. The claims of the parties upon that writ of error were on the part of the plaintiffs in error that the whole judgment of the state court was wrong; that neither the shareholders of the old nor of the new stock were liable to pay any amount of taxes other than the tax provided for in the charter, and that the same exemption applied to the bank. The defendants in error claimed that the whole judgment of the state court was right; that all the shareholders were properly assessed, but that if this were not so and the holders of old shares were exempt by reason of the clause in the charter, such clause did not apply to the holders of the new shares of stock, and that they were liable in any event, and that, therefore, the judgment as against such new shareholders was right, and to that extent the judgment should be affirmed, even if it should be reversed as to the holders of the old shares of stock. This court held that, as to the holders of the old shares, the judgment was wrong, as the exemption in the charter applied to the holders of the shares of stock and not to the capital stock itself. Concerning the further question whether the judgment was right as against the holders of the new shares of stock, the court held that it would not review the decision of the state court on that question; that as the state court had granted the exemption claimed by the holders of the new shares by virtue of the contract clause in the charter, this

court had no jurisdiction to review that decision, and, therefore, refused to do so. The whole judgment against all the stockholders, both of the new as well as of the old shares of stock, was reversed. In coming to that conclusion and in reversing the whole judgment we think this court inadvertently fell into error. The error consisted in mistaking a certain statement in a portion of the opinion of the court below for the judgment which it actually rendered. Instead of granting the exemption the court refused it entirely, and the judgment which it actually rendered was against all the shareholders alike, both of the old and of the new shares, but in the opinion the court stated that no difference existed between the holders of the old as compared with those of the new shares of stock, and that the holders of the new shares were entitled to the exemption from the tax to the same extent that the holders of the old shares were, but, as the court determined, neither the old nor the new shareholders were entitled to such exemption.

The material matter in the case was the judgment, and the judgment was against all the shareholders, so when that judgment was brought before this court by writ of error on the part of the shareholders, the question for this court was to determine whether or not there was error in that judgment. In the determination of that question no effect can be given the *opinion* of the state court *in favor* of the plaintiffs in error upon one ground, so long as it is rendered entirely immaterial by the *judgment* of that court *against* the plaintiffs in error upon another ground. It is our duty to look at the whole judgment as it comes before us, and if any portion of it be correct and is so stated as to be separable from and independent of the other portion which we find to be erroneous, it is our duty to affirm that portion in which we find no error and reverse that portion which we decide to be wrong. Therefore we think it is our duty to examine the question whether the judgment brought here for review is not right as against the holders of the new shares on the ground that they were not included in the charter clause providing for exemption from taxation, because their stock was issued since the constitution

of 1870 was adopted. Even if the opinions of the state court were a part of the record, as is claimed by counsel for the plaintiffs in error, no different result would follow on that account. Being a part of the record merely gives the court a right to look into these opinions for the purpose of discovering the ground upon which the judgment of the court actually proceeded. Looking at them we find, as reasons for the judgment of the state court against all the shareholders, that the exemption clause of the charter applied to the capital stock of the bank and not to the shareholders in any event. Looking further into the opinion we find the added statement that if the exemption clause had applied to the holders of the old shares it would equally have applied to the holders of the new, as they were both situated alike, and if one class were entitled to exemption the other was also. That opinion upon the latter subject is an abstract one, upon which no judgment was entered, because the state court held that neither class was entitled to exemption and directed judgment against them all. Under these circumstances it seems plain to us that in refusing to look into the question whether the judgment, so far as it affected the holders of the new shares only, was right or wrong, we failed to exercise our appropriate jurisdiction, and it is our duty, upon the question being now brought to our attention, to retrace our steps and examine the question and determine for ourselves whether that portion of the judgment of the state court enforcing taxation of the holders of the new shares of stock ought not to be upheld although for a different reason than that which controlled the action of that court.

The case of *Murdoch* v. *City of Memphis*, 20 Wall. 590, and other similar cases are not in point. The purpose of examining to see whether there is not some question other than a Federal one, decided in the case, is to *sustain* thereon the judgment under review. In this case the plaintiffs in error are not seeking a question of local law upon which to *sustain* the judgment against them. If we find the Federal questions properly decided as to one class of persons affected by the judgment we must sustain that part of it, although we come

to that conclusion for a different reason from that expressed by the state court, and one which upon that point is in conflict with its opinion but not with its judgment. So in the case suggested by counsel, of separate actions against the stockholders and the bank, and a decision by the state court that the holders of the new shares were exempt under the contract clause. Of course, no decision of that kind could be reviewed here because the claim was allowed by the state court, and judgment went in his favor. To make it parallel with this, the court should have held the holder of the new shares liable and entered judgment against him, while stating in its opinion that if the holders of old shares had been exempt he would have been also exempt, but as they were not, neither was he. Upon his writ of error to this court we could say that the judgment was right, because although the holders of the old shares were exempt, yet the holders of the new shares did not stand in the same position, and they were not exempt. The judgment would be upheld although for a different reason.

We come then to the merits of the subject. In determining the question whether the state court was right in adjudging the holders of the new shares of stock liable to assessment by reason of their ownership of that stock, (no matter for what reason such determination was reached,) it is necessary to see what the provisions of the charter were in relation to this increase of capital stock. We see by the second section above quoted that no limitation was therein prescribed of the amount of capital stock of the bank, and the provision for the increase of the capital stock, as mentioned in section 4 of the charter, makes the depositor the person who is to decide whether the stock shall be increased or not, for by that section the depositor when depositing his moneys as a stock depositor in the bank has himself the option when the deposit amounts to $50 or more to call for and to have scrip for stock issued to him therefor. By this provision it cannot be claimed that the State entered into such a contract with future depositors who might choose to demand stock for their deposits, that the provision relating thereto could not be changed by

the legislature. It was a provision in relation to one of the general powers of the corporation to issue stock which might be changed from time to time as the legislature in its discretion might think proper, so long as no vested right of property accruing prior to the legislative amendment was unfavorably affected thereby. We think there was no vested right on the part of the future depositor to make a stock deposit, and claim the issuing of a similar amount of stock to him, which a legislature could not cut off. If before making any such deposit the legislature altered that provision in the charter and prohibited any such kind of deposit thereafter, we think it clear that no vested right of a future depositor was thereby interfered with. We have held that the clause in the charter of this bank providing for taxation amounted to a contract that the shares of stock in the hands of the shareholders should be exempt from further taxation than that which is provided in the charter. Is the language in the charter to be extended to the shares of stock issued subsequently to the adoption of the constitution of 1870? In other words, does the contract obligation attach to and form a part of the stock so issued to the same extent as if the stock had been issued prior to 1870? We are inclined to think not. Full effect can be given to the charter by confining it to the shares of stock that might be issued under its provisions so long as the constitution of the State was not altered or a provision thereof adopted providing for the taxation of such property. Applying the rule which is always applied by this court in such cases, that the claim for exemption must rest upon language in regard to which there can be no doubt as to its meaning, and that the exemption must be granted in terms too plain to be mistaken, the claim for exemption for this subsequently issued stock cannot be maintained. This rule for the construction of exemption from taxation clauses in acts of the legislature is referred to in the opinion in *Phœnix Fire & Marine Insurance Co.* v. *Tennessee*, one of these cases and decided at the same time. 161 U. S. 174.

It is true there is an unlimited right to increase the capital stock of this bank under the fourth clause in question, but

it must be done in a certain way. The bank has no right separate and apart from the depositor to increase its stock, and the depositor's right is based upon his depositing the money in the bank as a stock depositor and calling for an issue of stock when it amounts to $50, or over, for the amount of such deposit. We think that the legislature might prohibit the further issue of capital stock in this corporation under this section. By the enactment of the charter there was no contract therein to forever continue this power to deposit and make such deposits a claim for stock therefor. There is no such language in terms, and none should be implied. It amounted to nothing more than a legislative license, which might be availed of by any depositor, but which the legislature might at any time revoke by thereafter prohibiting the issuing of stock in return for deposits. If the legislature could thus absolutely prohibit the further issuing of stock, could it not also provide that no stock should be thereafter issued unless subject to taxation as other property in the State? We see no reason to doubt the legislative capacity in that respect. Of course, the adoption of a constitutional provision of the same nature would be subject to the same rule. We do not see that by the adoption of the constitution of Tennessee in 1870, which provided for the taxation of all property, any contract obligation was impaired so far as regards the rights of the bank or the owners of the shares of stock issued subsequent to the adoption of the constitution. The constitution impaired no obligation of an existing contract. It prevented the subsequent making of one. No depositor could claim a contract or any vested right to make a deposit under the provision of section 4 of the act, and then claim an exemption from taxation of such stock where the deposit was made and the stock issued after the adoption of the constitution of 1870.

In *Pearsall* v. *Great Northern Railway Co.*, 161 U. S. 646, we held that a clause in a charter of a railroad corporation granting it certain powers to consolidate with or become the owner of other railroads was not such a vested right that it

could not be rendered inoperative by a subsequent statute passed before the company had availed itself of this power granted it by a former statute. We held that the power so conferred, so long as it was unexecuted, was within the control of the legislature and might be treated as a license, and be revoked by the legislature if it so chose. Much of the reasoning of that case is applicable here. We think the power of the legislature to alter the terms upon which stock might be subscribed is more clear than was its power in the case of *Pearsall*, *supra*. We assume in this case the legislative power to grant an unlimited right to increase the capital stock of the bank. That is a question of the power of the legislature of the State, and the decision of the state court in regard to the power of the legislature in such a case is one which we follow. Admitting the right to grant such power, it does not follow that it may not be taken away by a subsequent legislature, and if when the stock is issued there is a provision in force in the State for the taxation of all property, we do not think the clause providing for the exemption of the stock applies to such stock thus issued.

It is urged that this right to issue stock in exchange for deposits is a valuable franchise of the bank given to it by this charter, accepted by it, and held as a contract secure from any assault by state legislation. We do not think that it is thus secured, because we are of opinion that it is not of that contractual nature which the Federal Constitution prevents any impairment of by state legislation. As has been seen by reference to the above case of *Pearsall* v. *Railway Co.*, all provisions in a charter granting rights or powers to a corporation do not partake of the nature of a contract, which cannot for that reason be in any respect altered or the power recalled by subsequent legislation. Where no act is done under the provision and no vested right is acquired prior to the time when it was repealed, the provision may be validly recalled, without thereby impairing the obligation of a contract. The power to issue stock in return for deposits is of that kind which we think is subject to legislative power of repeal or of regulation so long as the action of the legisla-

ture interferes with no rights which have become vested before the passage of the act. Many cases bearing upon this subject are to be found cited in the arguments of counsel and in the opinion of this court in the *Pearsall case*, and it is unnecessary for us to further elaborate the question. Having the power to repeal altogether the grant to issue stock upon the making of stock deposits, as above stated, we think the power to permit it to be issued subject to taxation would be within the power of the legislature. This is in substance the effect of the constitution of 1870 providing for the taxation of all property. The clause of exemption no longer applies to shares of stock thereafter issued.

We think, therefore, the judgment of the Supreme Court of Tennessee adjudging a recovery against the shareholders of the new stock issued since 1870 was, to that extent, correct, and our former decision, which reversed the whole judgment of the state court as against the shareholders, must be amended.

The mandate will be recalled; so much of the judgment of the state court as permits a recovery against the holders of the old shares of stock in the bank is reversed; the judgment so far as it permits a recovery for taxes assessed against the holders of the new shares in the bank is affirmed, and the cases remanded to the state court for further proceedings not inconsistent with this opinion; and it is so ordered.

UNITED STATES v. REALTY COMPANY.

UNITED STATES v. GAY.

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

Nos. 870, 869. Argued April 22, 23, 24, 1896. — Decided May 25, 1896.

The appropriations of money by the act of March 2, 1895, c. 189, 28 Stat. 910, 933, to be paid to certain manufacturers and producers of sugar who had complied with the provisions of the act of October 1, 1890, c. 1244, 26 Stat. 567, were within the power of Congress to make, and were constitutional and valid.

It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the Judicial branch of the Government.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney and *Mr. Solicitor General* for plaintiffs in error. *Mr. Assistant Attorney General Dodge* was on their brief.

Mr. Charles F. Manderson, *Mr. Thomas J. Semmes* and *Mr. Joseph H. Choate* for defendants in error. *Mr. Edward Ham* was on Mr. Manderson's brief.

Mr. James D. Hill filed a brief for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

These are writs of error to the Circuit Court of the United States for the Eastern District of Louisiana. The actions were brought in that court under the second section of the act approved March 3, 1887, c. 359, 24 Stat. 505, commonly known as the Tucker act. Both actions were brought to

obtain payment of moneys by reason of the legislation of Congress in regard to sugar bounties. The court below in each case gave judgment for the plaintiffs therein, and the Government by writ of error brings the cases here for review.

The legislation out of which the question arises is as follows: By the act approved October 1, 1890, c. 1244, known as the tariff act of 1890, 26 Stat. 567, which act is entitled "An act to reduce the revenue and equalize duties on imports, and for other purposes," Congress legislated upon the subject of the tariff, and in that act paragraphs 231, 232, 233 and 235, "Schedule E, Sugar," (on p. 583,) read as follows:

"231. That on and after July first, eighteen hundred and ninety-one, and until July first, nineteen hundred and five, there shall be paid, from any moneys in the Treasury not otherwise appropriated, under the provisions of section three thousand six hundred and eighty-nine of the Revised Statutes, to the producer of sugar, testing not less than ninety degrees by the polariscope, from beets, sorghum or sugar cane grown within the United States, or from maple sap produced within the United States, a bounty of two cents per pound; and upon such sugar testing less than ninety degrees by the polariscope, and not less than eighty degrees, a bounty of one and three fourths cents per pound, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

"232. The producer of said sugar to be entitled to said bounty shall have first filed prior to July first of each year with the Commissioner of Internal Revenue a notice of the place of production, with a general description of the machinery and methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the current or next ensuing year, including the number of maple trees to be tapped, and an application for a license to so produce, to be accompanied by a bond in a penalty, and with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he will faithfully observe all rules and regulations that shall be prescribed for such manufacture and production of sugar.

"233. The Commissioner of Internal Revenue, upon receiv-

ing the application and bond hereinbefore provided for, shall issue to the applicant a license to produce sugar from sorghum, beets or sugar cane grown within the United States, or from maple sap produced within the United States at the place and time with the machinery and by the methods described in the application; but said license shall not extend beyond one year from the date thereof."

"235. And for the payment of these bounties the Secretary of the Treasury is authorized to draw warrants on the Treasurer of the United States for such sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounties shall be disbursed, and no bounty shall be allowed or paid to any person licensed as aforesaid in any one year upon any quantity of sugar less than five hundred pounds."

In 1894 Congress passed another act in relation to the tariff, which act was received by the President on the 15th of August, and became a law on the 28th of August, 1894, without his approval. Such act is entitled "An act to reduce taxation, to provide revenue for the government, and for other purposes." c. 349, 28 Stat. 509. Paragraph 162, "Schedule E, Sugar," p. 521, reads as follows:

"Schedule E. — Sugar. 182. That so much of the act entitled 'An act to reduce revenue, equalize duties, and for other purposes,' approved October first, eighteen hundred and ninety, as provides for and authorizes the issue of licenses to produce sugar, and for the payment of a bounty to the producers of sugar from beets, sorghum or sugar cane grown in the United States, or from maple sap produced within the United States be, and the same is hereby, repealed, and hereafter it shall be unlawful to issue any license to produce sugar or to pay any bounty for the production of sugar of any kind under the said act."

By another act of Congress, approved March 2, 1895, c. 189, 28 Stat. 910, 933, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1896, and for other purposes," Congress enacted as follows:

"Bounty on sugar: That there shall be paid by the Secretary of the Treasury to those producers and manufacturers of sugar in the United States from maple sap, beets, sorghum or sugar cane grown or produced within the United States who complied with the provisions of the bounty law as contained in Schedule E of the tariff act of October first, eighteen hundred and ninety, a bounty of two cents a pound on all sugars testing not less than ninety degrees by the polariscope, and one and three fourths cents per pound on all sugars testing less than ninety and not less than eighty degrees by the polariscope, manufactured and produced by them previous to the twenty-eighth day of August, eighteen hundred and ninety-four, and upon which no bounty has previously been paid; and for this purpose the sum of two hundred and thirty-eight thousand two hundred and eighty-nine dollars and eight cents is hereby appropriated, or so much thereof as may be necessary.

"That there shall be paid to those producers who complied with the provisions of the bounty law as contained in Schedule E of the tariff act of October first, eighteen hundred and ninety, by filing the notice of application for license and bond therein required, prior to July first, eighteen hundred and ninety-four, and who would have been entitled to receive a license as provided for in said act, a bounty of eight tenths of a cent per pound on the sugars actually manufactured and produced in the United States testing not less than eighty degrees by the polariscope, from beets, sorghum or sugar cane grown or produced within the United States during that part of the fiscal year ending June thirtieth, eighteen hundred and ninety-five, comprised in the period commencing August twenty-eighth, eighteen hundred and ninety-four, and ending June thirtieth, eighteen hundred and ninety-five, both days inclusive; and for this purpose the sum of five million dollars, or so much thereof as may be necessary, is hereby appropriated; provided, that no bounty shall be paid to any person engaged in refining sugars which have been imported into the United States, or produced in the United States upon which the bounty herein provided has already been paid or applied for.

"The bounty herein authorized to be paid shall be paid upon the presentation of such proofs of manufacture and production as shall be required in each case by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, and under such rules and regulations as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

"And for the payment of such bounty the Secretary of the Treasury is authorized to draw warrants on the Treasurer of the United States for such sums as shall be necessary, which sums shall be certified to him by the Commissioner of Internal Revenue, by whom the bounty shall be disbursed, and no bounty shall be allowed or paid to any person as aforesaid upon any quantity of sugar less than five hundred pounds."

Under the provisions of the appropriation made in the last above named act of Congress, the defendant in error in each of the above cases sues for the money claimed by it and him for the manufacture of sugar under the circumstances stated in the petition in each case. They are test cases. The Realty Company is one of a class coming under the terms of the appropriation to those who had manufactured a certain class of sugar previous to the 28th day of August, 1894, and upon which no bounty had previously been paid. The allegation in the petition of the company showed that it had between the first day of July, 1893, and the 30th day of June, 1894, under the provisions of the act of 1890, produced and manufactured at the places stated the amount of sugar mentioned in the petition, and that it was entitled to receive from the defendant the bounty thereon mentioned in the act, which it was alleged amounted to the sum of $5576.97. The repeal of the bounty clause in the act of 1890 by the act which took effect on the 28th of August, 1894, and which prohibited the payment of bounties thereafter, prevented the company from obtaining the money on the warrant which had been issued to it prior to that date. There were comparatively few persons coming under the class in which the company stood, and the appropriation made for the payment of that class was a little less than $250,000.

The plaintiff in the other suit, Mr. Gay, is one of a class coming under the second portion of the act of 1895, he being among those who complied with the provisions of the bounty act as contained in Schedule E of the act of October 1, 1890, by duly filing notice of application for license and bond as therein required, and who would have been entitled to receive a license as provided for in said act, and a bounty of eight tenths of a cent per pound on the sugars actually manufactured by him according to the provisions of such act during that part of the fiscal year ending June thirtieth, 1895, comprised in the period commencing August 28, 1894, and ending June 30, 1895, both dates inclusive. The amount of bounty claimed by Mr. Gay is between eight and nine thousand dollars, and the persons forming this class are quite numerous, and the appropriation for them amounted to the sum of $5,000,000, or so much thereof as might be necessary to make the payments provided for in the act.

Counsel for the government admit that the plaintiff in each case has complied with all the terms and conditions of the act in order to entitle each to recover the moneys demanded in these suits under the act of 1895, provided that act is constitutional and valid. If it be, the judgment in each case must be affirmed.

The proper disbursing officer of the Treasury refused to pay the warrants drawn upon the Treasury in these cases upon the sole ground that the act is unconstitutional. He has been fortified in his opinion and action by the views expressed in the Court of Appeals of the District of Columbia, in the case of *United States ex rel. Miles Planting & Manufacturing Co.* v. *Carlisle*, reported in 5 D. C. App. 138. That company, which was a Louisiana corporation engaged in the sugar business, claimed that the repealing portion of the act of August 28, 1894, was not effective so as to cut off the rights of persons who had prior to its passage procured licenses for the fiscal year beginning July 1, 1894, and had expended money thereunder. The company therefore applied to the Supreme Court of the District of Columbia for a writ of mandamus against the Secretary of the Treasury and the Commissioner

of Internal Revenue to compel action on their part under the act of 1890. The application was resisted by the government upon several grounds, among others, that the bounty legislation of 1890 was unconstitutional. The motion was denied upon all the grounds set up by the government, including that of unconstitutionality. Mr. Justice Shepard delivered the opinion of the court and Mr. Justice Morris concurred with him upon all points. Mr. Chief Justice Alvey expressed no opinion upon the constitutional question because the conclusion that Congress had power to repeal the provision giving the bounty for sugar rendered it unnecessary to pass upon the unconstitutionality of the original bounty clause.

It was by reason of this opinion upon the validity of the bounty legislation of 1890 that the Comptroller of the Treasury reëxamined the rulings which had been previously made in approving bounty claims theretofore presented; and he had concluded to and did refer another case involving this question, then before him, to the Court of Claims for its decision in accordance with the provisions of section 1063 of the Revised Statutes, but before that case reached the Court of Claims the present cases had been commenced and decided in Louisiana.

The question whether the bounty provisions of the act of 1890 were constitutional was raised in the case of *Field* v. *Clark*, 143 U. S. 649. The contention in that case was that such provisions were unconstitutional, and that therefore the whole tariff act of 1890 was void. This court declined to decide the question as to the constitutionality of those provisions because, as the court held, the rest of the act would be valid even if the bounty provision were void. The question has been again presented to us in this case, and been very ably argued by counsel both for the government and the defendants in error. The question is one of the very gravest importance. It should not be decided without very mature investigation and deliberation, and only when absolutely necessary to the determination of the rights of the parties.

In the view we take of these cases the rights of the parties

may be passed upon and the actions finally decided without our entering upon a discussion as to the validity of the bounty legislation contained in the act of 1890, and without deciding that question. For the purpose of the discussion of this case we think it unnecessary to decide whether or not such legislation is beyond the power of Congress. We are of the opinion that in either case the appropriations of money in the act of 1895 to be paid to certain manufacturers and producers of sugar who had complied with the act of 1890 were within the power of Congress to make, and were constitutional and valid.

Without referring to the first three findings of the court below in regard to the general policy of this government in relation to the tariff, and confining our attention to those facts which are matters of history and to the acts of Congress already referred to, and to the facts set forth in the petitions in the two cases and to the admissions of the parties made for the purposes of the trial of these cases, we may briefly describe the condition of affairs existing at the time of the passage of the appropriation act of 1895.

The production and manufacture of sugar in the Southern and some portions of the Western States from sugar cane and from sorghum and beets had become at the time of the passage of the act of 1890 an industry in which large numbers of the citizens of this country were engaged, and its prosecution involved the use of a very large amount of capital. The tariff theretofore had been very high upon imported sugar, and the native industry had thereby been encouraged, fostered and greatly increased. The subject of how to treat this industry was under discussion in Congress while the tariff act of 1890 was before it, and it finally decided the question by enacting the bounty clause of that act. Before that time the revenue on imported sugar had amounted to nearly $60,000,000 in one year. To put sugar on the free list would reduce the revenue that amount, but at the same time it might, as was urged in Congress, ruin the persons engaged in the industry in this country. So the tariff on sugar was reduced while at the same time a bounty was placed upon

its production here of an amount which it was thought would equal the protection the industry had theretofore enjoyed under the tariff. The act was approved by the President and no question of its validity was made by any officer of the government having any duties to perform under it. The bounty provision was by the terms of the act to remain in force for fifteen years. The citizens who were engaged in the manufacture of sugar prepared to comply with the provisions of the law under which the bounty was to be payable.

Under that act and during its existence large sums of money were paid to sugar manufacturers as a bounty, and all manufacturers continued to manufacture in reliance upon its provisions. During these years no officer of the government questioned the validity of the act, and the bounties earned under it were paid without objection or any hint that objection would thereafter be taken while the law was in force. This condition continued for about three years. In the winter, spring and summer of 1894 it is matter of history that the discussion of the tariff act, which finally became a law on the 28th of August of that year, was continually going on in Congress and through the public prints of the country. Before the passage of the act it was, of course, wholly uncertain as to what its provisions would be, including the question of the bounty for the manufacture of sugar. No man could predict it. No one could have stated whether the bounty would be taken off entirely or materially reduced, or left as it stood by the act of 1890. The whole question of tariff legislation at that time was full of uncertainty. In the meantime the season was approaching when the manufacturer of sugar must decide what to do. He was confronted with the fact that the act of 1890 was still in existence, and under its provisions he must, if he meant to avail himself of the bounties which might be payable under the act, make his application for and obtain a license prior to July 1 of that year. In his application for a license he was compelled to give a general description of the machinery and the methods to be employed by him, with an estimate of the amount of sugar proposed to be produced in the current year, and his

application would have to be accompanied by a bond, with sureties to be approved by the Commissioner of Internal Revenue, conditioned that he would faithfully observe the rules and regulations that would be prescribed for the manufacture and production of sugar. At the same time, if he made application and obtained his license and commenced the manufacture of sugar under the provisions of the act of 1890, he could not be certain that the Congress might not strike out altogether the provision for the payment of any bounty and he be left in such a condition that he could neither manufacture with profit nor abstain from manufacturing without loss. All this by no fault of his; doing his very best, exerting his every energy, sleeplessly vigilant at all points, it was yet impossible for him to decide what to do in this state of uncertainty, or to even guess which would be the road least liable to lead to great pecuniary loss, if not to ruin. Already embarked in the business and in this state of uncertainty, the manufacturer finally concludes to go on as if the act were to remain in existence, feeling probably a firm reliance that the government would not treat its citizens unjustly or unfairly by a sudden repeal of the bounty law without making some temporary provision of another nature by which justice would be done him. He applied for a license and commenced his preparations, as the then existing act of 1890 provided that he might do. Making his arrangements for the prospective year and preparing for the manufacture of sugar during that time, the manufacturer is, subsequently, confronted by the act of Congress taking effect August 28, 1894, totally repealing the provisions of the act of 1890 upon the subject of bounties and prohibiting from that time the payment thereof. This was the position of the plaintiff, Mr. Gay, and of large numbers of other people. The Realty Company occupied a still more unfortunate position. That company had manufactured sugar between the 1st of July, 1893, and the 1st of July, 1894, during the whole of which period the act of 1890 was in full force, and after July 1, 1894, the company obtained the warrants, duly certified and authenticated by the local government officers in Louisiana,

for the payment of its claim to bounty, but before actual payment from the Treasury of the United States could be obtained the act of 1894 came into existence, with its provision directing that no further payment of bounty should thereafter be made. Of course, under the circumstances, as set forth in regard to the plaintiffs in the above suits, there can be and is no question made as to the entire good faith of all parties, and the question presented to this court is one of constitutional power simply.

This condition of affairs confronted the Congress which passed the appropriation in question. It is now argued by counsel for the government that Congress had no valid power to recognize these claims against the United States made by the sugar manufacturers, because the provision in regard to the payment of bounties contained in the act of 1890 is unconstitutional.

Upon this assumption it is said that no claim, legal, moral, equitable or honorable can be created in favor of the sugar manufacturer and against the government, and that where there is neither legal, moral nor honorable obligation to pay, Congress has no power to appropriate money.

In our opinion it is not correct to say that no moral, equitable or honorable obligation can attach in favor of persons situated as were the defendants in error here, when the act of 1895 was passed. We think obligations of that nature may arise out of such circumstances. We regard the question of the unconstitutionality of the bounty provisions of the act of 1890 as entirely immaterial to the discussion here. These parties did not at that time (when manufacturing under its provisions) know that the act was unconstitutional; they could not be regarded as failing to do their whole duty because they proceeded with the manufacture of sugar in reliance upon the bounty promised by the government, under an act recognized by the officers of the government as valid, and which they were at all times executing. But it is said that if the act be unconstitutional the law imputes to these parties at all times a knowledge of its invalidity, and that it is not rendered valid by acquiescence in its provisions for any length

of time even by officers of the government holding the highest places therein and who are charged with its execution and believe in its validity. Being unconstitutional, there never was a moment, it is stated, when there was any valid act, and, therefore, no equities can arise in their favor because of any acts done by them upon the faith of the act, which they were bound to know was wholly void. This reasoning does not exactly fit the case. It is not a question whether any strictly legal rights can arise out of an unconstitutional act. It is a question whether equitable considerations can attach to a claim which, among other grounds, is based upon an act that was supposed by all the officers of the government to be valid and which was repealed only when the whole taxing act of 1890 was subjected to a careful and comprehensive revision. There are occasions when the presumption that every man knows the law must be enforced for the safety of society itself. An individual on trial for a violation of the criminal law will not be heard to allege as a defence that he did not know the act of which he was guilty was criminal. But in such a case as this, knowledge of the invalidity of the law in advance of any authoritative declaration to that effect will not be imputed to those who are acting under its provisions, and receiving the benefits provided by its terms. These parties cannot be held bound, upon the question of equitable or moral consideration, to know what no one else actually knew, and what no one could know prior to the determination, by some judicial tribunal, that the law was unconstitutional. Although it should finally turn out that the law is invalid, and is so pronounced, yet during all the time of its operation, as has been stated, all the officers of the government united in treating it as a valid act. No court had determined to the contrary. It was a question at least admitting of argument. Under such circumstances can it be said that the plaintiffs in these suits and persons situated like them were bound to know that this law was and would be pronounced unconstitutional, and that no rights could be acquired under it, and that they would not be justified in proceeding to manufacture sugar according to its provisions? Could no equities

be built up in their behalf (which the government might subsequently recognize) founded upon the belief that the act was valid, and upon the action of the officers of the government under it, because it was, or subsequently might be pronounced to be, unconstitutional?

We are of the opinion that the parties, situated as were the plaintiffs in these actions, acquired claims upon the government of an equitable, moral or honorary nature. Could Congress legally recognize and pay them although the act of 1890 as to its bounty provisions might be unconstitutional? It is true that in general an unconstitutional act of Congress is the same as if there were no act. That is regarding it in its purely legal aspect. Being in violation of the Constitution, that instrument must govern, and no one can base any legal claim as arising out of such an act. That is a very different principle, however, from that which we think governs in this case. The persons for whose benefit the appropriation contained in the act of 1895 was made are not, in the view we take, asserting the existence of a legal and valid debt against the United States which is at the same time based upon an unconstitutional act of Congress. No such inconsistent and illogical position is taken. They are asserting that by reason of the occurrences which took place before the appropriation, among which was the passage of the act of 1890, they were so placed before Congress, as to authorize that body to recognize the equities of the situation, and to pay their claims which, while they were not of a legal character, were nevertheless of so meritorious and equitable a nature as to authorize the nation through its Congress to appropriate money to pay them.

It is also true that it does not appear from the terms of the act of appropriation that the parties for whose benefit it is made had commenced the business of sugar manufacturing or enlarged their previous manufacture of sugar by reason of the bounties provided under the act of 1890. That was not necessary. There was enough in the circumstances which are before this court and which have been already in part detailed to make it a question for the decision of Congress,

whether upon the whole the persons so situated were equitably entitled to its consideration and to the appropriation asked for. If Congress possessed the power in any event to recognize equities of such a nature, we think it had enough in the case before it to uphold a favorable decision thereof. It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be postponed until it arises.

There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay.

Under the provisions of the Constitution, (article 1, section 8,) Congress has power to lay and collect taxes, etc., "to pay the debts" of the United States. Having power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. What are the debts of the United States within the meaning of this constitutional provision? It is conceded and indeed it cannot be questioned that the debts are not limited to those which are evidenced by some written obligation or to those which are otherwise of a strictly legal character. The term "debts" includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. The nation, speaking broadly, owes a "debt" to an individual when his claim grows out of general principles of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law. The power of Congress extends at least as far as the recognition and payment of claims against the government which are thus founded. To no other branch of the government than Congress could any application be successfully made on the part of the owners of such claims or debts

for the payment thereof. Their recognition depends solely upon Congress, and whether it will recognize claims thus founded must be left to the discretion of that body. Payments to individuals, not of right or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the Constitution. See, also, among other cases in this court, *Emerson* v. *Hall*, 13 Pet. 409; *United States* v. *Price*, 116 U. S. 43; *Williams* v. *Heard*, 140 U. S. 529. The last cited case arose under an act of Congress in relation to the Alabama claims.

The claims presented on the part of the United States against Great Britain, arising out of the depredations committed by the Confederate vessel Alabama and other designated Confederate vessels, which had sailed from British ports, upon the commerce and navy of the United States during the war of the rebellion, were by the treaty of Washington, concluded May 8, 1871, between the United States and Great Britain, submitted to a tribunal of arbitration called to meet at Geneva, in Switzerland. Certain indirect claims or war risks, as they were sometimes called, were included by this government in its claims against Great Britain and were presented to the tribunal above named. Great Britain objected to the submission of those claims on the ground that their consideration was not included in the purview of the treaty. This matter was the subject of some difference of opinion among the representatives of the respective governments, and they were not able to agree upon the subject, when the arbitrators, without expressing any opinion upon the point of difference as to the interpretation of the treaty, stated that these indirect or war

claims did not constitute upon principles of international law applicable to such cases a foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from all consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide them. This declaration was accepted by the President, and those claims were not insisted upon before the tribunal and were not taken into consideration in making the award. Thus it is seen that there were no legal claims of the holders of those war risks upon the government for the payment to them of any sum whatever. The award made by the tribunal, which was paid to the United States by Great Britain, was held to have been made to the United States as a nation, *United States* v. *Weld*, 127 U. S. 51, and the fund itself came into the treasury as any public moneys of the country.

By the act of June 5, 1882, c. 195, 22 Stat. 98, the Court of Commissioners of Alabama Claims was reëstablished, and the duty was imposed upon it to receive and examine claims which might be presented, putting them into classes, the second of which was "for the payment of premiums for war risks, whether paid to corporations, agents or individuals, for the sailing of any Confederate cruiser." The Heards were owners of claims for war risks, and Congress finally appropriated money to pay a portion of them. Congress thus recognized as proper to be paid a class of claims which had not been taken into consideration by the Geneva tribunal, but which had been decided by that tribunal to have no basis in international law. It is a case, therefore, of the recognition by Congress of what it regarded as an equitable claim on the part of the owners of these war risks to be paid some portion of their claims, and the validity of the appropriation was never questioned.

Among the latest examples of payments that are not of right or of any legal claim, but which are in the nature of a gratuity depending upon equitable considerations, are the cases just decided by this court of *Blagge* v. *Balch*, *Brooks* v.

Codman, and *Foote* v. *Women's Board of Missions*, reported as one case in 162 U. S. 439. The claims in those cases are what have been known as the French spoliation claims, being based upon depredations of French cruisers upon our commerce prior to July, 1801. An appropriation for their payment was made by Congress in 1891 upon the conditions and to the class of persons named in the act. Questions arose as to the proper interpretation of the act and as to the character of the payments provided for therein. This court held the payments were purposely brought by Congress within the category of payments that are not of right, but which are in the nature of a gratuity and as an act of grace, though founded upon a prior moral or honorable obligation to pay to some one who might be said in some way to represent the original sufferers. No question of the power of Congress to make such appropriation was raised by any one.

The power to provide for claims upon the State founded in equity and justice has also been recognized as existing in the state governments. For example, in *Guilford* v. *Chenango County*, 13 N. Y. 143, it was held by the New York Court of Appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals to cases in which legal demands existed against the State, but that it could recognize claims founded in equity and justice in the largest sense of these terms or in gratitude or in charity.

Of course, the difference between the powers of the state legislatures and that of the Congress of the United States is not lost sight of, but it is believed that in relation to the power to recognize and to pay obligations resting only upon moral considerations or upon the general principles of right and justice, the Federal Congress stands upon a level with the state legislature.

In truth, the general proposition that Congress can direct the payment of debts which have only a strong moral and honorable obligation for their support is not, as we understand it, denied by the learned counsel for the United States; but it is claimed that in these cases no foundation whatever is laid

for its application, because the claim arises out of the unconstitutional provisions of the act giving bounties in 1890. It is impossible, it is said, to build even an equity out of an act of Congress which is utterly void; that as the original act offering and paying bounties was void, it cannot become legal to pay them because of any alleged equities of those who would suffer from their sudden discontinuance as set forth in these cases. For the reasons already given we do not think, under the circumstances surrounding these cases, that the validity of the act of 1895 can be questioned successfully.

In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government. Upon the general principle, therefore, that the government of the United States, through Congress, has the right to pay the debts of the United States, and that the claims in these cases are of a nature which that body might rightfully decide to constitute a debt payable by the United States upon considerations of justice and honor, we think the act of Congress making appropriations for the payment of such claims was valid without reference to the question of the validity or invalidity of the original act providing for the payment of bounties to manufacturers of sugar, as contained in the tariff act of 1890. The judgments in these cases are right, irrespective of how that question might be decided, or of any conclusion that might be reached upon other questions suggested at the bar.

The judgments are, therefore,

Affirmed.

Mr. Justice White did not sit in nor take any part in the decision of these cases.

BLACK v. ELKHORN MINING COMPANY.

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

No. 220. Argued April 15, 16, 1896. — Decided May 18, 1896.

A locator of an unpatented mining claim under the laws of the United States, having only the possessory rights conferred by those laws, has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband.

THE case is stated in the opinion.

Mr. Thomas H. Carter for plaintiff in error. *Mr. Robert B. Smith* and *Mr. Robert L. Word* filed a brief for the same.

Mr. W. E. Cullen for defendant in error. *Mr. J. K. Toole* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is a writ of error to the Circuit Court of Appeals for the Ninth Circuit. The action was brought by the plaintiff in error for the purpose of recovering dower in a mining claim in Montana, a fractional interest in which was owned by her husband during coverture. The question is whether a mere locator of a mining claim in the State of Montana and under the laws of the United States, and having only the possessory rights conferred by those laws, has such an estate in the property as will sustain a claim for dower therein. The claim is made by the plaintiff, as widow, under the statute of Montana relating to dower, 1 Laws of Montana, 1876, chapter 63, which reads as follows: "A widow shall be entitled to a third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless the same shall have been relinquished in legal form. Equitable estates shall be subject to a widow's dower, and all real estate of every description contracted for by the husband during his

lifetime, the title to which may be completed after his decease." Another statute of Montana provides that "the word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights thereto and all interests therein." Section 202, p. 248, Compiled Laws of Montana.

The case was commenced in the state court and was subsequently removed, on the petition of the defendant, to the United States Circuit Court for the District of Montana. The facts upon which the question arises appear in the pleadings. and the question was raised by demurrer.

The plaintiff is the widow of one Leander W. Black, who died intestate in July, 1881. During his lifetime, and while the plaintiff was his wife, Black owned an undivided two fifths of a certain mining claim situate in the then Territory of Montana, called the A. M. Holter quartz lode. On the 7th of March, 1879, Black sold and conveyed his interest in this claim to one Burton, who took possession thereof, but the plaintiff did not join in that conveyance. The interest conveyed by him to Burton subsequently passed by various mesne conveyances to the defendant in error. On the 29th of October, 1883, an application was made to the proper United States land office by the immediate predecessor in interest of the defendant in error to enter the claim for patent, and such proceedings were had in the matter of the application that on the 19th of November, 1889, a patent therefor was issued by the United States to the applicant, covering the whole interest in the mining claim. No protest or adverse claim or objection of any character was made or filed by the plaintiff in error at any stage of such proceedings in the land department. Upon these facts the Circuit Court held: That the plaintiff had a contingent dower interest in the mining claim, under the Montana statute, although none in the interest the United States retained in such mining lands prior to the locator becoming entitled to a patent therefor; but that by the granting of a patent by the United States to the defendant's predecessor, the estate or interest in the lands called a mining claim ceased to exist, and the title to the whole land passed to the

patentee; the mining claim became merged in the paramount title and perished, and no estate was in the defendant out of which plaintiff could ask to have dower assigned.

Upon writ of error sued out by the plaintiff to review the judgment rendered against her by the Circuit Court, the case was argued before the United States Circuit Court of Appeals for the Ninth Circuit, where the judgment was affirmed. That court held that the locator before he made any application to purchase or paid any of the purchase money had no such estate in the mining claim as against the government or its grantee, as that a right of dower could be founded thereon by virtue of any state legislation, and it therefore affirmed the judgment of the Circuit Court. 7 U. S. App. 393. The plaintiff brings the case here for a review of the judgment against her in the Court of Appeals.

The two courts, while not precisely harmonious in their views as to the principles upon which the judgment should be rested, yet agreed in the result that the plaintiff was not entitled to dower. It was stated on the argument here that there is no decision of the Supreme Court of the State of Montana construing the state statute on the subject of dower, so far as regards this question.

The first question that presents itself is, what is the character of the interest which a locator has in a mining claim under the Revised Statutes of the United States, and prior to the time that he has made any application to purchase or paid any of the purchase money, and where no patent has been issued to him for the land? Also, what interest does he convey by a conveyance purporting to convey it all, but in which his wife does not join?

The Revised Statutes provide that:

"SEC. 2318. In all cases land valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

"SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States. . . ."

Section 2320 states the conditions governing mining claims already located as to length, etc., and also as to those located after the 10th of May, 1872. But it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Section 2322 gives to locators of all mining claims and their heirs and assigns, as stated therein, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies" as described in said statute.

It does not by its terms grant any right to the wife of the locator either present or contingent. Being the owner of the lands, the government could of course impose its own terms upon which to grant any right, whether of possession or of purchase.

By section 2324 certain conditions are imposed upon locators, upon a failure to comply with which the claim is rendered open to a relocation the same as if never before located. One of the conditions is the following: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." The section also contains a provision that "upon the failure of any one of several coöwners to contribute his proportion of the expenditures required hereby, the coöwners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent coöwner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his coöwners who have made the required expenditure."

A patent can be obtained under section 2325, which pro-

vides generally for the filing of an application, under oath, for such patent with the register of the proper land office, and also for the publication of that application, and if no adverse claim is filed with the register within the period stated by the statute, it is to be assumed that the applicant is entitled to a patent upon the terms therein mentioned; and it is then provided in the section that "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 provides for the course to be pursued in case an adverse claim is filed, and for the issuing of a patent after a decision by a court of competent jurisdiction of the question as to which of the parties is entitled thereto. *Perego* v. *Dodge*, *ante*, 160.

It has been held that this character of interest thus outlined is property, and it is recognized as such in those States of the West whose inhabitants are interested in mines. These claims are subjects of bargain and sale, and constitute, as it is said, very largely the wealth of the Pacific Coast States, and the right to sell, transfer, mortgage and inherit them is recognized by the courts. *Forbes* v. *Gracey*, 94 U. S. 762, 766; *Belk* v. *Meagher*, 104 U. S. 279, 283; *Manuel* v. *Wulff*, 152 U. S. 505, 510.

Mr. Justice Miller, in the course of his opinion in *Forbes* v. *Gracey*, stated: "It is very true that Congress has, by statutes and by tacit consent, permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the Government without exacting or receiving any compensation for those ores and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as asserted among themselves by the rules which have become the laws of the mining districts as regards mining claims, . . . *but in doing this it has not parted with the title to the land except in cases where the land has been sold in accordance with the provisions of the law upon that subject.*"

The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfil which forfeits the locator's interest in the claim. We do not think that under the Federal statute the locator takes such an estate in the claim that dower attaches to it.

To sum up as to the character of the right which is granted by the United States to a locator, we find: (1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in the statute. (2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work, or if, being one among several locators, he neglects to pay his share for the work which has been done by his coöwners, his right and interest in the claim may be forfeited to such coöwners under the provisions of the statute. (3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

An easement in real estate may be abandoned without any writing to that effect and by any act evincing an intention to give up and renounce the same. *Snell* v. *Levitt*, 110 N. Y. 595, and cases cited at p. 603 of opinion of Earl, J.; *White* v. *Manhattan Railway Co.*, 139 N. Y. 19. If the locator remained in possession and failed to do the work provided for by statute his interest would terminate, and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could

be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance? The abandonment by simply leaving the land is no more efficacious than conveying his rights and also leaving possession without any intention of returning. His simple abandonment would leave no right remaining in his wife to claim dower upon his death in the interest thus abandoned. If he add a conveyance as a clearer evidence of abandonment, her alleged right to dower is not strengthened.

By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and there is no condition that hampers the right to convey by incumbering it with an inchoate right of dower. And until he does some act towards paying the purchase money he obtains no vested right of purchase or claim to a patent. *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.*, 145 U. S. 428; *Shepley* v. *Cowan*, 91 U. S. 330.

The last cited case arose under the statute in relation to a settler seeking to acquire the right of preëmption in certain lands, yet the same principle applies to a case of one who had located land and is in possession thereof, but has paid nothing on account of the lands and has made no effort to purchase the same. An abandonment, therefore, by the locator surrenders merely a right to the exclusive possession, as provided for in the statute, which exclusive possession remains during the pleasure of the government. An abandonment of it by leaving it, not intending to return, or a conveyance of his interest to a third party, would seem equally to terminate that interest and effectually to bar all possible future claim, if any ever existed, on the part of his wife to dower in such premises.

By conveying his interest as locator he not only ceases to do any work on the claim as provided for by statute, but he puts another in possession with all his rights to do the work called for by it, and gives him the right to do all that he could have done towards purchasing the land itself. When the grantee does the work and then obtains a patent, it ought

not to be burdened with any right of dower in the widow of his grantor, who had by his conveyance abandoned all his rights and given up the possession upon which they were based. The statute, by expressly providing that the locator and his heirs and assigns should have the rights, clearly meant to provide for a conveyance thereof to the grantee to the same extent that they were possessed by the grantor.

We are of opinion, therefore, that by the conveyance of Mrs. Black's husband to his grantee of all his interest as locator in the mining claim in question he abandoned all his right and interest in the claim to his grantee, and that interest which thus passed to his grantee was not subject to any possible incumbrance of the wife by way of dower in the premises. The interest granted by the United States was of such a nature that a conveyance of Black's right to the possession terminated it to the same extent as if it had been forfeited by non-performance of the conditions provided for in the statute, and hence the wife has no claim for dower in the premises.

The judgment is

Affirmed.

FAUST *v.* UNITED STATES.

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

No. 637. Submitted January 9, 1896. — Decided May 25, 1896.

The defendant's name need not be correctly spelled in an indictment, if substantially the same sound is preserved.

On the trial under an indictment against an assistant postmaster for embezzling money-order funds of the United States, it being proved that he was the son and assistant of the principal postmaster, and as such had the sole management and possession of the money-order business and money-order funds during the entire term, a certified transcript from the office of the Auditor of the Treasury at Washington, showing the account of the postmaster, is admissible in evidence.

It was no error on such trial to refuse to admit evidence tending to show that another person than the defendant, at a time anterior to the time of the commission of the offence charged, had committed another and

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different offence than the one herein charged, and that said other person had been indicted and convicted thereof.

It was within the discretion of the court below to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination.

The objection that the charge as a whole was misleading is without merit.

The sixth assignment is based on the refusal of the court to charge the jury that the embezzlement must be proved to have taken place without the consent of the defendant's principal or employer. It was claimed that as the indictment failed to charge that the defendant embezzled any money without the consent of his principal or employer, and as the postmaster employed the defendant, the defendant's responsibility was to the postmaster, and not to the government. *Held* that it had no merit.

The remaining assignments are without merit.

In the District Court of the United States for the Northern District of Texas the defendant, plaintiff in error, was indicted, December 21, 1893, and subsequently tried, for feloniously embezzling certain money-order funds of the United States. On April 18, 1895, he was found guilty under the second count of the indictment, which alleged that on April 6, 1893, he was assistant postmaster at Thornton, in the county of Limestone, within the district aforesaid, and as such assistant postmaster had in his possession and control money-order funds to the amount of $400, and did unlawfully and feloniously embezzle and convert the same to his own use. He was sentenced to imprisonment in the penitentiary, and thereupon he applied for and obtained a writ of error from this court.

On the trial the defendant entered a plea of misnomer, as follows:

"And now comes W. J. Foust in his proper person, who is indicted by the name of W. J. Faust, and having heard the said indictment read, says that he was baptized in the name of W. J. Foust, and by that name always since his baptism hereto has been called and known, and by no other name has he ever been known or called, and this he, the said W. J. Foust, is ready to verify. Wherefore he prays judgment of the said indictment, and that the same may be quashed."

The court overruled this plea, and the defendant took an exception. At the suggestion of the attorney for the United

States the defendant was requested to suggest his true and proper name, in order that it might be inserted in the indictment and entered on the docket. This the defendant declined to do.

Exceptions were also taken by the defendant to the rejection of certain evidence offered on his behalf, and to the admission of certain evidence introduced by the government; and to the court's refusal to charge the jury as the defendant requested, and to certain portions of the charge which were given.

Mr. A. H. Garland and *Mr. R. C. Garland* for plaintiff in error. *Mr. Richard H. Harrison* was on the brief.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

In the indictment the defendant was described as one W. J. Faust, whose Christian name was to the grand jurors unknown. There was filed a plea of misnomer, in which the defendant averred that he had been baptized in the name of W. J. Foust, and that he had always been known and called by that name, and prayed that the indictment might be quashed. This plea was overruled, as was likewise a motion to quash the indictment on the ground that defendant's name was W. J. Foust, and not W. J. Faust, as it appeared in the indictment.

In this we see no error. A name need not be correctly spelled in an indictment, if substantially the same sound is preserved. The following are cases in which the variance between the names as alleged and as proven was at least as great as in the present, and in which it was held that the variance was not material: *Bubb* and *Bopp*, 39 Penn. St. 429; *Heckman* and *Hackman*, 88 Penn. St. 120; *Hutson* and *Hudson*, 7 Missouri, 147; *Shaffer* and *Shafer*, 29 Kansas, 337; *Woolley* and *Wolley*, 21 Arkansas, 462; *Penryn* and *Pennyrine*, 14 Maryland, 121.

The second assignment alleges error in the action of the court in admitting in evidence, on the part of the government, a certified transcript from the office of the Auditor of the Treasury at Washington, showing account of J. E. Foust, postmaster at Thornton, Texas, from October 10, 1891, to May 20, 1893, showing balance due of $744.18.

This was objected to, because said transcript did not purport to be a transcript from the money-order account books of the Post Office Department of the account of W. J. Foust, the defendant, and could not tend to prove any issue in the case against W. J. Foust.

The indictment was against W. J. Faust as assistant postmaster, and it was proved that he was the son and assistant of the principal postmaster, and as such had the sole management and possession of the money-order business and money-order funds during the entire term. It is scarcely necessary to say that there is no merit in this assignment of error.

The substance of the third assignment is the refusal of the court to admit evidence tending to show that another person than the defendant, at a time anterior to the time of the commission of the offence charged, had committed another and different offence than the one therein charged, and that said other person had been indicted and convicted thereof. This evidence was properly rejected as irrelevant and immaterial.

The fourth assignment complains of the refusal of the trial court to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination. This was plainly a matter within the discretion of the court below.

In the fifth assignment the charge as a whole is objected to as misleading, and also because it took from the jury the vital point at issue in the case.

Our reading of the charge does not support either of these objections.

We perceive no misdirection nor any statements calculated to confuse the jury. The jury were explicitly told that they were the judges of what the evidence was and of its weight.

The sixth assignment is based on the refusal of the court to

charge the jury that the embezzlement must be proved to have taken place without the consent of the defendant's principal or employer. It was claimed that as the indictment failed to charge that the defendant embezzled any money without the consent of his principal or employer, and as the postmaster, J. E. Foust, employed the defendant, the defendant's responsibility was to the postmaster, and not to the government. We see no merit in this assignment.

We have examined the remaining assignments and have found nothing therein set up of which the defendant has just reason to complain, and the judgment of the court below is accordingly

Affirmed.

EDDY *v.* LAFAYETTE.

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

No. 130. Submitted March 9, 1896. — Decided May 25, 1896.

It appears by the affidavit of the agent of the plaintiffs in error that he was their agent when service of process was made upon him, and that their allegation that he was not then their agent was therefore untrue.

The second section of the act of March 3, 1887, c. 373, was intended to place receivers of railroads on the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of service; and the service in the present case on an agent of the receivers was sufficient to bring them into court in a suit arising within the Indian Territory.

The terms of the summons were in accordance with the provisions of § 4868, Mansfield's Digest of Statutes of Arkansas, under which the summons was issued.

This action was brought by the defendants in error to recover the value of a large quantity of hay which it was alleged had been destroyed by a fire caused by sparks escaping from a locomotive through negligence, and falling on a quantity of dry grass and leaves that had been negligently allowed to accumulate on the railroad operated by the plaintiffs in error as receivers. The hay was cut from lands of the Creek nation under direction of Sallie M. Hailey, an Indian, one of the defendants in error, by Lafayette, a white man who was to receive an agreed part of the hay for cutting and curing it. *Held*

(1) That, in the absence of proof to the contrary it must be assumed

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that Mrs. Hailey was entitled to cut hay upon the land which she occupied in common with other members of the Creek nation;

(2) That Lafayette, under his agreement with Mrs. Hailey and his performance of it, acquired an interest in the hay;

(3) That an instruction to the jury "that evidence of a railroad company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company" was correct;

(4) That there was no error in the treatment given by the Circuit Court of Appeals to the several assignments respecting the trial court's instructions on the subject of the respective duties of the railroad company and of the plaintiffs.

The rule in cases of tort is to leave the question of interest as damages to the discretion of the jury; but as it is evident from the record that the jury did not allow interest, but based their verdict entirely upon the number of tons of hay destroyed at the market value per ton, this court acquiesces in the disposition made by the Circuit Court of Appeals of the question made in respect of the instruction of the trial court on the subject of interest.

THE complaint in this case was filed in the United States Court for the Indian Territory on March 17, 1890, and on the same day the clerk of that court issued the following summons:

"United States of America, }
Indian Territory. }

"The President of the United States of America to the marshal of the Indian Territory:

"You are commanded to summon George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, a corporation, to answer, on the first day of the next April term of the United States Court for the Indian Territory, being the 7th day of April, A.D. 1890, a complaint filed against them in said court by Sallie M. Hailey and Ben. F. Lafayette, and warn them that upon their failure to answer the complaint will be taken for confessed; and you will make due return of the summons on the first day of the next April term of said court.

"Witness the honorable James M. Shackelford, judge of

said court, and the seal thereof, at Muscogee, Indian Territory, this 17th day of March, A.D. 1890.

"WM. NELSON, *Clerk.*"

The summons bears the following return:

"Received this summons at 2 P.M., March 17, 1890, and I certify to having served said summons by leaving a copy thereof with J. W. Williams, the agent of the within named defendants, at Muscogee, this 17th day of March, 1890.

"T. B. NEEDLES, *Marshal.*"

The complaint began as follows: "The plaintiff, Ben. F. Lafayette, white, and residing in the Indian Territory, and plaintiff, Sallie M. Hailey, an Indian, and residing in the Indian Territory, allege that defendants George A. Eddy and H. C. Cross, white men, were at the time hereinafter mentioned, and are now, the receivers of the Missouri, Kansas and Texas Railway, a duly incorporated railroad company doing business in the Indian Territory, and operating its railroad through the Indian Territory under and by virtue of the laws of the United States, and that said George A. Eddy and H. C. Cross were on the — day of — duly appointed as receivers of said railroad by the Circuit Court of the United States for the eighth judicial circuit." It proceeded to allege that the said railroad was located near the premises of the plaintiff, Sallie M. Hailey, in the Indian Territory; that the defendants had negligently permitted large quantities of dry grass and weeds to accumulate on the railroad right of way, which was 100 feet in width on either side of the track; that the defendants, on August 20, 1889, were operating and running over the road an engine, No. 63, which was not supplied with the best appliances for arresting sparks of fire, and that while using the engine upon the road near the premises of the plaintiff, Sallie M. Hailey, they negligently permitted it to cast sparks and coals of fire into the dry grass on the said right of way, thus starting a fire which spread over the land of the said plaintiff, and there destroyed large quantities of hay,

which she and the plaintiff, Ben. F. Lafayette, had jointly put up and cured, and in the proceeds of the sale of which the plaintiffs were in certain proportions to share. It was averred that the amount of the hay so destroyed was 666½ tons, of the value of $2666, for which sums the plaintiffs asked judgment.

On May 6, 1890, the defendants entered a special appearance in the case, stating that they appeared "specially and only for the purposes of this motion and for no other purpose," and moved the court to quash both the said summons and the said return, upon the grounds that the summons was improperly and illegally issued, did not show the nature of the complaint filed, and did not set forth a cause of action; that the return was untrue; that J. W. Williams, who was designated in the return as "the agent of the within named defendants," was not, on March 17, 1890, such agent; that J. W. Williams was not on that day such a person as could legally have been served with process against the said receivers; and that the return and service were made improperly. In support of this motion the defendants proved that they were receivers of the said Missouri, Kansas and Texas Railway, duly appointed as such by the Circuit Court of the United States for the District of Kansas, and by the Circuit Court of the United States for the Western District of Arkansas, prior to the institution of this suit; that as such they were engaged in operating the said railway previously to and at the time of the service of the summons upon J. W. Williams; and that J. W. Williams was, on March 17, 1890, station agent for the said receivers at Muscogee, Indian Territory. The defendants filed at the same time the affidavit of J. W. Williams, to the effect that since the month of June, 1887, he had been station agent for the said receivers, but that he had never been the agent of "the Missouri, Kansas and Texas Railway, a corporation," within the Indian Territory, and was not such agent on March 17, 1890.

The court having heard and considered the motion, overruled the same, to which action the defendants excepted. Afterwards, on May 19, 1890, they filed their answer, deny-

ing therein all the essential allegations of the complaint, but protesting that they had not been served with process, and asserting that the court had not acquired jurisdiction over them in the case.

A trial was duly had before the court and a jury. After all the evidence on the part of the plaintiffs had been introduced, the defendants moved to have the same stricken out for the reason that it did not show that the engine which caused the alleged damage was engine No. 63, as alleged in the complaint. The motion was overruled, and the court granted the plaintiffs leave to amend their complaint by striking out of the same the words and figures "No. 63." The defendants excepted, and then moved for a continuance of the case in order to give them time to meet the allegations of the complaint as amended. This motion also was overruled, to which action the defendants excepted.

At the close of all the testimony the defendants moved the court to direct the jury to return a verdict in their favor. The court overruled the motion, and the defendants excepted. They then requested the court to give the jury certain instructions, among which was the following:

"The court instructs the jury that if you find from the evidence in this case that the hay claimed by the plaintiffs to have been burned by sparks cast out from the fire of one of defendants' engines was cut from the public domain or open lands of the Creek nation, and not upon land owned or possessed by plaintiffs or either or both of them, and that said hay was so cut upon the said public domain or open lands of the Creek nation, without the consent of the said Creek nation or its officers or agents, then the plaintiffs cannot recover in this action."

The court refused to give this instruction, to which refusal the defendants excepted. Among the instructions which the court gave, and to the giving of which the defendants excepted, were the following:

"X. The court further instructs the jury that evidence of a railway company allowing combustible materials to accumulate upon its track and right of way which is liable to take

fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company."

"XII. It is the duty of a railroad company to keep its right of way clear of combustible materials, and failure to do so is a circumstance showing negligence.

"XIII. The court further instructs the jury that if they shall find for the plaintiffs, then the measure of damages is the market value of the hay when burned, together with interest at six per cent per annum from the date of the destruction of the hay."

On June 27, 1891, the jury rendered a verdict for the plaintiffs for the sum of $2664, with interest thereon at six per cent, and on July 10, 1891, judgment was entered in favor of the plaintiffs in the said amount, with six per cent interest on the same from date until paid. The defendants took the case upon writ of error to the United States Court of Appeals for the Eighth Circuit, where, on February 15, 1892, the said judgment was affirmed, 4 U. S. App. 247. They then made a motion for a rehearing in that court, and the same having been denied, they sued out a writ of error bringing the case here.

Mr. James Hagerman, *Mr. Clifford L. Jackson* and *Mr. Joseph M. Bryson* for plaintiffs in error.

Mr. William T. Hutchings for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

This was an action brought in the United States Court in the Indian Territory to recover for damages caused to the property of the plaintiffs by the negligent management of the railroad of the Missouri, Kansas and Texas Railway Company, a corporation created by the laws of the United States, and, at the time of the accident, in the control and management of George A. Eddy and Harrison C. Cross, receivers, who had been appointed such by the United States Circuit Court for the District of Kansas and by the United States Circuit Court for

the District of Arkansas. Both of those districts and the Indian Territory constitute a portion of the eighth judicial circuit of the United States, and the railroad in question traverses the States of Arkansas, Kansas and the Indian Territory.

The first question presented is whether the trial court acquired jurisdiction to try the case against Eddy and Cross, receivers of the Missouri, Kansas and Texas Railway, by virtue of the summons served on one Williams as agent of said receivers in charge of their station at Muskogee in the Indian Territory.

The return of the marshal was that he had served the summons by leaving a copy thereof with J. W. Williams, the agent of the defendants at Muskogee, on March 17, 1890.

On April 8, 1890, the defendants entered a special appearance by attorney, and moved to quash the return of the marshal, for four reasons: "First, because on the day alleged in said return as the day of the service of said summons, to wit, March 17, 1890, J. W. Williams, styled in the marshal's return on said writ of summons as the agent of the within named defendants, was not such agent; second, because said J. W. Williams, on the 17th day of March, 1890, was not such a person upon whom process against the said George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, could legally have been served; third, because said return is untrue; fourth, because said service and said return were illegally and improperly made."

On May 6, 1890, the defendants, appearing specially, withdrew the motion theretofore filed by them to quash the return of the writ of summons, and, again appearing specially, and only for the purposes of a motion to quash writ of summons and return thereon, and, by leave of court, filed such motion, and in support thereof filed an affidavit of J. W. Williams and a certified copy of the order appointing receivers. The reasons filed in support of the second motion to quash were as follows: "First, because said writ of summons is improperly and illegally issued; second, because the writ of summons in this cause does not show the nature of the complaint filed herein; third, because no cause of action is set forth in the

writ of summons issued herein; fourth, because said return on said writ is untrue; fifth, because said J. W. Williams, who is designated in said return as the agent of George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway, a corporation, was not on the day alleged in said return as the day of the service of said summons, to wit, said 17th day of March, 1890, such agent; sixth, because said J. W. Williams was not on said 17th day of March, 1890, such a person upon whom process against George A. Eddy and H. C. Cross, as receivers of the Missouri, Kansas and Texas Railway, could legally have been served; seventh, because said return and such service were illegally and improperly made."

The affidavit of J. W. Williams was to the effect that, at no time was he ever the agent of the Missouri, Kansas and Texas Railway, a corporation within the Indian Territory, but that since the month of June, 1887, he has been station agent for George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas and Texas Railway Company, and has been such agent at said town of Muscogee in the Indian Territory.

It, therefore, appears by the affidavit of J. W. Williams that the allegation, in the reasons filed, that said Williams was *not* the agent of the said receivers, was untrue, and that Williams *was* their agent at the time and place named in the return.

So far, then, as the objection to the service and return of the summons depended on the allegation that Williams was not the agent of the receivers, it goes for naught, but the question remains whether he was such a person or agent on whom process against the receivers could be validly served.

In and by the act of Congress of May 2, 1890, c. 182, § 31, 26 Stat. 81, 94, it was provided that certain general laws of the State of Arkansas, in force at the close of the session of the general assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, should be extended and put in force in the Indian Territory until Congress should otherwise provide; and among those laws, so extended, were those relating to

questions of practice and procedure; and it is alleged, in the opinion of the Circuit Court of Appeals in the present case, that it is conceded that under the laws of the State of Arkansas, which have been made applicable to the Indian Territory, such service as was had in the present case is sufficient to confer jurisdiction, when the defendant is a railway company or a foreign corporation.

The trial court and also the Circuit Court of Appeals were of opinion that the third section of the judiciary act of March 3, 1887, c. 373, § 2, 24 Stat. 552, 554, authorizing suits to be brought against receivers of railroads, without special leave of the court by which they were appointed, was intended to place receivers upon the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad and as respects the mode of service. We concur in that view, and in the conclusion reached, that the service in the present case, on an agent of the receivers, was sufficient to bring them into court in a suit arising within the Indian Territory.

This conclusion renders it unnecessary to consider the soundness of the further view of the Circuit Court of Appeals, that the receivers waived their objections to the service of the summons by pleading to the merits and going to trial, although having excepted to the rulings of the trial court sustaining the regularity of the service. Such is certainly not the general rule. The court below thought the rule in Arkansas is that mere defects in the service of process may be waived by appearance after a motion has been overruled to set aside the service in cases where the court has jurisdiction of the subject-matter of the controversy and the defect in the service only impairs the jurisdiction over the person of the defendant, citing several decisions of the Supreme Court of Arkansas to that effect. As already said, however, we do not deem it necessary for us to consider that ground of the decision upholding the validity of the service in the present case.

Another objection argued in the court below and in this to the summons was that it did not sufficiently set forth the nature of the complaint.

Opinion of the Court.

The Circuit Court and the Circuit Court of Appeals were of opinion that the terms of the summons were in accordance with the provisions of § 4868, Mansfield's Digest of Statutes of Arkansas, under which this summons was issued, and we see no reason why we should not agree with them.

Coming to the case on its merits we are met by the contention that the plaintiffs failed to show such title to the hay destroyed as entitled them to recover its value. The title to the land from which this hay was cut is in the Creek nation, and it is claimed that the nation alone is in possession of the land and entitled to maintain an action for trespass or injury to the same. The view taken of this contention by the Circuit Court of Appeals was that the record failed to show whether the hay was cut on the common pasturage of the nation or on lands at the time occupied and held by Mrs. Hailey individually, according to the customs and usages of the nation, and that court declined to presume that either of the plaintiffs was guilty of a trespass, much less that in cutting the hay either of them violated a criminal statute.

The latter observation, as to a violation of a criminal statute, was occasioned by the putting in evidence by the defendants of a statute of the Creek nation, as contained in the compilation of their laws of March 1, 1890, which was in force at the time the hay in question was cut and burned, and was in the following words:

"No non-citizen licensed trader, who has not intermarried with a citizen of this nation, shall be allowed to enclose more than two acres of our public domain, nor be allowed to cut and put up hay from our common pasturage, and any non-citizen, not intermarried, licensed trader found cutting and putting up hay from the common pasturage shall be fined ten dollars per acre for each acre so cut and put up."

And as it was shown that B. F. Lafayette, one of the plaintiffs, was a non-citizen licensed trader, not intermarried with a citizen of the nation, it was urged that he, as a trespasser, could not recover for the hay. But the evidence for the plaintiff tended to show that the hay in question was cut and put up for Mrs. Sarah M. Hailey, a citizen of the Creek

nation, who had contracted with Lafayette to cut and put up the hay, and that Lafayette was to have an interest in the proceeds of the hay, in consideration of his services.

There was no evidence tending to show that Mrs. Hailey, in procuring the hay in question to be cut and put up, was acting illegally or was in anywise a trespasser. And the statute above quoted implies that citizens of the nation might cut hay without limit from the common pasturage, as it forbids only non-citizen traders from cutting hay from the common pasturage; and we agree with the court below that there is nothing in the present record that would authorize us to say that the hay was gathered on the public domain without license. No law of the nation was shown forbidding Mrs. Hailey from cutting hay on land which she occupied in common with other members of the Creek nation.

The trial court charged the jury as follows: "The court further instructs the jury that evidence showing that the fire originated from sparks of a passing engine is *prima facie* proof of negligence, and the burden shifts on the railway company to show that it was guilty of no negligence," and it is assigned for error in this court that the Circuit Court of Appeals erred in not correcting this error. It is sufficient to say that no exception was taken to this part of the charge in the trial court, nor was it assigned for error in the Circuit Court of Appeals.

Exception was taken in the trial court to the following part of the charge: "The court further instructs the jury that evidence of a railroad company allowing combustible materials to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company;" and that instruction was assigned for error in the Circuit Court of Appeals, whose refusal to hold the same to have been erroneous is complained of here.

We think that part of the charge was plainly correct, and no error was committed by the Circuit Court of Appeals in sustaining it. As we read the instructions given by the trial

court, the jury were not told that the action of the railway company in allowing combustible materials to accumulate upon its track and right of way, which was liable to take fire from sparks and communicate it to adjacent property, was negligence of itself, but was a fact from which, in the circumstances shown, the jury might infer negligence.

Nor do we find any error in the treatment given by the Circuit Court of Appeals to the several assignments respecting the trial court's instructions on the subject of the respective duties of the railroad company and of the plaintiffs.

The court instructed the jury that the measure of damages was the market value of the hay burned together with interest at six per cent per annum from the date of the destruction of the hay, and to this instruction exception was duly taken.

Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury. The Circuit Court of Appeals, while saying that the better, though not the invariable, practice is to leave the allowance of interest, in cases of tort, to the discretion of the jury, regarded it as quite evident from the record that, in point of fact, the jury did not allow interest, but based their verdict entirely upon the number of tons of hay destroyed at the market value per ton. Regarding the error, if such it was, as immaterial, the Circuit Court of Appeals declined to disturb the judgment of the trial court, and we acquiesce in that disposition of the question.

The judgment of the Circuit Court of Appeals is

Affirmed.

Syllabus.

GRAYSON *v.* LYNCH.

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

No. 290. Argued May 4, 5, 1896. — Decided May 25, 1896.

When the assignments of error are very numerous, it is practically found necessary to consider but a few of them.

A special finding of facts referred to in acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties.

If the findings of fact in such case be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, which bill cannot be used to bring up the whole testimony for review.

In cases brought by appeal from the Supreme Courts of the Territories, this court cannot consider the weight or the sufficiency of the evidence, but only whether the facts found by the court below support the judgment, and whether there was any error in rulings, duly excepted to, upon the admission or rejection of evidence.

The statute of the Territory of New Mexico requiring its Supreme Court to review causes in which a jury has been waived in the same manner and to the same extent as if it had been tried by a jury makes no essential change in the previous practice, and cannot affect the power of this court under the act of April 7, 1874, c. 80, 18 Stat. 27.

If a court can only review cases tried without a jury as it would review cases tried by a jury, it can only review them for errors apparent upon the record, or incorporated in a bill of exceptions.

Where a jury is waived the findings of fact by the court have the same force and effect as the verdict of a jury, and the appellate court will not set aside the findings and order a new trial for the admission of incompetent evidence, if there be other competent evidence to support the conclusion.

No variance between the allegations of a pleading and the proofs offered to sustain it is material unless it be of a character to mislead the opposite party. This rule is applied to sundry assignments of error.

In an action to recover for injuries suffered by reason of disease being communicated to herds of plaintiffs' cattle through negligence of the defendants in handling and managing their herds of cattle, allegations concerning the particular spot where the disease was communicated are not material and may be disregarded — especially if never called to the attention of the trial court.

Statement of the Case.

Witnesses not experts may testify as to symptoms observed by them in the progress of the disease.

The plaintiff being in uncontroverted possession of the land on which his cattle were grazing, it is immaterial in this action whether his possession was lawful.

The objections to the admissibility of the testimony of the chief of the veterinary division of the Department of Agriculture, and of others, as experts have no merit.

The court was not bound to find, upon the facts, that the plaintiffs were guilty of contributory negligence: what care it was necessary for the plaintiffs to take, depended upon circumstances, and was a proper question for the court.

It is to be regretted that the defendants found it necessary to multiply their assignments to such an extent.

THIS was an action originally begun in the District Court for the Third Judicial District, for the county of Dona Ana, New Mexico, by the appellees, constituting the firm of Lynch Bros., against the appellants, who are members of the firm of Grayson & Co., for loss and damage to a herd of cattle by a disease known as "Texas cattle fever," claimed to have been communicated to them by certain cattle owned by defendants, which had been shipped from infected districts in Texas, and permitted to roam over plaintiffs' range. There were two counts in the declaration, alleging the communication of the disease in two different counties, but in other respects the two counts were alike.

The declaration alleged in substance that plaintiffs, being in the peaceable possession of a certain cattle range suitable for pasturage, watering and raising cattle, had pastured and grazed on said lands a large number of meat cattle, which were entirely healthy and free from any contagious or infectious disease, all of which the defendants knew, and that defendants negligently and wilfully, against the remonstrance of the plaintiffs, turned in upon said lands and premises, among plaintiffs' cattle, a large number of their cattle infected with a contagious and fatal disease known as Texas cattle fever. That defendants knew that their cattle were so infected, and were liable to communicate the disease to plaintiffs' cattle; by reason whereof and through the carelessness and negligence of the defendants the disease was communicated to plaintiffs'

cattle, four hundred of which died and the remainder, namely, one hundred head, were rendered worthless in consequence of such disease.

Defendants interposed a general plea of not guilty, and a jury being waived by an agreement in writing, the case was tried by the District Court, which, having heard the evidence and arguments of counsel, found the issue in favor of the plaintiffs, and entered a judgment against the defendants for the sum of $5200 damages, together with their costs.

Thereupon defendants, after unsuccessfully moving for a new trial, prayed an appeal to the Supreme Court of the Territory, which made a finding of facts substantially to the effect that there were in the State of Texas certain districts which were permanently infected with germs of splenetic fever, Texas fever or Texas cattle fever, and that Oak and Bee Counties were a part of such infected districts; that a part of defendants' cattle were shipped by them from Oak and Bee Counties, and unloaded at Hatch station in the Territory of New Mexico, and were from there driven on foot, along the public road, across the range of the plaintiffs to the range of the defendants, adjoining plaintiffs' range, where they were turned loose to graze with other cattle upon defendants' range; that defendants were notified by plaintiffs, and thus had knowledge of the probable existence of such disease in said infected districts and said counties at the time they drove their said cattle from said counties across plaintiffs' range; that defendants' cattle brought with them the germs of an infectious and communicable disease known as splenetic or Texas fever, and communicated such disease to plaintiffs' cattle, either on the public road, on plaintiffs' range or on defendants' range, and plaintiffs' cattle became infected with the germs of such disease, and thereby sickened, and many of them died, and the plaintiffs sustained damage thereby to the amount of $5200; that before defendants' cattle were driven across plaintiffs' range, plaintiffs notified defendants that their cattle would be liable to communicate Texas fever to plaintiffs', and requested them to abstain from driving their cattle across plaintiffs' range; that afterwards and notwithstanding plaintiffs' request defend-

ants drove their said cattle across plaintiffs' range, in the manner heretofore stated, by reason of which said disease became communicated to plaintiffs' cattle.

Upon this finding, the court ordered a judgment to be entered affirming the judgment of the court below, and allowed an appeal to this court.

Mr. T. B. Catron for appellants.

Mr. Samuel M. Arnel and *Mr. S. B. Newcombe* for appellees.

Mr. Justice Brown delivered the opinion of the court.

In this case, which was tried by the court without a jury, there are fifty-three assignments of error taken to the introduction of much of the testimony and to the finding of the principal facts. As usual, when the assignments are so numerous, it will be necessary to consider but few of them.

1. Thirteen of these assignments are taken in different form to the action of the court in holding that, upon a trial by the court, the admission of improper, incompetent, irrelevant or immaterial evidence was no cause for reversal; that in such case, on appeal, the court will give no weight to such testimony in the determination of such appeal, but will not reverse the judgment because it was admitted, unless it appears that the court in making its decision relied upon such irrelevant evidence; that a finding of facts in a case at law, tried without a jury, is conclusive, where there is sufficient evidence to found it upon, even though the evidence be conflicting; in refusing to pass upon questions of law and fact apparent upon the face of the record, and in refusing to review the cause and pass upon the evidence as upon a hearing *de novo*.

The position of the defendants in this connection is that whatever may be the practice in the Federal courts under the Revised Statutes, or of the courts in other Territories, the laws of New Mexico require the Supreme Court, in passing upon cases tried in the court below without a jury, practically

to retry the case upon the law and facts, as though it were an appeal in equity.

In support of this, our attention is called to three statutes upon the subject of hearings in the Supreme Court, by one of which, (Compiled Laws, sec. 2060,) "trial by jury may be waived by the several parties to any issue of fact in the following cases: (1.) By suffering default by failing to appear at the trial. (2.) By written consent in person or by attorney, filed with the clerk," and by the second of which (sec. 2190) "the Supreme Court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the District Court, or give such other judgment as shall be agreeable to law." There is clearly nothing in these statutes which lays down a different rule from that ordinarily pursued in appellate courts. If the case be tried by jury and reviewed upon writ of error, the power of the appellate court is limited to affirming the judgment or reversing it for errors apparent upon the record, and remanding it for a new trial, as specified in this section. If it be an appeal in equity, the court retries the case upon the evidence in the court below, and gives such judgment as may be agreeable to law. No mention is made in this section of common law cases tried without a jury, and we perceive no necessity for our supplying omission. So far as this class of cases is concerned, they are left to be determined by the legal principles applicable to them in other jurisdictions, and as regards the Federal practice, this court has held in a series of cases that the special findings of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties; and, if the findings of fact be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, and that in such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. *Norris* v. *Jackson*, 9 Wall. 125; *Kearney* v. *Case*, 12 Wall.

275; *Miller* v. *Life Insurance Co.*, 12 Wall. 285; *Insurance Co.* v. *Folsom*, 18 Wall. 237; *Insurance Co.* v. *Sea*, 21 Wall. 158; *Jennisons* v. *Leonard*, 21 Wall. 302; *Tyng* v. *Grinnell*, 92 U. S. 467; *Insurance Co.* v. *Boon*, 95 U. S. 117; *The Abbotsford*, 98 U. S. 440.

So, too, in cases brought here by appeal from the Supreme Courts of the Territories, we have several times held that we cannot consider the weight or the sufficiency of the evidence, but only whether the facts found by the court below support the judgment, and whether there was any error in rulings, duly excepted to, upon the admission or rejection of evidence. *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U. S. 509; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120; *Smith* v. *Gale*, 144 U. S. 509; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 447.

By the act of April 7, 1874, c. 80, 18 Stat. 27, the appellate jurisdiction of this court, "over the judgments and decrees of the territorial courts in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal," with a proviso "that on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with a transcript of the proceedings and judgment or decree." It was said in the *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U. S. 509, 513, that the necessary effect of this enactment was that no judgment or decree of the highest court of a Territory could be reviewed by this court in matter of fact, but only in matter of law, or, as was said by Chief Justice Waite in *Hecht* v. *Boughton*, 105 U. S. 235, 236: "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement, which must come up with the appeal, are conclusive on us. Under these circumstances, the form of proceeding to get a

review is not of so much importance as certainty about what is to be done."

Indeed, no great stress was laid by the plaintiffs in error upon the above section of the Compiled Laws, their principal reliance being upon sec. 4, chap. 1, Laws of 1889, which reads as follows:

"SEC. 4. In all cases now pending in the Supreme Court, or which may hereafter be pending in the Supreme Court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common law side of the court, or in which a jury may have been waived, and the cause tried by the court or the judge thereof, it shall be the duty of the Supreme Court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them, and upon the errors, if any shall be found therein, in the rulings and decisions of the court below, grant a new trial, or render such other judgment as may be right and just, and in accordance with law; and said Supreme Court shall not decline to pass upon any question of law or fact which may appear in the record, either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or by the judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury."

By this statute it is made the duty of the Supreme Court of the Territory to look into and pass upon all the rulings and decisions of the court below, which may be apparent upon the record, or which may be incorporated into a bill of exceptions, and, if any error be found, grant a new trial or render such other judgment as may be right and just and in accordance with law. And the Supreme Court must not decline so to do because the case was tried by the court without a jury, but must review said cause *in the same manner and to the same extent as if it had been tried by a jury.*

It is difficult to perceive wherein this statute makes any essential change in the previous practice, or even if it did, how it could affect the power of this court under the statute

of 1874, above cited. It certainly does not, in terms, require that the court shall rehear the case upon the testimony, as if it were an appeal in equity, but limits its powers of review to such questions as are apparent upon the record, or incorporated in a bill of exceptions. And in cases where the cause is tried by the court without a jury it can only review it in the same manner, and to the extent, as if it had been tried by a jury. Now the Seventh Amendment to the Constitution expressly provides that no fact tried by a jury shall be otherwise reëxamined in any court of the United States than according to the rules of the common law, and in *Parsons* v. *Bedford*, 3 Pet. 433, 448, it was said that "the only modes known to the common law to reëxamine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court, for some error of law which intervened in the proceedings." See, also, *Lincoln* v. *Power*, 151 U. S. 436, 438; *Railroad Company* v. *Fraloff*, 100 U. S. 24, 31.

The seventeenth section of the act creating New Mexico a Territory, act of September 9, 1850, c. 49, 9 Stat. 446, 452, provides "that the Constitution, and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States." It would seem, then, to be entirely clear that, if a court can only review cases tried without a jury, as it would review cases tried by a jury, it can only review them for errors apparent upon the record, or incorporated in a bill of exceptions. If the statute had said that the Supreme Court should review the cause in the same manner and to the same extent as if it were a suit in equity, there would be room to contend that the case should be retried upon the testimony, although even in such case the power of this court would be limited by the act of 1874. But if this power be limited to a review in the same manner and to the same extent as if the case had been tried by jury, its powers are only such as could be exercised upon a writ of error.

We think there is nothing in this statute to take this case out of the general rule, so frequently announced, that in cases where a jury is waived, the findings of fact by the court have the same force and effect as the verdict of a jury, and that the appellate court will not set aside the findings and order a new trial, for the admission of incompetent evidence, if there be other competent evidence to support the conclusion. The evident purpose of Compiled Laws, sec. 2060, was to give to litigants the option of having their causes tried by a jury or by the court, and we think there is nothing in these statutes to indicate that the findings of the court were not intended to have the same force and effect as a special verdict of a jury, and that, where there is any testimony to support such findings, the power of the appellate court is limited to determine whether the facts so found are sufficient to support the judgment.

2. Ten assignments are addressed to questions of variance between the declaration and the facts, as specifically found by the court.

(*a*) The first of these questions relates to the allegation in the declaration that the disease of which the plaintiffs' cattle died, and which was communicated by the defendants' cattle, was known as "Texas cattle fever," whereas the finding of the court was that plaintiffs' cattle died of "Texas fever." In other portions of the finding, however, the disease is spoken of as commonly called splenetic fever, Southern cattle fever, Texas fever or Texas cattle fever, and it would appear that it was known by all these names, although the witnesses spoke of it generally as Texas fever. Assuming that to be its proper designation, defendants could not possibly have been misled, since the introduction of the word "cattle" was evidently intended to indicate merely that it was a fever originating in Texas, and prevailing among cattle. While cases may doubtless be found to the effect that descriptive allegations of this kind must be proved with great strictness, the tendency of modern authorities is to hold that "no variance between the allegations of a pleading and the proofs offered to sustain it, shall be deemed material, unless it be of a character to

mislead the opposite party in maintaining his action or defence on the merits." *Nash* v. *Towne*, 5 Wall. 689, 698; *Robbins* v. *Chicago City*, 4 Wall. 657; *Catlin* v. *Gunter*, 11 N. Y. 368.

(*b*) A variance is also claimed between the allegation that the disease was a "contagious" one, and the finding of the court that Texas fever is not communicated by contact, but is an "infectious" disease. There is doubtless a technical distinction between the two in the fact that a contagious disease is communicable by contact, or by bodily exhalation, while an infectious disease presupposes a cause acting by hidden influences, like the miasma of prison ships or marshes, etc., or through the pollution of water or the atmosphere, or from the various ejections from animals. The word "contagious," however, is often used in a similar sense of pestilential or poisonous, and is not strictly confined to influences emanating directly from the body. As applied to Texas fever the difference would be that if the word were strictly construed, it would follow that the disease must be communicated directly from one animal to another, while if it were infectious it would be communicated by cattle carrying the germs of the disease from the infected district, and depositing the same upon the range and waters occupied by other cattle susceptible to the infection, so that they would become infected therefrom. This was the finding of the court with respect to the disease in question. The difference is quite immaterial in this case, however, as the allegation of the second count is that plaintiffs' cattle were healthy, and were "especially free from a certain contagious, noxious, dangerous, infectious and fatal disease commonly known as the Texas cattle fever;" that with knowledge of this fact defendants turned upon plaintiffs' land and premises their own cattle, which were "infected with a noxious, dangerous and fatal disease, commonly known as the Texas cattle fever." And elsewhere defendants' cattle are spoken of as infected with "the said contagious disease," which they communicated to plaintiffs' cattle. It is evident that the words "infectious" and "contagious" were not used in any technical sense, or with any intention of averring that plaintiffs' cattle became ill from a contagious, as distinguished from

an infectious, disease; and that, reasonably construed, it was only intended to aver that defendants' cattle were afflicted with the Texas cattle fever, and that by the negligence of the defendants they communicated it to the plaintiffs' cattle. The general words "contagious," "noxious," "dangerous," "infectious" and "fatal" are evidently intended to be limited by the specific words "Texas cattle fever," and not to raise a medical question whether Texas cattle fever is, strictly speaking, contagious or infectious.

(*c*) There is also an allegation in the second count that the plaintiffs kept and grazed their cattle on certain lands of which they were possessed in the county of Sierra; that while so grazing upon said lands, defendants drove and pastured their cattle upon these lands, and *there* communicated to them the disease in question; while the finding of the court in that connection was, that it could not be determined "whether Lynch Bros.' cattle contracted the disease on the road, or on their own range, or on Grayson's range, owing to the indiscriminate mixing of them with Grayson & Co.'s cattle on both ranges." It certainly would not be claimed that the fact that plaintiffs could not prove whether the disease was communicated to their cattle while upon their own lands or elsewhere would prevent their recovery, if the disease were communicated either in one place or the other. In such case, if the description be wholly immaterial, it may be averred to have happened either in one place or the other, and the fact that it was impossible to tell exactly where the tort took place would not constitute a variance. It is said by Chitty (Pleading, 410) that "where the place of doing an act is precisely alleged, if the description be wholly immaterial, the ground of charge or of complaint not being local, the description may perhaps be rejected as surplusage; as if in trespass for taking goods, the declaration were to allege that they were taken 'in a house' it would seem to be sufficient to prove that they were taken elsewhere, unless indeed a local trespass as to the house be laid in the same count." In *United States* v. *Le Baron*, 4 Wall. 642, 648, it is said that allegations of time, quantity, value, etc., need not to be proved with precision, but that a large

departure from the same is allowable. The same rule also applies to allegations of place. See also *Pope* v. *Allis*, 115 U. S. 363, where proof of the delivery of iron at a different place from that alleged in the complaint was held to have been properly admitted, defendants having failed to prove that they were misled by the variance between the averment and the proof. *Peck* v. *Waters*, 104 Mass. 345, 351.

Besides this, however, none of the alleged variances appear to have been called to the attention of the District Court at any time during the trial, or in any of defendants' numerous objections to the introduction of testimony, or otherwise, nor are they noticed in any one of the fifty assignments of error filed in the Supreme Court of the Territory. If it were not too late to raise any of these questions at this time, the fact that they were never raised before would be a complete answer to any claim that defendants could have been misled by such variances. *Liverpool &c. Ins. Co.* v. *Gunther*, 116 U. S. 113; *Bell* v. *Knowles*, 45 California, 193; *Giffert* v. *West*, 33 Wisconsin, 617.

3. Objections were taken to the testimony of three witnesses, Speed, Halleck and Hargrave, upon the ground that, not being experts, they were permitted to say that the disease with which plaintiffs' cattle became affected was ordinarily called Texas fever. These witnesses, however, were not called as experts, nor did they purport to testify in that capacity. They testified fully as to the symptoms of the disease with which plaintiffs' cattle were afflicted, the resemblance of these symptoms to such as they had previously observed in other cattle, stating that the disease was generally called Texas fever. These were evidently matters of common observation. These witnesses did not claim to testify of their own knowledge as to the name of the disease, but merely as to the symptoms they observed, and that cattle so afflicted were ordinarily spoken of as having Texas fever.

4. The objection to the admission of a certain document, tending to show title to some of the lands in the plaintiffs, is obviously untenable, inasmuch as there was no finding of title in them, and the document appears to have been admitted

simply for the purpose of showing that plaintiffs were not mere trespassers upon the property. The fact that they were in possession was not controverted, and their rights as against the defendants did not even depend upon the lawfulness of such possession. The manner in which they took possession, or the validity of their title, was wholly immaterial.

5. Fourteen assignments of error are addressed to the admission of the depositions of Salmon and Detmers, who testified as experts to the nature and symptoms of the disease, and to the fact that there were certain districts infected with the fever. Salmon resided in Washington, was a professor of veterinary medicine, chief of the United States Bureau of Animal Industry, and at the time in the service of the United States government. He had held this position for more than ten years; had been chief of the veterinary division of the Department of Agriculture; had been in the employ of the Department of Agriculture, investigating the diseases of animals, for over fifteen years, and was called to Washington about 1883 in the discharge of his duties. He had investigated the disease known as the Texas fever. Detmers resided in Illinois, was a veterinary surgeon, and had been in the employ of the Department of Agriculture for the purpose of investigating contagious, infectious and epizootic diseases of horses, cattle and swine, and had investigated the disease known as Texas fever, and was acquainted with its symptoms and diagnosis; had made a good many *post mortem* examinations of cattle that had died with it, and was familiar with the disease. If these gentlemen, who were connected with the Department of Agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were. The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases

originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country. *Spring Co.* v. *Edgar*, 99 U. S. 645; *State* v. *Wood*, 53 N. H. 484; *Dole* v. *Johnson*, 50 N. H. 452; *Emerson* v. *Lowell Gas Light Co.*, 6 Allen, 148. While it is possible that some questions may have been asked of these witnesses which were irrelevant, immaterial and incompetent, the reception of such evidence, as already observed, does not vitiate the findings of the court, or entitle the party to a new trial.

The objections to the testimony of these witnesses are so numerous we have not deemed it necessary to examine them in detail. We are satisfied that there was nothing that went to their competency as experts.

As one of these witnesses testified that Oak and Bee Counties in Texas were known to be permanently infected with the fever, and as the court found that these counties were a part of the infected district; and also found that the cattle in question were shipped from those counties into the Territory of New Mexico, and that the defendants were notified by the plaintiffs of the existence of such disease in these counties at the time they drove their cattle across plaintiffs' range; and as there was evidence tending to show notice to the defendants of the disease in their own cattle, and of the liability to communicate the same to plaintiffs' cattle, and that they were requested to abstain from driving them over plaintiffs' range, we see no reason for attacking the findings of the court in this connection, and none that would authorize us to infer that defendants did not have the requisite notice to render them chargeable.

6. Error is also assigned upon the ground that it appears from the special finding of fact that plaintiffs were guilty of contributory negligence in allowing their cattle to range, graze and water on defendants' range with their cattle, and

made no effort to prevent them from doing so, or to aid in keeping defendants' cattle off their range. In this connection the court found that the cattle of defendants, Grayson & Co., were driven from the railway station along the public road, through the range where the plaintiffs' cattle grazed, by eighteen men. "They were driven straight on the road, and were strung out and men placed on each side of them, to keep them in the road, and one or two ahead to keep the herd on the road and drive away any other cattle that might be in the way, and keep them back from the herd. They were generally kept within twenty yards of the road on either side, and often in less space. They were kept as close together as possible. They did not get outside of that space. Only a few other cattle were seen along the road while driving, and such were driven away. No cattle not belonging to the herd got into it, or mixed up with it, while crossing plaintiffs', Lynch Bros.', range. They were driven without stopping from the time they got within sight of where Lynch Bros. claimed their cattle range, to the Percha River, inside of the defendants', Graysons', range, where about four hundred were stopped and others taken on to other parts of the range of defendants. Grayson & Co.'s range extended south of the Percha River one half or three fourths of a mile."

"Plaintiffs were informed by the man who was in charge of defendants' cattle when they came up that they came from San Antonio, Texas. Neither plaintiffs' nor defendants' range was fenced, but the cattle ranged at will, except that defendants, Grayson & Company, placed men at the Percha River, near the dividing line between the two ranges, and tried to keep the cattle back on each range and requested plaintiffs, Lynch Brothers, to do the same, and put a number of men there to help them; but Lynch Brothers declined to do so, saying they were there first; so it was impossible to keep the cattle of the two ranges from going from the one to the other. Lynch Brothers' cattle in large numbers went up onto Grayson & Company's range, and Graysons' cattle in large numbers went down onto Lynch Brothers' range. Grayson & Company at times rounded up their cattle and

drove them off of Lynchs' range, but Lynch Brothers did not drive their cattle back off Graysons', nor do anything to prevent their going there. When the cattle passed from one range to the other they mixed with the cattle on the range to which they went, and grazed on the same pasture and drank of the same water. Defendants from time to time drove their cattle back from plaintiffs' range to their own, the last time just prior to September 8, 1884. Lynch Brothers made no effort to prevent their cattle from going on Grayson & Company's range or from watering at the same holes and grazing and feeding on the same pastures and ranging with Grayson & Company's cattle which came from Texas in 1884, but allowed them to do so in large numbers.

"Lynch Brothers made no effort to keep Grayson & Company's cattle off their range and from grazing and feeding on the same grasses and ranging with their cattle and watering at the same watering holes with them, but when Lynch Brothers' cattle went onto Grayson & Company's range they would drift back to Lynch Brothers' range, carrying with them large numbers of Grayson & Company's new cattle, which had not become so thoroughly located as to keep them on their own range."

While the court, from this testimony, might have found that the plaintiffs did not use all the precautions that were possible to prevent the infection of their own cattle, it was not bound to find that they were guilty of contributory negligence in this connection. It did not seem to be the custom in that part of the country to fence the ranges, and the plaintiffs were not bound to put themselves to the sole expense of preventing their cattle from being intermingled with those of the defendants, in order to escape the possibility of infection; since in doing this they might be put to a very large expense without the possibility of recovering the same from the defendants, unless they could prove that defendants' cattle were in fact diseased, and that the precautions taken by them had in fact saved their own from infection. Upon the contrary, the defendants having been apprised of the fact that their cattle were or might be infected were bound to prevent such

infection being communicated to the plaintiffs' cattle. By the sixth section of the act of Congress of May 29, 1884, c. 60, for the establishment of a Bureau of Animal Industry, 23 Stat. 31, it is provided that no railroad company shall receive for transportation, or transport, from one State or Territory to another, any live stock affected by any contagious, infectious or communicable disease. "Nor shall any person, company or corporation deliver for such transportation to any railway company . . . any live stock, knowing them to be affected with any contagious, infectious or communicable disease; nor shall any person, company or corporation drive on foot or transport in private conveyance from one State or Territory to another . . . any live stock, knowing them to be affected with any contagious, infectious or communicable disease," etc. If defendants had knowledge of the fact that their cattle were infected with Texas fever, they were guilty of a violation of the statute in delivering them to the railway company for transportation to New Mexico, and the duty devolved upon them of using all necessary care to prevent their communicating the disease to healthy cattle. What care it was necessary for the plaintiffs to take in that connection depended upon circumstances, and was a proper question for the court.

In one view of the case it might be said that the plaintiffs, having knowledge that defendants' cattle were or might be diseased, were guilty of contributory negligence if they did not use every possible precaution to prevent the spread of the disease to their own cattle. This, however, might be an unjust rule applicable to a particular case, since it would shift upon the plaintiffs the entire duty and expense of avoiding the contagion when the defendants were the sole cause of the disease being introduced into that neighborhood. It was for the court to judge from the testimony what precautions the plaintiffs, in the reasonable and proper care of their own cattle, were bound to take, and it is evident, from the ultimate finding of the liability on the part of the defendants, that the court must have found that, under the circumstances of the case, the plaintiffs were not guilty of contributory negligence. There

are in reality two entirely separate findings of facts in the case, the first one of which is much more specific than the other, but contains evidence of facts as well as the facts themselves, but is less complete than the "statement of further findings of facts and conclusions of law," which is practically a finding of the ultimate facts of the case, and of the conclusion that, from the facts so found, the plaintiffs are entitled to judgment. There is no finding of contributory negligence on the part of the plaintiffs, nor do we think that the facts as found compel the conclusion that the plaintiffs were guilty of such negligence.

Other errors are assigned which it is unnecessary to notice in detail. Most of them are covered by those already discussed, and some of them are so obviously frivolous as to require no discussion.

It is to be regretted that defendants found it necessary to multiply their assignments to such an extent, as there is always a possibility that, in the very abundance of alleged errors, a substantial one may be lost sight of. This is a comment which courts have frequent occasion to make, and one which is too frequently disregarded by the profession.

There is no error in this case of which the defendants are entitled to complain, and the judgment of the court below is accordingly

Affirmed.

Mr. Justice Field dissented.

UNION PACIFIC RAILWAY COMPANY *v.* JAMES.

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

No. 270. Argued May 4, 1896. — Decided May 25, 1896.

The plaintiff, an employé of the railway company, sued to recover for injuries caused to him by the unblocking of a frog, in consequence of which he was thrown down, and an engine passed over him before he

Statement of the Case.

could recover himself. There was contradictory testimony as to the condition of the frog before and after the accident. On the trial below the only issue presented was — the condition of the frog at the time of the accident: but the court in substance instructed the jury that if the company had once properly blocked the frog it incurred no liability to its employés by reason of the subsequent displacement of the blocking, unless such displacement was made with its knowledge or had continued for such length of time as to impute notice to it. The same point having been taken in this court, *Held*,

(1) That there being a conflict of testimony as to the condition of the frog, that question of fact was properly submitted to the jury;

(2) That while the position of law taken by the company in this court cannot be disputed, it was not taken or considered on the trial, and is not open for consideration here;

(3) That although the case is not entirely clear, this court is not prepared to hold, on the record, that there was such error as would justify it in disturbing the judgment.

On April 12, 1890, defendant in error filed his petition in the District Court of Pottowattamie County, Iowa, to recover of plaintiff in error $20,000 for personal injuries. From the petition it appears that he was a brakeman in the employ of the railway company; that the injury occurred at the town of North Bend, in the State of Nebraska, and that it was caused by reason of his catching his foot in the narrow angle or frog made by the junction of the main and side tracks at that place, from which frog he was unable to extricate himself until an engine had passed over him. It was alleged that the blocking of such frog is the proper duty of every railway company, upon the performance of which every employé has a right to rely; and, further, "that in fact, said angle or frog was not then, and had not been, blocked or filled, but was in a very dangerous and hazardous condition by reason of not being blocked or filled, all of which the said defendant then and there knew, but of which said plaintiff had no knowledge whatever."

The defendant answered with a general denial, and by amendment that the plaintiff was entirely familiar with the condition of the tracks at North Bend, and by virtue of such knowledge waived the right to take advantage of any alleged defect in their condition. The case was removed on application of the railway company to the Circuit Court of the United

States for the Southern District of Iowa. Trial being had it resulted in a verdict and judgment for the plaintiff, which was affirmed by the Court of Appeals of the Eighth Circuit, 12 U. S. App. 482, to reverse which judgment the railway company sued out this writ of error.

Mr. John M. Thurston, (with whom was *Mr. John F. Dillon* on the brief,) for plaintiff in error.

Mr. Francis A. Brogan, (with whom was *Mr. M. J. Colbent* on the brief,) for defendant in error.

Mr. Justice Brewer delivered the opinion of the court.

The issues in this case were made up by the charge in the petition that the frog was not and had not been blocked, which charge was denied, and which denial was supplemented by the further allegation on the part of the railway company that the plaintiff knew the condition of the tracks and continued in defendant's employ with full knowledge of the same, waiving thereby the right to complain of any supposed defect.

The testimony of plaintiff was that at the time of the accident, about one o'clock in the morning, the frog was unblocked. In addition he called five witnesses, who testified that on the next morning they examined the track and that there was no blocking in the frog; or, as one of them said, "the same as no blocking at all." On the other hand, the defendant introduced the testimony of seven witnesses, who examined the track either the next morning, or soon thereafter, and each of whom found the frog properly blocked — one of them, the section foreman, testifying that before the accident he had himself put the blocking in.

Obviously the question which the parties submitted to the jury was that of the existence or non-existence of a block in the frog at the time of the accident. It is contended by the railway company that the court erred in failing to give a peremptory instruction to find a verdict for the defendant. The only witness who testified to the condition of the frog

at the time of the accident was the plaintiff, and he testified that it was an unblocked frog, and while the section foreman testified that it was blocked before, and that he found it the Sunday after in the same condition that he had originally placed it, and while there was testimony of several witnesses that immediately after the accident the frog was found to be properly blocked, yet there was also equally satisfactory testimony to the contrary. As this latter testimony obviously contradicts that of the section foreman as to the condition of the frog after the accident, it tends to impeach it as to placing blocking in the frog prior thereto. At any rate, in view of the plaintiff's personal testimony, there was certainly a question of fact to be submitted to the jury as to whether the frog was or was not blocked at the time of the accident, and their conclusion in that respect cannot be challenged, and it would have been error for the court to have given a peremptory instruction, based either way upon this disputed question of fact.

Again, it is said that the only testimony as to the condition of the frog prior to the accident was that of the section foreman, who testified that he had properly blocked it, and that if that be ignored there was no testimony tending to show that it was not at some time properly blocked and the block removed without the knowledge of or notice to the railroad company. The statement of the section foreman may be considered as challenged by the counter testimony of plaintiff and his witnesses, and in the absence of any testimony as to the condition of the frog prior to the accident the jury were not bound to assume that the frog had once been properly blocked and the blocking thereafter removed or destroyed. They were at liberty to infer that it never had been blocked, that the track as originally constructed at this place was as it was found to be at the time of the accident, and so a case was presented of the absolute omission of the railroad company to discharge its duty of providing a safe place for the movement of its trains and the work of its employés.

It is earnestly insisted by counsel for the railroad company that the court improperly narrowed the issues submitted to

the jury by charging that the single question was whether the frog was blocked or not at the time of the injury, and it is urged that the true rule is, that if the railroad company had once properly blocked the frog it incurred no liability to its employés by reason of the subsequent displacement of the blocking unless such displacement was with its knowledge or had continued for such a length of time as to impute notice to it. We do not question the proposition of law as thus stated, but the difficulty is that no such issue was tendered by the pleadings, and the parties evidently went to trial upon the single question whether the frog was or was not blocked at the time of the accident. The charge in the petition was that the frog was not and had never been blocked. The answer denied this fact, and did not assume to set forth as a defence that it had once been blocked and the block displaced without the knowledge of or notice to the railroad company. The railroad company was apparently content to rest its defence upon the single question of the existence of blocking at the time of the injury. The testimony went to that alone. In respect to this matter the trial judge in overruling the motion for a new trial observed as follows:

"The argument now advanced by defendant in support of his motion is, that even if the frog was unblocked, that fact of itself would not make defendant liable for the injury resulting therefrom; that the proof must go farther, and bring to defendant knowledge of such unblocked condition; either defendant must be proven to have had actual notice of such unblocked condition, or such condition must be proven to have existed so long as that, in the exercise of ordinary care, defendant should have discovered it. Defendant contends the proof did not fulfil these requisites as to notice, and that the jury were not instructed with reference to applying these requisites to the evidence.

"Neither in the opening statement to the jury, nor in the argument to the jury after the evidence had closed, did counsel for defendant lay his case on the line of these requisites. Throughout the trial, the position of defendant was that the frog was blocked at the time of the injury. Both in opening

statement and in closing argument defendant's counsel insisted the frog was blocked at the time of injury. To this, defendant's evidence was pointed, and in fact limited, so far as it tended to refute the charge of negligence alleged and attempted to be proven by plaintiff. Defendant did not attempt to escape or avoid, by any showing of sudden tearing out of the frog, whatever force attended plaintiff's evidence as to an unblocked condition of the frog. On neither side was any testimony introduced tending to show any sudden destruction of blocking at this frog. But on either side the contest was as to whether the frog was in fact blocked at the time of the injury. Plaintiff rested his claim, touching the cause of the injury, on the attempt to prove that such injury was caused by the frog being unblocked at time of injury. And defendant was equally content, as to evidence introduced, in attempting to prove the frog was then blocked. And defendant's counsel limited his argument to the jury upon the evidence to this same line of defence."

Yet notwithstanding the pleadings and the testimony seemed to narrow the issue to this particular matter, the court in its instruction discussed the further question of the liability of the company in case of an original proper blocking of the frog and its subsequent displacement. It said, among other things, on this matter:

"If evidence had been introduced to show that suddenly, by some disarrangement of the machinery of the train, the wooden part of the frog or blocking had been pulled out of the frog at a time so near the injury, as that the company could not have been charged with negligence in not having found it out reasonably by inspection through its workmen or otherwise, before the injury, then in an accident of that kind the company would not be liable for the injury to plaintiff, because the company would not have been negligent in not ascertaining that the block had been thus removed."

So that it cannot be said that the proposition of law upon which counsel for the railroad company so strenuously insists was wholly ignored on the trial. It was in fact presented by the court to the jury, although, it is true, coupled with the

statement that the issues made by the pleadings and the silence of the testimony in respect to the prior situation narrowed their inquiry to the single matter of the condition at the time of the accident.

It must be confessed that this case is not entirely clear, and yet, considering the entire record, we are not prepared to hold that there was error such as would justify this court in disturbing the judgment.

It is, therefore,

Affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* COOK.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 173. Argued and submitted March 24, 1896. — Decided May 25, 1896.

By the filing of the map of the line surveyed prior to December 24, 1867, for the route of the railroad now known as the Missouri, Kansas and Texas Railway, the route of the road was definitely fixed within the intent and meaning of the act of July 26, 1866, c. 270, 14 Stat. 289, granting lands to aid in its construction; and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated to definitely locate the line and limits of the right of way.

The grant of the lands and the grant of the right of way were alike grants *in præsenti*, and stood on the same footing; so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road.

The rights of the settler in this case were acquired after the line had been located, and were not affected by the subsequent act of the company in changing the location.

This was an action of ejectment brought by the Missouri, Kansas and Texas Railway Company, a corporation of the State of Kansas, and the Missouri Pacific Railway Company, a corporation of Missouri, in the District Court of Labette County, Kansas, August 17, 1887, against J. B. Cook and L. H. Printz, to recover possession of certain real estate situated in

the city of Chetopa in that county, and described in the petition. Defendants filed a general denial. The case was tried by the court on an agreed statement of facts, and judgment rendered for defendants. Plaintiffs thereupon took the case on error to the Supreme Court of Kansas, by which the judgment of the District Court was affirmed. 47 Kansas, 216. Thereupon a writ of error was taken out from this court.

The agreed statement was as follows:

"1. The Missouri, Kansas and Texas Railway Company was on the 25th day of September, 1865, duly organized as a corporation under the name of the Union Pacific Railway Company, Southern branch, and on the 3d day of February, A.D. 1870, its name was duly changed and made the Missouri, Kansas and Texas Railway Company, and it is the railway company referred to in the act of Congress, approved July 26, 1866, entitled an act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.

"2. The acceptance of the terms, conditions, and impositions of said act by the said Union Pacific Railway Company, Southern branch, was signified in writing, under the corporate seal of said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance was made and deposited with the Secretary of the Interior within one year after the passage of said act.

"3. The land in the petition described is a part of the lands known as the Osage ceded lands granted to the United States by the treaty between the United States of America and the Great and Little Osage Indians proclaimed January 21, 1867.

"4. Prior to the 24th day of December, 1867, a line was surveyed for the route of said railroad by G. M. Walker, then chief engineer of said company, which was the line from which the lands mentioned in stipulation No. 7 herein were withdrawn from market, but that line did not touch the southwest quarter of section thirty-four (34), township thirty-four (34), range twenty-one (21), which includes the land described in plaintiffs' petition in this case, and afterwards and between

May 1, 1870, and June 6, 1870, said company located its road on the line where now operated, and built same in substantial compliance with said act of Congress, but the route of said road on its present location has never been approved by the President of the United States, unless such approval is shown by the other facts herein admitted.

"5. The premises in plaintiffs' petition demanded lie wholly within one hundred feet of the centre line of the main track of the railway so built and constructed as aforesaid, the centre line of said main track being the centre of the right of way of the railroad company.

"6. On the first day of December, 1880, the said Missouri, Kansas and Texas Railway Company leased said railway to said Missouri Pacific Railway Company, which has since possessed and operated the same as such lessee.

"7. Upon the completion of said railway through said Osage ceded land the President of the United States issued to said Missouri, Kansas and Texas Railway Company patents under said act of Congress, approved July 26, 1866, for the alternate sections of land designated by odd numbers to the extent of five alternate sections per mile on each side of said railroad, which are the same patents set aside in the case of *The Missouri, Kansas and Texas Railway Company* v. *The United States*, reported in 92 U. S. 733, 760.

"8. The quarter section, including the land in question, was entered and purchased by one W. A. Hodges from the Government of the United States on October 9, 1869, and a certificate in due form was on that day, by the proper officers, issued to him therefor, and thereafter and on November 1, 1870, a patent in due form was issued therefor pursuant to the said entry, by the Government of the United States to said patentee, Hodges, which was duly signed and executed, and a perfect chain of title from said Hodges, patentee, now runs to and terminates in said defendant, J. B. Cook, and he is the owner thereof, unless the same is owned by plaintiffs by virtue of the facts herein admitted and the law governing the same. Defendant Printz is in possession of the premises in controversy as the tenant of defendant Cook.

"9. None of the land in dispute lies within fifty feet of the line of the centre of the main track of said railroad, nor does defendant claim any part of the strip of land within fifty feet on either side of the centre of said track.

"The plaintiff, at the time of constructing said road, erected a depot building on its right of way, and the land on which said building stands is adjacent to the land in dispute, which said depot has been used all the time since its erection for the purpose of receiving freight and passengers for shipment, nor does defendant claim any ground on which side tracks of said railroads are now located."

Mr. James Hagerman and *Mr. T. N. Sedgwick*, for plaintiff in error, submitted on their brief.

Mr. Nelson Case for defendant in error.

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

Plaintiff claimed the premises in question as a part of its right of way, under and by virtue of the act of Congress approved July 26, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas." 14 Stat. 289, c. 270.

By this act five alternate sections of land per mile on each side of the road were granted to the State of Kansas for the use and benefit of the railroad company, and in case it appeared that the United States had "when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of preëmption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purposes whatever," then other lands might be selected in lieu thereof: "*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner

by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States."

The fourth section read: "That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

By the sixth section it was provided: "That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern branch, its successors and assigns, for the construction of a railroad as proposed: . . . Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations."

The land in question was a part of the land ceded to the United States by the Great and Little Osage Indians by the treaty proclaimed January 21, 1867, 14 Stat. 687.

From the statement of facts it appears that prior to December 24, 1867, a line was surveyed for the route of the railroad by the chief engineer of the company, which was the line from which the granted lands were withdrawn from market, but that line did not touch the quarter section embracing the land described in the petition. The precise date of the filing of the map and profile of this survey does not appear, but this is not material.

In the instances of many of the land grants, the acts contemplated a preliminary designation of the general route by map filed in the Department of the Interior, upon which the

lands were withdrawn, but the grants only took effect on a subsequent designation of the definite location of the line of the road. *Kansas and Pacific Railroad* v. *Dunmeyer*, 113 U. S. 629; *United States* v. *Southern Pacific Railroad*, 146 U. S. 570. But this grant made no provision for any preliminary surveys and maps, and the only map provided for was that mentioned in section four, being, as stated, a map of "its line designating the route thereof." We think that by the filing of the map of the line surveyed the route was definitely fixed, within the intent and meaning of the act, and while the principal object in filing the map was to secure the withdrawal of the lands granted, it also operated, and could not otherwise than operate, to definitely locate the line and limits of the right of way. And this view is sustained by previous adjudications of this court.

By the act of Congress of July 23, 1866, c. 212, entitled "An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph," 14 Stat. 210, a grant of lands to the State of Kansas for the benefit of the St. Joseph and Denver City Railroad Company was made in substantially the same terms as those of the grant of July 26, 1866, under consideration.

In *Van Wyck* v. *Knevals*, 106 U. S. 360, this act came before this court for construction, and the rights of the parties depended on the time of the definite location of the road. Knevals, the complainant below, claimed through the company, and contended that the filing of the map with the Secretary of the Interior was the location of the road, and Mr. Justice Field, speaking for the court, said: "We are of opinion that the position of the complainant is the correct one. The route must be considered as 'definitely fixed' when it has ceased to be the subject of change at the volition of the company. Until the map is filed with the Secretary of the Interior, the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and

accepted by that officer, the route is established; it is, in the language of the act, 'definitely fixed,' and cannot be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route." *Walden* v. *Knevals*, 114 U. S. 373. And this was in accordance with the ruling of Mr. Justice Miller, on circuit, in *Knevals* v. *Hyde*, 6 Fed. Rep. 651.

The same conclusion necessarily followed in respect of the right of way. The grant of the lands and the grant of the right of way were alike grants *in præsenti* and stood on the same footing, so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. The easement and the lands were afloat until by definite location precision was given to the grant and they became permanently fixed. *Railroad Co.* v. *Baldwin*, 103 U. S. 426.

After the line had thus been definitely located, on October 9, 1869, the quarter section containing the real estate in controversy was entered at the government land office by W. A. Hodges, to whom the proper certificate was that day issued, under a resolution of Congress, approved April 10, 1869, 16 Stat. 55, in favor of *bona fide* settlers residing on any portion of the land acquired from the Osage Indians by the treaty proclaimed January 21, 1867. Between May 1 and June 6, 1870, the railroad company ran a second line, on which it built its road between those two dates, and entered into occupancy of a right of way one hundred feet in width. This line ran something like a mile east of that of definite location and through the quarter section in question, but none of the real estate in dispute lies within the right of way so occupied. On November 1, 1870, a patent was issued in due form to Hodges pursuant to his entry, and defendant Cook (under whom defendant Printz was in possession as tenant) holds by a perfect chain of title from Hodges. The issuing of the patent shows that the land department had found the existence of all the conditions, such as actual occupancy of

and residence on the premises and like matters, requisite thereto, and it took effect by relation as of the date of the certificate. It follows that as the rights of the settler were acquired after the right of way of the road had been definitely located, he was not subject to any risk which others may incur who purchase while the location remains floating and uncertain, and he could not be deprived of rights which had thus attached by the subsequent action of the company. And his grantees stand in his shoes.

We need not consider what effect, if any, deviations of the kind in question might have upon the grant, *Van Wyck* v. *Knevals*, *supra;* 16 Ops. Attys. Gen. 457; 6 L. D. 209; nor is it necessary to discuss the contention that a railroad company, by once locating its road, has exhausted its authority and cannot relocate it on a new line without additional legislative permission so to do, or the effect of the statute of Kansas, which allows railroad companies to change the location of their tracks. Whatever the rights of the company in this regard, such a change could not affect the rights of third parties, which had in the meantime lawfully intervened. *Washington & Idaho Railroad* v. *Cœur d'Alene Railway &c.*, 160 U. S. 77.

The inquiry does not arise as to how the railroad company acquired the one hundred feet which it occupies for right of way. It may have been purchased, or acquired by condemnation or by gift. We dispose of the case on the ground that on the record before us the state courts did not err in holding that plaintiff was not entitled to recover the premises in controversy, which do not embrace the right of way actually occupied by the company.

Judgment affirmed.

UNITED STATES *v.* ALLEN.

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

No. 337. Submitted May 8, 1896. — Decided May 25, 1896.

The right to a drawback on bituminous coal, imported into the United States and consumed as fuel on a steam vessel engaged in the coasting trade of the United States, which existed before the passage of the tariff act of October, 1, 1890, c. 1244, 26 Stat. 567, was taken away by the passage of that bill.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for plaintiffs in error.

Mr. L. E. Payson and *Mr. J. F. Evans* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The defendant in error brought his action against the United States in the District Court of the United States for the Northern District of California to recover the amounts of certain alleged drawbacks of duty on importations of bituminous coal, which, in February, 1891, were supplied as fuel to the steamer Humboldt, a vessel of the United States regularly engaged in the coasting trade between sundry ports in northern California. Tender of compliance with the regulations promulgated by the Secretary of the Treasury, under the authority of the tariff act of March 3, 1883, to obtain the allowance and payment of such drawbacks was averred, and it was alleged that the surveyor of the port and other government officials declined to recognize the existence of a right thereto. A demurrer to the complaint was overruled, 52 Fed. Rep. 575, and, subsequently, an answer was filed taking issue thereon. Upon hearing on the merits a judgment was rendered in favor of the

plaintiff, which judgment was subsequently affirmed by the Circuit Court of Appeals for the Ninth Circuit. 15 U. S. App. 252. Thereupon a writ of certiorari was allowed and the cause was brought here for review.

The right to the alleged drawbacks is grounded upon the second proviso of section 25 of the tariff act of 1890, which it was alleged continued in force the following provision of the tariff act of March 3, 1883, c. 121, 22 Stat. 488, 511:

"Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. A drawback of seventy-five cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the Secretary of the Treasury shall prescribe."

By section 10 of the shipping act of June 19, 1886, c. 421, 24 Stat. 81, the benefits of this provision were limited to vessels of the United States.

Section 25 of the tariff act of October 1, 1890, c. 1244, 26 Stat. 617, above referred to, reads as follows:

"25. That where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such mate-

rials used and the amount of duties paid thereon shall be ascertained, the fact of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter or agent shall in writing order such drawback paid under such regulations as the Secretary of the Treasury shall prescribe."

The tariff act of 1890 combined two paragraphs of the act of 1883 relating to coal, into one, (No. 432,) and omitted the drawback provision above referred to. Said paragraph 432 reads as follows (26 Stat. 600):

"432. Coal, bituminous and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel; coal slack or culm, such as will pass through a half inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel."

It is necessarily conceded that the omission of the drawback provision of the act of 1883 from this special paragraph obviously meant either that the drawback allowance was intended to be taken away, or that the intent was to provide for it elsewhere. If such provision is not found elsewhere in the act of 1890 it is clear, from the character of that act, that there was a repeal by implication of the drawback allowed by the earlier act, for, as was said by this court, speaking through Mr. Justice Harlan, in *Tracy* v. *Tuffly*, 134 U. S. 206, 223: "While it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held to be modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern."

Is the contention of the defendant in error well founded that the drawback provision actually omitted in the act of 1890 was yet saved by the second proviso to section 25 of that act?

The trial court and the Circuit Court of Appeals held that this section provided in distinct terms for a drawback, first,

on all articles wholly manufactured from imported materials and thereafter exported; and, second, for a drawback on all articles made partly from imported materials and thereafter exported, thus covering every possible manufacture made in this country of foreign materials and subsequently exported, and that the proviso following, to wit: "That the drawback on any article allowed under existing law shall be continued at the rate herein provided," recognized the continued right to the drawback here claimed, as it was then allowed by an existing law.

But this construction is faulty. It necessarily has, as its basis, the assumption that the act of 1883 was considered by Congress in passing the act of 1890, as an "existing law" within the purview of these words as used in the act of 1890. But the act of 1883 was clearly superseded in all its parts, and intended so to be, by the latter act. A comparison of the two acts will make manifest the fact that Congress sought and designed to embody in the act of 1890 all the provisions of the act of 1883 which it was not intended should be eliminated and repealed. Thus, sections 2503 *et seq.* of the act of 1883, 22 Stat. 522, embody lengthy provisions regarding special exemptions of merchandise, works of art, imported materials intended for particular purposes, etc. All such provisions will be found reënacted in the act of 1890. 26 Stat. pp. 609, 611, 613 to 616, 648, etc.

The act of 1883, in so far as it related to duties on imports, contained only two provisions for drawback, one on salt, the other on bituminous coal. The drawback on salt was reenacted in the act of 1890 in the same situation as found in the act of 1883, but the provision as to bituminous coal, as already stated, was omitted and no substitute appears. Under the circumstances, the act of 1883 cannot be regarded as "existing law," as that expression is employed in the proviso in question. Congress having altered the form of the paragraph of the act of 1883 relating to bituminous coal, not only by omitting the provision as to drawback, but by combining two paragraphs of the act of 1883 into one in the act of 1890, its attention was necessarily directed to the necessity

of providing elsewhere for the drawback if it was designed to retain it. It made special provision (par. 328) for a 99 per cent drawback on imported tin plate used in the manufacture of cans, etc., for export, and certainly the necessity for an equally unambiguous provision with reference to bituminous coal would have suggested itself if it was contemplated that such drawback should continue. It is altogether improbable that Congress couched an intention to continue a drawback on coal in the ambiguous language employed in the proviso which is relied on.

An added circumstance weighing against the construction that the proviso was intended to continue the drawback in question is the fact that the rule laid down in the proviso for determining the amount of drawback evidently had relation to articles manufactured from "materials," and not to a raw material like coal, in the production of which no materials are used which enter into and form a part of the product. The proviso requires that the drawback shall be continued "at the rate herein provided," and that rate is a sum "equal in amount to the duties paid on the 'material used,' less one per centum of such duties."

We are not called on now to determine whether the proviso in question should be limited solely to exported articles of domestic manufacture composed in whole or in part of foreign materials, or whether the provision has reference to the general and specific sections authorizing drawbacks contained in Chapter 9, Title XXXIV, of the Revised Statutes, or to special acts authorizing drawbacks, if any such there be. The argument that the language of the proviso which is here relied on must be held to mean nothing unless it be considered as continuing the drawback on coal, is without merit, for *non constat* that the language was employed, from abundance of precaution, to deny, in advance, the theory that the proviso repealed every drawback arising from general legislation outside of the act of 1883. It is, moreover, apparent, taking the most favorable view of the claim asserted, that it is extremely doubtful whether the construction of this second proviso of the tariff act of 1890, upon which the finding in

favor of the defendant in error was predicated, was justified. Such being the case, it results that the doubt engendered must be resolved against him. The claim advanced is that an exceptional privilege or exemption from the general operation of a law exists in favor of the defendant in error. Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption. *Schurtz* v. *Cook*, 148 U. S. 397; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301, 306.

It results from these considerations that the judgments of both the District Court of the United States for the Northern District of California and the Circuit Court of Appeals for the Ninth Circuit were erroneous. Both the judgments must, therefore, be

Reversed, and the cause be remanded to the District Court of the United States for the Northern District of California, with directions to enter judgment in favor of the United States, with costs.

Mr. Justice Peckham dissents.

WARD *v.* RACE HORSE.

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

No. 841. Argued March 11, 12, 1896. — Decided May 25, 1896.

The provision in the treaty of February 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon," etc., does not give them the right to exercise this privilege within the limits of that State in violation of its laws.

This appeal was taken from an order of the court below, rendered in a *habeas corpus* proceeding, discharging the ap-

pellee from custody. 70 Fed. Rep. 598. The petition for the writ based the right to the relief, which it prayed for and which the court below granted, on the ground that the detention complained of was in violation of the Constitution and laws of the United States, and in disregard of a right arising from and guaranteed by a treaty made by the United States with the Bannock Indians. Because of these grounds the jurisdiction below existed, and the right to review here obtains. Rev. Stat. § 753; act of March 3, 1891, 26 Stat. 826. The record shows the following material facts: The appellee, the plaintiff below, was a member of the Bannock tribe of Indians, retaining his tribal relation and residing with it in the Fort Hall Indian Reservation. This reservation was created by the United States in compliance with a treaty entered into between the United States and the Eastern band of Shoshonees and the Bannock tribe of Indians, which took effect February 24, 1869. 15 Stat. 673. Article 2 of this treaty, besides setting apart a reservation for the use of the Shoshonees, provided:

"It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the 'Port Neuf' and 'Kansas Prairie' countries."

In pursuance of the foregoing stipulation the Fort Hall Indian Reservation was set apart for the use of the Bannock tribe.

Article 4 of the treaty provided as follows:

"The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

In July, 1868, an act had been passed erecting a temporary

government for the Territory of Wyoming, 15 Stat. 178, c. 235, and in this act it was provided as follows:

"That nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

Wyoming was admitted into the Union on July 10, 1890. 26 Stat. 222, c. 664. Section 1 of that act provides as follows:

"That the State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Wyoming have formed for themselves be, and the same is hereby, accepted, ratified and confirmed."

The act contains no exception or reservation in favor of or for the benefit of Indians.

The legislature of Wyoming on July 20, 1895, (Laws of Wyoming, 1895, c. 98, p. 225,) passed an act regulating the killing of game within the State. In October, 1895, the district attorney of Uinta County, State of Wyoming, filed an information against the appellee (Race Horse) for having killed in that county seven elk in violation of the law of the State. He was taken into custody by the sheriff, and it was to obtain a release from imprisonment authorized by a commitment issued under these proceedings that the writ of *habeas corpus* was sued out. The following facts are unquestioned: 1st. That the elk were killed in Uinta County, Wyoming, at a point about one hundred miles from the Fort Hall Indian Reservation, which is situated in the State of Idaho; 2d, that the killing was in violation of the laws of the State of Wyoming; 3d, that the place where the killing took place was unoccupied public land of the United States, in the sense that the United States was the owner of the fee of the land; 4th, that the place where the elk were killed was in a mountainous region some distance removed from settlements, but was used by the settlers as a range for cattle, and was within election and school districts of the State of Wyoming.

Opinion of the Court.

Mr. Benjamin F. Fowler and *Mr. Willis Van Devanter* for appellant.

Mr. Attorney General for appellee.

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

It is wholly immaterial, for the purpose of the legal issue here presented, to consider whether the place where the elk were killed is in the vicinage of white settlements. It is also equally irrelevant to ascertain how far the land was used for a cattle range, since the sole question which the case presents is whether the treaty made by the United States with the Bannock Indians gave them the right to exercise the hunting privilege, therein referred to, within the limits of the State of Wyoming in violation of its laws. If it gave such right, the mere fact that the State had created school districts or election districts, and had provided for pasturage on the lands, could no more efficaciously operate to destroy the right of the Indian to hunt on the lands than could the passage of the game law. If, on the other hand, the terms of the treaty did not refer to lands within a State, which were subject to the legislative power of the State, then it is equally clear that, although the lands were not in school and election districts and were not near settlements, the right conferred on the Indians by the treaty would be of no avail to justify a violation of the state law.

The power of a State to control and regulate the taking of game cannot be questioned. *Geer* v. *Connecticut*, 161 U. S. 519. The text of article 4 of the treaty, relied on as giving the right to kill game within the State of Wyoming, in violation of its laws, is as follows:

"But they shall have the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

It may at once be conceded that the words "unoccupied

lands of the United States" if they stood alone, and were detached from the other provisions of the treaty on the same subject, would convey the meaning of lands owned by the United States, and the title to or occupancy of which had not been disposed of. But in interpreting these words in the treaty, they cannot be considered alone, but must be construed with reference to the context in which they are found. Adopting this elementary method, it becomes at once clear that the unoccupied lands contemplated were not all such lands of the United States wherever situated, but were only lands of that character embraced within what the treaty denominates as hunting districts. This view follows as a necessary result from the provision which says that the right to hunt on the unoccupied lands shall only be availed of as long as peace subsists on the borders of the hunting districts. Unless the districts thus referred to be taken as controlling the words "unoccupied lands," then the reference to the hunting districts would become wholly meaningless, and the cardinal rule of interpretation would be violated, which ordains that such construction be adopted as gives effect to all the language of the statute. Nor can this consequence be avoided by saying that the words "hunting districts" simply signified places where game was to be found, for this would read out of the treaty the provision as "to peace on the borders" of such districts, which clearly pointed to the fact that the territory referred to was one beyond the borders of the white settlements. The unoccupied lands referred to, being therefore contained within the hunting districts, by the ascertainment of the latter the former will be necessarily determined, as the less is contained in the greater. The elucidation of this issue will be made plain by an appreciation of the situation existing at the time of the adoption of the treaty, of the necessities which brought it into being and of the purposes intended to be by it accomplished.

When in 1868 the treaty was framed the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation. Whilst this was true, the march of advancing civilization foreshadowed the fact that the wilder-

ness, which lay on all sides of the point selected for the reservation, was destined to be occupied and settled by the white man, hence interfering with the hitherto untrammelled right of occupancy of the Indian. For this reason, to protect his rights and to preserve for him a home where his tribal relations might be enjoyed under the shelter of the authority of the United States, the reservation was created. Whilst confining him to the reservation, and in order to give him the privilege of hunting in the designated districts, so long as the necessities of civilization did not require otherwise, the provision in question was doubtless adopted, care being, however, taken to make the whole enjoyment in this regard dependent absolutely upon the will of Congress. To prevent this privilege from becoming dangerous to the peace of the new settlements as they advanced, the provision allowing the Indian to avail himself of it only whilst peace reigned on the borders was inserted. To suppose that the words of the treaty intended to give to the Indian the right to enter into already established States and seek out every portion of unoccupied government land and there exercise the right of hunting, in violation of the municipal law, would be to presume that the treaty was so drawn as to frustrate the very object it had in view. It would also render necessary the assumption that Congress, whilst preparing the way, by the treaty, for new settlements and new States, yet created a provision not only detrimental to their future well-being, but also irreconcilably in conflict with the powers of the States already existing. It is undoubted that the place in the State of Wyoming, where the game in question was killed, was at the time of the treaty, in 1868, embraced within the hunting districts therein referred to. But this fact does not justify the implication that the treaty authorized the continued enjoyment of the right of killing game therein, when the territory ceased to be a part of the hunting districts and came within the authority and jurisdiction of a State. The right to hunt given by the treaty clearly contemplated the disappearance of the conditions therein specified. Indeed, it made the right depend on whether the land in the hunting districts was unoccupied

public land of the United States. This, as we have said, left the whole question subject entirely to the will of the United States, since it provided, in effect, that the right to hunt should cease the moment the United States parted with the title to its land in the hunting districts. No restraint was imposed by the treaty on the power of the United States to sell, although such sale, under the settled policy of the government, was a result naturally to come from the advance of the white settlements in the hunting districts to which the treaty referred. And this view of the temporary and precarious nature of the right reserved, in the hunting districts, is manifest by the act of Congress creating the Yellowstone Park Reservation, for it was subsequently carved out of what constituted the hunting districts at the time of the adoption of the treaty, and is a clear indication of the sense of Congress on the subject. Act of March 1, 1872, c. 24, 17 Stat. 32; act of May 7, 1894, c. 72, 28 Stat. 73. The construction which would affix to the language of the treaty any other meaning than that which we have above indicated would necessarily imply that Congress had violated the faith of the government and defrauded the Indians by proceeding immediately to forbid hunting in a large portion of the Territory, where it is now asserted there was a contract right to kill game, created by the treaty in favor of the Indians.

The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign State, a necessary incident of whose authority was the complete power to regulate the killing of game within its borders. This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the State of Wyoming in defiance

of its laws. That "a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty," is elementary. *Fong Yue Ting* v. *United States*, 149 U. S. 698; *The Cherokee Tobacco*, 11 Wall. 616. In the last case it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty. Of course the settled rule undoubtedly is that repeals by implication are not favored, and will not be held to exist if there be any other reasonable construction. *Cope* v. *Cope*, 137 U. S. 682, and authorities there cited. But in ascertaining whether both statutes can be maintained it is not to be considered that any possible theory, by which both can be enforced, must be adopted, but only that repeal by implication must be held not to have taken place if there be a reasonable construction, by which both laws can coexist consistently with the intention of Congress. *United States* v. *Sixty-seven Packages Dry Goods*, 17 How. 85; *District of Columbia* v. *Hutton*, 143 U. S. 18; *Frost* v. *Wenie*, 157 U. S. 46. The act which admitted Wyoming into the Union, as we have said, expressly declared that that State should have all the powers of the other States of the Union, and made no reservation whatever in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule.

In *Pollard* v. *Hagan*, 3 How. 212, (1845,) the controversy was as to the validity of a patent from the United States to lands situate in Alabama, which at the date of the formation of that State were part of the shore of the Mobile River between high and low water mark. It was held that the shores of navigable waters and the soil under them were not granted by the Constitution to the United States, and hence the jurisdiction exercised thereover by the Federal government, before the formation of the new State, was held tem-

porarily and in trust for the new State to be thereafter created, and that such State when created, by virtue of its being, possessed the same rights and jurisdiction as had the original States. And, replying to an argument based upon the assumption that the United States had acquired the whole of Alabama from Spain, the court observed that the United States would then have held it subject to the Constitution and laws of its own government. The court declared, p. 229, that to refuse to concede to Alabama sovereignty and jurisdiction over all the territory within her limits would be to "deny that Alabama has been admitted into the Union on an equal footing with the original States." The same principles were applied in *Louisiana* v. *First Municipality*, 3 How. 589.

In *Withers* v. *Buckley*, 20 How. 84, (1857,) it was held that a statute of Mississippi creating commissioners for a river within the State, and prescribing their powers and duties, was within the legitimate and essential powers of the State. In answer to the contention that the statute conflicted with the act of Congress which authorized the people of Mississippi Territory to form a constitution, in that it was inconsistent with the provision in the act that "the navigable rivers and waters leading into the same shall be common highways, and forever free, as well to the inhabitants of the State of Mississippi as to other citizens of the United States," the court said (p. 92):

"In considering this act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning, or operation, or binding authority, farther than to affirm that it could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government, nor to inhibit or diminish its perfect equality with the other members of the confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the confederacy, from the language of the constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of *Pollard's Lessee* v. *Hagan*, 3 How. 223."

A like ruling was made in *Escanaba Company* v. *Chicago*, 107 U. S. 678, (1882,) where provisions of the ordinance of 1787 were claimed to operate to deprive the State of Illinois of the power to authorize the construction of bridges over navigable rivers within the State. The court, through Mr. Justice Field, said (p. 683):

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

And it was further added (p. 688):

"Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. . . . Equality of the constitutional right and power is the condition of all the States of the Union, old and new."

In *Cardwell* v. *American Bridge Company*, 113 U. S. 205, (1884,) *Escanaba Company* v. *Chicago*, *supra*, was followed, and it was held that a clause in the act admitting California into the Union, which provided that the navigable waters within the State shall be free to citizens of the United States, in no way impaired the power which the State could exercise over the subject if the clause in question had no existence. Mr. Justice Field concluded the opinion of the court as follows (p. 212):

"The act admitting California declares that she is 'admitted into the Union on an equal footing with the original States *in all respects whatever*.' She was not, therefore, shorn by the clause as to navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits."

A like conclusion was applied in the case of *Willamette Iron*

Bridge Co. v. *Hatch*, 125 U. S. 1, where the act admitting the State of Oregon into the Union was construed.

Determining, by the light of these principles, the question whether the provision of the treaty giving the right to hunt on unoccupied lands of the United States in the hunting districts is repealed, in so far as the lands in such districts are now embraced within the limits of the State of Wyoming, it becomes plain that the repeal results from the conflict between the treaty and the act admitting that State into the Union. The two facts, the privilege conferred and the act of admission, are irreconcilable in the sense that the two under no reasonable hypothesis can be construed as coexisting.

The power of all the States to regulate the killing of game within their borders will not be gainsaid, yet, if the treaty applies to the unoccupied land of the United States in the State of Wyoming, that State would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the State. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union, a power resulting from the fact of statehood and incident to its plenary existence. Nor need we stop to consider the argument advanced at bar, that as the United States, under the authority delegated to it by the Constitution in relation to Indian tribes, has a right to deal with that subject, therefore it has the power to exempt from the operation of state game laws each particular piece of land, owned by it in private ownership within a State, for nothing in this case shows that this power has been exerted by Congress. The enabling act declares that the State of Wyoming is admitted on equal terms with the other States, and this declaration, which is simply an expression of the general rule, which presupposes that States, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the States already admitted, repels any presumption that in this particular case Congress intended to admit

the State of Wyoming with diminished governmental authority. The silence of the act admitting Wyoming into the Union, as to the reservation of rights in favor of the Indians, is given increased significance by the fact that Congress in creating the Territory expressly reserved such rights. Nor would this case be affected by conceding that Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by Congress, during the existence of a Territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since, by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration. Indeed, the whole argument of the defendant in error rests on the assumption that there was a perpetual right conveyed by the treaty, when in fact the privilege given was temporary and precarious. But the argument goes further than this, since it insists that, although by the treaty the hunting privilege was to cease whenever the United States parted merely with the title to any of its lands, yet that privilege was to continue although the United States parted with its entire authority over the capture and killing of game. Nor is there force in the suggestion that the cases of the *Kansas Indians*, 5 Wall. 737, and the *New York Indians*, 5 Wall. 761, are in conflict with these

views. The first case (that of the Kansas Indians) involved the right of the State to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the State to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the State to tax land embraced in an Indian reservation, which existed prior to the adoption of the Constitution of the United States. Thus these two cases involved the authority of the State to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the State to extend its powers to lands not within the scope of its jurisdiction, whilst this case involves a question of whether where no reservation exists a State can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from. But that salutary rule should not be made an instrument for violating the public faith by distorting the words of a treaty, in order to imply that it conveyed rights wholly inconsistent with its language and in conflict with an act of Congress, and also destructive of the rights of one of the States. To refer to the limitation contained in the territorial act and disregard the terms of the enabling act would be to destroy and obliterate the express will of Congress.

For these reasons the judgment below was erroneous, and must, therefore, be

Reversed, and the case must be remanded to the court below with directions to discharge the writ and remand the prisoner to the custody of the sheriff, and it is so ordered.

Mr. Justice Brown dissenting.

As the opinion of the court seems to me to imply and to sanction a distinct repudiation by Congress of a treaty with the Bannock Indians, I am unable to give my assent to it. The facts are in a nutshell.

On July 3, 1868, the United States entered into a treaty, 15 Stat. 673, with the Shoshonees and Bannock tribes of Indians, by which the latter agreed to accept and settle upon certain reservations, and the former agreed that the Indians should have "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts."

A few days thereafter, and on July 25, 1868, Congress passed an act "to provide a temporary government for the Territory of Wyoming," 15 Stat. 178, within which the Bannock reservation was situated, with a proviso "that nothing in this act shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians."

So far as it appears, the above treaty still remains in force, but the position of the majority of the court is that the admission of the Territory of Wyoming as a State abrogated it *pro tanto*, and put the power of the Indians to hunt on the unoccupied lands of the United States completely at the mercy of the state government.

Conceding at once that it is within the power of Congress to abrogate a treaty, or rather that the exercise of such power raises an issue, which the other party to the treaty is alone competent to deal with, it will be also conceded that the abrogation of a public treaty ought not to be inferred from doubtful language, but that the intention of Congress to repudiate its obligation ought clearly to appear. As we said in *Hauenstein* v. *Lynham*, 100 U. S. 483, "where a treaty admits of two constructions, one restricted as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred. Such is the settled rule of this court." See also *Chew Heong* v. *United States*, 112 U. S. 536, 549.

It appears from the first article that this treaty was entered into at the close of a war between the two contracting parties; that the Indians agreed to accept certain reservations of land, and the United States, on its part, "solemnly agreed" that no

persons, with certain designated exceptions, "shall ever be permitted to pass over, settle upon or reside in the territory described in this article for the use of said Indians, and . . . they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists between the whites and the Indians on the borders of the hunting districts." The fact that the Territory of Wyoming would ultimately be admitted as a State must have been anticipated by Congress, yet the right to hunt was assured to the Indians, not until this should take place, but so long as game may be found upon the lands, and so long as peace should subsist on the borders of the hunting districts. Not only this, but the Territory was created with the distinct reservation that the rights of the Indians should not be construed to be impaired so long as they remained unextinguished by further treaty. The right to hunt was not one secured to them for sporting purposes, but as a means of subsistence. It is a fact so well known that we may take judicial notice of it, that the Indians have never been an industrial people; that even their agriculture was of the rudest description, and that their chief reliance for food has been upon the chase. The right to hunt on the unoccupied lands of the United States was a matter of supreme importance to them, and as a result of being deprived of it they can hardly escape becoming a burden upon the public. It is now proposed to take it away from them, not because they have violated the treaty, but because the State of Wyoming desires to preserve its game. Not doubting for a moment that the preservation of game is a matter of great importance, I regard the preservation of the public faith, even to the helpless Indian, as a matter of much greater importance. If the position of the court be sound, this treaty might have been abrogated the next day by the admission of Wyoming as a State, and what might have been done in this case might be done in the case of every Indian tribe within our boundaries. There is no limit to the right of the State, which may in its discretion prohibit the killing of all game, and thus practically deprive the Indians of their principal means of subsistence.

Dissenting Opinion: Brown, J.

I am not impressed with the theory that the act admitting Wyoming into the Union upon an equal footing with the original States authorized them to impair or abrogate rights previously granted by the sovereign power by treaty, or to discharge itself of burdens which the United States had assumed before her admission into the Union. In the cases of the *Kansas Indians*, 5 Wall. 737, we held that a State, when admitted into the Union, was bound to respect an exemption from taxation which had been previously granted to tribes of Indians within its borders, because, as the court said, the State of Kansas "accepted this status when she accepted the act admitting her into the Union. Conferring rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization. As long as the United States recognizes their national character they are under the protection of the treaties and laws of Congress, and their property is withdrawn from the operation of state laws."

It is true that the act admitting the State of Kansas into the Union contained a proviso similar to that in the act erecting a government for the Territory of Wyoming, viz.: "That nothing contained in this said constitution respecting the boundaries of said State shall be construed to impair the rights of person or property now pertaining to the Indians of said Territory, so long as such rights shall remain unextinguished by treaty with such Indians." In this particular the cases differ from each other only in the fact that the proviso in the one case is inserted in the act creating the Territory, and in the other in the act admitting the Territory as a State; and unless we are to say that the act admitting the Territory of Wyoming as a State absolved it from its liabilities as a Territory, it would seem that the treaty applied as much in the one case as in the other. But however this may be, the proviso in the territorial act exhibited a clear intention on the part of Congress to continue in force the stipulation of the treaty, and there is nothing in the act admitting the Territory as a State which manifests an intention to repu-

diate them. I think, therefore, the rights of these Indians could only be extinguished by purchase, or by a new arrangement with the United States.

I understand the words "unoccupied lands of the United States" to refer not only to lands which have not been patented, but also to those which have not been settled upon, fenced or otherwise appropriated to private ownership, but I am quite unable to see how the admission of a Territory into the Union changes their character from that of unoccupied to that of occupied lands.

Mr. Justice Brewer, not having heard the argument, takes no part in this decision.

INDIANA *v.* KENTUCKY.

ORIGINAL.

Argued April 27, 1896. — Decided May 18, 1896.

The report of the commissioners appointed October 21, 1895, 159 U. S. 275, to run the disputed boundary line between Indiana and Kentucky, is confirmed.

The commissioners appointed on the 21st day of October, 1895, 159 U. S. 275, to run the disputed boundary line between the States of Indiana and of Kentucky, reported as stated below. The State of Kentucky filed exceptions to the report. The State of Indiana moved to confirm it.

Mr. William A. Ketcham, Attorney General of the State of Indiana, for the motion.

Mr. Richard H. Cunningham opposing.

Mr. Chief Justice Fuller announced the decree of the court.

This cause came on to be heard on the report of Gustavus V. Menzies, Gaston M. Alves and Amos Stickney, commis-

sioners appointed herein at this term, on October 21, 1895, to ascertain and run the boundary line between the States of Kentucky and Indiana, as designated in the opinion of this court heretofore filed and judgment and decree heretofore entered herein, May 19, 1890, filed April 27, 1896; the exceptions of the State of Kentucky thereto and the motion of the State of Indiana for the confirmation thereof; and which report is as follows:

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1895.

Indiana
vs.
Kentucky.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States.

The undersigned commissioners appointed by this honorable court in the above entitled cause, to ascertain and run the boundary line between the States of Indiana and Kentucky, north of the tract known as Green River Island, have the honor to present the following report:

The first meeting of the commission was held at Evansville, Indiana, on December 7, 1895, all the commissioners being present, and each commissioner having been sworn according to the order of the court, the commission organized by electing Lieut. Col. Amos Stickney, U. S. army, as chairman.

At this meeting there were present Mr. R. H. Cunningham, of Henderson, Ky., representing the State of Kentucky; Mr. Merril Moores, deputy attorney general of the State of Indiana, representing that State, and Mr. J. E. Williamson, of Evansville, Indiana, representing a number of land owners along the line where the boundary is to be ascertained and run.

The above mentioned gentlemen being invited thereto, expressed their views in a general way as to a proper method of determining the boundary line to be run between the States of Indiana and Kentucky to accord with the decision of this court. Neither in the order of your honorable court

appointing the commissioners, nor subsequently, were your commissioners instructed as to the methods they should pursue in ascertaining the boundary line to be run. They therefore assumed that it was the intention of the court to leave them untrammelled with instructions other than such as were to be inferred, first, from the decision of the court, and, second, from the testimony upon which that decision was made.

Your commissioners then proceeded to and made a personal examination of the grounds where the boundary line was to be ascertained and run. After this examination, and a consideration of the subject in the light of the court's decision, and the testimony, it was concluded that a determination of a proper location of the boundary line would require the marking out upon the ground as nearly as possible of the meandered river bank lines of the survey of Jacob Fowler, made in 1805 and 1806, the oldest survey of record, copies of the map and notes of which were incorporated and unchallenged in the testimony in the case.

A competent surveyor was employed in the person of Mr. C. C. Genung, surveyor of Vanderburgh County, Indiana, who was familiar with the county records and the landmarks in the vicinity of the proposed line. Mr. Genung was instructed to proceed as soon as possible under the direction of the chairman, to reëstablish upon the ground as nearly as practicable the aforesaid meander line of the survey of 1805 and 1806, using every precaution to determine said line as accurately as might be, from the notes of the survey, and such marks referred to in the notes, and other authenticated marks as might be found.

He was also directed to make cross sections at intervals, by levelling across the depression now existing, where the island chute once was, and determine the present crests of the banks.

Mr. Genung performed the duty allotted to him, and made a map exhibiting the result of his surveys.

Your commissioners, after verifying his work on the ground, then held another meeting at Evansville, Indiana, January

22nd, 1896, and made a careful study of the information obtained by the survey. An examination of the map presented by Mr. Genung, giving the results of his survey, with a report upon the same, satisfied your commissioners on three points. The close accord of the reëstablished meander line with the existing crest of the high bank was strong proof that the line as reëstablished was in fact a very close approximation in location to the location of the line as originally run; it also indicated that the original meander line was practically along the crest of the high water bank, and not along the low water line; and further, that the crest of the bank along the Indiana side of the depression as it exists to-day must be nearly as it was at the time of the original survey.

It will be noticed from the topography on the map that the crest of the high water bank on the Indiana side of the depression is quite regular, while the crest of the bank on the island side, especially above the railroad crossing, is irregular, indicating probably, extensive deposits since the time when there was a free flowing stream around the island. In the testimony there are mentions of drift piles in the upper part of the chute causing deposits.

Below the railroad crossing the crests of the two banks are nearly parallel, and as scaled on the map where most nearly parallel, are about eight chains apart. It would seem probable that the chute before it was choked up by drifts and deposits had a width more or less uniform of about eight chains between crests of the high bank. During low water stages the part of the chute covered by water was probably nearly in the centre of the chute. Just how far the low water surface extended towards the Indiana side, it is impossible at this time to determine accurately, but it would seem that a close approximation to the water line would be a line equidistant from the Indiana bank crest line and the central line of the chute. Upon this assumption, the water of a low stage would have covered the middle half of the space between the crest of the high banks, and a fair allowance should be made for the space covered by the bank slopes extending from the crests of the high banks to the low water line.

It was decided then, to lay out as a trial line, a line parallel to the meander line of the survey of 1805 and 1806, as re-established, and at a distance of two chains from it, measured toward the island. This was done, and notification was sent to Hon. W. A. Ketcham, attorney general of the State of Indiana; Mr. R. H. Cunningham, representing the State of Kentucky, and Mr. J. E. Williamson representing land owners. The above mentioned gentlemen were invited to present in writing, if they so desired, any statements to prove that such line was not approximately the low water line in the year 1792. They were also invited to make any oral argument relating thereto to your commissioners at their next meeting.

On February 3rd, 1896, your commissioners again met at Evansville, Indiana, and proceeded to inspect the trial line as laid out and marked upon the ground. After their inspection they held a meeting, due notice of which had been given to the aforementioned gentlemen representing the different interests.

Mr. R. H. Cunningham on behalf of the State of Kentucky appeared, and had no particular objections to urge against the approximate line, but filed a request which is herewith transmitted, marked Exhibit "A." Mr. J. E. Williamson sent a communication, which is transmitted with this report and marked Exhibit "B."

After further consideration of the subject it was decided that your commissioners were not authorized to lay down any line beyond the upper and lower limits of Green River Island as it existed in 1792, and it was decided to adopt for recommendation the trial line within those limits as marked, with a slight change at the extreme upper end, to allow for what was undoubtedly a flat bank slope, it being upon a point.

Your commissioners would therefore respectfully state that they have now ascertained and run, according to their best judgment, the boundary line between Indiana and Kentucky, north of the tract known as Green River Island as it existed when Kentucky became a State, which is described as follows, to wit:

Decree of the Court.

Commencing at a point on the line between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches, S. 67° 50′ E. 24.1 ft., and is at the head of Green River Island, and also assumed low water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 163 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post witnessed by a sycamore 22 inches. S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1432.35 ft. to a post, witnessed by a red elm 48 inches, S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 13° 43′ 15″ course N. 69° 04′ W. 1187.2 ft. to a post, witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 88° 20′ E. 156.2 ft.

Angle to right 0° 42′ course N. 68° 22′ W. 1312.6 ft. to a post, witnessed by a sycamore 15 inches, south 16° 15′ E. 80.5 ft. And a sycamore 11 inches, S. 18′[°] 00′ E. 79.6 ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 ft.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post, witnessed by a sycamore 64 inches, N. 13° 40′ W. 130 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches, S. 44° 00′ W. 67 ft., and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a sycamore 48 inches, N. 74° 50′ E. 146.5 ft. and a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9), N. 32° 30′ E. 132.6 ft.

Angle to right 4° 36′ 30″, course N. 55° 15′ W. 1659.6 ft. to

a post, witnessed by a cottonwood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post, witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft., and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 13′ W. 2004.1 ft. to a post, witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.3 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′, course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 578 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2735.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.3 ft.

Angle to right 12° 17′ 30″, course N. 10° 45′ W. 1202.12 ft. to a post opposite the lower end of Green River Island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 363.45 ft.

The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between townships six (6) and seven (7).

The above described line is indicated by the red line on the map transmitted herewith, marked Exhibit "C." We also transmit the preliminary and final reports of the surveyor, Mr. C. C. Genung, marked Exhibits "D" and "E," also a sheet of cross sections marked Exhibit "F."

The above described line is now marked by cedar posts, set at the initial and terminal points, and points where changes in direction occur, and it is recommended that it should be permanently marked as follows:

Three suitable points should be selected upon the line, one near the upper end, one near the middle, and one near the lower end. At each of these points a monument should be erected which should consist of a stone of durable quality, six feet long, and eighteen inches square in cross section. This stone should be imbedded in a well made foundation of concrete. The concrete foundation to be six feet square and four feet deep, the upper surface being at the surface of the ground. The stone should be placed upright so as to extend three feet into the concrete, and have three feet above the ground. Upon one side of the stone should be cut the word "Indiana," and upon the opposite side the word "Kentucky." Between the stone monuments, at each turning point of the line, there should be placed an iron post six feet long, and six inches in diameter of cross section. The iron post to be imbedded in a foundation of concrete two feet square, and three and one half feet deep; the top of the concrete to be at the surface of the ground, and the post standing upright in the concrete, the top of the post being three feet above the ground.

The estimated cost of the above described monuments, including placing the same, is $600.00.

We herewith file as a part of our report, two certified copies of the original map, which we recommend be furnished the respective States, as may be directed by the court.

We herewith attach an itemized statement of costs and expenses incurred by the commissioners, marked Exhibit "G," which, if approved, we recommend be adjudged equally against the parties to the suit.

Respectfully submitted.

AMOS STICKNEY,
Lt. Col. of Engrs., U. S. A.
GUSTAVUS V. MENZIES,
GASTON M. ALVES,
Commissioners.

EXHIBIT "A."

Honorable Commissioners of U. S. Supreme Court to ascertain and run the boundary line between Indiana and Kentucky at and near Green River Island.

GENTLEMEN: While I have no special objection to the test line you have tentatively adopted, although it does not seem to make allowance for any accretion to the Indiana bank of the river between June 1st, 1792, and the date of the Congressional survey in 1806, I suggest and request that such line as you may finally adopt be extended upon such course and for such distance as you find correct until it intersects the present low water line of the Ohio River both at the upper and lower ends. In other words that you run at each end to the points where low water mark in 1792 coincides with low water mark at the present time.

Very respectfully,

R. H. CUNNINGHAM,
For the Commonwealth of Kentucky.

February 3d, 1896.

EXHIBIT "B."

EVANSVILLE, IND., Feb. 2, 1896.

COL. AMOS STICKNEY, Evansville, Ind.

DEAR SIR: I was shown a sketch, by Capt. Genung, of the line as staked off. Capt. Genung said to me that he had a letter from you stating that you would be in the city to-morrow, and that the commission would meet to-morrow night. I am compelled to leave home to-night, and will probably not be at home for a day or two. Capt. Genung will explain fully.

The line as staked off in the main will be satisfactory. I desire to call the attention of the commission to the two termini. I understand the controlling fact has been the survey of 1806, and the notes of this survey show that stakes were driven at several points on the bank of the river. If we take the dividing line between sections 14 and 15 as a sample, the notes show that a stake was driven on the bank of the river between the point where the stake was driven and the

present bank of the river is a very considerable distance, and the evidence shows that a great deal of land has been made by accretion opposite the mouth of Green River. If we take an east and west line, or say the northern boundary line of section 14 and measure off the full length of the east side we have the distance shown by the stake driven. If we were to go one section still further east, a point which nobody has ever claimed was reached by Green River Island, we will have exactly the same thing, a stake on the bank of the Ohio River, and I assume the same notes would show stakes on the Ohio River up to the Ohio line. It does not follow therefore that all the land that has been made south of these stakes is in Kentucky. The same thing holds good at the lower end of the line. Only sixty days ago I passed on an abstract of title for a tract of land belonging to the Smiths immediately down the river from the present site owned by the city for its water works. We commenced on a line back from the river and the calls in the deed were so many feet to the Ohio River, when we measured for the number of feet, we found that it did not reach the Ohio River by one hundred or two hundred feet. I thought at first there was a mistake in the deed, but when we came to ascertain the facts more definitely, it was learned that the difference in feet was accounted for by the accretion. I am confident that the same will hold at many other points along the river. It seems, therefore, to me that we cannot rely on calls of the survey of 1806 to locate the upper and lower ends of the island, as there have been accretions at both points.

Yours respectfully, J. E. Williamson.

Exhibit "D."

To the Honorable Board of Commissioners of the Indiana and Kentucky Boundary Line at Green River Island.

Gentlemen: In accordance with your instructions I have reëstablished the sectional and meander lines of fractional sections, 5, 6, 8, 9, 15, 16 and a part of 14 T. 7 S., R. 10 W., and also a part of section 31, T. 6 S., R. 10 W. following the notes of the original United States surveys as made by Jacob Fowler

in 1805 and 1806, as closely as possible. I found, however, that his work had not been very carefully nor accurately done, his lines not having all been run with the same variation, nor his distances always accurately chained.

I first sought to locate his original corners, the posts set by him having long since disappeared. I found a mulberry stub standing on the line between sections 15 and 16, and 16.23 chains south of the northwest corner of sec. 15, which is an original witness tree, as noted by him. At the termination of the section line between sections 5 and 6 a maple tree witnessed by him has been standing, up to about one year ago, but the stump, now five feet in diameter, with witness marks on it, is still there. Each of these points so located are also points on the meander line, and the surveyor's records in my office, as well as oral testimony of the old inhabitants, go to show beyond question that these are corners established by Mr. Fowler.

In 1856 A. T. Whittlesey, who was surveyor of Vanderburgh County, reëstablished the northwest corner of sec. 14, putting down a cypress post, which he afterwards replaced by a stone, which now marks the corner. One of the original witness trees was then standing. At the same time he reestablished a point on this line between sections 14 and 15 and 40 chains south of the northwest corner of sec. 14, by a cedar post which is still standing. At that point one of the original witness trees was then standing. The distance was by close measurement 39.91 chains. This line produced south from said northwest corner of sec. 14 64.25 chains, the distance given by Mr. Fowler, fixes its termination and also a point on the meander line. The variation is 2° 30′.

The northeast corner of sec. 16 was reëstablished by A. T. Whittlesey, surveyor of Vanderburgh County, in 1856. The box elder witness tree noted by Mr. Fowler was standing at that time. From that corner running west 29.67 chains the distance given by Mr. Fowler, gives the termination of the section line between sections 9 and 16, which is also a point on the meander line. The northeast corner of sec. 16 is also 16.23 chains north of the corner by the mulberry stub, this

being the distance given by Mr. Fowler, and has a variation of 3° 40′.

At the northwest corner of sec. 9, J. Lindsley, surveyor of Vanderburgh County, in 1837, set a white oak post to reëstablish the corner, the original witness trees being then standing. In 1855 C. G. Olmstead, surveyor of Vanderburgh County, replaced the oak post by a mulberry post, and in 1874 this was replaced by a limestone, set by August Pfafflin, surveyor of Vanderburgh County, which stone is still there. Commencing at that point and running south 49.84 chains, the distance given by Mr. Fowler, I found the termination of the line between sections 8 and 9, which is also a point on the meander line. This variation is 3° 30′.

Running west from the northwest corner of section 9, 58.00 chains, the distance given by Mr. Fowler, gives the termination of the line between sections 5 and 8, and also a point on the meander line.

The southwest corner of sec. 32, T. 6 S., R. 10 W. I established from two old monuments, one at the northwest corner, and the other at the southeast corner of said section. This line between the southeast and southwest corners had a variation of 2° 50′. From this corner so established, I ran south 51.72 chains to a post near the maple stump, original witness tree, Mr. Fowler giving the distance as 51.50 chains. This line had a variation of 3° 00′, and its termination is also a point on the meander line. From the southwest corner of sec. 32 I ran west 25.70 chains, the distance given by Mr. Fowler, which is the termination of the line between section 31, T. 6 S., R. 10 W., and section 6, T. 7 S., R. 10 W., and also a point on the meander line.

In this way I found seven points which are as closely absolutely correct as it is possible to locate them after a lapse of ninety years. Primarily fixed points, if correct, must govern as against distances or compass variations, secondly, distances, and lastly, courses. Upon this basis I ran the meander line, following Mr. Fowler's notes as closely as possible, and making such corrections as were necessary. It was impossible to follow them exactly, for the reasons already stated, that the

compass variations on the lines between section corners established by Mr. Fowler vary from one to two degrees, and in only one instance has a line the correct variation, and in 28 distances given by him, which I remeasured, 12 of them varied from two to seventy-four links each.

The following are the field-notes for the meander line:

Commencing at a post at a point on the bank between fractional sections 9 and 16, T. 7 S., R. 10 W., running thence up stream as corrected. Witnessed sycamore 6′ N. 82° W. 1.31 chains S. 60° E. 26.31 chains. Variation 3° 05′.

Post witnessed, sycamore S. 12° 50′ E. 4 links S. 69° E. 7.73, var. 3° 05′ to a post between secs. 15 & 16.

Witnessed by stub of original mulberry S. 66° W. 4 links S. 69° E. 19.84, var. 3° 15′.

Post witnessed, stake N. 43° 30′ E. 25 links, and stake N. 36° 30′ W. 25 links. S. 70° E. 18.38, var. 3° 15′.

Post witnessed, stake N. 44° 30′ E. 45½ links and apple tree S. 63° W. 28 links. S. 56° E. 22.01, var. 3° 15′.

Post witnessed, stake, N. 43° 30′ E., 50 links, and stake N. 36° 30′ W. 50 links. S. 49° E. 17.91 var. 3° 15′.

Post witnessed, stake, N. 40° 50′ E. 65 links and stake N. 66° 30′ W. 50 links. S. 45° E. 9.92, var. 3° 15′.

Post witnessed, stake, N. 40° 20′ E. 68 links and stake N. 66° 30′ W. 50 links. S. 63° E. 5.00 var. 3° 15′ to a post between secs. 15 & 14.

Witnessed, honey locust 24″ S. 8° 15′ W. 78 links. Sec. line S. 6.37 ch. to water's edge of Ohio River. S. 73° E. 5.50, var. 3° 15′.

Post witnessed, cottonwood, 16″ S. 14° 50′ W. 1.71 ch. S. 82° E. 16.00, var. 3° 15′.

Post witnessed, osage orange 6″ S. 54° 45′ E. 26½ links and osage orange 8″ S. 62° W. 36½ links. S. 3.88. ch. to water's edge, Ohio River.

From the post between secs. 9 and 16 running down stream: N. 63° W. 14.60 chains, var. 2° 45′.

Post witnessed, sycamore snag, 36″ N. 81° 55′ E. 86½ links N. 61° W. 44.00 to a post between secs. 8 and 9, var. 2° 45′.

Post witnessed sycamore 48″ S. 45° 30′ W. 54 links N. 57° W. 25.00, var. 2° 00′.

Decree of the Court.

Post, sycamore stump 40″ S. 42° 30′ E. 72 links N. 54° W. 14.20 var. 2° 00′.

Post witnessed sycamore snag N. 78° E. 56 links N. 46° W. 30.00, var. 2° 00′.

Post witnessed, elm, 38″ N. 31° 40′ W. 2.53 chains N. 40° W. 7.12, var. 2° 00′. Post between secs. 5 and 8.

Witnessed sycamore 40″ S. 74° 50′ W. 21½ links, and cottonwood snag 21″ N. 40° 30′ W. 80 links. N. 40° W. 19.00, var. 2° 30′.

Post witnessed, sycamore, 32″ S. 4° 15′ W. 2.56 ch. N. 34° W. 18.84 to a post between secs. 5 and 6, var. 2° 30′.

Post witnessed, maple 60″ N. 65° W. 27 links, Original witness tree. N. 32° W. 17.75 to a post, var. 2° 00′.

Post witnessed, sycamore snag 45″ S. 43° 15′ W. 16 links N. 25° W. 40.00 to a post between sec. 6, T. 7 S., R. 10 W., and sec. 31, T. 6 S. R. 10 W., var. 2° 00′.

Post witnessed, maple snag, 20″ N. 66° 30′ E. 53 links, and maple 24″ S. 83° 30′ E. 52 links. N. 12° W. 36.00 to a post, var. 2° 30′.

Witness stake on river bank S. 78° W. 4.70 ch. and post N. 78° E. 4.00. Distance 5 chains S. 78° W. to water's edge, Ohio River.

At points marked A, B, C, etc., corresponding to the same letters on the map, cross section levels were taken across the meander line to the bank on the southwest side of the slough, taking low water mark on the gauge at Evansville as the base, and from the section line between secs. 14 and 15 to the point where meander line ends in section 31, T. 6 S., R. 10 W. The difference of elevation in the water surface at those extreme points is 16 inches.

Accompanying this report is a map of the lands lying between Evansville and a point opposite the mouth of Green River on a scale of 10 chains to an inch, showing section and meander lines, and the topography near the meander line, and marked Exhibit "C." Also a cross section of the levels taken, marked Exhibit "F."

Respectfully submitted. C. C. Genung.

Jan'y 22d, 1896. *C. E. and S. V. C.*

EXHIBIT "E."

To the Honorable Board of Commissioners, on the Indiana and Kentucky Boundary Line at Green River Island.

GENTLEMEN: The line of the low water mark of 1792, from the head to the foot of Green River Island, has been located as ordered by you, and the commencement, terminus and each intermediate angle marked by planting a cedar post five inches square and seven feet in length in the ground to the depth of four and one half feet. The line is, except at the commencement and ending, two chains (132 feet) to the left of the meander line going down stream, and parallel thereto. The angles, checked by the needle, were taken twice, and each distance carefully measured twice to avoid the possibility of errors. The line is laid down on the map marked "Exhibit C" in red ink, and the distances are given in feet. The true meridian was obtained by observation of Polaris on two different nights.

The following are the notes of the location:

Commencing at a point on the line between sections fifteen (15) and fourteen (14), township seven (7) south, range ten (10) west, and 67.25 chains south of the northeast corner of section fifteen (15). The post set at this point is witnessed by a sycamore tree 36 inches, S. 1° 55′ E. 43.8 ft.; and also by a honey locust 32 inches, S. 67° 50′ E. 24 ft., and is at the head of Green River Island, and also assumed low water mark in 1792. From this point going down stream and making an angle to the left from the east line of section fifteen (15) of 50° 26′, and on a course of N. 49° 16′ W., a distance of 1098.55 ft. to a post witnessed by a cottonwood 48 inches, N. 79° 45′ W. 163 ft.

Angle to right 0° 45′ 15″, course N. 48° 30′ 45″ W. 1171.45 ft. to a post, witnessed by a sycamore 22 inches, S. 66° 50′ E. 398 ft.

Angle to left 6° 50′, course N. 55° 20′ 45″ W. 1432.35 ft. to a post, witnessed by a red elm 48 inches S. 81° 40′ E. 150.5 ft. And also a red elm 60 inches, S. 83° 20′ E. 160 ft.

Angle to left 13° 43′ 15″, course N. 69° 04′ W. 1187.2 ft. to a post witnessed by a sycamore 41 inches, S. 87° 15′ E. 149.7 ft.; and also a sycamore 48 inches, S. 88° 20′ E. 156.2 ft.

Angle to right 0° 42′, course N. 68° 22′ W. 1312.6 ft. to a post, witnessed by a sycamore 15 inches, S. 16° 15′ E. 80.5 ft., and a sycamore 11 inches S. 18° 00′ E. 79.6. ft.

Thence on same tangent and course 520.55 ft. to a post, witnessed by a cottonwood 16 inches, S. 8° 45′ E. 61.4 ft.

Angle to right 9° 01′ 30″, course N. 59° 20′ 30″ W. 1735 ft. to a post, witnessed by a sycamore 64 inches, N. 13° 40′ W. 130 ft.

Angle to left 2° 37′, course N. 61° 57′ 30″ W. 964.6 ft. to a post, witnessed by a cottonwood 30 inches S. 44° 00′ W. 67 ft., and a cottonwood 37 inches, S. 34° 40′ W. 70.3 ft.

Angle to right 2° 06′, course N. 59° 51′ 30″ W. 2926.5 ft. to a post, witnessed by a sycamore 48 inches, N. 74° 50′ E. 146.5 ft. Also a sycamore 56 inches, N. 27° 30′ E. 94.8 ft., and a stone on section line, between sections eight (8) and nine (9) N. 32° 30′ E. 132.6 ft.

Angle to right 4° 36′ 30″, course N. 55° 15′ W. 1659.6 ft. to a post, witnessed by a cottonwood 22 inches, S. 17° 15′ W. 141.7 ft.

Angle to right 3° 05′ 30″, course N. 52° 09′ 30″ W. 952 ft. to a post, witnessed by a sycamore 60 inches, S. 88° 05′ E. 254 ft. and a sycamore snag 31 inches, N. 49° 25′ E. 164.4 ft.

Angle to right 7° 56′ 30″, course N. 44° 13′ W. 2004.1 ft. to a post witnessed by an elm 60 inches, N. 2° 35′ E. 230.5 ft.

Angle to right 5° 58′, course N. 38° 15′ W. 477.65 ft. to a post, witnessed by a sycamore 56 inches, N. 29° 45′ E. 115 ft.

Angle to left 0° 40′, course N. 38° 55′ W. 1259 ft. to a post, witnessed by a sycamore 36 inches, S. 44° 55′ E. 131.3 ft., and a cottonwood 40 inches, S. 42° 50′ W. 155 ft.

Angle to right 6° 07′ course N. 32° 58′ W. 1257 ft. to a post, witnessed by an elm 53 inches, S. 43° 25′ E. 578 ft. and the stump of the original maple witness tree of 1806, 65 inches, N. 49° 55′ E. 126 ft.

Angle to right 2° 42′, course N. 30° 06′ W. 1186.6 ft. to a post, witnessed by a sycamore snag 28 inches, N. 69° 15′ E. 102.7 ft.

Angle to right 7° 03′ 30″, course N. 23° 42′ 30″ W. 2735.7 ft. to a post, witnessed by a maple 36 inches, N. 78° 00′ E. 165.3 ft.

Angle to right 12° 17′ 30″, course N. 10° 45′ W. 1202.12 ft. to a post opposite the lower end of Green River Island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N. 65° 35′ E. 363.45 ft. The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between township six (6) and seven (7).

Respectfully submitted.

C. C. Genung,
C. E. and S. V. C.

Feb'y 3d, 1896.

Exhibit "G."

Statement of Costs and Expenses.

C. C. Genung, civil engineer, services rendered by order of the commission.....		$575 75
Expenses of Lieut. Col. Amos Stickney, U. S. A., commissioner	$64 60	
Services as member of the commission	500 00	564 60
Expenses of Gaston M. Alves, commissioner	20 00	
Services as member of the commission	500 00	520 00
Expenses of Gustavus V. Menzies, commissioner.....	20 00	
Services as member of the commission	500 00	520 00
F. A. Guthrie, typewriter		15 00
Kellar Printing Company		41 25
Total		$2236 60

And the court being now fully advised in the premises:

It is ordered that the exceptions to the report of said commissioners be overruled and that the report of said commissioners be, and the same is hereby, confirmed.

And it is ordered, adjudged, and decreed that the boundary line between said States of Indiana and Kentucky in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report and the map accompanying the same and referred to therein, which map is hereby directed to be filed as a part of this decree.

It is further ordered, adjudged, and decreed that the said

boundary line as described in said report and as delineated on said map, and now marked by cedar posts, be permanently marked as recommended in said report, with all convenient speed, and that said commission be continued for that purpose, and make report thereon to this court, and that this cause be retained until such report is made.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their duties, up to this time, be, and they are hereby, allowed at the sum of two thousand two hundred and thirty-six dollars and sixty cents in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between said States as may not have been settled by this decree under the pleadings in this case.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the States of Kentucky and Indiana copies of this decree duly authenticated under the seal of this court.

per Mr. Chief Justice Fuller.

May 18, 1896.

PLESSY v. FERGUSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 210. Argued April 13, 1896. — Decided May 18, 1896.

The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account

Statement of the Case.

of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

This was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of

New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the General Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual, and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to ad-

mit that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court which was allowed by the Chief Justice of the Supreme Court of Louisiana.

Mr. A. W. Tourgee and *Mr. S. F. Phillips* for plaintiff in error. *Mr. F. D. McKenney* was on *Mr. Phillips's* brief.

Mr. James C. Walker filed a brief for plaintiff in error.

Mr. Alexander Porter Morse for defendant in error. *Mr. M. J. Cunningham*, Attorney General of the State of Louisiana, and *Mr. Lional Adams* were on his brief.

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

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required

to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employés of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate

said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude — a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word "servitude" was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights cases*, 109 U. S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but

only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. "It would be running the slavery argument into the ground," said Mr. Justice Bradley, "to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business."

A statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or reëstablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-house cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts* v. *City of Boston*, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Charles Sumner,) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establish-

ment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State* v. *McCann*, 21 Ohio St. 198; *Lehew* v. *Brummell*, 15 S. W. Rep. 765; *Ward* v. *Flood*, 48 California, 36; *Bertonneau* v. *School Directors*, 3 Woods, 177; *People* v. *Gallagher*, 93 N. Y. 438; *Cory* v. *Carter*, 48 Indiana, 327; *Dawson* v. *Lee*, 83 Kentucky, 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State* v. *Gibson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder* v. *West Virginia*, 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia* v. *Rives*, 100 U. S. 313; *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of

color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company* v. *Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons travelling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be so far as it applied to interstate commerce, unconstitutional and void. *Hall* v. *De Cuir*, 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States.

In the *Civil Rights case*, 109 U. S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects that are within the

domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, New Orleans &c. Railway* v. *Mississippi*, 133 U. S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi, 662, had held that the statute applied solely to commerce within the State, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section, as to the power of the State to separate in different compartments interstate pas-

sengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott* v. *Hicks, Judge, et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co.* v. *State*, 66 Mississippi, 662, and affirmed by this court in 133 U. S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester &c. Railroad* v. *Miles*, 55 Penn. St. 209; *Day* v. *Owen*, 5 Michigan, 520; *Chicago &c. Railway* v. *Williams*, 55 Illinois, 185; *Chesapeake &c. Railroad* v. *Wells*, 85 Tennessee, 613; *Memphis &c. Railroad* v. *Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood* v. *Memphis &c. Railroad*, 23 Fed. Rep. 318; *McGuinn* v. *Forbes*, 37 Fed. Rep. 639; *People* v. *King*, 18 N. E. Rep. 245; *Houck* v. *South Pac. Railway*, 38 Fed. Rep. 226; *Heard* v. *Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; *S. C.*, 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensa-

tion in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side

of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company* v. *Husen*, 95 U. S. 465; *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, and cases cited on p. 700; *Daggett* v. *Hudson*, 43 Ohio St. 548; *Capen* v. *Foster*, 12 Pick. 485; *State ex rel. Wood* v. *Baker*, 38 Wisconsin, 71; *Monroe* v. *Collins*, 17 Ohio St. 665; *Hulseman* v. *Rems*, 41 Penn. St. 396; *Orman* v. *Riley*, 15 California, 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances

is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly

or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, (*State* v. *Chavers*, 5 Jones, [N. C.] 1, p. 11); others that it depends upon the preponderance of blood, (*Gray* v. *State*, 4 Ohio, 354; *Monroe* v. *Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (*People* v. *Dean*, 14 Michigan, 406; *Jones* v. *Commonwealth*, 80 Virginia, 538.) But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan dissenting.

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, *or* by dividing the passenger coaches by a *partition* so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,

he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employés of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants travelling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while travelling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act, "white and colored races," necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the judgment of

this court in *Olcott* v. *The Supervisors*, 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester* v. *Western Railroad Corporation*, 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement." It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the

race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through

many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race — the right to exemption from unfriendly legislation against them distinctively as colored — exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder* v. *West Virginia*, 100 U. S. 303, 306, 307; *Virginia* v. *Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law." *Gibson* v. *Mississippi*, 162 U. S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does

not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. *134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road

or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coördinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally, in order to carry out the legisla-

tive will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.* It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race — a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the

war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is, that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperilled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through

which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the

Syllabus.

People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

UNION PACIFIC RAILWAY COMPANY *et al.*[1] *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY.

UNION PACIFIC RAILWAY COMPANY *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

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

Nos. 157, 158. Argued April 21, 22, 1896. — Decided May 25, 1896.

Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable themselves from the discharge of the functions, duties and obligations which they have assumed.

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State,

[1] The other party was *The Omaha and Republican Valley Railway Company.*

or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing 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*.

The contract with the Rock Island Company on the part of the Union Pacific Company which forms one subject of this controversy was one entirely within the corporate powers of the latter company, and, throughout the whole of it there is nothing which looks to any actual possession by the Rock Island Company of any of the Union Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company; and this was an arrangement entirely within the corporate powers of the Union Pacific Company to make, and which was in no respect *ultra vires*.

The common object of the act of February 24, 1871, c. 67, regarding the construction of a bridge across the Missouri at Omaha, and the act of July 25, 1866, c. 246, touching the construction of several bridges across the Mississippi, was the more perfect connection of the roads running to the respective bridges on either side; and being construed liberally, as they should be, the scheme of Congress in the act of 1871 was to accomplish a more perfect connection at or near Council Bluffs, Iowa, and Omaha, Nebraska.

It being within the power of the Union Pacific Company to enter into contracts for running arrangements, including the use of its track and the connections and accommodations provided for by the contract in controversy, and that contract not being open to the objection that it disables the Union Pacific Company from discharging its duties to the public, it will not do to hold it void, and to allow the Union Pacific Company to escape from the obligations which it has assumed, on the mere suggestion that at some time in the remote future a contingency may arise which will prevent it from performing its undertakings in the contract.

Other objections made on behalf of the Union Pacific Company disposed of as follows: (1) The provision in the contract respecting reference does not take from the company the full control of its road; (2) Its acts in constructing its road in Nebraska, not having been objected to by the State, must, in the absence of proof to the contrary, be deemed valid; (3) The contract is not to be deemed invalid because, during its term, the charter of the Rock Island Company will expire; (4) The Republican Valley Company, being a creation of the Pacific Company, is bound by the contract; (5) The Pacific Company has power, under its charter, to operate the lines contemplated by these contracts, it being a general principle that where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts dis-

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approve of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise.

The contracts in question were in proper form; signed and executed by the proper executive officers; attested by the corporate seal of the Union Pacific Company; approved and authorized by the executive committee, which had all the powers of the board; and ratified, approved and confirmed by the stockholders at their next annual meeting: and this was sufficient to bind the Union Pacific Company, although no action by the board was had.

These contracts were such contracts as a court of equity can specifically enforce, and thereby prevent the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure, by electing to pay damages for the breach.

The public interests involved in these contracts demand that they should be upheld and enforced. It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action.

These were petitions in equity filed by the Chicago, Rock Island and Pacific Railway Company against the Union Pacific Railway Company and the Omaha and Republican Valley Railway Company; and by the Chicago, Milwaukee and St. Paul Railway Company against the Union Pacific Railway Company in the District Court of Douglas County, Nebraska, January 2, 1891, to compel the specific performance of two contracts dated May 1, 1890, and April 30, 1890, respectively, and removed on petition of the Union Pacific Railway Company to the United States Circuit Court for the District of Nebraska, where they were heard by Mr. Justice Brewer, and decrees rendered in favor of complainants. 47 Fed. Rep. 15. From these decrees defendants appealed to the United States Circuit Court of Appeals for the Eighth Circuit, by which they were affirmed. 10 U. S. App. 98. Thereupon these appeals were prosecuted.

To the contract of May 1, 1890, the Union Pacific Railway Company, the Omaha and Republican Valley Railway Company and the Salina and Southwestern Railway Company

were parties on one side and the Chicago, Rock Island and Pacific Railway Company and the Chicago, Kansas and Nebraska Railway Company on the other; and the contract of April 30 was between the Union Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company.

The Union Pacific Railway Company controlled and operated more than five thousand miles of railroad, and, among others, a main line extending from Council Bluffs, Iowa, by way of Omaha and Valley Station, Nebraska, to Ogden in Utah Territory, a distance of about eleven hundred miles; a main line from Kansas City, Missouri, by way of Topeka and Salina, Kansas, to Denver, Colorado; the Republican Valley railroad extending from Valley Station, Nebraska, by way of Lincoln and Beatrice, in that State, to Manhattan, Kansas; the Salina railroad extending from Salina to McPherson, in Kansas; and a railroad extending from Hutchinson, in Kansas, to the southern border of that State; and other auxiliary roads.

The Rock Island Company owned and operated a line of railway extending from Chicago by way of Davenport to Council Bluffs, Iowa, and from Davenport to St. Joseph, Missouri. As the owner of the latter line and lessee of the Chicago, Kansas and Nebraska Railway Company and other corporations, it controlled and operated a through line of railway from Chicago by way of Davenport, St. Joseph and Beatrice, Nebraska, to Colorado Springs and Denver, Colorado; and a line from St. Joseph, Missouri, by way of Horton, Topeka and Hutchinson to Liberal, Kansas, and other lines, amounting in the aggregate to more than three thousand miles of railway.

The Union Pacific Railroad owned nearly all of the stock and bonds, elected the directors and built, controlled and operated the railroads of the Republican Valley and Salina Companies, and the Rock Island Company owned and operated the roads of the Kansas Company under a lease for nine hundred and ninety-nine years, so that the Pacific Company and the Rock Island Company were practically the real parties in interest to the contract of May 1.

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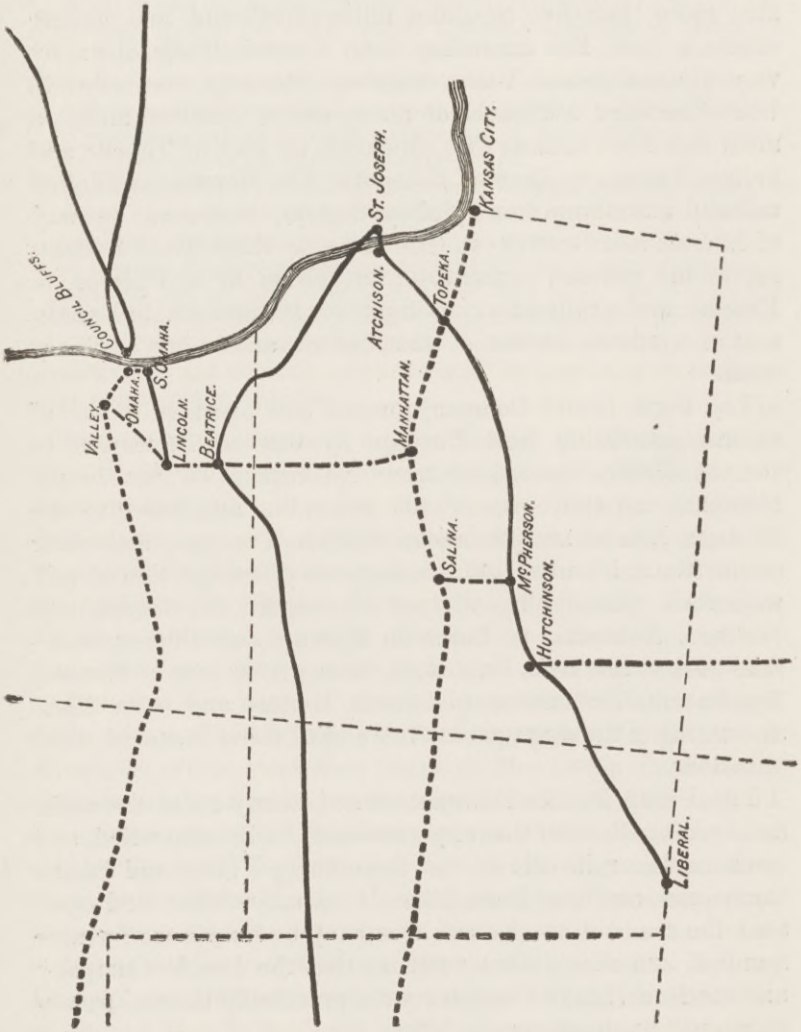
The St. Paul Company was operating more than six thousand miles of railroad, and one of its lines extended from Chicago to Council Bluffs, Iowa.

The following sketch roughly indicates the domain of the contracts:



Statement of the Case.

Early in 1890 the Rock Island Company determined to connect its lines from Chicago to Council Bluffs with its southerly line to Colorado Springs by constructing a bridge across the Missouri River at Council Bluffs and a railroad from that terminus, by way of Omaha and South Omaha and Lincoln to Beatrice, Nebraska, thereby shortening its line from Chicago to Denver and Colorado Springs; and the St. Paul Company joined in the undertaking in order to extend its line from Council Bluffs on to Omaha and South Omaha. Acting in concert the two companies caused a corporation to be created under the laws of the State of Iowa by the name and style of the Nebraska Central Railway Company, with power to build a bridge across the river at Omaha and one or more lines from that city west. Congress granted to this corporation the necessary franchise for the bridge. 23 Stat. 43. Preliminary surveys and estimates were made which showed that the entire cost of the bridge and tracks to South Omaha would be about two and one half million dollars. In February, 1890, the presidents of the St. Paul and Rock Island Companies visited New York for the purpose of arranging for the construction of the proposed work, when the Pacific Company requested them to suspend operations, and proposed to make a trackage arrangement with them by which they could use the bridge and tracks of the Pacific Company between Council Bluffs and South Omaha for their terminal facilities in Omaha and South Omaha, and the continuous line desired by the Rock Island Company could be completed. By direction of the president and at least two directors of the Pacific Company, its chief of construction and two of its directors obtained a meeting with the presidents of the St. Paul and Rock Island Companies and agreed with them upon the terms of the contracts in question. From the memoranda then made by the chief of construction of the Pacific Company the contracts were subsequently drawn. They were examined and approved by the general solicitor of the company at Omaha. The executive committee of the board of directors of the Pacific Company, at a meeting on April 22, 1890, at which six of the seven members of that committee

were present, (five in person and one by proxy,) considered and unanimously voted to approve of the contracts and authorized the president to execute them. The custom of the secretary had been not to specify in the notice of the meetings of the executive committee the subjects to be considered, and the notice of this meeting did not state that the subject-matter of these contracts would be considered. The member of the executive committee who was absent and not represented was a government director.

At the annual meeting of the stockholders of the company held April 30, 1890, at which more than two thirds of the stock was represented, these contracts and the action of the executive committee thereon were considered and resolutions passed by an unanimous vote of that stock, approving and ratifying the contracts and the action of the committee authorizing their execution. The call of the annual meeting did not state that the subject-matter of these contracts would be considered, but that certain other subjects would be, and that the meeting was for the selection of directors for the coming year and the transaction of any other business which might legally come before the meeting. The record of the meeting of the executive committee, April 22, 1890, reads thus:

"The president submitted Vice-President Holcomb's letter No. 1139, dated April 18, 1890, enclosing an agreement between this company and the Chicago, Milwaukee and St. Paul Railway Company, and an agreement between this company, the Omaha and Republican Valley Railway Company, the Salina and Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, and the Chicago, Kansas and Nebraska Railway Company, dated May 1, 1890.

"Whereupon, after consideration, it was,

"On motion of Mr. Spaulding,

"Voted unanimously, that the agreement submitted to the committee between this company and the Chicago, Milwaukee and St. Paul Railway Company, granting trackage rights to the latter company over this company's lines between Council Bluffs, Omaha and South Omaha, for a period of

999 years from May 1, 1890, at a monthly rental of $3750, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of this company;

"Voted, unanimously, that the agreement submitted to the committee, dated May 1, 1890, between this company, the Omaha and Republican Valley Railway Company, the Salina and Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway Company, and the Chicago, Kansas and Nebraska Railway Company, providing for the use of this company's lines from Council Bluffs to Omaha, including the bridge over the Missouri River and the lines of this company's Omaha and Republican Valley branch from Lincoln to Beatrice, Nebraska, and for the use by this company of the Chicago, Kansas and Nebraska Railway Company's lines between McPherson, Kansas, and South Hutchinson, Kansas, for a period of 999 years from May 1, 1890, and for the use of the line between the cities of South Omaha and Lincoln, Nebraska, for a period of 999 years from October 1, 1890, at the rentals severally provided for therein, is approved, subject to the ratification of the stockholders, and the president is hereby authorized to execute the same on behalf of the company."

The following are the resolutions severally adopted by a separate vote, of the entire stock represented, in favor of each:

"*Resolved*, That the agreement between the company and the Chicago, Milwaukee and St. Paul Railway Company, dated May 1, 1890, granting trackage rights to the latter company over this company's lines, between Council Bluffs, Iowa, and Omaha and South Omaha, Nebraska, a copy of which is herewith submitted, be and is hereby approved, and the action of the executive committee in authorizing its execution is hereby ratified, approved and confirmed.

"*Resolved*, That the agreement between the Union Pacific Railway Company, the Omaha and Republican Valley Railway Company, the Salina and Southwestern Railway Company, the Chicago, Rock Island and Pacific Railway

Company, and the Chicago, Kansas and Nebraska Railway Company, dated May 1, 1890, a copy of which is herewith submitted, granting to the latter companies trackage rights over this company's lines from Council Bluffs to Omaha, including the Omaha bridge, and the lines of this company's Omaha and Republican Valley branch from Lincoln to Beatrice, Nebraska, and providing further for the use by this company of the Chicago, Kansas and Nebraska Railway Company's line between McPherson and South Hutchinson, Kansas, and the line from South Omaha to Lincoln, Nebraska, on the terms therein provided for, be and is hereby approved, and the action of the executive committee in authorizing the execution thereof is hereby ratified, approved and confirmed."

At this time the whole number of shares was 608,685, and 437,376 shares were voted.

It is not disputed that the board of directors and the body of the stockholders of the other corporations, parties to the contracts, took proper action to authorize and ratify the execution thereof by their respective corporations, and that the formal execution of the contracts by the parties to them was sufficient.

The preamble to the Rock Island contract described the several railways owned by the parties, and recited that the Rock Island Company had become a domestic corporation of the State of Nebraska, and proposed to extend its railway from its terminus at Council Bluffs to a connection with its leased line, the Chicago, Kansas and Nebraska Railway, at the city of Beatrice; that the parties to the contract believed that the interests of all would be promoted by using for a part of said extension the main tracks of the Union Pacific Railway Company, in the cities of Council Bluffs and Omaha, the bridge over the Missouri River and that portion of the Omaha and Republican Valley Company, owned by the Union Pacific Company, between Lincoln and the point of junction at the city of Beatrice; by a lease from the Rock Island Company to the Union Pacific Company of a portion of the railroad controlled by it, between McPherson and

Hutchinson, Kansas, a distance of about thirty miles; and a lease of the right of the Union Pacific Company to operate its trains over the road which the Rock Island Company was about to build between the cities of South Omaha and Lincoln.

The contract provided: "The Pacific Company hereby lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks, now located and established, or which may be hereafter located and established, between the terminus of such tracks in the city of Council Bluffs, in the State of Iowa, and a line drawn at a right angle across said tracks within one and one half ($1\frac{1}{2}$) miles southerly from the present passenger station of South Omaha, in the State of Nebraska, including the bridge on which said tracks extend across the Missouri River, between said cities of Council Bluffs and Omaha; connections with Union Depot tracks in Omaha, the side or spur track leading from its main tracks to the lower grade of the Pacific Company's sidings and spur tracks in Omaha, and such extensions thereof as may be hereafter made; side tracks in Omaha on which to receive from and deliver to the Rock Island Company freight that may be handled through the warehouses, or switched by the Pacific Company; the connections with the Union Stock Yards tracks in South Omaha, and conveniently located grounds in South Omaha, on which the Rock Island Company may construct, maintain and exclusively use a track or tracks, aggregating three thousand (3000) feet in length, for the storage of cars and other purposes, for the term of nine hundred and ninety-nine (999) years, commencing on the first day of May, in the current year; for which possession and use the Rock Island Company covenants, promises and agrees to pay to the order of the said Pacific Company, monthly, during the continuance of said term, the sum of three thousand seven hundred and fifty (3750) dollars," and a certain portion of the expense incurred in maintaining and operating the property between Council Bluffs and South Omaha, and of the assessments and taxes levied thereon in proportion as its wheelage should be to the entire wheelage

over the same; and also a reasonable compensation for handling its traffic in Omaha; and that the Pacific Company lets the Rock Island Company into the full, joint and equal possession and use of its tracks, stations and appurtenances along the line of the railway of the Republican Valley Company from a point near the northern boundary of the city of Lincoln to the point where its tracks connect with those of the Kansas Company at Beatrice, Nebraska, for the same length of time, for which the Rock Island Company agrees to pay the Pacific Company a certain rental computed on a percentage of the value of the main track, and a proportion of the cost of maintenance; that the Rock Island Company lets the Pacific Company into the full, joint and equal possession and use of its tracks and stations along the lines of the Kansas Company from McPherson to Hutchinson for the same length of time, for a rental to be computed in the same way; that the Rock Island Company lets, leases and demises to the Pacific Company for a like term, commencing October 1, 1890, the right to move and operate over the tracks of the railway it proposes to construct between the cities of South Omaha and Lincoln in the State of Nebraska its freight and passenger trains, engines and cars of all classes for a rental based upon a mileage of the trains; that each of the parties to the contract shall take such steps as will be necessary to continue all the stipulations of the contract in force; that each contract of lease shall attach to that portion of the railway leased during the corporate existence of the owner thereof and all extensions of such existences by renewal or otherwise, and that the contract shall bind the parties thereto, their successors, grantees and assigns; that "schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by either a preference over trains of an

inferior class operated by the other. All rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed and all trains moved under the immediate direction of the superintendent or other officer of the lessor company. If the parties cannot agree upon the adoption of any schedule, rule or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter provided. The referees are hereby invested with power to prescribe schedules, rules and regulations and to modify existing ones; and in case of wilful disregard by either party of the rights of the other, to award damages to the party injured for injuries sustained because of such wilful act;" and that the referees shall be appointed when needed by the selection of one by each party, and the appointment of a third by the two so chosen, with further provision for their action in cases of disagreement in other particulars.

It was also agreed that the Pacific Company might admit any other company to the joint use and possession of the same tracks and property upon substantially the same terms, provided such additional burden did not interfere with the Rock Island Company. Another provision was as follows: "If for any reason any of the covenants, promises and agreements in any of these articles expressed, and not material to the right of the lessee to use the property leased and demised, shall be adjudged void, such adjudication shall not affect the validity or obligation of any other covenant, promise or agreement which is in itself valid. In the event of a failure in law of any of the covenants, promises and agreements herein contained, such steps shall be taken and contracts made as shall be advised by counsel to carry into effect the purpose and intent herein expressed."

The Rock Island Company was chartered to exist until 1930, but the charter provided that its existence might "be renewed from time to time as may be provided by the laws of the States of Illinois and Iowa."

The Rock Island Company, upon the construction of its pro-

posed line from South Omaha to Lincoln, obtained by the agreement access to Omaha and South Omaha, and a shorter continuous line from Chicago to Denver by way of Council Bluffs, Lincoln and Beatrice than by its southerly route; while by the use of the proposed road from South Omaha to Lincoln the Pacific Company obtained a line from Omaha to Lincoln and Beatrice, about forty miles shorter than its former route by way of Valley Station; and, by its use of the road from McPherson to Hutchinson, it filled the gap between its line there and obtained a continuous line by way of Salina to the southern boundary of Kansas; and a rental of $45,000 a year, and other compensation as provided.

The contract with the St. Paul Company let it into the joint and equal use of the tracks and bridge between Council Bluffs and South Omaha for the same time and on the same terms named in the contract with the Rock Island Company. The main tracks of the Pacific Company to be used under this contract were two, extending a distance of about seven miles from Council Bluffs across the bridge and through the city of Omaha to South Omaha.

On the seventeenth of May the superintendent of the Pacific Company addressed a letter to the superintendent of the Rock Island Company, requesting the construction of the connecting track which would enable it to use the Kansas Railway between McPherson and Hutchinson. The Rock Island immediately constructed the track, and the Pacific Company at once began to use it, and continued to use it until January 12, 1891.

The Rock Island proceeded with the construction of its road from South Omaha to a connection with the tracks of the Republican Valley in Lincoln, and secured depots and yards in Omaha and South Omaha, and made an arrangement with the Pacific Company for the construction of freight and passenger stations and a yard on the ground of the Republican Valley road in Lincoln to be used by the Rock Island and Pacific companies jointly. Prior to December 1, 1890, it had expended in such construction between South Omaha and Lincoln over $1,400,000. All this was done in reliance upon the contract, and the railway and buildings erected could be used

for the principal purpose for which they had been constructed only in connection with the tracks of the Union Pacific at and between Council Bluffs and South Omaha and at and between Lincoln and Beatrice. The work at Lincoln had commenced on December 1, when the Pacific Company notified the Missouri and Burlington Company, whose depot it had theretofore been using, that after December 31 it would abandon such use. This notice was given with the intention of entering into the joint use of the Rock Island depots and tracks.

About June 1, 1890, the St. Paul Company entered upon the use and possession of the bridge and the tracks between the points named in its contracts.

November 26, 1890, a change of management in the Union Pacific took place and opposition to the contracts developed. Early in January, 1891, the Pacific Company forcibly prevented the use by the Rock Island and St. Paul companies of its tracks at Omaha which they were entitled to use under the contracts and absolutely refused to perform the contracts. Thereupon these suits were commenced, one by the Rock Island Company against the Pacific Company and the Republican Valley Company, and the other by the St. Paul Company against the Pacific Company. The Pacific Company set up by way of defence that the use of this road as claimed would deprive it of the means granted to it under the act of Congress to earn moneys with which to maintain its corporate existence, perform the duties of a common carrier and meet the demands of the government; that the officers of the Pacific Company were not so authorized to execute the contracts as to make it competent for them to do so and that they were not so entered into as to bind the company to the performance thereof; that the contracts were unjust and inequitable, and were improvidently made, and ought not to be sanctioned and enforced by a court of equity; that the government directors of the Pacific Company did not authorize or sanction the contracts; that the contracts were *ultra vires*, and that that company did not have any right, power or authority to enter into them; and that the contracts were not such as a court of equity could or should specifically enforce.

In the *Rock Island case*, the Circuit Court decreed that the contract was "the valid obligation of the parties thereto, and should be performed in good faith by each of them;" that it secured the several rights embraced thereby, all of which were specifically set forth, subject to the following limitations:

"1. That the engines, cars and trains of complainant shall be moved on said tracks under rules and regulations to be agreed upon by and between the parties, or ordained by referees selected and appointed in the manner provided by said contract, and securing equality of right, privilege and advantage to trains of the same class operated by both parties, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other; which rules and regulations shall be executed and all engines, cars and trains moved under the immediate direction of the superintendent or other officers of the defendant, the Union Pacific Railway Company.

"2. That the Union Pacific Railway Company may admit any other company or companies operating a connecting railway or railways to the joint possession and use of the railway, or any part thereof, at and between Council Bluffs and South Omaha, upon substantially the same terms as those granted to the complainant; and apply the compensation which it may receive from such additional company or companies to its own use, without accounting for the same or any part thereof to the complainant.

"3. The complainant shall not do any business as a common carrier of persons or property to or from any stations on said line between said cities of Lincoln and Beatrice.

"4. That complainant shall make compensation for such possession and use as provided by said contract."

The decree then continued:

"III. That the defendants, the Union Pacific Railway Company and the Omaha and Republican Valley Railway Company, are commanded severally to specifically perform, keep and observe the several covenants, promises and agreements in said contract set out, to be by them, either jointly or severally observed, kept or performed; and that said rail-

way companies and the officers, agents, attorneys and employés of each are hereby commanded and enjoined to wholly refrain from directly or indirectly interposing any obstacle, interference, hindrance or delay to the performance of the several promises, covenants and agreements in said contract set out, or to the enjoyment of any of the rights or privileges by said contract granted, concerning the railway and railway property above described, by any and all of the parties to said contract, or by any of the officers, agents, attorneys or employés of said parties, or any of them ; and especially from in any manner obstructing or interfering with said complainant in restoring and maintaining the connections which have heretofore been constructed, or in constructing and maintaining at such point or points, as may be determined under the contract, additional necessary connections between the railways of the Chicago, Kansas and Nebraska Railway Company and the Omaha and Republican Valley Railway Company at Beatrice, and between the railway of complainant and that of the Omaha and Republican Valley Railway Company at Lincoln, in the State of Nebraska, and between the railway of complainant and the railway of said Union Pacific Railway Company, at South Omaha and Omaha, in the State of Nebraska, and the city of Council Bluffs, in the State of Iowa; and from doing any act or thing, or permitting the doing of any act or thing, if it shall have power to prevent the same, whereby said complainant may be prevented from enjoying any and all of the benefits and advantages secured to it by said contract, or doing any act or thing which the complainant by the terms of said contract is authorized to do; from interfering with the use of, and from removing, injuring or destroying buildings or other structures erected by the complainant upon the grounds of the defendant, the Omaha and Republican Valley Railway Company, in the city of Lincoln, in the State of Nebraska, without the consent of said complainant.

"IV. That each and every party hereto is commanded to refrain from interposing any obstacle or hindrance to the establishment, or alteration, or amendment in the manner provided

by said contract, of time cards, rules and regulations governing the operations of engines, cars and trains over said railways and every part thereof; or to the execution and enforcement of such time cards, rules and regulations when so established, altered or amended, otherwise than by apt proceedings in a court having competent jurisdiction.

"V. That nothing in this decree contained shall operate to estop any party hereto from recovering against another party or parties, by appropriate proceedings in law or equity, the compensation to which it is now or may be hereafter entitled, for the use of any of the railway and appurtenant property between and at Council Bluffs and South Omaha, between and at South Omaha and Lincoln, between and at Lincoln and Beatrice, and between McPherson and South Hutchinson, or from recovering in such proceedings damages which it has sustained, or may sustain, because of any breach or violation of said contract.

"VI. That while this decree is final in determining the rights of the parties under said contract, the court reserves the power to make additional orders from time to time, as may be necessary to enforce such rights."

The decree in favor of the St. Paul Company was to the same effect, *mutatis mutandis*.

Mr. John F. Dillon and *Mr. John M. Thurston* for appellants. *Mr. Harry Hubbard* was on their brief.

Mr. J. M. Woolworth for Chicago, Rock Island and Pacific Railway Company. *Mr. M. A. Low* and *Mr. R. Mather* were on his brief.

Mr. George R. Peck for Chicago, Milwaukee and St. Paul Railway Company. *Mr. Burton Hanson* was on his brief.

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

The questions to be considered are whether these contracts are within the corporate powers of the parties; were duly

authorized as respects the Union Pacific Railway Company; were such contracts as a court of equity can specifically enforce; and were properly enforced on the merits.

It will be most convenient to consider the appeal in the case of the Rock Island Company. If the decree in favor of that company is affirmed, a like result must follow on the appeal in the case of the St. Paul Company. And we may remark in the outset that the main contention of the Pacific Company concerns the tracks between Council Bluffs and South Omaha, including the bridge.

1. Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable themselves from the discharge of the functions, duties and obligations which they have assumed. Can it be held that the contract with the Rock Island Company, judged by its terms, construed in the light of matters of common knowledge, of the evidence and of applicable legislation, was made in the assumption of powers not granted, or amounted to the surrender of powers that were?

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel. *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24.

But where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing "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*." *Jacksonville Railway Co.* v. *Hooper*, 160 U. S. 514, 525; *Attorney*

General v. *Great Eastern Railway*, 5 App. Cas. 473, 478; *Brown* v. *Winnisimmet Company*, 11 Allen, 326, 334.

Taking up the contract with the Rock Island Company, what is the nature of the undertaking of the Pacific Company? In several places in this instrument it is called a "lease" and the parties are called "lessor" and "lessee;" while, on the other hand, in the record of the proceedings of the executive committee of the Pacific Company and of its stockholders, it is called an agreement "granting trackage rights" between Council Bluffs and South Omaha. But what it was styled by the parties does not determine its character or their legal relations, and in its interpretation the rule applies that "the court is not only at liberty, but required, to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was signed." *Rock Island Railway Co.* v. *Rio Grande Railway Co.*, 143 U. S. 596, 609.

In *Thomas* v. *Railroad Company*, 101 U. S. 71, 79, Mr. Justice Miller stated the real question to be "whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void."

And Mr. Justice Brewer, in his opinion on circuit, observed: "Neither the form of expression on the one hand, nor the name on the other, is conclusive. We must see what rights and privileges were in fact granted, what burdens and obligations assumed."

The contract provided that the Pacific Company hereby "lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks." The possession here spoken of was such possession as the Rock Island Company would have when its engines, cars and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them. Moreover, all trains were to be moved under the direction of an officer of the Pacific Company.

The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Company into that of the Pacific, and its officials were subjected to the orders of the Pacific's officers. And throughout the whole contract there does not appear to be a single provision which looks to any actual possession by the Rock Island of any of the Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company. The contract in this regard was really an agreement for trackage rights, for running arrangements, a "terminal contract" with compensation on a "mileage" or "wheelage basis," rather than a lease.

The Pacific Company in its answer said that it had offered and now offered "to accept and transport all the cars and trains of the complainant, freight and passenger, to and from all points on the line of the said defendant described in said supposed contract, and thereby enable the complainant to maintain its business at Omaha and South Omaha, and to carry on exactly the same business that it could have carried on by the operation of its own trains, by its own engines and by its own employés, as provided for in said supposed contract; and it says that it has offered, in the utmost good faith, to perform this service immediately and at all times, for the said complainant, at a reasonable compensation, to be fixed in any fair, usual and ordinary manner." It thus appears that the Pacific Company could do what it had contracted to do, and that the contention resolves itself into the proposition that there is a fundamental legal difference between authorizing the Rock Island to haul its trains with its own engines, and agreeing to haul them with the Pacific Company's engines, though in either event they were to be moved under the train dispatchers of the Pacific Company — a difference we find ourselves unable to admit.

In *Chicago, Rock Island & Pacific Co.* v. *Denver & Rio Grande Co.*, 143 U. S. 596, 618, the Rio Grande Company had granted to the Rock Island Company the use of its terminal facilities at Denver, and it insisted that it could more conveniently handle the Rock Island trains with its own

engines and crews than with those of the Rock Island. But this court, speaking through Mr. Justice Brown, said: "It is obviously necessary to the harmonious working of the two systems that the general control and management of the yard should remain with the defendant; but it is not easy to see why that control may not be as well exercised over two switching crews belonging to two different companies as over two crews belonging to the same company. . . . It occurs to us that it would cause fully as much inconvenience to transfer the control of trains from the employés of one company to those of another, as such trains enter or leave the terminal yard, as it would be to permit the switching of such trains within the yard by the hands that brought them in or were to take them out. It appears that yards have been jointly operated in this manner in such large railway centres as Kansas City, Toledo and Chicago without serious difficulty. We think that the same rule should also be applied to those employed in handling the freight. With reference to this, the decree of the court below provided that the plaintiff had a right to employ its separate switching crews and operate its own switching engines in the yards of the defendant company under the sole and absolute supervision, direction and control, however, of the yardmaster or other properly constituted officer or agent of the defendant, and subject to the orders and instructions of such yardmaster, etc., and in this there was no error."

Such being the nature of the contract, a contract frequently made between railroad companies, upon what reasonable ground should it be held invalid as an unlawful assumption of power?

The evidence shows that between the bridge and South Omaha some of the most thickly populated and densely settled portions of the city of Omaha are situated; that five railroads engaged in transcontinental traffic do their terminal business there, taking up and setting down passengers, collecting, unloading and delivering freight; that a large part of the territory is filled with the tracks of the Union Pacific and Burlington Companies, and that there is scant room, if

any, for another company with the many tracks required for terminal business; that the whole territory is very valuable, densely populated and filled with tracks; and that at South Omaha are stockyards and packing industries of great extent, furnishing the companies a vast volume of freight and compelling the building of many tracks. If it were true that railroad companies could not, ordinarily, without the aid of a statute, grant running facilities over their tracks even when such an arrangement would not interfere with their business, the application of so rigorous a rule to defeat a contract as between the parties, in respect of tracks in the congested parts of large cities, where the entire use of them is not required by their owners, does not seem reasonable. It is well said by Sanborn, J., speaking for the Circuit Court of Appeals: "Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other."

We think that it would be carrying the doctrine of *ultra vires* much too far to deny absolutely the competency of a railroad company, being a public highway, whose use is common to all citizens, to contract to give another running rights over its tracks without express statutory authority; and that, under proper circumstances, such a contract may well be held within its implied powers.

In *Lake Superior Railway Co.* v. *United States*, 93 U. S. 492, Mr. Justice Bradley adverts to and comments on the fact that in England and in this country railroads when first constructed were by the legislatures and the people regarded and treated as public highways for the use of all who had occasion to run their vehicles thereon; and this is certainly so far true, in modern acceptation, that being for the common use of the public, their owners are ordinarily competent to make contracts which will subserve such use.

But the determination of the existence of the power to grant running rights in this instance does not rest on these

considerations alone. For the provisions of the Pacific Railroad acts relating to the bridge over the Missouri River, its construction and operation, imposed on the Pacific Company the duty of permitting the Rock Island Company to run its engines, cars and trains over the bridge and the tracks between Council Bluffs and Omaha, and we think that South Omaha was included.

The original charter of 1862 required the construction of the Pacific road from the east bank of the river, and so impliedly authorized the company to bridge it, and the amendatory act of 1864 expressly gave the corporation authority "to construct bridges over said Missouri River." The bridge contemplated was for the company's use as a part of its road, and no provision was made for other roads or other business, nor were any special means provided for the construction of the bridge.

In 1871 several roads had been built from the East to Council Bluffs, and others were building and roads were in process of construction in Nebraska with Omaha as their terminus.

The Omaha Bridge act of February 24, 1871, c. 67, 16 Stat. 430, was then passed, by which, "for the more perfect connection of any railroads that are or shall be constructed to the Missouri River, at or near Council Bluffs, Iowa, and Omaha, Nebraska," the company was authorized to issue bonds not exceeding two and one half million dollars, and to "secure the same by mortgage on the bridge and approaches and appurtenances, as it may deem needful to construct and maintain its bridge over said river, and the tracks and depots required to perfect the same, as now authorized by law of Congress." The bridge was "to be so constructed as to provide for ordinary vehicles and travel;" and the company was authorized "to levy and collect tolls for the use of the same." The act further provided "for the use and protection of said bridge and property, the Union Pacific Railway Company shall be empowered, governed and limited by the provisions of the act entitled 'An act to authorize the construction of certain bridges and to establish them as post roads,' approved July twenty-five, eighteen hundred and sixty-six, so far as the same

is applicable thereto." The act of 1866 thus referred to, 14 Stat. 244, c. 246, is entitled "An act to authorize the construction of certain bridges and to establish them as post roads." It authorized the construction of nine different bridges, eight across the Mississippi River and one across the Missouri River. The first bridge provided for was to be constructed at Quincy, Illinois, and by the first section it was made lawful for any person or persons, company or corporation, having authority from the States of Illinois and Missouri for that purpose, "to build a bridge across the Mississippi River at Quincy, Illinois, and to lay on and over said bridge railway tracks, for the more perfect connection with any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed the trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge for reasonable compensation, to be made to the owners of said bridge under the limitations and conditions hereinafter provided."

The common object of both these acts plainly was the more perfect connection of roads running to the bridges on either side of the river. And this is in harmony with numerous acts of Congress referred to in the opinion of the Circuit Court of Appeals; Act of February 21, 1868, 15 Stat. 37; Act of May 6, 1870, c. 93, 16 Stat. 121; Act of June 30, 1870, c. 176, 16 Stat. 173; Act of July 1, 1870, c. 195, 16 Stat. 185; Act of March 3, 1871, c. 110, 16 Stat. 473; Joint resolution of March 3, 1871, No. 48, 16 Stat. 599, and many others, all of them indicating a settled policy that all structures of this character should allow connecting roads to cross them with their cars, trains and engines. It is said that the reference to the act of 1866 should be confined to its second and third sections; but as the matters provided for in those sections were fully otherwise covered in the Pacific Railroad acts, that does not commend itself to us as a reasonable construction. But it is argued that even if the Pacific Company were authorized to grant to the Rock Island Company the right to run its trains with its engines over the bridge, it was not empowered to grant the same rights over the tracks. The evidence shows

that the tracks east of the bridge were upon the approach to the structure proper, and it appears from the maps that the depot at the west end of the bridge was more than half a mile distant. The act of 1871 provided that for the more perfect connection of the roads east of the river with those west of it the company might issue bonds and secure the same by mortgage "on the bridge and approaches and appurtenances," and it would seem to be clear that the approaches on the west side, as well as on the east, must be regarded as part of the structure. Moreover, the act refers to "the tracks and depots required to perfect the same." A railroad bridge can be of no use to the public unless united with necessary appurtenances, such as approaches, tracks, depots and other facilities for the public accommodation. And we consider Council Bluffs, Omaha and South Omaha, under the facts, as necessarily embraced in the intention of Congress. It is true that it appears that from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles; but the scheme of Congress was to accomplish the more perfect connection "at or near Council Bluffs, Iowa, and Omaha, Nebraska," and we think this distance reasonably within the terms of the act of 1871, liberally construed, as the act should be.

The legislation of 1862 and 1864 in respect of the Union Pacific Railway Company was under consideration in *Union Pacific Railway Co.* v. *Hall*, 91 U. S. 343, 345, and it was said by Mr. Justice Strong: "The scheme of the act of Congress, then, is very apparent. It was to secure the connection of the main line, by at least three branches, with the Missouri and Iowa railroads, and with a railroad running eastwardly from Sioux City in Iowa, either through that State or through Minnesota. An observance of this scheme, we think, will aid in considering the inquiry at what place the act of Congress, and the orders of the President made in pursuance thereof, established the eastern terminus of the Iowa branch. From it may reasonably be inferred that the purpose of Congress was to provide for connections of the branches of the main line of the Union Pacific road with railroads running through the States on the east of the Territory, and to provide for those connec-

tions within those States at points at or near their western boundaries."

On June 15, 1866, an act was approved, c. 124, 14 Stat. 66, "to facilitate commercial, postal and military communication among the several States," carried forward as section 5258 of the Revised Statutes, which provided that "every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freights and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination."

It is impossible for us to ignore the great policy in favor of continuous lines thus declared by Congress, and that it is in effectuation of that policy that such business arrangements as will make such connections effective are made.

We are of opinion that it was within the powers of the Pacific Company to enter into contracts for running arrangements, including the use of its tracks, and the connections and accommodations provided for, and we cannot perceive that this particular contract was open to the objection that it disabled the Pacific Company from discharging its duties to the public. By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in the furtherance of the demands of a wise public policy. If, by so doing, it may have assisted a competitor, it does not lie in its mouth to urge that as rendering its contract illegal as opposed to public policy. Ability to perform its own immediate duties to the public is the limitation on its *jus*

disponendi we are considering, and that limitation had no application to such a use as that in question.

The leading cases of *Thomas* v. *Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad Co.* v. *St. Louis, Alton &c. Railroad*, 118 U. S. 290; *Oregon Railway Co.* v. *Oregonian Railway Co.*, 130 U. S. 1; *Central Transportation Co.* v. *Pullman Car Co.*, 139 U. S. 24; *St. Louis &c. Railroad Co.* v. *Terre Haute &c. Railroad Co.*, 145 U. S. 393; *United States* v. *Union Pacific Railway Co.*, 160 U. S. 1, arose upon instruments which dispossessed the corporations of all their property and of all capacity to perform their public duties. But we have no such case here.

The argument is pressed that the Pacific Company might become disabled by reason of the increase of business in the future, but the defendant asserts in its answer that it is able to carry on the business of hauling complainant's cars "immediately and at all times," if it may do so with its own engines and on its own terms, and be permitted in the meantime to repudiate this contract. The proof wholly fails to establish that the contract involves any present inability or any existing ground for apprehension in that regard, and shows that the bridge and tracks of the Pacific Company are fully adequate to meet much larger demands than are now, or within any reasonable time can be expected to be, made upon them under the contract. The country, as was said below, will grow in population and business, and the business of this particular corporation will increase, but with the increased volume of business come increased facilities for its transaction. Moreover, increase in the same ratio for the future as in the past is not to be expected, for new roads are constantly being built and other channels of transportation opened; and it cannot be conclusively assumed that the common means of transportation twenty years hence may not be quite different from what they are at present. It will not do to hold this contract void and allow defendant to escape from the obligations it assumed on the mere suggestion that at some time in the remote future there is a possibility that the suggested contingency might arise. Should it happen, however, the courts are competent

to relieve from the consequences of so radical a change of condition.

Objection is made that by reason of the provision for referees in case of difference between the two companies as to the operation of trains, the full control of the Pacific Company of its road and franchises is taken away. If that stipulation were stricken out, the right of the Rock Island Company to use the tracks, subject to the reasonable management of the Pacific Company's officers, would still remain, and the contract itself contained a provision contemplating the possible invalidity of some one of the stipulations not of the essence of the contract. There does not appear to have been any specific contention in the Circuit Court or in the Court of Appeals that that particular clause was invalid; and, if it were, the power reserved in the decree was sufficient to permit an application to the court for its modification and the substitution of the judgment of the court. We cannot hold that if the particular clause were objectionable the contract would be invalidated as a whole, and it is too late to ask a reversal on the ground that the clause itself is not enforceable.

We do not feel called upon to enter at length upon other objections urged by appellants' counsel. One of them was that the Rock Island and St. Paul companies derived no power from the laws of Nebraska to enter into the alleged contract because they had not complied with the statutes of the State in that behalf. After the testimony was closed, and as the final hearing commenced, defendants moved the court to permit the introduction of the evidence upon which this contention is based. This was objected to by complainants, the objection sustained and defendants excepted. We concur in the view of the Circuit Court of Appeals, which held that there was no abuse of discretion in the court below in denying the motion, and did not consider the rejected evidence or the argument based upon it. The Rock Island Company built its road from South Omaha to Lincoln as vested with the corporate power to do so, and it contracted as in the possession of the power as a corporation existing in

and under the laws of Nebraska. The State appears to have been content, and the contract, not being necessarily beyond the scope of the powers of the corporation, must, in the absence of proof to the contrary, be deemed valid.

Nor can the contract be held invalid because within its prescribed duration the charter of the Rock Island Company expired by its terms. The contract was carefully drawn in view of such expiration of the several corporate existences of the parties to it, who bound themselves to take such steps as might be necessary to continue the contract in force. And, as observed by the Court of Appeals, the contingency that the Rock Island Company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." 10 U. S. App. 192.

It is also said that the contract was void so far as the Republican Valley Railroad Company was concerned, because without consideration, inasmuch as the Rock Island Company was to pay the Pacific Company for the possession and use of the railway and appurtenant property between Lincoln and Beatrice to the Pacific Company, and so the Valley Company, as an independent corporation, received no compensation; but the stockholders of the Valley Company entered into the covenants in question, and as each of its incorporators was an officer or employé of the Union Pacific Company; its road was built with the funds of that company; every share of its stock ever issued was taken, held or voted by some officer or employé of that company in trust for it; the officers of the two companies had always been the same, and in their operation no distinction had ever been made between the two roads; and their earnings had gone into and their expenditures been paid from a common treasury, we think there is no merit in the objection that for the reason given the Valley Company was not bound by its covenants.

But it is earnestly contended that the Pacific Company had no power under its charter as a Federal corporation to operate any other line of road than those lines which it was specifically authorized by Congress to construct, and that it was prohibited under the constitution and laws of Nebraska from

doing so, and therefore that it could not obligate itself to use, and to pay to the Rock Island Company compensation for the use of, the road between South Omaha and Lincoln.

It does not appear that this point was called to the attention of the Circuit Court or decided by it, nor in the errors assigned to the decree of the Circuit Court in the Circuit Court of Appeals was there any error attributed to the decree in this particular; nor did that court pass upon any such question. It is indeed admitted that the point is raised for the first time in this court. We have to determine on this appeal whether in our judgment the Circuit Court of Appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the Circuit Court in reviewing the action of the Court of Appeals upon it, and, under the statute, our mandate goes to the Circuit Court directly, but it is, notwithstanding, the judgment of the Circuit Court of Appeals that we are called on primarily to revise. It will be seen then that the judgments of the Courts of Appeals should not ordinarily be reëxamined on the suggestion of error in that court in that it did not hold action of the Circuit Court erroneous which was not complained of. We will, however, make a few observations on the point thus tardily presented.

The eighth section of the eleventh article of the constitution of that State provided that no railroad corporation of any other State or of the United States, doing business in Nebraska, should be entitled to exercise the right of eminent domain or have power to acquire right of way or real estate for depot or other uses until it should have become a corporation of the State pursuant to the constitution, but we do not see what that provision has to do with this question. The stipulations of the contract relating to the use of the Rock Island tracks between South Omaha and Lincoln by the Pacific Company did not embrace the acquisition of right of way or real estate, or the exercise of the power of eminent domain by the latter.

By the contract the Rock Island Company gave the Pacific Company "the right and privilege to move and operate its

trains over the tracks" and nothing more, and it was provided that the Pacific Company should do no business at intermediate points. The Pacific Company was to run its trains over the Rock Island tracks forty-five miles, and it agreed to pay a fair compensation for doing so. It was perfectly competent for the Pacific Company to contract to deliver at Lincoln freight and passengers taken up at Omaha, and in carrying out such contract it could make deliveries in carloads just as well as in small parcels. It follows that its cars might be run through, and the fact that under this contract the Pacific Company would haul its cars with its own engines amounts to no more than a mere method of doing the business. And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that compensation might be fixed by the parties upon any basis they agreed to. Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise. As remarked in *Jacksonville Railway Co.* v. *Hooper*, 160 U. S. 514: "Although the contract powers of railroad companies are to be 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 be useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers which 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 railroad companies as is necessary to promote the success of the company within the powers of its charter and to contribute to the comfort of those who travel thereon." And that principle is applicable to the transportation of through freight and passengers over connecting lines.

Under the laws of Nebraska railroad companies are clothed with ample power to make leases or any arrangements for their common benefit consistent with and calculated to promote the objects for which they are created. Comp. Stat. Neb. 1889, 248, c. 16, § 94. There is nothing in the charter of the Pacific Company that prohibits such an arrangement as this in controversy, unless by implication, and as by it the public interest was subserved, that company reached its own lines by a shorter route and accommodated its own through freight and travel, we are not prepared to hold that it was invalid.

These observations also apply to the clause of the contract in respect of the road between McPherson and Hutchinson, but it should be added that that reach of road was held and operated by the Kansas Company, which was a Kansas corporation. The Union Pacific Railway Company was formed by the consolidation of the Union Pacific Railway Company, a Federal corporation, the Denver Company, a Colorado corporation, and a corporation originally named the Leavenworth, Pawnee and Western Railway, afterwards called the Union Pacific Railway, Eastern Division, and lastly the Kansas Pacific Railway. The latter company by its first name was incorporated under the laws of the Territory of Kansas, and upon the admission of Kansas into the Union became a corporation of that State. The acts of Congress of 1862 and 1864 clothed it with new franchises, but did not deprive it of its powers as a State corporation, which could be exercised by the consolidated company in Kansas, so far as not in derogation of its Federal powers. And Kansas corporations were duly empowered to enter into leases and the like by the state laws. Gen. Stat. Kansas, c. 23, § 112, vol. 1, 443.

2. Was the contract, if within its powers, duly authorized by the Pacific Company? No question arises but that the contract was executed in due form, and, as to the manner in which its execution was authorized, the facts appear to be: On April 22, 1890, the executive committee passed the resolution approving the contract and authorizing the president of the company to execute it, and on the thirtieth of the same

month the stockholders at their regular annual meeting voted to approve the contract and the action of the executive committee relative thereto. The board of directors never formally acted. As soon as the contract was executed, the Pacific Company required the Rock Island Company to make proper connections between McPherson and Hutchinson, which was done, and the Pacific Company commenced to run over those tracks, and continued to do so until after the disputes between the two companies became flagrant. On the other hand, the Rock Island Company commenced the construction of its road between South Omaha and Lincoln and of the stations and yards at Lincoln on the lands of the Republican Valley Company. Appellants contend that the action of the stockholders and the executive committee was ineffectual because the board of directors was the only body that could authorize the president and secretary to make the contract. The contract appearing on its face to have been duly executed, and the parties having entered upon its execution, necessarily with full knowledge on the part of the board of directors of the Pacific Company, the board would be presumed to have ratified it, although it in fact took no affirmative action in the matter. *Pittsburgh &c. Railway Co.* v. *Keokuk Bridge Co.*, 131 U. S. 371, 381.

When by the charter of a corporation its powers are vested in its stockholders, and this was the common law rule when the charter was silent, the ultimate determination of the management of the corporate affairs rests with its stockholders, and the charter of the Pacific Company did not commit the exclusive control to the board of directors.

By the first section of the act certain persons named, together with five commissioners to be appointed by the Secretary of the Interior, were with their successors created a body corporate and politic with certain powers, which were to determine after the company was fully organized, "and thereafter the stockholders shall constitute said body politic and corporate." It was further provided: "Said company, at any regular meeting of the stockholders called for that purpose, shall have power to make by-laws, rules and regulations

as they shall deem needful and proper, touching the disposition of the stock, property, estate and effects of the company not inconsistent herewith, the transfer of shares, the terms of office, duties and conduct of their officers and servants, and all matters whatsoever which may appertain to the affairs of said company." The same section provided that the directors "shall have power to appoint such engineers, agents and subordinates as may from time to time be necessary to carry into effect the object of this act, and to do all acts and things touching the location and construction of said road and telegraph. Said directors may require payment of subscriptions to the capital stock after due notice, at such times and in such proportions as they may deem necessary to complete the road and telegraph within the time in this act prescribed."

Acting under the authority conferred upon them by the charter, the stockholders of the Pacific Company adopted by-laws for the government of the corporation and for the regulation of its business affairs. By section two of article four of the by-laws it was provided: "The board of directors shall have the whole charge and management of the property and effects of the company and they may delegate power to the executive committee to do any and all of the acts which the board is authorized to do except such acts as by law and these by-laws must be done by the board itself." Thus the stockholders authorized the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. The executive committee derived its authority from the stockholders through the board of directors. By section two of article five of the by-laws it was provided: "The executive committee shall have, and may exercise by a majority of its members, all the powers and authority which from time to time may be delegated to said committee by the board of directors." As early as March 15, 1877, the board of directors adopted a resolution, "that while the board of directors is not in session the full power thereof, under the charter and by-laws, is hereby conferred upon the executive committee, and the proceedings of said committee at its last meeting are hereby ratified and con-

firmed." In 1879 the form of resolution adopted by the board was as follows: "Resolved, that while the board of directors is not in session, the full power under the charter and by-laws be, and it is hereby, conferred upon the executive committee." Similar resolutions were passed every year up to April 30, 1890, when the board of directors passed substantially the same resolution which they had been in the habit of adopting from year to year. It was shown that the meetings of the executive committee were frequent, but that the board usually met only twice a year, the business of the company being more conveniently transacted by the committee.

The contracts in question were in the proper form, signed and executed by the proper executive officers and attested by the corporate seal; they were approved and authorized by the executive committee, which committee had all the powers of the board, and were ratified, approved and confirmed by the stockholders at their regular annual meeting. This was sufficient to bind the Pacific Company although no formal action by the board was had. But it is argued that this cannot be so because of the peculiar relation which the government directors of the Pacific Company bore to the corporation, differing from that of other directors; and the absence of the government director, who was a member of the executive committee, from the meeting which approved and authorized the contracts, is also commented on as if thereby the action of the executive committee in that behalf was rendered ineffective.

By the first section of the act of 1862 not less than thirteen directors were to be elected and two to be appointed by the President of the United States, "who shall act with the body of directors, and be denominated directors on the part of the government."

The thirteenth section of the act of 1864 is as follows:

"That at and after the next election of directors, the number of directors to be elected by the stockholders shall be fifteen; and the number of directors to be appointed by the President shall be five; and the President shall appoint three additional directors to serve until the next regular election, and there-

after five directors. At least one of said government directors shall be placed on each of the standing committees of said company, and at least one on every special committee that may be appointed. The government directors shall, from time to time, report to the Secretary of the Interior, in answer to any inquiries he may make of them, touching the condition, management and progress of the work, and shall communicate to the Secretary of the Interior at any time such information as should be in the possession of the department. They shall, as often as may be necessary to a full knowledge of the condition and management of the line, visit all portions of the line of road, whether built or surveyed; and while absent from home, attending to their duties as directors, shall be paid their actual travelling expenses, and be allowed and paid such reasonable compensation for their time actually employed as the board of directors may decide."

We see nothing in the provisions relating to government directors which makes it indispensable that the board should formally authorize such contracts as the one under consideration. Congress did not vest in the government directors any peculiar powers. They had the same powers as other directors and no more, but as government directors they were to make reports to the Secretary of the Interior in respect of the affairs and matters mentioned in the act of 1864. They could not either by a negative vote or by absenting themselves from the meetings prevent the transaction of the necessary business of the company, in which they were entitled to participate on the same terms as their associates. Congress did not look to any action of theirs for the protection of the public interests but sought to secure those interests by specific legislation. Thus it was provided by the act of 1862 that patents for lands and government bonds should not be issued to the company until the road had been constructed, examined and approved by the commissioners and the facts certified to the President and Secretary of the Treasury; and a forfeiture of the rights belonging to the company and the lands granted to it in case of default on its part to redeem the bonds or any of them when required to do so by the Secretary of the Treasury in

accordance with the provisions of the act, was also provided for.

The joint resolution for the protection of the interests of the United States, 16 Stat. 56; the appropriation act of March 3, 1873, 17 Stat. 485, 508; the Thurman act, 20 Stat. 56; the act amendatory of the fifteenth section of the act of 1862, 18 Stat. 111; the act providing for a commission to investigate the transactions of the company, 24 Stat. 488; are examples of such legislation, and it was through them and not through the agency of the government directors that Congress sought to protect the interests of the government and the public. We regard the position as wholly untenable that this provision for government directors took the corporation out of the general rule that except in cases where the charter imposes a limitation the stockholders are the proper parties to take final action in the management of the corporate affairs.

3. The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach.

It is not contended that multiplicity of suits to recover damages for the refusal of defendants to perform would afford adequate relief, nor could it be, for such a remedy under the circumstances would neither be plain nor complete, nor a sufficient substitute for the remedy in equity, nor would the interests of the public be subserved thereby. But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract.

It must not be forgotten that in the increasing complexities

of modern business relations equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;" and "has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed." Pom. Eq. Jur. § 111.

We regard the case of *Joy* v. *St. Louis*, 138 U. S. 1, as determining that this contract was one within the control of a court of equity to specifically enforce. In that case the St. Louis, Kansas City and Colorado Railroad Company acquired by succession, under a contract, the right of running its trains over the line of the Wabash Company from a point on the northern line of Forest Park, through the park and into the Union Depot at St. Louis, together with the right to use side tracks, switches, turnouts and other terminal facilities. It was a continuing right and unlimited in time, and the contract contained provisions regulating the running of trains and prescribing the duties of superintendents, trainmasters and other officers. The objections that are urged against the specific performance of the contract under consideration were urged against the specific performance of that contract and were severally overruled, and it was held that nothing short of the interposition of a court of equity would provide for the exigencies of the situation.

This case was cited with approval in *Franklin Telegraph Co.* v. *Harrison*, 145 U. S. 459. The contract there was one for the use by Harrison Brothers & Co. of a wire of the Franklin Telegraph Company between Philadelphia and New York. It appeared that Harrison Brothers & Co. had been in the possession of a certain valuable contract with the Insulated Lines Telegraph Company, to the rights of which company the Franklin Telegraph Company had succeeded. Desiring to

have that contract terminated, the Franklin Company entered into a new contract with Harrison Brothers, by which the Franklin Company agreed to allow Harrison Brothers the right to put up, maintain and use a telegraph wire on the poles of the Franklin Company. At the expiration of ten years thereafter the wires were to become the property of the telegraph company, after which time the telegraph company was to lease the same to Harrison Brothers for $600 per annum, payable quarterly, and with all the other terms and conditions as they existed before. The ten years having expired Harrison Brothers continued to use the wire, paying the stipulated sum of $600 per annum therefor, but after this had gone on for about three years the telegraph company served notice on Harrison Brothers putting an end to the agreement, whereupon Harrison Brothers filed a bill to restrain the telegraph company from terminating the contract and to have the same specifically enforced, and this court held that the contract was one proper for specific performance.

The same rule was laid down in *Prospect Park & Coney Island Railroad* v. *Coney Island & Brooklyn Co.*, 144 N. Y. 152, where many authorities are cited.

In *Railroad Co.* v. *Alling*, 99 U. S. 463, this court directed an injunction against the Cañon City Railway Company from preventing the Denver road from using the right of way through the Grand Cañon, and said: "If, in any portion of the Grand Cañon, it is impracticable or impossible to lay down more than one roadbed and track, the court, while recognizing the prior right of the Denver Company to construct and operate that track for its own business, should, by proper orders, and upon such terms as may be just and equitable, establish and secure the right of the Cañon City Company, conferred by the act of March 3, 1875, to use the same roadbed and track, after completion, in common with the Denver Company."

In *The Express cases*, 117 U. S. 1, the express companies sought to restrain the railway companies from refusing to carry express matter on the terms of contracts which had expired, which the court held could not be done, and it was

said: "The legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage or by contract, or by statute, courts cannot be called on to give it effect."

It was objected in *Joy's case* that the court was proposing to assume the management of the railroad "to the end of time," but Mr. Justice Blatchford, speaking for the court, responded that the decree was complete in itself, and that it was "not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances." And the court applied the principle that considerations of the interests of the public must be given due weight by a court of equity, when a public means of transportation, such as a railroad, comes under its jurisdiction. "Railroads are common carriers and owe duties to the public," said Mr. Justice Blatchford. "The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions."

Clearly the public interests involved in the contracts before us demand that they should be upheld and enforced.

4. Doubtless a court of equity may refuse to decree the specific performance of a contract, if it be unconscionable;

or bad faith in the parties seeking its enforcement be shown; or duress or fraud appear; or if it be unjust or inequitable; or if the decree would produce results so inequitable as to be incompatible with the proper exercise of the jurisdiction. But here it appears that the contracts were solicited by the Pacific Company; were fairly made on terms substantially proposed by itself; and that their violation by that company was unjustifiable. The contracts were approved promptly and with unanimity; the consideration appears to have been fair and reasonable; the St. Paul and Rock Island companies abandoned their previous enterprise in reliance on them; they entered upon the performance of the contracts, and large sums of money were expended in carrying them out. The conduct of the Pacific Company was not such as to commend itself to a court of equity, and we can do no better than to quote from the opinion of Mr. Justice Brewer, in deciding the case on circuit: "It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action."

Decrees affirmed.

Mr. Justice Shiras dissenting.

To make arrangements with other railroad companies whereby they are permitted to make use of the Missouri River bridge and of the tracks and station-houses within the cities of Omaha and South Omaha may be fairly held to be within the range of the general authority of the Union Pacific Railway Company. Such contracts are not unusual, and are calculated to promote the convenience of the public and the welfare of the railroad companies which enter into them. And if the contracts in question presented such a case, I should have no difficulty in affirming their validity. But, as I read

them, they go far beyond such supposed arrangements, and contain covenants and stipulations which bring them within the condemnation of our previous decisions.

What is granted to the Rock Island Railway Company and to the St. Paul Railway Company is not a mere right or privilege, for a reasonable compensation, and subject to the rules and regulations of the Union Pacific, to run their trains over the bridge and into and out of the city stations, but "the full, equal and joint possession and use of the main and passing tracks" belonging to the lessor company, and extending from Council Bluffs on the east side of the Missouri River to the town of South Omaha, a distance of — miles. Nor is the power of control and management reserved to the Union Pacific Railway Company. The words of the contract, in that particular, are as follows:

"Schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege and advantage to trains of the same class operated by the lessor and lessee, and shall secure to neither any preference or discrimination against the other. They shall be executed and all trains moved under the immediate direction of the superintendent or other officer of the lessor company. If the parties cannot agree upon the adoption of any schedule, rules or regulation, or as to the modification of any one existing, either party may demand a decision of such controversy by referees as hereinafter directed. The referees are hereby invested with power to prescribe schedules, rules and regulations, and to modify existing ones; and, in case of wilful disregard by either party of the rights of the other, to award damages to the party injured for injuries sustained because of such wilful act."

The legal effect of these contracts is to create a joint ownership, for 999 years, of an important portion of the Union Pacific's railroad and appurtenances, "a full, equal and joint

possession of its tracks," and a subjection to rules and regulations prescribed by the duly authorized officers of the lessor and lessee companies, and, in case of disagreement, subjection to the decision of referees, mutually appointed, invested with power to prescribe schedules, rules and regulations, and to modify existing ones.

These contracts, in my opinion, are plainly void within the principles of the following cases: *Thomas* v. *Railroad Company*, 101 U. S. 71; *Branch* v. *Jessup*, 106 U. S. 468; *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 290; *Oregon Railway* v. *Oregonian Railway*, 130 U. S. 1; *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24. The doctrine of those cases may be sufficiently expressed by the following paragraph taken from the opinion of Mr. Justice Miller in the case of *Pennsylvania Railroad* v. *St. Louis &c. Railroad*, 118 U. S. 309:

"We think it may be stated, as the just result of these cases and on sound principle, that, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

To which may be added the following observations of Mr. Justice Gray in the very recent case of *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 48:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the

courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In commenting upon that clause of the contracts in which the Union Pacific Company "lets the Rock Island Company into the full, equal and joint possession and use of its main and passing tracks," the opinion of the court states that "the possession here spoken of was such possession as the Rock Island Company would have when its engines, cars and trains were running over the tracks. The company had no possession before its trains came on the tracks or after they had run off of them, and while its trains were on the tracks its possession was only of the particular part occupied temporarily while running over them."

But this view, I submit, overlooks the necessary meaning of the language of the contracts. The possession, whose right is given, is described as full — that is, entire, not imperfect, or insufficient; as equal — that is, as great as that of the lessor company; as joint — that is, united in interest and obligation with the other party. If doubt could be entertained of the meaning of language so explicit, such doubt would be removed by the other express provisions that the "schedule of rules and regulations shall, as nearly as may be practicable, accord equality of right, privilege and advantage to trains of the same class operated by the lessor and lessee, and to trains of a superior class operated by either a preference over trains of an inferior class operated by the other — all rules and regulations shall be reasonable and just to both lessor and lessee, and shall secure to neither any preference or discrimination against the other."

Again, the opinion states that "moreover, all trains were to be moved under the direction of an officer of the Pacific Company. The Rock Island trains coming upon a Pacific track immediately passed from the control of the Rock Island Com-

pany into that of the Pacific, and its officials were subject to the orders of the Pacific's officers."

I am unable to so read any provision of the contract. On the contrary, as already stated, it is expressly stipulated that "the schedules of rules and regulations for the movement of engines and trains over the several railways hereby let and demised shall be made for each railway by the duly authorized officers of the lessor and lessee companies by which such railways shall at the time be operated;" and if the parties cannot agree upon such rules and regulations, then mutually appointed referees shall exercise authority to "prescribe schedules, rules and regulations and to modify existing ones." The plain meaning, as I think, of these contracts is that the Union Pacific Railway Company has thereby parted with its sole and absolute control of those portions of its road and tracks that are embraced within the scope of the contracts, and with the sole and absolute power to exercise its franchises to occupy, possess and operate such portions of its road, and has agreed to participate, for a period of 999 years, with other railway companies, in the full, joint and equal possession of those portions of its road, in their physical aspect, and to confer upon such other companies the right to join, on equal terms, in the making of all rules and regulations pertaining to the use and management thereof. When a contract provides for the possession of a railroad and for its operation by rules and regulations it has covered everything that exists — the road as a physical structure, and the franchises to operate it by rules and regulations.

It is true that the contract provides that the rules and regulations "shall be executed and all trains moved under the immediate direction of the superintendent or other officer of the lessor company." But the duties of such an officer are subordinate. He is to carry out the rules and regulations prescribed jointly and equally by the lessor and the lessee companies, and the meaning and effect of the provision in question is to prevent the confusion that would result if there were two superintendents to enforce the same rules over the same portions of railroad.

The opinion of the court disposes of the cases hereinbefore cited by the observation that they arose upon instruments which dispossessed the corporations of all their property and of all capacity to perform their public duties, and that such is not the case here.

But the reason why the contracts in those cases were held void was not because they embraced all the property of corporations, but because the companies sought to part with the possession and control of their property without legislative authority for doing so. Can that be a sound view which, while admitting that the Union Pacific Railway Company is forbidden to lease the possession and control of its road to another company without authority expressly given, yet would hold that that company may, without such authority, part with the possession and control of one half or of any appreciable part of its road? Can it be maintained that, while the Union Pacific Railway Company cannot lease its railroad from Council Bluffs to Ogden, it may contract with the Rock Island Railway Company to give it joint and equal possession and management of its road between those points? And, in point of principle, if such a contract would be void if embracing the road between Council Bluffs and Ogden, how could it be declared valid if embracing the road between Council Bluffs and South Omaha?

The views of the majority seem to me to overlook the essential question, and that is, the power of the Union Pacific Railway Company to part with its road and franchises, temporarily or forever, in whole or in part. A contract by that company to share its road and those powers, called franchises, which are necessary to operate it, is just as much forbidden by the principle of the cases as a contract to lease its road as an entirety. The objection to an irrevocable contract for 999 years that the Union Pacific Railway Company may hereafter need to use its tracks and franchises in their entirety, is not satisfactorily met by the suggestion that, in such event, the courts can, in some way, relieve the company from the contract. It is not easy to see how an engagement now held valid can be hereafter dispensed with.

The Union Pacific Railway does not hold and exercise the

powers conferred on it by Congress, subject to the control and approval of the courts. Nor is it competent for the courts to enforce or relax, at their will and according to their views of expediency, the obligations of contracts into which the railway company may have entered.

Other provisions of these contracts which seek to subject the Omaha and Republican Valley Railway Company and the Salina and Southwestern Railway Company to the use of the Rock Island and St. Paul companies, and which render the Union Pacific Railway Company liable as lessee of railroads owned by the Rock Island Company, are, in my judgment, equally without authority of law. But it is scarcely worth while to consider them minutely. As this is a proceeding to enforce specific performance of the entire contract, invalidity of any important part of the contract, but for which it would not have been entered into at all, is enough to defeat the bill.

It is scarcely necessary to say that if these contracts were void for the reasons given, no action taken under them would justify a court of equity in enforcing them. As was said in *Thomas* v. *Railroad Co.*, above cited: "In the case of a contract forbidden by public policy and beyond the powers of the defendant corporation, it was its legal duty — a duty both to the stockholders and the public — to rescind and abandon the contract at the earliest moment, and the performance of that duty, though delayed for several years, was a rightful act when done, and could give the other party no right of action, and that to hold otherwise would be to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, as far as could be done consistently with adherence to law, by

permitting property or money, parted with on the faith of the unlawful contract, to be recovered back or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, money or property which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

I think that the judgment of the Circuit Court of Appeals should be reversed and the cause remanded to the Circuit Court with directions to set aside its decree and dismiss the bill.

MR. JUSTICE GRAY likewise dissented.

UNION PACIFIC RAILWAY COMPANY *v.* CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY. UNION PACIFIC RAILWAY COMPANY *v.* CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY. Nos. 41, 42. Argued April 21, 22, 1896. Decided May 25, 1896.

THE CHIEF JUSTICE: These appeals were from the Circuit Court and the cases have just been disposed of on appeals from the Circuit Court of Appeals.

Appeals dismissed.

Mr. John F. Dillon and *Mr. John M. Thurston* for appellants.

Mr. J. M. Woolworth for Chicago, Rock Island and Pacific Railway Co.

Mr. George R. Peck for Chicago, Milwaukee and St. Paul Railway Co.

LUCAS *v.* UNITED STATES.

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

No. 692. Submitted November 19, 1895. — Decided May 25, 1896.

On the trial of a Choctaw Indian for the murder of a negro at the Choctaw Nation, in the Indian country, the status of the deceased is a question of fact, to be determined by the evidence, and the burden of proof is on the Government to sustain the jurisdiction of the court by evidence.

Statements alleged to have been made by the negro in his life time that he did not belong to the Indian country are not admissible for that purpose.

DEFENDANT was indicted in the Circuit Court of the United States for the Western District of Arkansas, February 15, 1895, for the murder, at the Choctaw Nation, in the Indian country, of one Levy Kemp, who was alleged in the indictment to have been "a negro and not an Indian." Having been tried and convicted, he was sentenced to death. He then sued out a writ of error from this court.

It was proven at the trial that defendant was a Choctaw Indian, and that Kemp was by blood a negro. The crime was alleged to have been committed in the fall of 1894.

The Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of any one of the States, Congress may, by law, punish any offence there committed. See *In re Mayfield*, 141 U. S. 106, 112, and cases there cited. By section 8 of article VIII of the treaty between the Choctaw and Chickasaw Indians, concluded April 28, 1866, 14 Stat. 769, 773, it was agreed by those Indians that a court or courts might be established in the Indian Territory with such jurisdiction and organization as Congress might prescribe, provided that the same should not interfere with the local judiciary of said nations.

The jurisdiction of the Circuit Court of the United States for the Western District of Arkansas was made to extend, by section 533, Revised Statutes, to "the country lying west of Missouri and Arkansas, known as the 'Indian Territory.'"

Statement of the Case.

Subsequently, by the act of Congress of January 6, 1883, 22 Stat. 400, c. 13, § 2, and the act of March 1, 1889, 25 Stat. 783, 786, c. 333, § 17, certain parts of the Territory were annexed, respectively, to the District of Kansas and the Eastern District of Texas, leaving that part of the Territory which includes the portion of the Choctaw Nation in which this case arose, to remain within the Western District of Arkansas.

Section 2145, Rev. Stat., provides that, except as regards certain crimes, "the general laws of the United States as to the punishment of crimes committed within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country;" and by section 2146, Rev. Stat., it is provided that "the preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian."

And by the act of May 2, 1890, c. 182, 26 Stat. 81, "to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," it is provided "that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties," etc.

By the third article of the above mentioned treaty with the Choctaws and Chickasaws they, in consideration of the sum of $300,000, ceded to the United States certain territory, with the provision that the said sum should be invested and held in trust for the said nations by the United States, at interest, until the legislatures of the Choctaw and Chickasaw nations, respectively, should have made such laws, rules and regulations as might be necessary to give all persons of African descent, resident in the said nations at the date of the treaty of Fort Smith, and their descendants, held in slavery among the said nations previously to the date of the treaty, all the rights, privileges and immunities, including the right of suffrage, of citizens of said nations, etc. The second article provided that slavery in the said two nations should be at once abolished.

Previously to the year 1879, the Choctaw Nation had mani-

fested a willingness to adopt its freedmen, but the question seems to have arisen whether the joint or concurrent action of both nations was not required to make the adoption by either nation valid. It is understood that the Chickasaws, for some reason, refused to agree to any plan of adoption into their nation of the freedmen belonging therein; and that, therefore, the Choctaw National Council, on November 2, 1880, sent a memorial to Congress expressing their willingness to accept their freedmen as citizens, and asking for legislation that would enable them to do so. The only result of this memorial seems to have been the introduction of a Senate bill which was never reported. Two years later, however, in 1882, a clause was inserted in the Indian appropriation bill, act of May 17, c. 163, of that year, 22 Stat. 68, 72, providing for the appropriation of the sum of $10,000 out of the $300,000 reserved by the third article of the treaty above referred to, for the purpose of educating freedmen of the Choctaw and Chickasaw Nations, to be expended in the manner directed by the act, and providing further that either of said nations might, before the expenditure of the money so appropriated, adopt and provide for the freedmen of the said nations, respectively, and that in such case its proportion of the money appropriated should be paid over to such nation. Under this provision the Choctaw Nation adopted its freedmen as citizens by an act of its legislature of May 21, 1883. This action of the Choctaw Nation is referred to in the Indian appropriation act of March 3, 1885, 23 Stat. 362, 366.

The plaintiff in error submitted on the record.

Mr. Assistant Attorney General Dickinson for defendants in error.

Mr. Justice Shiras delivered the opinion of the court.

It has recently been decided by this court in the case of *Alberty* v. *United States*, 162 U. S. 499, that the act of May 2, 1890, wherein it provides that the judicial tribunals of the Indian nations shall retain exclusive jurisdiction in all civil

and criminal cases arising in the country in which members of the nation by nativity or by adoption shall be the only parties, is to be construed as meaning the parties to a crime as well as parties to a civil controversy, and as, under the present condition of the laws pertaining to the Choctaw tribe, negroes who have been adopted into the tribe are within the jurisdiction of its judicial tribunals, it follows that the averment in the indictment in the present case that Levy Kemp, the murdered man, was a negro and not an Indian was the averment of a jurisdictional fact, which it was necessary for the prosecution to sustain by competent evidence. Such averment implied that there were negroes who were and those who were not Indians in a jurisdictional sense.

As the accused was a Choctaw Indian, as the killing took place in the Indian Territory, and as Kemp was alleged and conceded to be a negro, the question arises, what was the legal presumption as to the latter's citizenship? Is it to be presumed that he was a citizen of the United States, or that he was a member and citizen of the Choctaw tribe?

We understand the learned judge to have assumed that the presumption was that Kemp was not a member of the Choctaw tribe, and to have so instructed the jury. His language on this subject was as follows:

"In the first place, you are required to find that Kemp, the man killed, or the unknown man, if you should believe his name has not been established, was a negro and not an Indian. That means he was a citizen of the United States; that means that the court has jurisdiction of the case under the law. You may find that proposition by circumstances as well as by what is called positive proof."

In disposing of the motion for a new trial, the judge said:

"Now it may be said that there are some people who are negroes who are adopted into that nation, but that is the exception to the rule. That is an exception to the general rule. The proof in this case, as we find by proceeding further on, shows that the deceased in this case, was not one of that class. It is certainly a correct rule of law when you come to an exception of that character, when you find a man who is a

negro by blood said to be such, and there was no controversy over that, and the government proves that fact, that makes a *prima facie* case of jurisdiction, because it shows that he belonged to a race that, as a rule, are not of the Indian race, and they are only of such Indian race by adoption. When that fact is proven it makes a *prima facie* case of jurisdiction."

The view of the trial judge, therefore, seems to have been that a finding of the fact that the deceased was a negro established the jurisdiction of the court by reason of a presumption that a negro, though found within the Indian Territory, was not a member of the tribe.

In so holding we think the court erred. If there is any presumption in such a case, it rather is that a negro found within the Indian Territory, associating with the Indians, is a member of the tribe by adoption. But we prefer, in the present case, not to invoke such a presumption, but to regard the status of the deceased as a question of fact, to be determined by the evidence. This was the theory of the indictment, as the allegation concerning Kemp's citizenship was not restricted to his being a negro, but added the averment, "not an Indian."

So, too, it is obvious that the attorney for the government did not rely upon a presumption that a negro, found in the Indian country, was not a member of the tribe, but undertook to sustain the jurisdictional averment of the indictment by affirmative evidence. John le Flore was called by the Government to prove that Kemp was not a resident of the Indian country, but had come from a place named Mount Kemp, near Little Rock, Arkansas. It is scarcely necessary to observe that, in the case of *United States* v. *Rogers*, 4 How. 567, where it was held that Rogers, a white man, was indictable in the Circuit Court of the United States for an offence committed in the Indian Territory, although he had become a member of the Cherokee tribe, there was no statute in terms extending jurisdiction of the Indian courts in civil and criminal cases over their adopted citizens.

Assuming that the government adduced competent evidence tending to show that Kemp was not a member of the tribe, still the admission of such evidence would not cure the error

of the instruction as to the presumption. The burden of proof was on the government to sustain the jurisdiction of the court by evidence as to the status of the deceased, and the question should have gone to the jury as one of fact and not of presumption.

But we are of opinion that the evidence put in by the government, on this question, was not competent. It consisted of statements alleged to have been made by the deceased, in his lifetime, to le Flore, the witness, that he did not belong to the Indian country, but had come from Arkansas. Such statements do not come within any rule permitting hearsay evidence. The trial judge appears to have regarded the testimony as within the rule that declarations of deceased persons made against their interest are admissible — that as a colored man adopted in the Choctaw Nation gets benefits, rights and privileges, a declaration made by him against that interest would be competent. It may be that, in a controversy on behalf of a deceased negro's right, or that of his representatives, to participate in the property of the nation, such admissions might be competent. But this case is not within any such rule. The object of the evidence here was not to enforce any rights or claims of the deceased against the Choctaw Nation, but was to sustain an allegation in an indictment, upon which the jurisdiction of the United States court depended.

It is contended in this court, on behalf of the government, that exception to this evidence was not sufficiently taken. The record, however, discloses that the counsel for the defendant, at the trial, objected to the questions put to the witness le Flore to elicit the statements made by Kemp. It is true that the question had been put and answered before the objection was made, but the defendant's counsel asked that the testimony should be excluded, and that an objection should be noted, and thereupon the judge declared the evidence competent. It is, therefore, apparent that the objection was made in time to enable the government to introduce other and more competent evidence, and that the judge did not overrule the objection because it was not taken in time, but because he

deemed the evidence competent. Moreover, in the charge, the judge instructed the jury that they had a right to take into consideration the facts that had gone to them for the purpose of showing who Kemp was and where he came from, and as there was no other evidence on this topic than that of le Flore, it is plain that the judge submitted to the jury the evidence of le Flore, as to the statements, as competent. To this portion of the charge the defendant excepted before the jury retired and in their presence. It is, indeed, now contended that the exception was too indefinite; but we think that the exception was sufficient to enable the trial court to perceive the particular matter objected to.

We think, therefore, that the court erred in instructing the jury that they had a right to find that the deceased was not a member of the Choctaw Nation from the mere fact that he was a negro, and also in admitting evidence of the statements of the deceased and in instructing the jury that such statements were competent evidence as to his citizenship.

The judgment is reversed, and the case remanded with instructions to set aside the verdict and grant a new trial.

BROWN *v.* WYGANT AND LEEDS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 209. Submitted April 2, 1896. — Decided May 25, 1896.

R. obtained a judgment against B. on the law side of the Supreme Court of the District of Columbia. Shortly after he assigned the judgment to S. W , who subsequently became bankrupt, and as such surrendered all his property, including said judgment. G. was duly made his assignee. S. W. died and G. W. was made his executrix. The death of S. W. being suggested on the record, a writ of *scire facias* was issued to revive the judgment, and on return of *nihil* a second writ was issued on which a like return was made. When these proceedings came to the knowledge of B. he filed a bill to set them aside. A demurrer being sustained on the ground that the assignee was not a party the assignee was summoned in; and, upon his death, his successor was made a party on his

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own motion. After issues were made by the pleadings, the suit proceeded to a final decree in the Supreme Court of the District, from which an appeal was taken to the Court of Appeals. The latter court reversed the judgment of the court below. On appeal to this court it is *Held*,

(1) That the proceedings to revive the judgment were regular;

(2) That as the assignee was a party to the proceedings, with his official rights protected, the judgment debtor could not set up that it was not competent for G. W. to originate the proceedings;

(3) That no substantial reason was shown why B. should be relieved from the judgment.

On June 22, 1887, Joseph M. Brown, a citizen of the United States, residing in the District of Columbia, filed in the Supreme Court of the District of Columbia a bill in equity against Grace Wygant, executrix of Stephen I. Wygant, deceased, a resident of the State of New Jersey, seeking to enjoin the collection of a judgment of the Supreme Court of the District of Columbia in favor of the said Grace Wygant, executrix, against the said Joseph M. Brown, dated March 3, 1886.

The bill alleged that on the 9th day of February, 1874, one Thomas L. Raymond obtained a judgment against the complainant Brown, on the law side of the Supreme Court of the District of Columbia, for the sum of $5000; that on May 14, 1874, said Raymond assigned said judgment upon the records of the court to Stephen I. Wygant, the testator of said Grace Wygant; that on February 23, 1878, the said Stephen I. Wygant was adjudged a bankrupt by the District Court of the United States for the Southern District of New York, and on that day duly surrendered all his property, including said judgment for $5000; that on March 20, 1878, one Henry T. Godet was appointed assignee in bankruptcy; that said judgment for $5000 was in terms included in the schedule of assets filed by Stephen I. Wygant; that claims aggregating more than $12,000 were proven in said bankruptcy proceedings; that the said judgment for $5000 was the principal asset, and that the aggregate value of the assets was much less than the claims; that the estate of said bankrupt had never been settled, and that the said judgment for $5000 still belonged to Henry T. Godet, as assignee; that the defendant, Grace Wygant, had full knowledge of the bankruptcy pro-

ceedings, and relying upon complainant's ignorance thereof and for the purpose of harassing him, on January 12, 1886, applied for and procured letters testamentary from the Supreme Court of the District of Columbia on the estate of Stephen I. Wygant, then deceased; that said Grace Wygant, after receiving such letters testamentary, and on February 1, 1886, caused the clerk of said Supreme Court of the District of Columbia to enter upon the docket of said court a suggestion of the death of Stephen I. Wygant, and to issue a writ of *scire facias* to revive said judgment, and upon the return by the marshal of the District, of "*nihil*," the said Grace Wygant, on the 4th day of February, 1886, caused an alias writ of *scire facias* to be issued, which writ was, on the same day, returned by the marshal endorsed "*nihil;*" that the said Grace Wygant obtained, upon the issuance and return of such writs of *scire facias*, a "*fiat*" from the justice holding said Circuit Court of the Supreme Court of the District of Columbia on the 3d day of March, 1886, for the purpose of reviving said judgment; that the complainant had no knowledge of such proceedings in the said special terms of said Supreme Court of the District of Columbia for probate and circuit court business until a long time after the rendition of said "*fiat;*" that as soon as he received notice of said proceedings he filed a motion to set them aside and for the vacating of the "*fiat*," but that the justice holding such Circuit Court overruled said motion, reserving to appellant his rights to proceed in equity for relief; that after the rendition of the "*fiat*" aforesaid, Grace Wygant, as such executrix, brought an action for the enforcement of such judgment against the complainant in the Supreme Court of the county of New York on December 28, 1885; and thereupon the complainant prayed for both a temporary and final injunction against Grace Wygant, as such executrix, and for general relief.

A demurrer was sustained to the bill on the ground that the assignee in bankruptcy was not made a party, but leave was given to amend by making the assignee a party. On January 10, 1888, the complainant amended by adding the name of Henry T. Godet, assignee in bankruptcy of Stephen

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I. Wygant, deceased, as an additional defendant, and by filing as an exhibit the assignment conveying to Godet, assignee, the entire estate of the said bankrupt, executed March 3, 1878, by the register in bankruptcy. After a general demurrer to the bill as thus amended had been overruled, Grace Wygant, executrix, filed an answer, and issue was joined, June 26, 1888, by replication. On February 5, 1888, an injunction *pendente lite* was allowed as prayed in the bill. On September 11, 1888, on motion of the solicitor of the defendant, the death of Godet, assignee, was entered of record. On September 29, 1890, Henry Leeds, as successor to Godet, was, on his own petition, admitted to become a party defendant, and on November 4, 1890, Leeds, as assignee, filed his separate answer, substantially admitting the allegations of the amended bill, to which complainant filed a replication. On November 10, 1890, leave was given defendant Leeds to file a cross-bill, which he did, alleging that he, as assignee, was entitled to the judgment, and praying that it might be decreed to be an asset of the bankrupt's estate and of full force and vigor against the complainant, and that the defendant, Grace Wygant, should be decreed to assign to him such judgment and her apparent rights thereto.

On November 25, 1890, the complainant filed an answer to the cross-bill. In this answer he denied that the Supreme Court of the District of Columbia had jurisdiction to issue the letters testamentary to the defendant, Grace Wygant; denied that the "*fiat*" of the Circuit Court of the Supreme Court of the District of Columbia was pronounced by lawful authority, and denied that the judgment in controversy was still in force — pleaded the statute of limitations. He also averred that Godet, the original assignee, had actual notice of the pendency of this suit, but had refused and declined to become a party thereto.

On the 14th day of January, 1891, Grace Wygant, as executrix, filed an answer to the cross-bill, denying that Leeds was invested with title to the judgment as assignee, and likewise averring that since the filing of the original bill she had become the lawful assignee of all the claims of the creditors

against the bankrupt's estate except one owned by the city of New York.

On February 14, 1891, the Supreme Court of the District of Columbia, at special term, filed a decree dismissing the cross-bill and granting a final injunction against Grace Wygant, enjoining her as executrix from further prosecuting the judgment obtained by her against the complainant in respect to the said judgment for $5000 in the Supreme Court of the county of New York.

From this decree Grace Wygant, executrix, and Henry Leeds, assignee, appealed to the Supreme Court of the District of Columbia at general term, and that court, on April 4, 1892, reversed the decree of the special term, dismissed the bill of complaint of Joseph M. Brown, adjudged that the judgment in controversy was the property of Henry Leeds as assignee in bankruptcy of Stephen I. Wygant, deceased, as an asset of said estate, and decreed that said Grace Wygant, executrix, should convey and assign to said Henry Leeds, assignee, all her apparent rights in said judgment.

On April 16, 1892, the complainant filed a petition asking the court to vacate its said decree and to remand the cause to the special term, in order that evidence might be taken, for reasons set forth in said petition. On November 21, 1892, this motion was refused, and on December 20, 1892, an appeal was taken to this court.

Mr. Robert Christy for appellant.

Mr. A. A. Birney for Leeds, appellee.

Mr. Justice Shiras delivered the opinion of the court.

In dismissing the appellant's bill of complaint and sustaining the cross-bills the Supreme Court of the District evidently proceeded on the view that it was competent for the Circuit Court to render judgment of "*fiat executio*" on the return of "*nihil*" to two successive writs of *scire facias* on the original judgment. That a return of two *nihils* is equivalent to a service has been a rule of practice of long standing in England and in most of the States of this Union.

The writ of *scire facias quare executio non* is defined to be a writ issued out of the court wherein a judgment has been entered, reciting such judgment, suggesting the grounds requisite to entitle plaintiff to execution, and requiring the defendant to make known the reason, if any there be, why such execution should not issue. Bingham on Executions and Judgments, 123; Freeman on Executions, vol. 1, § 81.

"On the return day of the writ the sheriff either returns '*scire feci*,' that is, that he has warned the party, or '*nihil*,' that is, that the party has nothing by which he can warn him. When the sheriff returns '*nihil*,' the party must sue out a second or *alias* writ of *scire facias*, and if the sheriff returns '*nihil*' also to the second writ, and the defendant do not appear, there shall be judgment against him. [In other words, two returns of '*nihil*' are equivalent to one return of '*scire feci*.']" Bingham on Executions and Judgments, 124; *Andrews* v. *Harper*, 8 Mod. 227; *Chambers* v. *Carson*, 2 Whart. 9; *Choate* v. *The People*, 19 Illinois, 62; *Kearns* v. *The State*, 3 Blackford, 334; *Barrow* v. *Bailey*, 5 Florida, 9; *Cumming* v. *Eden*, 1 Cowen, 70.

And as the Supreme Court of the District of Columbia has, in the present case, recognized the regularity of the proceedings to revive the judgment against the appellant, no reason is seen why this court should take a different view. *Owens* v. *Henry*, 161 U. S. 642, is distinguishable from this case, because there the defendant had ceased to be a resident of Pennsylvania, where the original judgment had been entered, years before the writ of *scire facias* was sued out, and had become a citizen of Louisiana, in which State the statute of limitations had run.

It is urged on behalf of the appellant that as Wygant, the original owner of the judgment, had been declared a bankrupt, and as the judgment, as an asset of his estate, had become the property of the assignee in bankruptcy, it was not competent for Grace Wygant, as his executrix, to revive the judgment by proceeding in the Supreme Court of the District of Columbia. A sufficient answer to this is that Brown, as the judgment debtor, was not injured, and could not have

successfully set up that matter by plea to the *scire facias*. *Thatcher* v. *Rockwell*, 105 U. S. 467, was a case where, after suit brought, the plaintiff was adjudged to be a bankrupt, and assignees were appointed, and it was held that the bankruptcy of the plaintiff could not be set up by the defendants to bar its further prosecution in his name, this court saying: "It is no defence to the debt that the creditor has become a bankrupt; and if an assignee, after notice, permits a pending suit to proceed in the name of the bankrupt for its recovery, he is bound by any judgment that may be rendered. This is a sufficient protection for the debtor."

In the present case, Leeds, the assignee in bankruptcy, ratified the action of the executrix, by making himself a party to the proceedings and procuring a decree compelling her to transfer the judgment to him as an asset of the bankrupt's estate. By that feature of the decree Brown is protected from any danger of being compelled to pay twice.

If, then, the original judgment was regularly obtained, was duly revived by lawful proceedings, and is now made payable, by the decree of the court below, to the party legally entitled to receive the same, no reason is presented by this record why this court should disturb that decree. Equity refuses to relieve from a judgment unless substantial merits are shown.

It is true that the appellant undertook to show that he had a meritorious defence to the suit as originally brought, by certain allegations made in a petition to the Supreme Court of the District of Columbia filed after the final decree had been entered against him. We are not obliged to notice allegations made at such a late period in the proceedings — not made, indeed, till the controversy had been finally closed. However, we have read this petition, and it is sufficient to say that it contains nothing which, even if true and if made to appear during the trial of the present case, would have justified any change in the decree.

The decree of the Supreme Court of the District of Columbia is

Affirmed.

UNITED STATES *v.* PERKINS.

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

No. 422. Submitted May 8, 1896. — Decided May 25, 1896.

Personal property, bequeathed by will to the United States, is subject to an inheritance tax under state law.

Under the statutes of New York the United States are not a corporation, exempted from such inheritance tax.

THIS was a writ of error to an order of the General Term of the Supreme Court, affirming an order of the Surrogate's Court of Suffolk County, assessing an inheritance tax of $3964.23 upon the personal property of William W. Merriam, bequeathed by him to the United States.

It appeared that Merriam, who was a resident of Suffolk County, died on January 30, 1889, leaving a last will and testament, by which he devised and bequeathed all his estate, both real and personal, to the United States government. Upon the petition of the executor an appraiser was appointed, and upon his report the Surrogate fixed the tax at the above amount. On appeal to the General Term of the Supreme Court the order of the Surrogate's Court was affirmed, and upon a further appeal to the Court of Appeals the order of the Supreme Court was affirmed, and the case remanded to that court for final judgment, which was entered against the United States March 31, 1894. Whereupon the United States and the executor joined in suing out this writ of error. Defendant in error is the county treasurer of Suffolk County.

Mr. Solicitor General for plaintiffs in error.

Mr. Timothy M. Griffing for defendant in error.

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

This case raises the single question whether personal

property bequeathed by will to the United States is subject to an inheritance tax under the laws of New York.

By chapter 483, Laws of 1885, as amended by chapter 215, Laws of 1891, it was enacted as follows: "SEC. 1. After the passage of this act all property which shall pass by will or by the intestate laws of this State from any person who may die seized or possessed of the same while a resident of this State, . . . to any person or persons, or to any body politic or corporate, in trust or otherwise, . . . other than to or for societies, corporations and institutions now exempted by law from taxation, or from collateral inheritance tax, shall be and is subject to a tax at the rate hereinafter specified," etc.

By chapter 399 of the Laws of 1892, Vol. 1, entitled "An act in relation to taxable transfers of property," (sec. 1,) "a tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars or over, . . . to persons or corporations not exempt by law from taxation on real or personal property." By sec. 23 of this law certain previous acts were repealed, subject to a saving clause contained in sec. 24, to the effect that the repeal should not affect or impair any act done, or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the passage of this act. The twenty-fifth section also provided that the provisions of this act, so far as they were substantially the same as those of the laws existing April 30, 1892, should be construed as a continuation of such laws, modified or amended according to the language employed in this act, and not as new enactments.

The testator Merriam died January 30, 1889, but the tax was not assessed until February 16, 1893, after the act of 1892 had taken effect. Upon this state of facts, the Court of Appeals of New York was of opinion that the case was covered by the act of 1892, although it was thought that the legacy was subject to taxation whether it was taxed under that or the previous acts. This ruling as to the applicability of the act of 1892 seems to conflict with the case of *Seaman*, 147 N. Y. 69, but the difference is not material in this case.

The case really presents two questions:

1. Whether it is within the power of the State to tax bequests to the United States.

2. Whether, under these statutes, the United States are a corporation exempted by law from taxation.

1. While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. "By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal." 2 Bl. Com. 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one half the estate if the testator leave but one child; one third, if he leaves two children; one fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one half of his property, and but three fourths if he have ancestors in but one line. By the law of Italy, one half a testator's property must be distributed equally among all his children; the other half he may

leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

In this view, the so called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. This was the view taken of a similar tax by the Court of Appeals of Maryland in *State* v. *Dalrymple*, 70 Maryland, 294, 299, in which the court observed: "Possessing, then, the plenary power indicated, it necessarily follows that the State in allowing property . . . to be disposed of by will, and in designating who shall take such property where there is no will, may prescribe such conditions, not in conflict with or forbidden by the organic law, as the legislature may deem expedient. These conditions, subject to the limitation named, are, consequently, wholly within the discretion of the General Assembly. The act we are now considering plainly intended to require that a person taking the benefit of a civil right secured to him under our laws should pay a certain premium for its enjoyment. In other words, one of the conditions upon which strangers and

collateral kindred may acquire a decedent's property, which is subject to the dominion of our laws, is, that there shall be paid out of such property a tax of two and a half per cent into the treasury of the State. This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

That the tax is not a tax upon the property itself, but upon its transmission by will or by descent, is also held both in New York and in several other States, *Matter of the Estate of Swift*, 137 N. Y. 77, in which it is said, p. 85, that "the effect of this special tax is to take from the property a portion, or a percentage of it, for the use of the State, and I think it quite immaterial whether the tax can be precisely classified with a taxation of property or not. It is not a tax upon persons." *Matter of Hoffman*, 143 N. Y. 327; *Schoolfeld's Executor* v. *Lynchburg*, 78 Virginia, 366; *Strode* v. *Commonwealth*, 52 Penn. St. 181; *In re Cullum*, 145 N. Y. 593. In this last case, as well as in *Wallace* v. *Myers*, 38 Fed. Rep. 184, it was held that, although the property of the decedent included United States bonds, the tax might be assessed upon the basis of their value, because the tax was not imposed upon the bonds themselves, but upon the *estate* of the decedent, or the privilege of acquiring property by inheritance. *Eyre* v. *Jacob*, 14 Grattan, 422; Dos Passos on Inheritance Tax Law, chap. 2, sec. 8, and cases cited. Such a tax was also held by this court to be free from any constitutional objection in *Mager* v. *Grima*, 8 How. 490, 493, Mr. Chief Justice Taney remarking that "the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. . . . If a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or

policy." To the same effect is *United States* v. *Fox*, 94 U. S. 315.

We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

2. Whether the United States are a corporation "exempt by law from taxation," within the meaning of the New York statutes, is the remaining question in the case. The Court of Appeals has held that this exemption was applicable only to domestic corporations declared by the laws of New York to be exempt from taxation. Thus, in *Matter of Estate of Prime*, 136 N. Y. 347, it was held that foreign religious and charitable corporations were not exempt from the payment of a legacy tax, Chief Judge Andrews observing (p. 360): "We are of opinion that a statute of a State granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the State and over which it has power of visitation and control. . . . The legislature in such cases is dealing with its own creations, whose rights and obligations it may limit, define and control." To the same effect are *Catlin* v. *Trustees of Trinity College*, 113 N. Y. 133; *White* v. *Howard*, 46 N. Y. 144; *Matter of Balleis*, 144 N. Y. 132; *Minot* v. *Winthrop*, 162 Mass. 113; Dos Passos, chap. 3, sec. 34. If the ruling of the Court of Appeals of New York in this particular case be not absolutely binding upon us, we think that, having regard to the purpose of the law to impose a tax generally upon inheritances, the legislature intended to allow an exemption only in favor of such corporations as it had itself created, and which might reasonably be supposed to be the special objects of its solicitude and bounty.

In addition to this, however, the United States are not one of the class of corporations intended by law to be exempt

Names of Counsel.

from taxation. What the corporations are to which the exemption was intended to apply are indicated by the tax laws of New York, and are confined to those of a religious, educational, charitable or reformatory purpose. We think it was not intended to apply it to a purely political or governmental corporation like the United States. *Catlin* v. *Trustees of Trinity College*, 113 N. Y. 133; *Matter of Estate of Van Kleeck*, 121 N. Y. 701; Dos Passos, chap. 3, sec. 34. In the *Matter of Hamilton*, 148 N. Y. 310, it was held that the execution did not apply to a municipality, even though created by the State itself.

Upon the whole, we think the construction put upon the statute by the Court of Appeals was correct, and the judgment of the Supreme Court is, therefore,

Affirmed.

Mr. Justice Harlan dissented.

United States *v.* Fitch. Error to the Supreme Court of the State of New York. No. 828. Submitted with No. 422.

Mr. Justice Brown. In this case George W. Cullum, a resident of the State of New York, died in the city of New York on February 28, 1892, leaving a last will and testament, which, on the 30th day of April, 1892, was duly admitted to probate. By this will the testator bequeathed to the United States government the sum of $175,100, upon which, by order of the Surrogate's Court, there was assessed an inheritance tax of $8755.

The case does not differ in principle from the one above decided, and the judgment of the court below is, therefore,

Affirmed.

Mr. Justice Harlan dissented.

Mr. Solicitor General for plaintiffs in error.

Mr. Benjamin F. Dos Passos and *Mr. Edgar J. Levey* for defendant in error.

Syllabus.

WIBORG *v.* UNITED STATES.

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

No. 986. Submitted May 18, 1896. — Decided May 25, 1896.

The several acts described in and made punishable by Rev. Stat. § 5286, are stated therein separately and disjunctively, connected by the conjunction "or." The indictment in this case, charging that the defendants committed some of those acts, connects them by the conjunction "and." No question of duplicity was raised by the defendants' counsel. The trial judge instructed the jury that the evidence would not justify a conviction of anything more than providing the means for, or aiding the military expeditions set forth in the indictment, by furnishing transportation for their men, etc. *Held*, that the verdict could not be disturbed on the ground that more than one offence was included in the same count of the indictment.

Providing, or preparing the means of transportation for such a military expedition or enterprise as is referred to in Rev. Stat. § 5286, is one of the forms of provision or preparation therein denounced.

A hostile expedition, dispatched from a port of the United States, is within the words "carried on from thence."

A body of men went on board a tug in a port of the United States, loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba, when the United States were at peace with Spain. *Held*, that this constituted a military expedition or enterprise within the provisions of the Revised Statutes.

On the question whether the defendants aided the expedition with knowledge of the facts, the jury were instructed that they must acquit unless they were satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects, and had arranged and provided for its transportation. *Held*, that the defendants had no adequate ground of complaint on this branch of the case.

A statement of facts by the court in a recapitulation of the evidence, based on uncontradicted testimony, no rule of law being incorrectly stated, and the facts being submitted to the determination of the jury, is not open to exception.

The ruling in *Simmons* v. *United States*, 142 U. S. 148, that "the judge presiding at a trial, civil or criminal, in any court of the United States, may express his opinion to the jury upon the questions of fact which he sub-

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mits to their determination" applied to statements by the court below in its charge in this case.

Assuming that a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the declarations of those engaged in it explanatory of acts done in furtherance of its object were competent.

Where a plain error has been committed in a matter vital to defendants, this court is at liberty to correct it, although the question may not be properly raised; and being of opinion that adequate proof of guilty knowledge or participation on the part of the mates is not shown by the record, it reverses the judgment as to them, although no exception was taken.

WIBORG, the captain, and Petersen and Johansen, the mates, of the steamer Horsa, were indicted in the District Court of the United States for the Eastern District of Pennsylvania under section 5286 of the Revised Statutes. The indictment charged that defendants, "mariners, at the district aforesaid and within the jurisdiction of this court, did, within the territory and jurisdiction of the United States, to wit, at the port of Philadelphia, Pennsylvania, within the district aforesaid, begin, set on foot and provide and prepare the means for a certain military expedition and enterprise to be carried on from thence against the territory and dominions of a foreign prince, to wit, against the Island of Cuba, the said Island of Cuba being then and there the territory and dominions of the King of Spain, the said United States being then and there at peace with the King of Spain, contrary to the form of the act of Congress in such case made and provided and against the peace and dignity of the United States of America." They were tried before Judge Butler and a jury, and convicted. Motions in arrest of judgment and for a new trial were severally made and overruled, and defendants were sentenced to pay fines and to serve terms in the state penitentiary. This writ of error was thereupon sued out and defendants admitted to bail.

The Horsa was a Danish steamer, sailing under the Danish flag, and defendant Wiborg, its captain, was a subject of the King of Denmark, as were also his co-defendants, as claimed by their counsel.

Statement of the Case.

The Horsa was engaged in the fruit business for John D. Hart & Company, of Philadelphia, and on November 9, 1895, cleared from Philadelphia for Port Antonio, Jamaica. She had on board but little cargo, consisting of two life-boats, a lot of empty boxes and barrels, two horses, some horse feed, bales of hay and boxes of corn, all of which were entered on her manifest. Just before sailing, Captain Wiborg received a message, (in writing but not produced,) which, he said, was: "After I passed the Breakwater to proceed north near Barnegat and await further orders." The Horsa sailed between six and seven P.M., and, after passing the Delaware Breakwater, her proper course would be southward. She turned, however, to the northward, went up the Jersey coast to Barnegat light and anchored on the high seas between three and four miles off the shore. Between ten and eleven the same evening the steam lighter J. S. T. Stranahan sailed from Brooklyn, carrying some cases of goods and two life-boats, which had been put on board by the crew of the lighter during the evening. On the lower bay of New York, below Staten Island, during the night she took on board between thirty and forty passengers, mostly dark-complexioned men speaking a foreign language, apparently Cubans or Spaniards. The lighter then ran down to Barnegat, where she saw the Horsa under a white flag. She also ran up a white flag, went alongside, and put aboard her passengers with the cases of goods and the life-boats. They brought authority in writing from John D. Hart & Company, which was not produced. Captain Wiborg saw the transfer made, and assented to it. His firemen complaining, he answered: "I told them if anybody had to hang for this I would be the man to hang for it." He testified that the man on the lighter brought him a message from John D. Hart & Company. "He told me to take those men and luggage and whatever they had aboard the Horsa, and let them off whenever they called for it to be let off. I shipped two boats at the same time, and the order of my message was to deliver those two boats to those men and the two boats that I had shipped here in Philadelphia. . . . The only order was they had a colored man there that they

called the pilot, and whenever he called for them to be let off I should let them off and give them the boats." As to the boats taken on at Philadelphia and those taken on off Barnegat, he was "to deliver them to these men as soon as they called for them. . . . The pilot did not tell me where he was going. I did talk to him, but he could talk very little English." The captain testified that the writing from J. D. Hart & Company, "to take whatever was in the tug, the men and their luggage and boxes, and let them off whenever they called for it to be let off," did not strike him as an unusual thing; it did not strike him as unusual "that these men were to be taken on board and turned out on the sea with the boats." It appeared and was admitted that there was an insurrection in Cuba. The captain was informed that the party was going to Cuba, and believed the men were going to fight for Cuba, but was careful to ask no questions, and testified that he considered his own part in the affair to be lawful. The charter-party was not produced.

After boarding the Horsa, these persons broke open the boxes which they had brought with them, and took out rifles, swords and machetes, and one cannon. They also had cartridge belts, medicines, and bandages with them. They were not in uniform, but there was evidence that some of them had caps with a little flag, which they said was a Cuban flag. They brought their own food with them. The evidence tended to show that when these men divided up the arms, every man had a rifle; that certain of them, understood to be officers, had swords and revolvers; that one seemed to be in command of them; and that this commander asked some of the crew whether they would fight if attacked by a Spanish gunboat. There was also some evidence that there were military exercises in the nature of drilling by from three to seven men at a time; that these persons stated that they were going to Cuba to fight the Spaniards; that on the second day out they made small canvas bags to put cartridges in, and unpacked a bale of blankets which they had brought with them, wrapped one hundred and fifty spare rifles in these blankets in small bundles, about five in each, and threw the

boxes overboard in which the rifles had come, taking a rifle, sword and machete apiece, and practising with them and the cannon. There were three kinds of cartridges and two kinds of rifles. One witness stated that, as he was informed by them, there were small Winchesters for the cavalry and big rifles for the infantry; big revolvers for the officers; and that the cannon was a Maxim gun, in charge of a French Canadian. This machine gun was worked with a slot and a crank, and had its own cartridges. The witness saw it worked, and saw them practising with it, and the man in charge showed him how they were doing it. Some testimony was introduced on behalf of defendants to the effect that a machete is generally carried by the inhabitants of the West Indies, and has many peaceful uses. One of the defendants' witnesses admitted that it was a formidable weapon, and, moreover, that he had never seen citizens carry guns in Cuba. It is unquestioned that the machete is used for both war and peace, it being described in the Century Dictionary as a "heavy knife or cutlass, used among Spanish colonists and Spanish American countries, both as a tool and as a weapon," and by Webster as "a large, heavy knife, resembling a broadsword, often two or three feet in length, used by the inhabitants of Spanish America as a hatchet to cut their way through thickets, and for various other purposes."

After leaving Barnegat, the Horsa took the usual course for Jamaica, which follows the Cuban coast for about six hours. The usual color of her funnel was yellow below with red above and black on top, and it was so painted when she left Philadelphia. While she was at sea the funnel was repainted red and black, and when she returned to Philadelphia it was black, red and yellow. The name of the Horsa was painted out amidships, but her name was on the stern in brass letters and on the bow, and those letters were not painted over to the captain's knowledge. About six miles off the coast of Cuba the colored pilot gave orders to disembark. This was about eleven o'clock at night, and the disembarkation was conducted under the supervision of Captain Wiborg, who had the lights of the vessel put out. The two boats

were launched which had come on board at Philadelphia and also those which had come with the lighter, and Captain Wiborg sold the men one of the ship's boats. As one of the boats leaked, another was lowered from the ship. The passengers took to the boats, taking with them all the ammunition and arms they could carry. The steamer then undertook to tow the boats, but a strange light was seen in the distance, and at the request of the men the captain cut the boats loose and started away at full speed. Some forty boxes of cartridges had been left on the Horsa because there was no room for them on the boats, and Captain Wiborg directed that these should be thrown overboard. He said this was to avoid getting into trouble at Port Antonio, since the boxes were not manifested for that port. The Horsa then completed her voyage to Port Antonio. The captain said he told the collector there he had lost two boats, "to put him off his guard."

Defendants' counsel requested the court to give to the jury thirteen points of instructions, of which the fourth, fifth, sixth, seventh, eighth, ninth and eleventh were as follows :

"4. That the laws of the United States and the section under which the defendants are indicted do not prohibit transporting of arms or of military equipments to a foreign country or forbid one or more individuals, singly or in unarmed association, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries or between different parties in the same country.

"5. That before the jury can find the defendants guilty under this indictment they must first find that there was a 'military expedition or enterprise' against the territory of the King of Spain. A military expedition or enterprise does not exist unless there is a military organization of some kind designated as infantry, cavalry or artillery, and officered and equipped for active hostile operations.

"6. That if the jury find that there were transported on board of the Horsa arms and men, but the same were not a 'military organization as infantry, cavalry or artillery, and

officered and equipped, or in readiness to be officered and equipped,' then the jury must find the defendants not guilty.

"7. That it is not an offence against the laws of the United States for a shipper to ship arms to a foreign country or for volunteers to go to a foreign country for the purpose of joining in military operations which are being carried on between other countries or between different parties in the same country; in such cases the shipper and volunteer would run the risk, the one of capture of his property, and the other of the capture of his person by the foreign power; but the master of the ship transporting such arms and volunteers, not being a military expedition or enterprise, would not commit any offence against the laws of the United States and would not be liable under this indictment.

"8. That if the jury find from the evidence in this case that the officers of the steamship Horsa took on board, off the coast of New Jersey, on the high seas, a number of men, all dressed as citizens, without arms and equipments on their persons, and at the same time took on board certain boxes of arms and ammunition and munitions of war, but that the said men were not organized as infantry, cavalry or artillery or ready for such organization, the jury are instructed that they must find the defendants not guilty, even if the jury believe that the passengers on board intended to enlist, on arrival in Cuba, in the Cuban army.

"9. That if the jury find from the evidence that the defendants took on board their vessel, off the New Jersey coast, a number of men, unarmed and not organized, either as infantry, cavalry or artillery, and at the same time took on board boxes of ammunition and arms, the jury are instructed that they must find the defendants not guilty, even if the jury should believe that the men intended upon arrival in Cuba to enlist in the Cuban army, and that the boxes of arms were intended for use in the Cuban army."

"11. That if the jury find from the evidence that the passengers and boxes of arms did not constitute a military expedition or enterprise, but that the said passengers were simply going to Cuba to enlist in either army, and the said

arms and ammunition were being conveyed to Cuba to be used by either army, then the jury are instructed that the defendants in transporting them in due course of their business committed no offence against the laws of the United States; and the jury are further instructed that all evidence of secrecy, such as taking on the passengers and boxes of arms on the high seas and putting out the lights off the coast of Cuba, were acts which the defendants might lawfully do to avoid the capture of the passengers and the capture of the property from off their ship by Spanish men-of-war; but under such circumstances, if the jury find there was no military expedition or enterprise, such acts would not of themselves be evidence of any intent to violate the statute of the United States under which the defendants are indicted."

The court charged the jury, explaining the indictment, and then continued as follows:

"The evidence heard would not justify a conviction of anything more than providing the means for or aiding such military expedition by furnishing transportation for the men, their arms, baggage, etc. To convict them, you must be fully satisfied by the evidence that a military expedition was organized in this country, to be carried out as and with the object charged in the indictment, and that the defendants, with knowledge of this, provided means for its assistance and assisted it as before stated.

"Thus you observe the case presents two questions: First, was such military expedition organized here in the United States? Secondly, did the defendants render the assistance stated here with knowledge of the facts?

"In passing on the first question, it is necessary to understand what constitutes a military expedition, within the meaning of the statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniforms, or prepared for efficient service, nor that they shall have been organized as, or accord-

ing to the tactics or rules which relate to, what is known as infantry, artillery or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on the foreign government, and have provided themselves with the means of doing so. I say 'provided themselves with the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, etc., is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided, I should hold that it is not necessary.

"Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

Taking up defendants' thirteen points, the court disposed of them as follows:

"'1. It is not a crime or offence against the United States, under the neutrality laws of this country, for individuals to leave this country with intent to enlist in foreign military service, nor is it an offence against the United States to transport persons out of this country and to land them in foreign countries when such persons have an intention to enlist in foreign armies.'

"As a general proposition this is true, and the point is affirmed.

"'2. It is no offence against the laws of the United States to transport arms, ammunition and munitions of war from this country to any other foreign country, whether they are to be used in war or not; that in such case the shipper and transporter of the arms, ammunition and munitions of war only run the risk of the capture and seizure of such arms and contraband of war by the foreign power against whom they are intended to be used; but this does not make it an offence against the laws of the United States, and for such cause the defendants cannot be held guilty.'

"This is also true. No military expedition would exist in such case.

"'3. That it is no offence against the laws of the United States to transport persons intending to enlist in foreign armies, and arms and munitions of war, on the same ship; that in such case the persons transported and the shipper and transporter of the arms run the risk of seizure and capture by the foreign power against whom the arms were to be used and against whom the persons and passengers intended to enlist; but such cause did not constitute an offence against the laws of the United States, and for such cause the defendants cannot be found guilty.'

"This is true, provided the persons referred to herein had not combined and organized themselves in this country to go to Cuba and there make war on the government. If they had so combined and organized, and yet intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, they would constitute a military expedition, as before described, and the transportation of such body of persons from this country for such a purpose would be an offence against the statute.

"The fourth, fifth, sixth, seventh, eighth and ninth points are fully answered by what has been said.

"'10. Even if the jury do find that the men taken on board were an organized military force with officers, as infantry, cavalry or artillery, the jury cannot find the defendants guilty unless the jury also find that the defendants knew that they were such a military organization as infantry, cavalry or artillery, constituting a military expedition or enterprise against the kingdom of Spain.'

"As before stated, to justify conviction of the defendants, the jury must be fully satisfied that the defendants knew that the men constituted a military expedition such as I have described.

"The eleventh point has been fully answered by what the court has said.

"The twelfth point is a very important point, and is as follows:

"'12. If the jury find that when the defendants left Phila-

delphia, and until after they had passed beyond the jurisdiction of the United States, they were ignorant of the fact that they were to transport the men in question, with their arms and provisions, and find that the point off Barnegat where the men in question were taken aboard was beyond the jurisdiction of the United States — in other words, beyond the three mile limit — and find that the vessel was sailing under a Danish flag, then and in that case they will find the defendants not guilty.'

"This point raises the question whether the defendants committed an offence against the statute, if the only aid which they furnished the expedition was furnished out at sea, beyond the jurisdiction of this country; and I instruct you that if the only aid furnished the vessel, being a foreign vessel, was so beyond our jurisdiction they did not commit an offence, and must consequently be acquitted. They allege that the point off Barnegat where the men were taken on board was not within three miles of our shore. If this is true, and the defendants did not start from our shore under an agreement to provide the means for transporting and to transport the men, but were ignorant of the object of going to Barnegat until they reached there, they cannot be convicted.

"If, however, they entered into an arrangement here to furnish and provide the means of transportation, and provided it, they are guilty, if this was a military expedition, although the men were not taken aboard and the transportation did not commence until the ship anchored off Barnegat.

"'13. It is the duty of the government to satisfy the jury beyond a reasonable doubt that the men and arms and ammunition taken on board the steamship Horsa was a military expedition or enterprise from the United States against the kingdom of Spain, and also that the defendants knew or shut their eyes to the fact that it was a military expedition or enterprise from the United States against the kingdom of Spain; and if the jury have from the testimony any reasonable doubt upon either of these questions or facts, the jury will find the defendants not guilty.'

"This point is affirmed. I trust the jury understand it. To convict the defendants it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty."

The court then further recapitulated and commented on the evidence, and, in the course of doing so, said:

"Some of them who were able to speak English declared that they were Cubans going to Cuba to fight the Spanish; and if these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition. . . .

"That this was a military expedition designed to make war against the government of Spain would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for the defendants, without going further. If, on the other hand, you find that it was a military expedition intended to make war against the government of Cuba, then you must pass upon the second question stated, to wit, Did the defendants, with knowledge of the facts, aid in carrying out its purpose in going to Cuba? They transported the men with their arms, ammunition and provisions. Did they enter upon this service here with the knowledge of the fact that the men constituted a military expedition, to fight against the government of Cuba? . . . From this and any other testimony bearing on this subject you must determine whether they understood what the expedition and its objects were, and had arranged and provided for its transportation when they left Philadelphia or left our shores within the three mile limit stated. If they were ignorant on this subject until they anchored off Barnegat light, the point being, according to the testimony, beyond the jurisdictional limits of the United States,

no offence was committed, as I have before stated, against the laws of this country.

"The question, therefore, is, Did the defendants understand they were to carry this expedition and had provided for it, and understand what the expedition was before leaving here? As you have seen, they took on two extra boats before starting, and cleared for Port Antonio, Jamaica, and turned off of their course at the Breakwater (the captain explaining this, to which explanation you will give whatever weight you deem it to be worth). When the men came to the ship off Barnegat, there is no evidence that the captain or any one of the defendants expressed or exhibited any surprise. It was then manifest that the service required was to carry men and arms to Cuba (the captain says he then so understood it), a most hazardous undertaking. Is it probable that the defendants would have risked themselves and their ship in this service if they had not been prepared for it by previous arrangement, and have done it without demurring or hesitating? Again, is it likely that those in charge of the expedition would have risked bringing the men and the property to that point on the mere chance that the defendant would take the risk of carrying them and the property to Cuba without arranging for it beforehand? If the defendants had refused, as it was their right to refuse, and it would seem certain or at least extremely probable that they would refuse, this most hazardous service if previous arrangement had not been made, what would have been the situation of the men and the property? The expedition would have failed. The men would have been subject to arrest and the property to sacrifice. Is it probable that those in charge of such an enterprise would take the men and property to this point, without having secured certain means of transportation for it in advance? The captain says he was ignorant of the service required of him until he reached the point near Barnegat. You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with knowledge of and provision for what they were about to do.

"I now submit the case to you, reminding you of its impor-

tance. If the evidence of the defendants' guilt is not entirely clear, they should be acquitted. If it is thus clear, they should certainly be convicted. No sympathy or prejudice must be allowed to influence your minds in passing on this case. We have nothing to do with the controversies between the people of Cuba and the government of that island. We are concerned only with the execution of the law in this case. We have only to consider whether the statute to which your attention has been called has been violated. It is our duty to see that the law is honestly and justly executed; that is all. The peace and safety of the community so manifestly depend upon the faithful and honest administration of the law, that no man can fail to see it. We are suffering to-day, as probably no other people suffers, from lawlessness, from mobs, lynch law, murder, violation of trusts, as the result of want of faithfulness in executing the law.

"You will take the case and decide it with a careful regard to the rights of the defendants." 73 Fed. Rep. 159.

No motion or request was made that the jury be instructed to find for defendants or either of them.

Defendants excepted "to that part of the charge of the court giving the definition of a military expedition;" to the refusal of the court "to read the points that were not read to the jury," "to affirm all the points without qualification," and "to affirm each point without qualification;" to "the statement of the court that in its opinion this was a military expedition;" and "that the men were armed;" to "the failure of the court to comment on the evidence on behalf of the defendants;" to the statements "of the court in reference to the reasons, motives, purposes, and acts of the defendants;" "that the defendants did not express surprise that the men came on the vessel off Barnegat;" and "that the declarations of the men on the ship to the witnesses for the government were evidence against the defendants;" also to the statements "that even if an agreement to furnish and provide the means of transportation was made within the jurisdiction of the United States to carry on a military expedition which was not consummated until they got outside of the three mile

limit, that constituted an offence against the laws of the United States;" and "that the acts and declarations of the Cubans themselves were evidence against them all as to the nature of the expedition."

The motion in arrest was based on the alleged want of jurisdiction of the court. Errors were assigned to the giving, refusing and qualification of instructions; to the admission in evidence of declarations of some of the party, during the voyage, as to their destination; and to the overruling of defendants' motion in arrest of judgment for want of jurisdiction.

Mr. W. Hallett Phillips and *Mr. William W. Kerr* for plaintiffs in error.

Mr. Attorney General, *Mr. Solicitor General* and *Mr. Assistant Attorney General Whitney* for defendants in error.

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

Title LXVII of the Revised Statutes, headed "Neutrality," embraces eleven sections, from 5281 to 5291, inclusive. Section 5281 prohibits the acceptance of commissions from a foreign power by citizens of the United States within our territory to serve against any sovereign with whom we are at peace. Section 5282 prohibits any person from enlisting in this country as a soldier in the service of any foreign power and from hiring or retaining any other person to enlist or to go abroad for the purpose of enlisting. Section 5283 deals with fitting out and arming vessels in this country in favor of one foreign power as against another foreign power with which we are at peace. Section 5284 prohibits citizens from the fitting out or arming, without the United States, of vessels to cruise against citizens of the United States; and section 5285, the augmenting of the force of a foreign vessel of war serving against a friendly sovereign. Sections 5287 to 5290 provide for the enforcement of the preceding sections, and section 5291, that the provisions set forth shall not be construed to prevent the enlistment of certain foreign citizens in the United States.

Section 5286 is as follows:

"Every person who, within the territory or jurisdiction of the United States, begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or State, or of any colony, district or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

This section was originally section five of an act approved June 5, 1794, 1 Stat. 381, c. 50, carried forward as section six of an act of April 20, 1818, 3 Stat. 447, c. 88, and differs therefrom in no respect material here. The language of the section closely follows the recommendation of President Washington in his annual address December 3, 1793, when he said: "Where individuals shall . . . enter upon military expeditions or enterprises within the jurisdiction of the United States . . . these offences cannot receive too early and close an attention, and require prompt and decisive remedies." Annals 3d Congress, 1793–95, 11. The legislation is historically considered in Dana's Wheaton, § 439, note. The statute was undoubtedly designed in general to secure neutrality in wars between two other nations, or between contending parties recognized as belligerents, but its operation is not necessarily dependent on the existence of such state of belligerency. 13 Ops. Attys. Gen. 177, 178. Section 5286 defines certain offences against the United States and denounces the punishment therefor, but, although a penal statute, it must be reasonably construed, and not so as to defeat the obvious intention of the legislature. *United States* v. *Lacher*, 134 U. S. 624, 628.

The offence is defined disjunctively as committed by every person who, within our territory or jurisdiction, "begins, *or* sets on foot, *or* provides *or* prepares the means for, any military expedition *or* enterprise, to be carried on from thence."

This indictment charged that defendants did "begin, set on

foot, *and* provide *and* prepare the means for a certain military expedition *and* enterprise."

Defendants' counsel did not seek to compel an election, nor in any manner, by their motion in arrest or otherwise, to raise the question of duplicity, nor do they now make objections to the proceedings on this ground. The district judge instructed the jury that the evidence would not justify a conviction "of anything more than providing the means for or aiding such military expedition by furnishing transportation for their men, their arms, baggage," etc. Under these circumstances, the verdict cannot be disturbed on the ground that more than one offence was included in the same count of the indictment, but it must be applied to the offence to which the jury were confined by the court. *Crain* v. *United States*, 162 U. S. 625.

We think that it does not admit of serious question that providing or preparing the means of transportation for such a military expedition or enterprise as is referred to in the statute is one of the forms of provision or preparation therein denounced. Nor can there be any doubt that a hostile expedition dispatched from our ports is within the words "carried on from thence." The officers of the Horsa were concerned in providing the means of transportation.

1. The first and the main question in the present case is whether the trial judge erred in his instructions to the jury in respect of what constitutes a "military expedition or enterprise" under the statute. The question is one of municipal law, and the writers on international law afford no controlling aid in its solution. They deal principally with the status of belligerents, and the rights and obligations of neutral nations when the existence of such a status is formally recognized or accepted as existing *de facto*.

Calvo defines a military expedition as being an armed enterprise against a country, and he gives the expedition of Xerxes as an illustration. Dict. de Droit Int. verbo, Expédition Militaire.

Professor Lawrence (Prin. Int. Law, 1895, p. 508) is quoted by counsel to the effect that, to constitute a warlike expedi-

tion, "it must go forth with a present purpose of engaging in hostilities; it must be under military or naval command; and it must be organized with a view to proximate acts of war. But it need not be in a position to commence fighting the moment it leaves the shelter of neutral territory; nor is it necessary that its individual members should carry with them the arms they hope soon to use. When a belligerent attempts to organize portions of his combatant forces on neutral soil or in neutral waters, he commits thereby a gross offence against the sovereignty of the neutral government, and probably involves it in difficulties with the other belligerent, who suffers in proportion to his success in his unlawful enterprise."

In Hall's Rights and Duties of Neutrals, § 22, it is said: "In the case of an expedition being organized in and starting from neutral ground, a violation of neutrality may take place without the men of whom it is composed being armed at the moment of leaving. . . . On the other hand, the uncombined elements of an expedition may leave a neutral state in company with one another, provided they are incapable of proximate combination into an organized whole."

Boyd in his edition of Wheaton's International Law, § 439*aa*, says: "It is impossible to lay down any hard and fast line separating commercial transactions in munitions of war, and the organizing of hostile expeditions. International law is necessarily incapable of being defined and laid down with the precision attainable by municipal law. The question is one of intent, and it is the duty of a neutral government to exercise due diligence in ascertaining what the real character of the transaction may be. The elements of a hostile expedition are thus described by Professor Bernard: 'If at the time of its departure there be the means of doing any act of war, — if those means, or any of them, have been procured and put together in the neutral port, — and if there be the intention to use them (which may always be taken for granted when they are in the hands of the belligerent), the neutral port may be justly said to serve as a base or point of departure for a hostile expedition.' Montague Bernard, Neutrality of Great Britain, p. 399."

But this statute is to be construed as other domestic legislation is, and its meaning is to be found in the ordinary meaning of the terms used. The definitions of the lexicographers substantially agree that a military expedition is a journey or voyage by a company or body of persons, having the position or character of soldiers, for a specific warlike purpose; also the body and its outfit; and that a military enterprise is a martial undertaking, involving the idea of a bold, arduous and hazardous attempt. The word "enterprise" is somewhat broader than the word "expedition"; and although the words are synonymously used, it would seem that under the rule that its every word should be presumed to have some force and effect, the word "enterprise" was employed to give a slightly wider scope to the statute.

The phrase "military expedition or enterprise" has been variously construed by the District Courts, but apparent differences in expression may be largely attributable to the differences in the facts under consideration in the particular case.

In *United States* v. *O'Sullivan*, 2 Whart. Crim. Law, § 2802, 4th ed. note, Judge Judson charged the jury that before they could "convict on this indictment, it must be proved to their satisfaction that the expedition or enterprise was in its character military; or, in other words, it must have been shown by competent proof that the design, the end, the aim and the purpose of the expedition, or enterprise, was some military service, some attack or invasion of another people or country, State or colony as a military force. . . . But any expedition or enterprise in matters of commerce, or of business of a civil nature, unattended by a design of an attack, invasion or conquest, is wholly legal, and is not an expedition or an enterprise within this act. . . . The term 'expedition' is used to signify a march or voyage with martial or hostile intentions. The term 'enterprise' means an undertaking of hazard, an arduous attempt."

Judge Maxey in *United States* v. *Ybanez*, 53 Fed. Rep. 536, concurred in this view and further said: "This statute does not require any particular number of men to band together to constitute the expedition or enterprise one of a mili-

tary character. There may be divisions, brigades and regiments, or there may be companies or squads of men. Mere numbers do not conclusively fix and stamp the character of the expedition as military or otherwise. A few men may be deluded with the belief of their ability to overturn an existing government or empire, and, laboring under such delusion, they may enter upon the enterprise. . . . The proof must establish in your minds the fact that the expedition or enterprise was of a military character; and when evidence shows that the end and object were hostile to or forcible against the Republic of Mexico, then it would be, to all intents and purposes, a military expedition. . . . Evidence showing that the end and objects were hostile to or forcible against a nation at peace with the United States characterizes it, to all intents and purposes, as a military expedition or enterprise."

Judge Brawley, in *United States* v. *Hughes*, not yet reported, applied the test suggested by Mr. Hall as to capability of proximate combination of the uncombined elements of an expedition into an organized whole; and he said in reference to the passengers in that case: "But if after they got aboard they took the arms from the boxes, and organized into a company or organization, if they were drilled or went through the manual of arms under the leadership or direction of one man or more, if they themselves became a military organization by reason of such coming together, and of such drill or instruction, then from that time forth they would be a military organization or enterprise within the meaning of this statute."

In *United States* v. *Pena*, 69 Fed. Rep. 983, Judge Wales, and in *United States* v. *Hart*, not yet reported, Judge Brown, of the Southern District of New York, considered the statute as exacting a high degree of organization, but Judge Brown said: "I do not say that in order to constitute a military expedition to be 'carried on from this country,' as the statute reads, it must be complete at the start, or possess all the elements of a military body. It is sufficient if there was a combination by the men for that purpose, with the agreement and

the intention of the body that embarks that it should become a military body before reaching the scene of action. Such a combination and agreement, if means for effecting it were provided, followed by embarcation in pursuance of the agreement, would show such a partial execution of the design on our soil, as to bring the case within our statute, as 'a military enterprise begun and carried on from the United States.'"

It is argued that as persons are not prohibited from going abroad for the purpose of enlisting in the service of a foreign army; and as the transportation of arms, ammunition and munitions of war from this country to any other foreign country is not unlawful, 3 Whart. Int. Law Dig. § 388 *et seq.*; *The Itata*, 15 U. S. App. 1, and authorities cited; therefore no offence was committed in the transportation of these men, the arms and munitions; and reference is made to an opinion of Mr. Secretary Fish on this subject during the Franco-German war of 1870. A statement of that matter is given in Hall's Rights and Duties of Neutrals, § 22, and in a letter of Sir Edward Thornton to Lord Granville, dated September 26, 1870, 61 State Papers, 1870–71, p. 822, and elsewhere. It seems to have been an informal communication to the Prussian Minister, who had complained of the fact that the transatlantic steamer Lafayette was carrying a large cargo of arms and ammunition for sale to the French, while at the same time she was carrying several hundred French passengers, all of whom, as was generally supposed, intended to enlist in the army of France on their arrival. These passengers, however, appear to have been all travelling as individuals without any concert of action, and they had no access to the arms and ammunition any more than an ordinary passenger on an ocean steamer has access to any part of the cargo. Sir Edward Thornton wrote that "Mr. Fish replied to the District Attorney that he was to be guided by the neutrality laws of the United States, and that with regard to the ship it could not be alleged that she was intended for hostile purposes against North Germany. As for the arms and ammunition, they were articles of a legitimate commerce, with which the United States would not interfere, although the vessel might

run the risk of being detained by the cruisers of North Germany on her voyage to France."

The district judge ruled nothing to the contrary and charged the jury in this case that it was not a crime or offence against the United States under the neutrality laws of this country for individuals to leave the country with intent to enlist in foreign military service, nor was it an offence against the United States to transport persons out of this country and to land them in foreign countries when such persons had an intent to enlist in foreign armies; that it was not an offence against the laws of the United States to transport arms, ammunition and munitions of war from this country to any foreign country, whether they were to be used in war or not; and that it was not an offence against the laws of the United States to transport persons intending to enlist in foreign armies and munitions of war on the same trip. But he said that if the persons referred to had combined and organized in this country to go to Cuba and there make war on the government, and intended when they reached Cuba to join the insurgent army and thus enlist in its service, and the arms were taken along for their use, that would constitute a military expedition, and the transporting of such a body from this country for such a purpose would be an offence against the statute. The judge also charged the jury as follows:

"In passing on the first question, it is necessary to understand what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition, we being at peace with Cuba, constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service, nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery or cavalry. It is sufficient that they shall have combined and organized here to go there and make war on a foreign government, and to have provided themselves with the means of doing so. I say 'provided themselves with

the means of doing so,' because the evidence here shows that the men were so provided. Whether such provision, as by arming, and so forth, is necessary need not be decided in this case. I will say, however, to counsel that were that question required to be decided I should hold that it is not necessary.

"Nor is it important that they intended to make war as an independent body or in connection with others. Where men go without combination and organization to enlist as individuals in a foreign army, they do not constitute such military expedition, and the fact that the vessel carrying them might carry arms as merchandise would not be important."

It appears to us that these views of the district judge were correct as applied to the evidence before him. This body of men went on board a tug loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three mile limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba. The men and the arms and ammunition came together; the arms and ammunition were under the control of the men; the elements of the expedition were not only "capable of proximate combination into an organized whole," but were combined or in process of combination; there was concert of action; they had their own pilot to the common destination; they landed themselves and their munitions of war together by their own efforts. It may be that they intended to separate when they reached the insurgent headquarters, but the evidence tended to show that until that time they intended to stand together and defend themselves if necessary. From that evidence the jury had a right to find that this was a military expedition or enterprise under the statute, and we think the court properly instructed them on the subject. This conclusion disposes of most of the errors assigned to the instructions given, qualified or refused. Some of the points requested on defendants' behalf were incorrect; some were covered by the general charge; and others were properly qualified.

2. The second material question is, whether if a military expedition or enterprise was made out, the court erred in its instructions in respect of defendants' knowledge or notice of the facts. And this involves the jurisdictional question which is raised by the exception to the qualification of the twelfth point. In that qualification and elsewhere, the district judge specifically and clearly instructed the jury that although this was a military expedition or enterprise, nevertheless the defendants were not criminally responsible unless they were aware of its nature before they sailed from Philadelphia. "To convict the defendants," said the district judge, "it is necessary that the government shall have satisfied your minds beyond a reasonable doubt that this was a military enterprise, and that the defendants when they started knew it. Otherwise they are not guilty." "The question, therefore, is: Did the defendants understand that they were to carry this expedition, and had provided for it, and understand what the expedition was before leaving *here* [Philadelphia]?" It is true that the expedition started in the Southern District of New York, and did not come into immediate contact with defendants at any point within the jurisdiction of the United States, as the Horsa was a foreign vessel; but the Horsa's preparation for sailing and the taking aboard of the two boats at Philadelphia constituted a preparation of means for the expedition or enterprise, and if defendants knew of the enterprise when they participated in such preparation, then they committed the statutory crime upon American soil, and in the Eastern District of Pennsylvania, where they were indicted and tried.

The jurisdictional point was again presented by the motion in arrest, but its disposition calls for no further observations.

We repeat that on the second material question, namely, whether the defendants aided the expedition with knowledge of the facts, the jury were instructed that they must acquit unless satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects and had arranged and provided for its transporta-

tion. We hold that defendants have no adequate ground of complaint on this branch of the case.

3. An exception was taken to the statement of the court that the men were armed. The court said: "They were armed, having rifles and cannon, and were provided with ammunition and other supplies." This statement was based on uncontradicted testimony, and occurring as it did in a recapitulation of the evidence, no rule of law being incorrectly stated and the matters of fact being specifically submitted to the determination of the jury, we do not regard the exception as tenable. *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 137 U. S. 568, 574.

4. Objection is also made because the court expressed its opinion that this was a military expedition. But what the court said was that this "would seem to the court to be free from reasonable doubt. The question, however, is one for your determination alone, and I submit it to you as such, reminding you that the responsibility of deciding it rests upon you only. If you find that this was not a military expedition, or, rather, if you are not fully satisfied that it was, your verdict will be for defendants without going further." Clearly the observation of the court thus guarded did not so trespass on the province of the jury as to constitute reversible error. *Simmons* v. *United States*, 142 U. S. 148, 155.

5. Again, it is urged that the court erred, when referring to the captain's testimony that "he was ignorant of the service required of him until he reached the point near Barnegat," in saying: "You must judge whether he should be believed or not, and from all the evidence must determine whether the defendants left here with the knowledge of, and provision for, what they were about to do." No exception was taken to this part of the charge; but if there had been, we cannot say that the trial judge was not justified in that remark in view of all the facts and circumstances.

Nor was any exception taken to the closing observations by the court as to the importance of faithfulness in the execution of the law, although they are now assigned for error. We see

in them nothing which could properly be regarded as prejudicial to the defendants.

6. Other assignments of error relate to the admissibility of declarations of members of the party, during the voyage, as to their destination. One of the witnesses for the prosecution testified on cross-examination "that he had spoken to a couple of those young fellows there, and they said they were going to Cuba." On redirect examination he was asked: "Did they tell you where they were going?" The answer, which was objected to, was: "They told me they were going to Cuba. They did not say what they were going to do." It was uncontroverted in the case that the party meant to go and did go to Cuba, and the evidence was not material. Another witness for the government was asked: "Q. Did you have any talk with any of those men? Objected to unless it was in the presence of these defendants. Objection overruled. Exception by defendants. A. Yes, sir. I was going in the forecastle one night and he told us, 'I go down to Cuba to fight.' Q. To fight whom? A. The Spanish."

There was no objection to the second question, or to either answer, and no motion to strike out. It does not appear who made the statement or how many persons were present, or that defendants were not present. These assignments are without merit.

There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: "If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition," and to this an exception was taken. The general rule was stated in *American Fur Co.* v. *United States*, 2 Pet. 358, 365, by Mr. Justice Washington, speaking for the court, that "where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others." The declarations must be made in furtherance of the common object, or must constitute a part

of the *res gestæ* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, declarations of those engaged in it explanatory of acts done in furtherance of its object came within the general rule and were competent. *St. Clair* v. *United States*, 154 U. S. 134; *People* v. *Davis*, 56 N. Y. 95, 102; *Lincoln* v. *Claflin*, 7 Wall. 132, 139; 1 Greenl. Ev. § 111; Starkie Ev. 466.

The extent to which evidence of this kind is admissible is much in the discretion of the trial court, and we do not consider that that discretion was abused in this instance. *Clune* v. *United States*, 159 U. S. 590, 592.

7. No motion or request was made that the jury be instructed to find for defendants or either of them. Where an exception to a denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it.

The Horsa was bound for Jamaica, and her course carried her along the coast of Cuba for about six hours. She took on board at Philadelphia two boats entered on the manifest as for Port Antonio, but intended for and ultimately devoted to the use of the party she transported. The captain received at the wharf written instructions, which he did not produce on the trial, and says he did not keep when he left the vessel, but in accordance with which he went north off Barnegat, anchored outside the three mile limit, and awaited orders. The inference was not unjustifiable that he was thus and then informed that safety required that whatever was to take place off Barnegat should take place beyond the jurisdiction of the United States, in other words, that a transgression of the laws of the United States was contemplated. The Horsa was boarded on the high seas off Barnegat as heretofore described, and the captain testified that he did not regard the occurrence

as anything unusual or important. But the firemen said that they went to the chief engineer, when these men came aboard, and told him they would not go along. "We won't go down there and get shot." "We did not sign for that." The chief engineer bade them keep quiet, and the captain "told them if anybody had to hang for this I would be the man to hang for it. I told them they had better go below and mind their own business." The written instructions the captain there received were not produced, but he said he was to take the men and whatever they had and let them off when told to do so, delivering the two boats shipped at Philadelphia, and the two shipped from the tug, to them as soon as called for; and that this did not strike him as singular. The evidence shows that the nature of the enterprise was apparent at this time, and the jury may not unreasonably have inferred that the captain received the men and their arms, entered upon the hazards of the voyage, and quieted the complaints of the firemen, with an equanimity springing from a mind previously made up on the subject. We deem it unnecessary to go over the evidence. We cannot say as matter of law that there was no evidence tending to sustain the verdict against the captain.

But we think the case as to Petersen and Johansen stands on different ground, and that we may properly take notice of what we believe to be a plain error, although it was not duly excepted to. These men were the mates of the vessel, and they proceeded on the voyage under the captain's orders. This would not excuse them if there were proof of guilty knowledge or participation on their part in assisting a military expedition or enterprise when they left Philadelphia. We are of opinion that adequate proof to that effect is not shown by the record, and that as the case stood the jury should have been instructed to acquit them. The captain testified that the mates "had nothing to do with this ship or with its business. They listened to my orders; they were under my orders. I was the master of that vessel. I am responsible for all that was done." The order he received to go north and await orders beyond the three mile limit does

not appear to have been communicated to them ; and whatever they must have known after the Horsa was boarded off Barnegat, there is nothing sufficiently justifying a presumption of knowledge when the vessel left the wharf.

It is not necessary to enlarge upon the public importance of the neutrality laws. This case is a criminal case arising on an indictment under a section of the Revised Statutes, and we dispose of it on what we deem to be the proper construction of that section, and after subjecting the correctness of the rulings of the court below to that careful examination which the discharge of our duty required.

The judgment against defendant Wiborg is affirmed; the judgment against defendants Petersen and Johansen is reversed, and the cause remanded with instructions to set aside the verdict and grant a new trial as to them.

Mr. Justice Harlan dissenting.

I concur with my brethren in holding that the judgment against Petersen and Johansen should be reversed, and a new trial ordered as to them.

But I am of opinion that the judgment against Wiborg should also be reversed. It is conceded that the men on the tug were received on board the Horsa at a point off Barnegat which was more than three miles from our shore. It is clear from the evidence that at the time his vessel left Philadelphia, and previous to his receiving those men on board, Wiborg had no knowledge of the purpose for which the charterer ordered him, after he passed the Breakwater, "to proceed north near Barnegat and wait further orders." The movements of the vessel were under the control of the charterer. Wiborg was under no legal obligation to inquire from the charterer why the Horsa was ordered to that point, or what were the orders he was likely to receive after arriving there. His duty was to obey the orders of the charterer, unless such orders obviously contemplated a breach of the laws of this country. The only evidence in the case bearing upon the question whether Wiborg knew, when he left Philadelphia, of

any arrangement for his vessel, after it passed beyond the territory and jurisdiction of the United States, to receive men destined for Cuba, was that given by himself. And he distinctly swore that when he started from Philadelphia he did not know that "we were going to take these people and their goods on the Horsa." There was not the slightest ground in the evidence to suppose that he ever had any communication with those people, or that he ever saw them, before they came on his vessel. Those persons had, of course, arranged with the charterer for passage on the Horsa. But the charterer did not communicate the fact of such an arrangement to the captain of the vessel while he was within the territory and jurisdiction of the United States. The direction that he should receive the men and their goods on board came to him, from the charterer, when he was not within the territory or jurisdiction of the United States. He cannot, therefore, be said to have provided or prepared, "within the territory or jurisdiction of the United States," any means for the expedition or enterprise against the territory or dominion of Spain. Under the interpretation placed upon the statute by the government, the charterer did provide for such means. But, curiously enough, the charterer was not indicted. The prosecution is against the officers of the vessel, no one of whom, according to the proof, had any knowledge, at the time the Horsa left Philadelphia, nor while it was within the jurisdiction of the United States, that the charterer had arranged that the vessel, after it got beyond the jurisdiction of the United States, should receive on board individuals destined for Cuba, and who intended, after they arrived there, to engage in the struggle to overthrow the authority of Spain in that island.

Independently of the view just expressed, this was not, I think, a military expedition or enterprise within the meaning of the statute. It had none of the features of such an expedition or enterprise. There was no commanding officer, whose orders were recognized and enforced. It was, at most, a small company of persons, no one of whom recognized the authority of another, although all desired the independence of Cuba, and had the purpose to reach that island, and engage,

not as a body, but as individuals, in some form, in the civil war there pending — a loose, unorganized body, of very small dimensions, and without any surroundings that would justify its being regarded as a military expedition or enterprise to be carried on from this country.

UNITED STATES *v.* BALL.

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

No. 461. Argued March 23, 1896. — Decided May 25, 1896.

A general verdict of acquittal, in a court having jurisdiction of the cause and of the defendant, upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before verdict as insufficient in that respect, is a bar to a subsequent indictment against him for the same killing.

A verdict in a case submitted to the jury on Saturday may be received and the jury discharged on Sunday.

A defendant in a criminal case, who procures a verdict and judgment against him to be set aside by the court, may be tried anew upon the same or another indictment for the same offence of which he was convicted.

Whether defendants jointly indicted shall be tried together or separately rests in the sound discretion of the trial court.

After a witness in support of a prosecution has testified, on cross-examination, that he had, at his own expense, employed another attorney to assist the attorney for the government, the question "How much do you pay him?" may be excluded as immaterial.

Upon a trial for murder by shooting, in different parts of the body, with a gun loaded with buckshot, and after the introduction of conflicting evidence upon the question whether a gun found in the defendant's possession would scatter buckshot, it is within the discretion of the court to decline to permit the gun to be taken out and shot off, in the presence of a deputy marshal, in order to test how it threw such shot.

An indictment for murder, which alleges that A, at a certain time and place, by shooting with a loaded gun, inflicted upon the body of B "a mortal wound, of which mortal wound the said B did languish, and languishing did then and there instantly die," unequivocally alleges that B died of the mortal wound inflicted by A, and that B died at the time and place at which the mortal wound was inflicted.

Opinion of the Court.

The court is not bound, as matter of law, to set aside a verdict of guilty in a capital case, because no special oath was administered to the officer in charge of the jury, if he was a deputy marshal who had previously taken the oath of office, and no objection to his taking charge of the jury without a new oath was made at any stage of the trial, and the jury were duly cautioned by the court not to separate or to allow any other person to talk with them about the case, and there is nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties or prejudice the defendant.

This was an indictment for murder, returned at April term, 1891, of the Circuit Court of the United States for the Eastern District of Texas. The case is stated in the opinion.

Mr. C. H. Smith for plaintiffs in error. *Mr. J. C. Hodges* and *Mr. A. J. Nichols* were on his brief.

Mr. Assistant Attorney General Dickinson for defendants in error.

Mr. Justice Gray delivered the opinion of the court.

At October term, 1889, of the Circuit Court of the United States for the Eastern District of Texas, the grand jury returned an indictment against Millard Fillmore Ball, John C. Ball and Robert E. Boutwell, for the murder of William T. Box, alleging that the defendants, being white men and not Indians, on June 26, 1889, in Pickens county, in the Chickasaw Nation, in the Indian Territory, did unlawfully and feloniously, and with their malice aforethought, and with a deadly weapon, to wit, a gun, held in their hands, and loaded and charged with gunpowder and leaden balls, make an assault upon the body of William T. Box, and "did shoot off and discharge the contents of said gun in and upon the body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish, and languishing did die."

Upon that indictment, the three defendants were arraigned, and pleaded not guilty, and were tried together upon the issues so joined. The trial began on Wednesday, October 30,

1889, and proceeded from day to day until Saturday, November 2, when the jury retired to consider of their verdict, and no verdict having been returned at the usual hour of adjournment, the court was kept open to receive the verdict. On Sunday, November 3, 1889, the jury returned a verdict as follows: "We, the jury, find the defendants J. C. Ball and R. E. Boutwell guilty, as charged in this indictment; and we find M. Fillmore Ball not guilty." The court, on the same day, made the following order: "It is therefore considered by the court that the defendants J. C. Ball and R. E. Boutwell are guilty, as charged in the indictment herein, and as found by the jury; and it is ordered that they be remanded to the custody of the marshal, and be by him committed to the county jail of Lamar county, to await the judgment and sentence of the court. It is further ordered that the defendant M. F. Ball be discharged and go hence without day."

Afterwards, at the same term, John C. Ball and Robert E. Boutwell were adjudged guilty and sentenced to death, and sued out a writ of error from this court; and in the assignment of errors filed by them in the Circuit Court, (as appears by the record transmitted to this court in that case,) specified, among other things, "because no legal indictment was returned into court against respondents," in that the indictment on which they were tried "nowhere alleges when and where said William T. Box died;" and "for the errors stated and apparent upon the record herein, respondents pray that the judgment be reversed, and the cause remanded for a new trial." And the brief then filed in their behalf concluded by submitting that the judgment ought to be reversed, and the indictment dismissed.

Upon that writ of error, this court, at October term, 1890, held that that indictment, although sufficiently charging an assault, yet, by reason of failing to aver either the time or the place of the death of Box, was fatally defective, and would not support a sentence for murder; and therefore reversed the judgments against John C. Ball and Robert E. Boutwell, and remanded the case with directions to quash the indictment, and to take such further proceedings in relation to them as to

justice might appertain. *Ball* v. *United States*, 140 U. S. 118, 136.

At April term, 1891, of the Circuit Court, that indictment was dismissed; and the grand jury returned against all three defendants a new indictment, (being the one now before the court,) like the former one, except that, after charging the assault, with malice aforethought, and with a loaded gun, upon Box on June 26, 1889, in Pickens county in the Indian Territory, it went on to charge that the three defendants "did then and there shoot off and discharge the contents of said gun at, in and upon the body of said William T. Box, inflicting thereon a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die, and did then and there die within a year and a day after the infliction of the said mortal wound as aforesaid."

To this indictment the defendant Millard F. Ball filed a plea of former jeopardy and former acquittal, relying upon the trial, the verdict of acquittal, and the order of the court for his discharge, upon the former indictment; a certified copy of the record of the proceedings upon which was annexed to and made part of his plea.

The defendants John C. Ball and Boutwell filed a plea of former jeopardy, by reason of their trial and conviction upon the former indictment, and of the dismissal of that indictment.

Both those pleas were overruled by the court, and the three defendants then severally pleaded not guilty.

At the trial, it appeared that William T. Box was killed on June 26, 1889; the defendants offered in evidence the record of the proceedings upon the former indictment; and it was admitted by all parties that the offence charged in the former indictment and that charged in the present indictment was one and the same transaction and offence, to wit, the killing of Box by the three defendants; that the defendants in the two indictments were the same persons; and that no writ of error was ever sued out upon the judgment or order entered upon the former indictment as to Millard F. Ball.

The Circuit Court, among other instructions, instructed the jury to find against both pleas of former jeopardy, because

this court had decided that the former indictment was insufficient as an indictment for murder. The jury returned a verdict of guilty of murder against all three defendants; each of them was adjudged guilty accordingly, and sentenced to death; and thereupon they sued out this writ of error.

The first matter to be considered is the effect of the acquittal of Millard F. Ball by the jury upon the trial of the former indictment.

In England, an acquittal upon an indictment so defective that, if it had been objected to at the trial, or by motion in arrest of judgment, or by writ of error, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal. 2 Hale P. C. 248, 394; 2 Hawk. P. C. c. 35, § 8; 1 Stark. Crim. Pl. (2d ed.) 320; 1 Chit. Crim. Law, 458; Archb. Crim. Pl. & Ev. (19th ed.) 143; 1 Russell on Crimes, (6th ed.) 48. And the general tendency of opinion in this country has been to the same effect. 3 Greenl. Ev. § 35; 1 Bishop's Crim. Law, § 1021, and cases there cited.

The foundation of that doctrine is *Vaux's case*, 4 Rep. 44, in which William Vaux, being duly indicted for the murder of Nicholas Ridley by persuading him to drink a poisoned potion, pleaded a former acquittal, the record of which set forth a similar indictment alleging that Ridley, not knowing that the potion was poisoned, but confiding in the persuasion of Vaux, took and drank (without saying "took and drank said potion"); a plea of not guilty; a special verdict, finding that Ridley was killed by taking the poison, and that Vaux was not present when he took it; and a judgment rendered thereon that the poisoning of Ridley and persuading him to take the poison, as found by the verdict, was not murder, and that the defendant go without day — *eat sine die*. Upon a hearing on the plea of *autrefois acquit*, the Court of Queen's Bench was of opinion that Vaux was a principal, although not present when Ridley took the poison; but that the indictment was insufficient, for not expressly alleging that Ridley drank the poison; and that "because the indictment in this case was insufficient, for this reason he was not *legitimo*

modo acquietatus," "nor was the life of the party, in the judgment of the law, ever in jeopardy."

Yet the decision in *Vaux's case* was treated, both by Lord Coke and by Lord Hale, as maintainable only upon the ground that the judgment upon the first indictment was *quod eat sine die*, which might be given as well for the insufficiency of the indictment, as for the defendant's not being guilty of the offence; and Lord Hale was clearly of opinion that a judgment *quod eat inde quietus* could not go to the insufficiency of the indictment, but must go to the matter of the verdict, and would be a perpetual discharge. 3 Inst. 214; 2 Hale P. C. 394, 395. And Mr. Starkie has observed: "The doctrine expounded in this case does not appear to consist with the general principle on which the plea of *autrefois acquit* is said to depend, since an acquittal upon a special verdict would leave the defendant exposed to a second prosecution, whenever a formal flaw could be detected in the first indictment at any subsequent period." 1 Stark. Crim. Pl. 320, note.

In the leading American case of *People* v. *Barrett*, 1 Johns. 66, while a majority of the court, consisting of Chief Justice Kent and Justices Thompson and Spencer, followed the English authorities, Justices Livingston and Tompkins strongly dissented, and their reasons were fully stated by Mr. Justice Livingston, who, after distinguishing cases in which upon the first trial there had been no general verdict of acquittal by the jury, but only a special verdict, upon which the court had discharged the defendant, as well as cases in which the defendant himself had suggested the imperfection in the first indictment, and thereupon obtained judgment in his favor, said: "These defendants have availed themselves of no such imperfection, if any there were, nor has any judgment to that effect been pronounced. This case, in short, presents the novel and unheard of spectacle, of a public officer, whose business it was to frame a correct bill, openly alleging his own inaccuracy or neglect, as a reason for a second trial, when it is not pretended that the merits were not fairly in issue on the first. That a party shall be deprived of the benefit of an acquittal by a jury, on a suggestion of this kind, coming too from the officer

who drew the indictment, seems not to comport with that universal and humane principle of criminal law, 'that no man shall be brought into danger more than once for the same offence.' It is very like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of the accused to end? If a conviction take place, whether an indictment be good, or otherwise, it is ten to one that judgment passes; for, if he read the bill, it is not probable he will have penetration enough to discern its defects. His counsel, if any be assigned to him, will be content with hearing the substance of the charge without looking farther; and the court will hardly, of its own accord, think it a duty to examine the indictment to detect errors in it. Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits. But reverse the case, and suppose an acquittal to take place, the prosecutor, if he be dissatisfied and bent on conviction, has nothing to do but to tell the court that his own indictment was good for nothing; that it has no venue, or is deficient in other particulars, and that, therefore, he has a right to a second chance of convicting the prisoner, and so on, *toties quoties*." 1 Johns. 74.

In *Commonwealth* v. *Purchase*, 2 Pick. 521, 526, Chief Justice Parker, speaking of the doctrine which allows a man to be tried again after being acquitted on an indictment substantially bad, said that "ingenuity has suggested that he never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgment;" but that this "is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case."

In the Revised Statutes of Massachusetts of 1836, c. 123, §§ 4, 5, provisions were inserted, which, as the commissioners who reported them said, were "intended to define and determine, as far as may be, the cases in which a former acquittal shall, or shall not, be a bar to a subsequent prosecution for the same offence;" and were as follows: "No person shall be held to answer on a second indictment, for any offence of which he has been acquitted by the jury upon the facts and

merits, on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offence, notwithstanding any defect in the form or in the substance of the indictment on which he was acquitted. If any person, who is indicted for an offence, shall on his trial be acquitted upon the ground of a variance between the indictment and the proof, or upon any exception to the form or to the substance of the indictment, he may be arraigned again on a new indictment, and may be tried and convicted for the same offence, notwithstanding such former acquittal." Similar statutes have been passed in other States. 1 Lead. Crim. Cas. (2d ed.) 532.

The American decisions in which the English doctrine has been followed have been based upon the English authorities, with nothing added by way of reasoning.

After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds on which it proceeds, as well as unjust in its operation upon those accused of crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing.

The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence. *Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. c. 35, § 3; 1 Bishop's Crim. Law, § 1028. But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment

is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. *Ex parte Parks*, 93 U. S. 18. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed; and the government cannot. *United States* v. *Sanges*, 144 U. S. 310. But the fact that the judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case.

The former indictment set forth a charge of murder, although lacking the requisite fulness and precision. The verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge, of murder, as well as of any less offence included therein. Rev. Stat. § 1035. That he was thereupon discharged by the Circuit Court by reason of his acquittal by the jury, and not by reason of any insufficiency in the indictment, is clearly shown by the fact that the court, by the same order which discharged him, committed the other defendants, found guilty by the same verdict, to custody to await sentence, and afterwards adjudged them guilty and sentenced them to death upon that indictment. Millard F. Ball's acquittal by the verdict of the jury could not be deprived of its legitimate effect by the subsequent reversal by this court of the judgment against the other defendants upon the writ of error sued out by them only.

It is true that the verdict finding John C. Ball and Robert E. Boutwell guilty as charged in the indictment, and finding Millard F. Ball not guilty, was returned on Sunday; as well as that the order thereupon made by the court, by which it was considered that the first two defendants were guilty as charged in the indictment and found by the jury, and be remanded to custody to await the judgment and sentence of the court, and that Millard F. Ball be discharged and go without day, was made on the same day. That order, indeed, as al-

ready adjudged by this court, could not have effect as a judgment against the two defendants who had been convicted, because no judgment can lawfully be entered on Sunday. *Ball* v. *United States*, 140 U. S. 118, 131; 3 Bl. Com. 277. But when a case is committed to the jury on Saturday, their verdict may be received and the jury discharged on Sunday. This has been generally put upon the ground that the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion; or that it is an act of necessity; and it certainly tends to promote the observance of the day more than would keeping the jury together until Monday. *Hoghtaling* v. *Osborn*, 15 Johns. 119; *Van Riper* v. *Van Riper*, 1 Southard, (4 N. J. Law,) 156; *Huidekoper* v. *Cotton*, 3 Watts, 56; *Baxter* v. *People*, 3 Gilman, 368, 385; *Hiller* v. *English*, 4 Strob. 486; *Cory* v. *Silcox*, 5 Indiana, 370; *Webber* v. *Merrill*, 34 N. H. 202; *Reid* v. *State*, 53 Alabama, 402; *Meece* v. *Commonwealth*, 78 Kentucky, 586, 588; *State* v. *Ford*, 37 La. Ann. 443, 466.

As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence. *United States* v. *Sanges*, 144 U. S. 310; *Commonwealth* v. *Tuck*, 20 Pick. 356, 365; *West* v. *State*, 2 Zabriskie, (22 N. J. Law,) 212, 231; 1 Lead. Crim. Cas. 532.

For these reasons, the verdict of acquittal was conclusive in favor of Millard F. Ball; and as to him the judgment must be reversed, and judgment rendered for him upon his plea of former acquittal.

It therefore becomes unnecessary to consider any of the other questions raised at the trial which affect Millard F. Ball only; and we proceed to consider those affecting the other defendants, John C. Ball and Robert E. Boutwell.

Their plea of former conviction cannot be sustained, because

upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offence of which he had been convicted. *Hopt* v. *Utah*, 104 U. S. 631; 110 U. S. 574; 114 U. S. 488; 120 U. S. 430; *Regina* v. *Drury*, 3 Cox Crim. Cas. 544; *S. C.* 3 Car. & Kirw. 193; *Commonwealth* v. *Gould*, 12 Gray, 171. The court therefore rightly overruled their plea of former jeopardy; and cannot have prejudiced them by afterwards permitting them to put in evidence the former conviction, and instructing the jury that the plea was bad.

These two defendants moved that they be tried separately from Millard F. Ball, because he had been previously acquitted; because the government relied on his acts and declarations made after the killing and not in their presence or hearing; and because he was a material witness in their behalf. But the question whether defendants jointly indicted should be tried together or separately was a question resting in the sound discretion of the court below. *United States* v. *Marchant*, 12 Wheat. 480. It does not appear that there was any abuse of that discretion in ordering the three defendants to be tried together, or that the court did not duly limit the effect of any evidence introduced which was competent against one defendant and incompetent against the others. See *Sparf* v. *United States*, 156 U. S. 51, 58. On the contrary, upon the offer by the United States of evidence of declarations made by Millard F. Ball after the killing and not in the presence of the other defendants, and upon an objection to its admissibility against them, the court at once said, in the presence of the jury, that, of course, it would be only evidence against him, if he said anything; and the court was not afterwards requested to make any further ruling upon this point.

The exception to the restriction of the cross-examination of Cross and Berney, two material witnesses for the prosecution, cannot be sustained. The court permitted the defendants' counsel, for the purpose of showing bias and prejudice on the part of these witnesses, to ask them whether they had, at their own expense, employed another attorney to assist the District Attorney in the prosecution of this case; and they frankly answered that they had. That fact having been thus proved and admitted, the further question to one of them, "How much do you pay him?" might properly be excluded by the presiding judge as immaterial.

The government introduced evidence tending to show that Box was killed with low-mould buckshot, as he was going home through a cornfield late at night; that he had twelve wounds on his breast, collar bone and hips; that gun wadding was found close to his body; that he was shot with a double-barrelled, muzzle-loading gun, belonging to the defendant John C. Ball, and which had been in the marshal's exclusive control since the arrest of the defendants; and that this gun scattered low-mould buckshot badly. The defendants introduced evidence that the gun did not scatter such shot; and requested permission of the court to take the gun out and shoot it off in the presence of a deputy marshal, in order to test how it threw such shot. The court denied the request; and the defendants excepted to the denial. The granting or refusal of such a request, first made in the midst of the trial, was clearly within the discretion of the court.

The only grounds of the motion in arrest of judgment, which were argued in this court, were that the indictment did not allege that Box died of the wound charged to have been inflicted upon his body by the defendants; nor that he died at a place within the jurisdiction of the court. But the indictment alleged that the defendants, in Pickens county in the Indian Territory, on June 26, 1889, by shooting with a loaded gun, inflicted upon the body of Box "a mortal wound, of which mortal wound the said William T. Box did languish, and languishing did then and there instantly die." It was thus distinctly and unequivocally alleged that Box died of the

mortal wound alleged to have been inflicted by the defendants, and that he died at the time and place at which the mortal wound was inflicted.

The court overruled a motion of the defendants for a new trial, made upon the ground that the jury, from the time they were empanelled until they returned their verdict, were not in charge of a proper officer. At the hearing of this motion, it was admitted that the jury, during all the trial, were in charge of a deputy marshal of the United States for the district, who was not sworn as bailiff of this jury, and the only oath ever administered to whom was as deputy marshal many months before the trial; and "that the court instructed the jury in this case that they must not separate, must not talk to each other, and must not allow themselves to be talked to by any party on the outside, about this case." It would have been according to the more usual and regular practice, to administer a special oath to the officer put in charge of a jury. But the jury were in charge of a deputy marshal, who had, as such, taken an oath that he would "in all things well and truly, and without malice or partiality, perform the duties of the office of marshal's deputy." Rev. Stat. § 782. No objection to his taking charge of the jury without a new oath was made at any stage of the trial; the jury were duly cautioned by the court not to separate, nor to allow any other person to talk to them about the case; and there was nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties, or in any way prejudice the defendant. Such being the facts, the court was not obliged, as matter of law, to set aside the verdict because no special oath had been administered to the officer in charge of the jury.

No other question of law affecting the defendants John C. Ball and Robert E. Boutwell is presented by the copy of record submitted to this court, and which, by stipulation of counsel, has been agreed to contain everything that is material.

Judgment reversed as to Millard F. Ball, and affirmed as to the other defendants.

APPENDIX.

I.

CASES ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES AT OCTOBER TERM, 1895, NOT OTHERWISE REPORTED, INCLUDING CASES DISMISSED IN VACATION PURSUANT TO RULE 28.

No. 797. Aetna Life Insurance Company *v.* Florida. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. November 18, 1895: Petition denied. *Mr. Frank M. Estes* for the petition. *Mr. L. R. Wilfley* opposing.

No. 109. Allen *v.* Cannon. Appeal from the Supreme Court of the Territory of Utah. December 4, 1895: Dismissed with costs pursuant to the tenth rule. *Mr. Charles H. Armes* for appellant. No appearance for appellees.

No. 212. American Dock and Improvement Company *v.* Jersey City. Error to the Court of Errors and Appeals of the State of New Jersey. April 13, 1896: Dismissed for want of jurisdiction. *Mr. J. D. Bedle* and *Mr. Robert W. De Forest* for plaintiff in error. *Mr. Gilbert Collins* and *Mr. Wm. D. Edwards* for defendants in error.

No. 994. American Water Works Company *v.* Farmers' Loan and Trust Company. No. 995. Clarkson *v.* Farmers'

Cases not otherwise Reported.

LOAN AND TRUST COMPANY. Petitions for writs of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. May 18, 1896: Petition denied. *Mr. John L. Webster* in support of petitions. *Mr. David McClure* opposing.

No. 803. ANDREWS *v.* THUM. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit. January 6, 1896: Petition denied. *Mr. Thomas J. Johnston* and *Mr. Wm. H. Doolittle* for petitioner. No one opposing.

No. 126. ASLESEN *v.* MINNESOTA. Error to the Supreme Court of the State of Minnesota. December 17, 1895: Dismissed per stipulation. *Mr. John M. Oliver* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

No. 787. ATCHISON, TOPEKA AND SANTA FÉ RAILROAD COMPANY *v.* MULLIGAN *alias* GUIVER. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. November 25, 1895: Petition denied. *Mr. E. D. Kenna*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for petitioner. *Mr. Alphonso Hart* opposing.

No. 816. BACA *v.* UNITED STATES. Appeal from the Court of Private Land Claims. December 9, 1895: Docketed and dismissed on motion of *Mr. Solicitor General* for appellees. No one opposing.

No. 626. BALTIMORE AND OHIO RAILROAD COMPANY *v.* SUTHERLAND. Error to the Supreme Court of the State of Ohio. March 23, 1896: Dismissed for want of jurisdiction. *Mr. John K. Cowen* for plaintiff in error. *Mr. G. R. Walker*, *Mr. John H. Doyle* and *Mr. Warren Severance* for defendant in error

Cases not otherwise Reported.

No. 78. Baltimore and Ohio and Chicago Railway Company *v.* Yarde. Error to the Circuit Court of the United States for the District of Indiana. November 20, 1895: Dismissed with costs, on motion of counsel for plaintiff in error. *Mr. John K. Cowen* and *Mr. E. J. D. Cross* for plaintiff in error. *Mr. Merrill Moores* for defendant in error.

No. 954. Barber *v.* Isaacs. Error to the Supreme Court of the State of Washington. May 25, 1896: Dismissed with costs on motion of *Mr. John H. Mitchell* for plaintiff in error. No appearance for the defendant in error.

No. 772. Barber Asphalt Paving Company *v.* Harrisburg. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit. October 21, 1895: Petition denied. *Mr. William H. Middleton* for the petition. *Mr. A. S. Worthington* and *Mr. Charles H. Bergner* opposing.

No. 127. Bassett *v.* Minnesota. Error to Supreme Court of the State of Minnesota. December 17, 1895: Dismissed per stipulation. *Mr. John M. Oliver* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

No. 28. Bate Refrigerating Company *v.* Toffey. Appeal from the Circuit Court of the United States for the District of New Jersey. October 14, 1895: Dismissed per stipulation. *Mr. Paul H. Bate* and *Mr. B. F. Lee* for appellant. *Mr. Livingston Gifford* for appellees.

No. 927. Baughn *v.* Millirons. Appeal from the Circuit Court of the United States for the Southern District of Georgia. May 4, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. W. C. Glenn* for appellant. *Mr. J. M. Terrell* for appellees.

Cases not otherwise Reported.

No. 278. BERTHA ZINC AND MINERAL COMPANY *v.* CARRICO. Appeal from the Circuit Court of the United States for the Western District of Virginia. November 11, 1895: Dismissed with costs on motion of *Mr. F. S. Blair* for appellant. No appearance for appellees.

No. 233. BLACK *v.* BLACK. Error to the Circuit Court of the United States for the Eastern District of Pennsylvania. April 27, 1896: Dismissed for the want of jurisdiction on the authority of *Smith* v. *McKay*, 161 U. S. 355. *Mr. Francis Tracy Tobin* and *Mr. Henry Budd* for plaintiff in error. *Mr. Arthur Biddle* and *Mr. George W. Biddle* for defendant in error.

No. 274. BOOTH *v.* CRAWFORD. Error to the Supreme Court of the Territory of Utah. October 14, 1895: Dismissed with costs, on authority of counsel for plaintiffs in error. *Mr. James N. Kimball* for plaintiffs in error. No appearance for defendant in error.

No. 792. BUCK *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. March 9, 1896: Judgment affirmed. No appearance for plaintiffs in error. *Mr. Attorney General* and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 775. CALIFORNIA FIG SYRUP COMPANY *v.* PUTNAM. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit. October 21, 1895: Petition denied. *Mr. F. W. Lehmann* and *Mr. Paul Bakewell* for the petition. No opposition.

No. 167. CAMPBELL *v.* QUIGLEY. Error to the Court of Common Pleas of Charleston County, South Carolina. March 19, 1896: Dismissed with costs, pursuant to the tenth rule.

Mr. William E. Earle for plaintiffs in error. No appearance for defendant in error.

No. 155. CAMPBELL *v.* SCHACHTE. Error to the Court of Common Pleas of Charleston County, South Carolina. March 13, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. William E. Earle* for plaintiffs in error. No appearance for defendant in error.

No. 154. CAMPBELL *v.* THAMES. Error to the Court of Common Pleas of Charleston County, South Carolina. March 12, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. William E. Earle* for plaintiffs in error. No appearance for defendant in error.

No. 877. CAVERLY *v.* DEERE. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. March 30, 1896: Petition denied. *Mr. Henry M. Foote* for the petition. *Mr. L. L. Bond*, *Mr. C. E. Pickard*, *Mr. A. H. Adams* and *Mr. J. L. Jackson*, opposing.

No. 931. CEBALLOS *v.* SCHOONER WARREN ADAMS. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. March 23, 1896: Petition denied. *Mr. Sidney Chubb* for petitioner. *Mr. R. D. Benedict* opposing.

No. 749. CENTRAL TRUST COMPANY OF NEW YORK *v.* RICHMOND, NICHOLASVILLE IRVINE AND BEATTYVILLE RAILROAD COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit. October 28, 1895: Petition denied. *Mr. Rozel Weissinger* for the petition. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* opposing.

Cases not otherwise Reported.

No. 298. CERTAIN REAL ESTATE KNOWN AS THE GARDO HOUSE *v.* UNITED STATES. No. 299. UNITED STATES *v.* CERTAIN REAL ESTATE KNOWN AS THE GARDO HOUSE. No. 300. CERTAIN REAL ESTATE KNOWN AS THE CHURCH FARM *v.* UNITED STATES. No. 301. CERTAIN REAL ESTATE KNOWN AS THE COAL LANDS *v.* UNITED STATES. No. 302. UNITED STATES *v.* CERTAIN REAL ESTATE KNOWN AS THE TITHING YARD AND OFFICES. Appeals from the Supreme Court of the Territory of Utah. April 20, 1896: Judgments reversed and causes remanded to the Supreme Court of the State of Utah for such further proceedings as to law and justice may appertain, in conformity with the provisions of the joint resolution of Congress "providing for the disposition of certain property now in the hands of the receiver of the Church of Jesus Christ of Latter Day Saints," approved March 28, 1896. *Mr. F. S. Richards* and *Mr. LeGrand Young* for CERTAIN REAL ESTATE, &c. *Mr. Attorney General* and *Mr. Solicitor General* for UNITED STATES.

No. 239. CHARLESTON BRIDGE COMPANY *v.* HIGBEE. Appeal from the District Court of the United States for the District of South Carolina. April 20, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. John F. Ficken* for appellant. *Mr. J. P. Kennedy Bryan* for appellees.

No. 333. CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY *v.* STAHLEY. Error to the Circuit Court of the United States for the District of Kansas. January 7, 1896: Dismissed with costs, on the authority of counsel for the plaintiff in error. *Mr. M. A. Low* and *Mr. W. F. Evans* for the plaintiff in error. *Mr. Henry Elliston* for the defendant in error.

No. 551. CHIN YUAN SING *v.* KILBRETH. Appeal from the Circuit Court of the United States for the Southern District of New York. March 2, 1896: Dismissed, pursuant to the

tenth rule. *Mr. B. C. Chetwood* for the appellant. *Mr. Attorney General* for the appellee.

No. 849. CHURCH OF CHRIST *v.* REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. January 27, 1896: Petition denied. *Mr. Smith McPherson* and *Mr. Frank Hagerman* for the petitioner. *Mr. C. O. Tichenor* opposing.

No. 379. CILLEY *v.* PATTEN. Error to the Supreme Court of the State of New Hampshire. July 17, 1895: Dismissed, pursuant to the twenty-eighth rule. *Mr. Harvey D. Hadlock* for plaintiff in error. *Mr. John M. Mitchell* and *Mr. Frank S. Streeter* for defendant in error.

No. 465. CILLEY *v.* PATTEN. Appeal from the Circuit Court of the United States for the District of New Hampshire. July 17, 1895: Dismissed, pursuant to the twenty-eighth rule. *Mr. Harvey D. Hadlock* for appellant. *Mr. Frank S. Streeter* for appellees.

No. 263. COMITIZ *v.* PARKERSON. Error to the Circuit Court of the United States for the Eastern District of Louisiana. April 29, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. E. Howard McCaleb* for plaintiff in error. No appearance for defendants in error.

No. 1022. COOK *v.* EELLS. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. May 25, 1896: Docketed and dismissed with costs, on motion of *Mr. Solicitor General* for appellees. No one opposing.

Cases not otherwise Reported.

No. 226. Cook *v.* Street. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. April 20, 1896: Dismissed with costs, on the authority of *Credit Company* v. *Arkansas Central Railway Company*, 128 U. S. 258; *Evans* v. *State Bank*, 134 U. S. 330; *Green* v. *Elbert*, 137 U. S. 615, and *Jacobs* v. *George*, 150 U. S. 415. *Mr. W. H. Webster* for plaintiffs in error. *Mr. F. C. Winkler* for defendants in error.

No. 837. Cooper *v.* United States. Error to the Circuit Court of the United States for the Northern District of Alabama. January 6, 1896: Docketed and dismissed on motion of *Mr. Solicitor General* for defendant in error. No one opposing.

No. 955. Crimp *v.* McCormick Construction Company. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. May 4, 1896: Petition denied. *Mr. John N. Jewett* for petitioner. *Mr. Charles M. Sturges* opposing.

Nos. 261 and 262. Cropper *v.* McLane. Error to the Supreme Court of the District of Columbia. March 23, 1896: Dismissed with costs, per stipulation, on motion of *Mr. J. Holdsworth Gordon* for defendants in error. *Mr. Blair Lee* and *Mr. Jeremiah M. Wilson* for plaintiffs in error. *Mr. Enoch Totten*, *Mr. J. Holdsworth Gordon* and *Mr. Bernard Carter* for defendants in error.

No. 747. Davenport *v.* United States. Error to the Circuit Court of the United States for the Western District of Arkansas. February 3, 1896: Judgment reversed upon confession of error by counsel for defendant in error, and cause remanded with directions to set aside the verdict and grant a

new trial. *Mr. G. B. Denison* for plaintiff in error. *Mr. Attorney General, Mr. Solicitor General, Mr. Assistant Attorney General Whitney* and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 295. DAVIS *v.* PATRICK. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 20, 1896: Dismissed with costs, on authority of counsel for plaintiffs in error. *Mr. J. M. Woolworth* for plaintiffs in error. No appearance for defendant in error.

No. 776. DAVIS *v.* WAKELEE. No. 777. DAVIS *v.* CORNWALL. Petitions for writs of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. October 21, 1895: Petitions denied. *Mr. Walter S. Logan* and *Mr. C. M. Demond* for petitioners. *Mr. Anson Maltby* opposing.

No. 190. DENNIS *v.* DELACEY. Appeal from the Circuit Court of the United States for the Northern District of California. March 25, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. J. C. Campbell* for appellant. No appearance for appellee.

No. 3. DENO *v.* GRIFFIN. Error to the Supreme Court of the State of Nevada. October 29, 1895: Dismissed with costs, the case having abated. *Mr. H. F. Bartine* for plaintiff in error. *Mr. Jackson H. Ralston* for defendant in error.

No. 684. DETROIT CITIZENS' STREET RAILWAY COMPANY *v.* DETROIT. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit. November 11, 1895: Petition denied. (*Mr. Justice Brown* took no part in the consideration and determination of this petition.) *Mr. C. A. Kent* and *Mr. Benton Hanchett* for petitioner. *Mr.*

Henry M. Duffield, *Mr. Michael Brennan*, *Mr. John C. Donnelly*, *Mr. Ashley Pond*, *Mr. Fred. A. Baker* and *Mr. James C. Carter*, opposing.

No. 309. DOUGLAS *v.* UNITED STATES. Error to the Supreme Court of the State of North Carolina. May 5, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. R. R. McMahon* for plaintiff in error. *Mr. R. H. Battle* for defendants in error.

No. 193. DUBOIS *v.* COMMISSIONER OF PATENTS. Appeal from the Supreme Court of the District of Columbia. March 26, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. Rodney Mason* for appellant. No appearance for the appellee.

No. 27. DUFFY *v.* GREEN. Appeal from the Circuit Court of the United States for the District of West Virginia. October 16, 1895: Dismissed with costs, pursuant to the tenth rule. *Mr. Alfred Caldwell* and *Mr. T. S. Riley* for appellants. *Mr. William J. Robertson* for appellees.

No. 634. DUVAL *v.* PULLMAN PALACE CAR COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit. October 21, 1895: Petition denied. *Mr. J. L. Peeler* for petitioner. *Mr. Percy Roberts* opposing.

No. 192. EASTERN RAILWAY COMPANY OF MINNESOTA *v.* MORAN. Error to the Supreme Court of the State of Minnesota. October 14, 1895: Dismissed with costs, per stipulation. *Mr. M. D. Grover* for plaintiff in error. *Mr. John M. Martin* and *Mr. Charles E. Flandrau* for defendant in error.

Cases not otherwise Reported.

No. 131. EDDY *v.* WALLACE. Error to the United States Circuit Court of Appeals for the Eighth Circuit. December 16, 1895: Dismissed with costs, on motion of *Mr. A. B. Browne* in behalf of counsel for the plaintiffs in error, and cause remanded to the United States court for the Indian Territory. *Mr. James Hagerman* for plaintiffs in error. *Mr. W. T. Hutchings* for defendant in error.

No. 862. ELDER *v.* MCCLASKEY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit. February 3, 1896: Petition denied. *Mr. S. T. Crawford* and *Mr. John A. Crawford* for petitioner. *Mr. Richard A. Harrison*, *Mr. J. C. Harper* and *Mr. Ledyard Lincoln* opposing.

No. 855. ELMIRA AND HORSEHEADS RAILWAY COMPANY *v.* THOMSON-HOUSTON ELECTRIC COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. February 3, 1896: Petition denied. *Mr. Edmund Wetmore*, *Mr. William A. Jenner* and *Mr. Thomas B. Kerr* for petitioner. *Mr. Frederic H. Betts* and *Mr. James R. Sheffield* opposing

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No. 211. EPPERSON *v.* CARTER. Error to the Supreme Court of the State of Tennessee. April 1, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. W. W. Upton* for plaintiff in error. *Mr. Henry W. McCorry* for defendants in error.

No. 237. FARMER *v.* NATIONAL LIFE ASSOCIATION. Error to the Circuit Court of the United States for the Eastern District of New York. April 20, 1896: Dismissed per stipulation. *Mr. A. G. McDonald* and *Mr. James P. Judge* for plaintiff in error. *Mr. Roger Foster* for defendant in error.

Cases not otherwise Reported.

No. 785. FARMERS' LOAN AND TRUST COMPANY *v.* SCOTT. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. April 24, 1896: Dismissed per stipulation. *Mr. James M. Lawrence* for appellant. *Mr. Charles E. Joslin* and *Mr. Charles A. Willard* for appellee.

No. 228. FILHIOL *v.* UNITED STATES. Appeal from the Court of Claims. April 20, 1896: Affirmed for want of prosecution. *Mr. Wm. E. Earle* and *Mr. James L. Pugh, Jr.*, for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Dodge* for appellee.

No. 151. FIRST NATIONAL BANK OF CLARK *v.* SOUTH DAKOTA. Error to the Supreme Court of the State of South Dakota. March 18, 1896: Dismissed with costs, pursuant to the sixteenth rule. *Mr. John G. Manahan* for the plaintiff in error. *Mr. Robert Dollard* for defendant in error.

No. 817. FLETCHER *v.* UNITED STATES. Appeal from the Court of Private Land Claims. December 9, 1895: Docketed and dismissed on motion of *Mr. Solicitor General* for appellees. No one opposing.

No. 514. FLOURNOY LIVE STOCK AND REAL ESTATE COMPANY *v.* BECK. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. October 23, 1895: Dismissed with costs, pursuant to the tenth rule, and cause remanded to the Circuit Court of the United States for the District of Nebraska. *Mr. Wm. V. Allen* for appellant. *Mr. Attorney General* for appellee.

No. 255. FORMAN *v.* CHOPPIN. Error to the Circuit Court of the United States for the Eastern District of Louisiana. May 4, 1896: Dismissed for want of jurisdiction. *Mr. E.*

Howard McCaleb for plaintiff in error. No appearance for defendants in error.

No. 272. FOSTER *v.* WISTAR. Error to the Supreme Court of the State of Minnesota. April 30, 1896: Dismissed with costs, pursuant to tenth rule. *Mr. James Spencer* for plaintiff in error. *Mr. William W. Billson* for defendants in error.

No. 985. FRANKEL'S SONS *v.* UNITED STATES. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. May 18, 1896: Petition denied. *Mr. W. Wickham Smith*, *Mr. Charles Curie* and *Mr. David Ives Mackie* for petitioner. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* opposing.

No. 546. FRIEND *v.* UNITED STATES. Appeal from the Court of Claims. September 19, 1895: Dismissed, pursuant to the twenty-eighth rule. *Mrs. Belva A. Lockwood* for appellant. *Mr. Attorney General* and *Mr. Solicitor General Conrad* for appellees.

No. 882. GARITEE *v.* UNITED STATES. Error to the District Court of the United States for the District of Maryland. February 3, 1896: Docketed and dismissed on motion of *Mr. Solicitor General* for defendant in error. No one opposing.

Nos. 182 and 183. GARLAND *v.* BEAR LAKE AND RIVER WATER WORKS AND IRRIGATION COMPANY. Appeals from the Supreme Court of the Territory of Utah. January 27, 1896: Dismissed, per stipulation, on motion of *Mr. John F. Dillon* for appellee. *Mr. Sanford B. Ladd* for appellant. *Mr. John F. Dillon* and *Mr. C. O. Tichenor* for appellees.

Cases not otherwise Reported.

No. 657. GARNER *v.* NATIONAL BANK. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit. May 18, 1896: Petition denied. *Mr. Alexander Thain* for petitioner. *Mr. James Tillinghast*, *Mr. A. T. Britton* and *Mr. A. B. Browne*, opposing.

No. 690. GERMAN BANK *v.* TENNESSEE. Error to the Supreme Court of the State of Tennessee. January 16, 1896: Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for defendant in error. *Mr. L. B. McFarland* for plaintiffs in error. *Mr. C. W. Metcalf* and *Mr. Samuel P. Walker* for defendant in error.

No. 691. GERMAN BANK *v.* TENNESSEE. Error to the Supreme Court of the State of Tennessee. January 16, 1896: Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for defendants in error. *Mr. L. B. McFarland* for plaintiffs in error. *Mr. C. W. Metcalf* and *Mr. Samuel P. Walker* for defendant in error.

No. 145. GOHLMAN *v.* BARTON. Error to the United States Court for the Indian Territory. December 20, 1895: Dismissed with costs, pursuant to the tenth rule. *Mr. Robert E. Collins* for plaintiffs in error. No appearance for defendants in error.

No. 728. GOLDSBY *alias* CHEROKEE BILL *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. May 18, 1896: Dismissed, the cause having abated, on motion of *Mr. Solicitor General* for defendant in error. *Mr. Attorney General* for defendant in error. No appearance for plaintiff in error.

No. 602. GREGORY *v.* PIKE. No. 603. GREGORY *v.* TALBOT. Appeals from the United States Circuit Court of Appeals for

the First Circuit. November 25, 1895: Dismissed for the want of jurisdiction, and causes remanded to the Circuit Court of the United States for the District of Massachusetts. *Mr. F. A. Brooks* for appellants. *Mr. Thomas H. Talbot* and *Mr. John Lowell* for appellees.

No. 213. GUNN *v.* GEORGIA. Error to the Supreme Court of the State of Georgia. April 1, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. R. F. Lyon* for plaintiff in error. *Mr. J. M. Terrell* for defendant in error.

No. 832. HAMER *v.* OGDEN CITY. Appeal from the Supreme Court of the Territory of Utah. May 4, 1896: Motion to remand granted and cause remanded to the Supreme Court of the State of Utah for further proceedings in conformity to law. *Mr. Franklin S. Richards*, *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson* and *Mr. Charles C. Richards* for appellant. *Mr. Arthur Brown* for appellee.

No. 944. HAMMOND *v.* STOCKTON COMBINED HARVESTER AND AGRICULTURAL WORKS. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit. March 30, 1896: Petition denied. *Mr. John H. Miller* and *Mr. James G. Maguire* for petitioner. No one opposing.

No. 987. HATHAWAY AND CO. *v.* MARTS. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit. May 18, 1896: Petition denied. *Mr. Edward E. Blodgett* and *Mr. Eugene P. Carver* for petitioner. No one opposing.

No. 556. HOLCOMB *v.* WRIGHT. No. 577. WRIGHT *v.* HOLCOMB. Appeals from the Court of Appeals of the District of Columbia. January 20, 1896: Dismissed, costs to be paid by

Curtis W. Holcomb, per stipulations, on motion of *Mr. Walter H. Smith* for Holcomb. *Mr. Walter H. Smith* for Holcomb. *Mr. C. A. Brandenburg*, *Mr. Henry E. Davis* and *Mr. Edward A. Newman* for Wright.

No. 208. HOWELL *v.* UNITED STATES. Error to the District Court of the United States for the Western District of Missouri. March 9, 1896: Dismissed on authority of counsel for plaintiffs in error, on motion of *Mr. Solicitor General* for defendant in error. *Mr. W. F. Evans* and *Mr. William Warner* for plaintiffs in error. *Mr. Attorney General* and *Mr. Solicitor General* for defendant in error.

No. 934. HUBBARD *v.* EXCHANGE BANK. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. March 30, 1896: Petition denied. *Mr. W. J. Curtis* for petitioner. *Mr. John R. Abney* opposing.

No. 125. HUKILL *v.* GUFFEY. Error to the Supreme Court of Appeals of the State of West Virginia. December 12, 1895: Dismissed with costs, pursuant to the tenth rule. *Mr. W. P. Hubbard* for plaintiff in error. No appearance for defendants in error.

No. 935. HUNTINGTON *v.* PROCEEDS OF THE STEAMSHIP ADVANCE. No. 936. HUNTINGTON *v.* PROCEEDS OF THE STEAMSHIP ALLIANCA. No. 937. HUNTINGTON *v.* PROCEEDS OF THE STEAMSHIP VIGILANCIA. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. March 30, 1896: Petition denied. *Mr. R. D. Benedict* and *Mr. Maxwell Evarts* for petitioner. *Mr. Lewis Cass Ledyard* opposing.

No. 117. ILLINOIS CENTRAL RAILROAD COMPANY *v.* MATTOON. Error to the Supreme Court of the State of Illinois. October

14, 1895: Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. James Fentress* for plaintiff in error. No appearance for defendant in error.

No. 244. ILLINOIS CENTRAL RAILROAD COMPANY *v.* WALKER. Error to the Circuit Court of the United States for the Southern District of Mississippi. April 27, 1896: Dismissed for the want of jurisdiction. *Mr. Edward Mayes* and *Mr. James Fentress* for plaintiff in error. *Mr. L. Brame* for defendant in error.

No. 906. INSURANCE COMPANY OF NORTH AMERICA *v.* INTERNATIONAL TRUST COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. March 16, 1896: Petition denied. *Mr. Ebenezer T. Wells*, *Mr. Mortimer F. Taylor* and *Mr. Sylvester G. Williams* for petitioner. *Mr. Henry Wise Garnett* and *Mr. N. T. N. Robinson* opposing.

No. 902. INTERNATIONAL TRUST COMPANY *v.* NORWICH UNION FIRE INSURANCE SOCIETY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. March 16, 1896: Petition denied. *Mr. Ebenezer T. Wells*, *Mr. Mortimer F. Taylor* and *Mr. Sylvester G. Williams* for petitioner. *Mr. Henry Wise Garnett* and *Mr. N. T. N. Robinson* opposing.

No. 743. KAHNWEILER *v.* PHENIX INSURANCE COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. December 9, 1895: Petition denied. *Mr. Henry Elliston* and *Mr. Horace M. Jackson* for petitioner. No one opposing.

No. 780. KILDARE LUMBER COMPANY *v.* NATIONAL BANK OF COMMERCE. Petition for a writ of *certiorari* to the United

States Circuit Court of Appeals for the Fifth Circuit. December 16, 1895: Petition denied. *Mr. M. L. Crawford* and *Mr. Charles S. Todd* for petitioner. *Mr. Elijah Robinson* opposing.

No. 338. KNOX *v.* GADDIS. Appeal from the Court of Appeals of the District of Columbia. December 2, 1895: Dismissed with costs, on motion of *Mr. J. J. Johnson* for appellant. *Mr. J. J. Johnson* for appellant. No appearance for the appellee.

No. 638. LAW *v.* STEAMSHIP TRAVE. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. October 21, 1895: Petition denied. *Mr. William D. Shipman* for petitioner. *Mr. Eugene P. Carver* and *Mr. Harrington Putnam* opposing.

No. 243. LINK *v.* UNION PACIFIC RAILWAY COMPANY. Error to the Supreme Court of the State of Wyoming. April 20, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. A. T. Britton* and *Mr. A. B. Browne* for plaintiff in error. *Mr. John F. Dillon* and *Mr. John M. Thurston* for defendant in error.

No. 11. Original. *Ex parte. In re* LOCHREN, COMMISSIONER OF PENSIONS. May 4, 1896: Writ of mandamus granted on the authority of *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for petitioner. No one opposing.

No. 763. LUCKEY *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. January 27, 1896: Judgment reversed, upon confession of error by the defendant in error, and cause remanded with directions to set aside the verdict and grant a new trial. No

appearance for the plaintiff in error. *Mr. Attorney General*, *Mr. Solicitor General*, *Mr. Assistant Attorney General Whitney* and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 84. LYBARGER *v.* WASHINGTON STATE. Error to the Supreme Court of the State of Washington. November 21, 1895: Dismissed with costs, pursuant to the tenth rule. *Mr. B. Sheeks* for plaintiff in error. *Mr. W. C. Jones* for defendant in error.

No. 717. LYONS-THOMAS HARDWARE COMPANY *v.* PERRY STOVE MANUFACTURING COMPANY. Error to the Supreme Court of the State of Texas. December 9, 1895: Dismissed for want of jurisdiction. *Mr. James G. Dudley*, *Mr. A. H. Garland* and *Mr. R. C. Garland* for plaintiffs in error. *Mr. H. D. McDonald* and *Mr. V. W. Hale* for defendants in error.

No. 188. MCCLELLAN *v.* PYEATT. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 25, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. A. H. Garland* for plaintiffs in error. *Mr. John H. Rogers* for defendants in error.

No. 799. MCCONNELL *v.* PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit. November 25, 1895: Petition denied. *Mr. Edwin B. Smith* for petitioner. *Mr. Tully R. Cornick* and *Mr. Jerome Templeton* opposing.

No. 442. MCCULLOUGH *v.* NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY. Certificate from the United States Circuit Court of Appeals for the Second Circuit. December 16, 1895: Dismissed on motion of *Mr. Mason N.*

Richardson in behalf of counsel for McCullough. *Mr. J. A. Hyland* for McCullough. No appearance for the railroad company.

No. 70. McGlensy *v.* Van Vranken. Appeal from the Circuit Court of the United States for the Eastern District of Virginia. November 18, 1895: Order reversed on the authority of *Johnson* v. *Sayre*, 158 U. S. 109, and cause remanded with directions to remand Van Vranken to custody. *Mr. Attorney General* and *Mr. Solicitor General* for appellant. No appearance for appellee.

No. 916. Mack *v.* Porter. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit. March 9, 1896: Petition denied. *Mr. Samuel Shellabarger* and *Mr. Jeremiah M. Wilson* for petitioner. *Mr. William P. Hubbard* and *Mr. Henry M. Russell* opposing.

No. 956. Martin & Hill Cash Carrier Company *v.* Martin. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the First Circuit. April 27, 1896: Petition denied. *Mr. Samuel Norris, Jr.*, for petitioner. *Mr. Frederick P. Fish* opposing.

No. 216. Mathews *v.* Hanks. Appeal from the Supreme Court of the Territory of Utah. April 2, 1896: Dismissed with costs, on motion of counsel for appellant, and cause remanded to the Supreme Court of the State of Utah. *Mr. Arthur Brown* for appellant. *Mr. William T. S. Curtis* for appellee.

No. 221. Matthews *v.* Scott. Appeal from the Supreme Court of the District of Columbia. April 13, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. C. M. Matthews* for appellant. No appearance for appellees.

Cases not otherwise Reported.

No. 355. MAYES *v.* CHRISTIE. Appeal from the United States Court for the Indian Territory. January 13, 1896: Dismissed, the cause having abated owing to the death of the appellee, on motion of *Mr. R. C. Garland* in behalf of counsel for appellant. *Mr. William M. Cravens* and *Mr. A. H. Garland* for appellant. No appearance for appellee.

No. 839. MAYOR AND CITY COUNCIL OF COLUMBUS *v.* DENNISON. Petition for writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit. January 27, 1896: Petition denied. *Mr. A. H. Garland* and *Mr. R. C. Garland* for petitioner. *Mr. R. C. Beckett* opposing.

No. 670. MECHANICS' SAVINGS BANK *v.* TENNESSEE. Error to the Supreme Court of the State of Tennessee. January 16, 1896: Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for defendant in error. *Mr. George Gantt* for plaintiffs in error. *Mr. C. W. Metcalf* and *Mr. Samuel P. Walker* for defendant in error.

No. 671. MECHANICS' SAVINGS BANK *v.* TENNESSEE. Error to the Supreme Court of the State of Tennessee. January 16, 1896: Dismissed with costs, per stipulation, on motion of *Mr. S. P. Walker* for defendants in error. *Mr. George Gantt* for plaintiffs in error. *Mr. C. W. Metcalf* and *Mr. Samuel P. Walker* for defendants in error.

No 222. MEDLER *v.* ALBUQUERQUE HOTEL AND OPERA HOUSE COMPANY. Appeal from the Supreme Court of the Territory of New Mexico. October 14, 1895: Dismissed with costs, on authority of counsel for appellant. *Mr. Thomas Smith* and *Mr. W. B. Childers* for appellant. No appearance for appellees.

Cases not otherwise Reported.

No. 77. MICHIGAN DAIRY COMPANY *v.* CONVERSE. Appeal from the Circuit Court of the United States for the Western District of Michigan. November 15, 1895: Dismissed with costs, pursuant to the tenth rule. *Mr. E. S. Eggleston* for appellants. *Mr. Niram A. Fletcher* and *Mr. George P. Wanty* for appellee.

No. 297. MINNEAPOLIS, ST. PAUL AND SAULT STE. MARIE RAILWAY COMPANY *v.* FARWELL FARMERS' WAREHOUSE ASSOCIATION. Error to the Supreme Court of the State of Minnesota. October 30, 1895: Dismissed per stipulation. *Mr. Albert E. Clarke* for plaintiff in error. *Mr. H. W. Childs* for defendant in error.

No. 144. MISSOURI *v.* BOARD OF EQUALIZATION OF BUCHANAN COUNTY. Error to the Circuit Court of Buchanan County, Missouri. December 20, 1895: Dismissed with costs on authority of counsel for plaintiffs in error. *Mr. G. G. Vest* and *Mr. H. K. White* for plaintiffs in error. *Mr. Stephen L. Brown* for defendant in error.

Nos. 578, 579. MISSOURI *v.* SLOVER. Error to the Supreme Court of the State of Missouri. February 3, 1896: Dismissed with costs on authority of counsel for plaintiff in error. *Mr. L. H. Bisbee* for plaintiff in error. No appearance for defendant in error.

No. 181. MITCHELL *v.* SOUTH DAKOTA. Error to the Supreme Court of the State of South Dakota. March 24, 1896: Dismissed with costs, pursuant to the tenth rule. *Mr. Thomas B. McMartin* for plaintiff in error. No appearance for defendant in error.

No. 531. MOORE *v.* MILLER. Appeal from the Court of Appeals of the District of Columbia. October 30, 1895: Dis-

missed with costs, on motion of *Mr. Samuel Shellabarger* for appellant. *Mr. George F. Edmunds*, *Mr. Samuel Shellabarger* and *Mr. J. M. Wilson* for appellant. *Mr. Attorney General* and *Mr. Assistant Attorney General Whitney* for appellee.

No. 169. Morse Arms Manufacturing Company *v.* United States. Appeal from the Court of Claims. April 27, 1896: Dismissed on motion of *Mr. James A. Skilton* for the appellant. *Mr. H. E. Paine* and *Mr. James A. Skilton* for appellant. *Mr. Attorney General* for appellee.

No. 976. Neall *v.* Schrader. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit. May 4, 1896: Petition denied. *Mr. Henry Flanders* and *Mr. E. F. Pugh* for petitioner. *Mr. J. Rodman Paul* and *Mr. John G. Johnson* opposing.

No. 306. New Mexico *v.* Perea. Error to the Supreme Court of the Territory of New Mexico. May 5, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. Charles H. Gildersleeve* for plaintiff in error. No appearance for defendant in error.

No. 92. New Orleans *v.* United States *ex rel.* Whitney. Error to the Circuit Court of the United States for the Eastern District of Louisiana. November 22, 1895: Dismissed with costs pursuant to the tenth rule. *Mr. Henry C. Miller* for plaintiff in error. No appearance for defendant in error.

No. 133. New Orleans City and Lake Railroad Company *v.* New Orleans. Error to the Supreme Court of the State of Louisiana. December 18, 1895: Dismissed with costs on motion of *Mr. E. B. Whitney* in behalf of counsel for the plaintiff in error. *Mr. Charles F. Buck*, *Mr. George Denegre*

and *Mr. Walter D. Denegre* for plaintiff in error. *Mr. E. A. O'Sullivan* for defendant in error.

No. 76. NEW YORK AND NEW ENGLAND RAILROAD COMPANY *v.* RUMSEY. Error to the Supreme Court of the State of New York. November 18, 1895: Dismissed with costs on authority of counsel for the plaintiff in error. *Mr. W. C. Anthony* for plaintiff in error. *Mr. Lawrence Godkin* for defendant in error.

No. 223. NEW YORK AND NEW ENGLAND RAILROAD COMPANY *v.* RUMSEY. Error to the Supreme Court of the State of New York. April 13, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. W. C. Anthony* for plaintiff in error. *Mr. Lawrence Godkin* for defendants in error.

No. 201. NORTHERN PACIFIC RAILROAD COMPANY *v.* CAVANAUGH. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 13, 1896: Dismissed per stipulation. *Mr. A. H. Garland*, *Mr. W. J. Curtis* and *Mr. Charles W. Bunn* for plaintiff in error. *Mr. Cyrus Wellington* for defendant in error.

No. 152. NORTHERN PACIFIC RAILROAD COMPANY *v.* NICKELS. Error to the United States Circuit Court of Appeals for the Eighth Circuit. October 18, 1895: Dismissed per stipulation and cause remanded to the Circuit Court of the United States for the District of Minnesota. *Mr. James McNaught* and *Mr. W. J. Curtis* for plaintiff in error. *Mr. Frank D. Larabee* for defendant in error.

No. 205. NORTHERN PACIFIC RAILROAD COMPANY *v.* PETERSON. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 13, 1896: Dismissed per stipula-

tion. *Mr. A. H. Garland*, *Mr. James McNaught*, *Mr. W. J. Curtis* and *Mr. Charles W. Bunn* for plaintiff in error. *Mr. Cyrus Wellington* for defendant in error.

No. 203. NORTHERN PACIFIC RAILROAD COMPANY *v.* SULLIVAN. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 24, 1896: Dismissed on authority of counsel for plaintiff in error. *Mr. A. H. Garland*, *Mr. W. J. Curtis* and *Mr. Charles W. Bunn* for plaintiff in error. *Mr. Henry J. Gjertsen* for defendant in error.

No. 830. OLCOTT *v.* RICE. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit. March 9, 1896: Petition denied. *Mr. John G. Winter*, *Mr. A. H. Garland* and *Mr. R. C. Garland* for petitioner. *Mr. Henry F. Ring* opposing.

No. 288. OUZTS *v.* WARD. Appeal from the Circuit Court of the United States for the District of South Carolina. May 4, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. Mr. D. A. Townsend* for appellant. *Mr. Hugh L. Bond*, *Jr.*, for appellee.

No. 933. PERALTAREAVIS *v.* UNITED STATES. Appeal from the Court of Private Land Claims. March 16, 1896: Docketed and dismissed on motion of *Mr. Solicitor General* for appellee. No one opposing.

No. 479. PETERS *v.* UNITED STATES. Error to the Supreme Court of the Territory of Oklahoma. October 22, 1895: Dismissed pursuant to the tenth rule. *Mr. Fred. Beall* for plaintiff in error. *Mr. Attorney General* for defendant in error.

Cases not otherwise Reported.

No. 231. PIPER *v.* CHIPPEWA IRON COMPANY. Error to the Supreme Court of the State of Minnesota. April 16, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. J. L. Washburn* for plaintiff in error. No appearance for defendant in error.

No. 232. PIPER *v.* CHIPPEWA IRON COMPANY. Error to the Supreme Court of the State of Minnesota. April 17, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. J. L. Washburn* for plaintiff in error. No appearance for defendant in error.

No. 102. PITTS *v.* UNITED STATES. Error to the Circuit Court of the United States for the Northern District of Florida. December 3, 1895: Dismissed pursuant to the tenth rule. *Mr. James N. Castle* for plaintiff in error. *Mr. Attorney General* for defendant in error.

No. 24. POLLARD *v.* BONSACK MACHINE COMPANY. Appeal from the Circuit Court of the United States for the Western District of Virginia. October 15, 1895: Dismissed with costs pursuant to the nineteenth rule. *Mr. William D. Baldwin* for appellant. *Mr. Samuel A. Duncan* for appellee.

No. 149. POSTAL TELEGRAPH CABLE COMPANY *v.* NORFOLK AND WESTERN RAILROAD COMPANY. Error to the Supreme Court of Appeals of the State of Virginia. March 10, 1896: Dismissed with costs on motion of *Mr. William A. Maury* for plaintiff in error. *Mr. Edgar Allen* and *Mr. William A. Maury* for plaintiff in error. *Mr. George H. Fearons*, *Mr. George S. Bernard* and *Mr. Robert Stiles* for defendant in error.

No. 1012. PRESS PUBLISHING COMPANY *v.* MCDONALD. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. May 25, 1896: Petition

denied. *Mr. Charles N. Harris* and *Mr. John M. Bowers* for petitioner. *Mr. Joseph G. Deane* and *Mr. Horace E. Deming* opposing.

No. 932. PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY *v.* NIXON. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit. March 23, 1896: Petition denied. *Mr. Edwin B. Smith* and *Mr. Edmund Wetmore* for petitioner. *Mr. Stanton Warburton* opposing.

No. 825. QUAKER CITY NATIONAL BANK *v.* NOLAN COUNTY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fifth Circuit. March 2, 1896: Petition denied. *Mr. John J. Butts* for petitioner. No one opposing.

No. 434. RAVEN GOLD MINING COMPANY *v.* MINERS' UNION. Appeal from the Circuit Court of the United States for the District of Colorado. March 9, 1896: Dismissed with costs. *Mr. Charles S. Thomas* and *Mr. W. H. Byrant* for appellant. No appearance for the appellees.

No. 224. REEDER *v.* LEWIS. Appeal from Circuit Court of the United States for the District of West Virginia. April 16, 1896: Dismissed for the want of jurisdiction. *Mr. James McColgan* for appellant. *Mr. George E. Price* for appellee.

No. 287. RISER *v.* LANGFORD. Appeal from the Circuit Court of the United States for the District of South Carolina. May 4, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. D. A. Townsend* for appellant. *Mr. Hugh L. Bond, Jr.*, for appellee.

No. 61. ROBERTSON *v.* DRUKER. No. 64. DRUKER *v.* ROBERTSON. Error to the Circuit Court of the United States for the

Southern District of New York. October 14, 1895: Judgment reversed and cause remanded with directions to proceed according to law, per stipulation of counsel, on motion of *Mr. Solicitor General* and *Mr. Attorney General* for Robertson. *Mr. Stephen G. Clarke*, *Mr. Edwin B. Smith*, and *Mr. Charles Curie* for Druker.

No. 1021. Ross *v.* Eells. Appeal from the United States Circuit Court of Appeals for the Ninth Circuit. May 25, 1896: Docketed and dismissed with costs on motion of *Mr. Solicitor General* for appellees. No one opposing.

No. 705. Rouse *v.* Cloughley. Error to the United States Circuit Court of Appeals for the Eighth Circuit. March 23, 1896: Dismissed for the want of jurisdiction per stipulation. *Mr. James Hagerman* for plaintiff in error. *Mr. Nelson Case* for defendant in error.

No. 997. Rouse *v.* Hornsby. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. May 18, 1896: Petition denied. *Mr. A. B. Browne*, *Mr. James Hagerman* and *Mr. T. N. Sedgwick* for petitioner. *Mr. Nelson Case* opposing.

No. 101. Sage *v.* St. Paul, Stillwater and Taylor's Falls Railway Company. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. December 2, 1895: Dismissed with costs on motion of *Mr. A. B. Browne* for the appellant, and cause remanded to the Circuit Court of the United States for the District of Minnesota. *Mr. C. K. Davis*, *Mr. A. T. Britton* and *Mr. A. B. Browne* for appellant. *Mr. Thomas Wilson* for appellee.

No. 474. Sage *v.* Winona and St. Peter Railroad Company. Appeal from the United States Circuit Court of Ap-

peals for the Eighth Circuit. December 2, 1895: Dismissed with costs on motion of *Mr. A. B. Browne* for appellant, and cause remanded to the Circuit Court of the United States for the District of Minnesota. *Mr. A. T. Britton* and *Mr. A. B. Browne* for appellant. *Mr. Thomas Wilson* for appellees.

No. 29. SALOMON *v.* ROBERTSON. Error to the Circuit Court of the United States for the Southern District of New York. January 7, 1896: Dismissed with costs on the authority of counsel for plaintiffs in error. *Mr. Henry E. Tremain* and *Mr. M. W. Tyler* for plaintiffs in error. *Mr. Attorney General* for defendant in error.

No. 484. SALT LAKE RAPID TRANSIT COMPANY *v.* RILEY. Error to the Supreme Court of the Territory of Utah. August 6, 1895: Dismissed pursuant to the twenty-eighth rule. *Mr. C. W. Bennett* and *Mr. John A. Marshall* for plaintiff in error. *Mr. P. L. Williams* for defendant in error.

No. 292. SCRANTON *v.* WHEELER. Error to the United States Circuit Court of Appeals for the Sixth Circuit. April 27, 1896: Judgment reversed, costs in all United States courts to be paid by Wheeler; and cause remanded to the Circuit Court of the United States for the Western District of Michigan, with instructions to remand it to the Circuit Court of Chippewa County, Michigan, on motion of *Mr. Solicitor General* for defendant in error. *Mr. John C. Donnelly* for plaintiff in error. *Mr. Attorney General* and *Mr. Solicitor General* for defendant in error.

No. 90. SHIPMAN *v.* MAGARITY. Error to the Supreme Court of the District of Columbia. November 22, 1895: Dismissed with costs pursuant to the tenth rule. *Mr. W. Willoughby* for plaintiffs in error. *Mr. S. S. Henkle* for defendant in error.

Cases not otherwise Reported.

No. 996. SHREVE *v.* CHEESMAN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. May 18, 1896: Petition denied. *Mr. Charles J. Hughes, Jr.*, and *Mr. Tyson S. Dines* for petitioner. *Mr. T. M. Patterson* and *Mr. C. C. Parsons* opposing.

No. 168. SHUTE *v.* KEYSER. Appeal from the Supreme Court of the Territory of Arizona. October 17, 1895: Dismissed per stipulation, each party to pay one half the costs in this court. *Mr. Wm. Allen Butler* and *Mr. John Notman* for appellants. *Mr. R. F. Brent* for appellee.

No. 236. SMITH *v.* SELLECK. Error to the Circuit Court of the United States for the Eastern District of Wisconsin. April 27, 1896: Dismissed for the want of jurisdiction. *Mr. Lysander Hill* for plaintiff in error. *Mr. J. V. Quarles* and *Mr. Reese H. Voorhees* for defendant in error.

No. 826. SOCIETY OF SHAKERS *v.* WATSON. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit: December 23, 1895: Petition denied. *Mr. Watson Andrew Sudduth* for petitioner. *Mr. St. George R. Fitzhugh* opposing.

No. 2. SOUTHERN PACIFIC RAILROAD COMPANY *v.* ESQUIBEL. Error to the Supreme Court of the Territory of New Mexico. October 15, 1895: Dismissed with costs pursuant to the nineteenth rule. *Mr. Charles H. Tweed* and *Mr. T. B. Catron* for plaintiff in error. *Mr. Charles H. Gildersleeve* for defendant in error.

No. 823. SOUTHERN PACIFIC RAILROAD COMPANY *v.* PATTERSON. Appeal from the Circuit Court of the United States for

the Southern District of California. December 10, 1895: Docketed and dismissed with costs on motion of *Mr. S. M. Stockslager* for appellees. No one opposing.

No. 821. SOUTHERN PACIFIC RAILROAD COMPANY *v.* TILLEY. Appeal from the Circuit Court of the United States for the Southern District of California. December 10, 1895: Docketed and dismissed with costs on motion of *Mr. S. M. Stockslager* for appellees. No one opposing.

No. 822. SOUTHERN PACIFIC RAILROAD COMPANY *v.* WALKER. Appeal from the Circuit Court of the United States for the Southern District of California. December 10, 1895: Docketed and dismissed with costs on motion of *Mr. S. M. Stockslager* for appellee. No one opposing.

No. 409. SOUTHWESTERN RAILROAD COMPANY *v.* CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA. Certificate from the United States Circuit Court of Appeals for the Fifth Circuit. April 14, 1896: Dismissed. *Mr. Frank H. Miller*, *Mr. Augustus O. Bacon* and *Mr. Charles C. Beaman* for the Southwestern Railroad Company. No appearance for the Central Railroad and Banking Company of Georgia.

No. 604. STARLING *v.* WEIR PLOW COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. May 4, 1896: Petition denied. *Mr. William Starling* for petitioner. No one opposing.

No. 734. STEAMSHIP CENTURION *v.* AMERICAN SUGAR REFINING COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. October 21, 1895: Petition denied. *Mr. W. W. MacFarland* for

petitioner. *Mr. J. Parker Kirlin* and *Mr. George A. Black* opposing.

No. 992. STEAMSHIP CERES *v.* WESSELS. No. 993. SYDSVENSKA ANGFARTYGS AKTIEBOLAGET *v.* WESSELS. Petitions for writs of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit. May 18, 1896: Petitions denied. *Mr. J. Parker Kirlin* for petitioner in No. 992. *Mr. Harrington Putnam* in opposition to petition in No. 992 and in support of petition in No. 993.

No. 122. STEED *v.* NORFOLK AND WESTERN RAILROAD COMPANY. Error to the Circuit Court of the United States for the Western District of Virginia. October 14, 1895: Dismissed with costs, on authority of counsel for plaintiff in error. *Mr. Michael L. Woods* and *Mr. James H. Bible* for plaintiff in error. No appearance for the defendant in error.

No. 162. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* LEE. Error to the Supreme Court of the State of Arkansas. October 14, 1895: Dismissed with costs on motion of *Mr. A. B. Browne* for plaintiff in error. *Mr. A. T. Britton*, *Mr. A. B. Browne*, *Mr. George R. Peck* and *Mr. F. D. Kenna* for plaintiff in error. *Mr. A. H. Garland* and *Mr. R. C. Garland* for defendant in error.

No. 163. ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY *v.* RYAN. Error to the Supreme Court of the State of Arkansas. October 14, 1895: Dismissed with costs on motion of *Mr. A. B. Browne* for plaintiff in error. *Mr. A. T. Britton*, *Mr. A. B. Browne*, *Mr. George R. Peck* and *Mr. E. D. Kenna* for plaintiff in error. *Mr. A. H. Garland* and *Mr. R. C. Garland* for defendant in error.

Cases not otherwise Reported.

No. 945. STRICKLAND *v.* LOMM. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Fourth Circuit. April 20, 1896: Petition denied. *Mr. Robert Hughes* for petitioner. *Mr. Wilhelmus Mynderse* opposing.

No. 923. SUN INSURANCE OFFICE *v.* INTERNATIONAL TRUST COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. March 16, 1896: Petition denied. *Mr. T. J. O'Donnell*, *Mr. W. S. Decker* and *Mr. Milton Smith* for petitioner. *Mr. Henry Wise Garnett* and *Mr. N. T. N. Robinson* opposing.

No. 307. TAYLOR *v.* GIRARD LIFE INSURANCE ANNUITY AND TRUST COMPANY. Error to the Court of Appeals of the District of Columbia. May 5, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. Nathaniel Wilson*, *Mr. R. Ross Perry* and *Mr. Ludovic Bennett* for appellants. *Mr. Walter H. Smith* and *Mr. W. L. Cole* for appellee.

No. 114. TEXAS AND PACIFIC RAILWAY COMPANY *v.* ROSEDALE STREET RAILWAY COMPANY. Error to the Court of Appeals of the State of Texas. November 14, 1895: Dismissed with costs on motion of *Mr. John F. Dillon* for plaintiff in error. *Mr. W. S. Pierce* and *Mr. John F. Dillon* for plaintiff in error. No appearance for defendant in error.

No. 729. THORNTON *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. January 13, 1896: Judgment reversed and cause remanded with a direction to set aside the verdict and grant a new trial, upon confession of errors by counsel for defendant in error. No appearance for the plaintiff in error. *Mr. Attorney General*, *Mr. Solicitor General*, *Mr. Assistant*

Attorney General Whitney and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 69. THORP *v.* TENAM DITCH COMPANY. Appeal from the Supreme Court of the State of Washington. October 18, 1895: Dismissed with costs pursuant to the tenth rule. *Mr. A. H. Garland* and *Mr. H. J. May* for appellants. No appearance for appellee.

No. 824. TRAVELERS' INSURANCE COMPANY *v.* HENDERSON. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Eighth Circuit. December 16, 1895: Petition denied. *Mr. J. J. Darlington* for petitioner. *Mr. T. F. Burke* and *Mr. B. D. Lee* opposing.

No. 452. TUBMAN *v.* DEMENT. Error to the Court of Appeals of the State of Maryland. January 27, 1896: Dismissed with costs on motion of *Mr. J. Hubley Ashton* for plaintiff in error. *Mr. J. Hubley Ashton* for the plaintiffs in error. No appearance for defendant in error.

No. 118. UNION PACIFIC RAILWAY COMPANY *v.* CHILTON. Error to the Supreme Court of the Territory of Utah. August 6, 1895: Dismissed pursuant to the twenty-eighth rule. *Mr. John F. Dillon* for plaintiff in error. *Mr. Lindsay R. Rogers* for defendant in error.

No. 250. UNION PACIFIC RAILWAY COMPANY *v.* COLORADO EASTERN RAILWAY COMPANY. Error to the United States Circuit Court of Appeals for the Eighth Circuit. November 14, 1895: Dismissed with costs on motion of *Mr. John F. Dillon* for plaintiff in error, and cause remanded to the Circuit Court of the United States for the District of Colorado. *Mr. John F. Dillon* for plaintiff in error. No appearance for defendant in error.

Cases not otherwise Reported.

No. 103. UNION PACIFIC RAILWAY COMPANY *v.* JONES. Error to the United States Circuit Court of Appeals for the Eighth Circuit. November 14, 1895: Dismissed with costs on motion of *Mr. John F. Dillon* for plaintiff in error, and cause remanded to the Circuit Court of the United States for the District of Colorado. *Mr. John F. Dillon* and *Mr. John M. Thurston* for plaintiff in error. *Mr. E. T. Wells* and *Mr. R. T. McNeal* for defendant in error.

No. 245. UNION PACIFIC RAILWAY COMPANY *v.* REESE. Error to the United States Circuit Court of Appeals for the Ninth Circuit. April 20, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. Samuel Shellabarger*, *Mr. J. M. Wilson* and *Mr. John M. Thurston* for plaintiff in error. *Mr. S. M. Stockslager* and *Mr. George C. Heard* for defendant in error.

No. 913. UNITED STATES *v.* ARNOLD. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Seventh Circuit. March 9, 1896: Petition denied. *Mr. Hiram T. Gilbert* for petitioner. *Mr. Levy Mayer* opposing.

No. 106. UNITED STATES *v.* AULICK. Appeal from the Court of Claims. October 14, 1895: Dismissed on motion of *Mr. Solicitor General* for the appellant. *Mr. Attorney General* and *Mr. Solicitor General* for appellant. No appearance for appellee.

No. 249. UNITED STATES *v.* FINCH. Appeal from the Court of Claims. October 14, 1895: Dismissed on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* for appellant. *Mr. J. Altheus Johnson* for the appellee.

No. 814. UNITED STATES *v.* HARDEN. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for

the Second Circuit. December 16, 1895: Petition denied. *Mr. Attorney General* and *Mr. Solicitor General Conrad* for petitioners. *Mr. Charles Curie*, *Mr. W. Wickham Smith* and *Mr. D. I. Mackie*, opposing.

No. 108. UNITED STATES *v.* LOVELL. Appeal from the Court of Claims. October 14, 1895: Dismissed on motion of *Mr. Solicitor General* for appellant. *Mr. Attorney General* and *Mr. Solicitor General* for appellants. No appearance for appellee.

No. 700. UNITED STATES *v.* UNION PACIFIC RAILWAY COMPANY. Appeal from the United States Circuit Court of Appeals for the Eighth Circuit. March 23, 1896: Dismissed per stipulation. *Mr. Attorney General* and *Mr. Solicitor General* for appellants. *Mr. M. R. Kelly* and *Mr. A. L. Williams* for appellee.

No. 483. UNITED STATES *v.* ZUCKER. Error to the District Court of the United States for the Southern District of New York. May 18, 1896: Dismissed, per stipulation, on motion of *Mr. Solicitor General* for plaintiff in error. *Mr. Attorney General* and *Mr. Solicitor General* for plaintiffs in error. *Mr. Abram J. Rose* for defendants in error.

No. 965. WALRATH *v.* CHAMPION MINING COMPANY. Petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Ninth Circuit. April 20, 1896: Petition denied. *Mr. James F. Smith* for petitioner. No one opposing.

No. 178. WASHINGTON STATE *v.* BOARD OF HARBOR LINE COMMISSIONERS. Error to the Supreme Court of the State of Washington. October 14, 1895: Dismissed per stipulation. *Mr. A. H. Holmes* for plaintiff in error. *Mr. W. C. Jones* for defendant in error.

Cases not otherwise Reported.

No. 264. WASHINGTON STATE *v.* BOARD OF TIDE LAND APPRAISERS OF WHATCOM COUNTY. Error to the Supreme Court of the State of Washington. April 29, 1896: Dismissed with costs pursuant to the tenth rule. *Mr. W. H. Calkins* for plaintiffs in error. *Mr. Alfred L. Black* for defendants in error.

No. 727. WAYNE LUMBER COMPANY *v.* COLLINS. Error to the Supreme Court of the State of Missouri. May 4, 1896: Dismissed for want of jurisdiction. *Mr. J. N. Morrison* and *Mr. Warwick Massey Hough* for plaintiff in error. *Mr. Eleneious Smith* for defendants in error.

No. 275. WESTERN UNION TELEGRAPH COMPANY *v.* CHARLESTON. Appeal from the Circuit Court of the United States for the District of South Carolina. October 14, 1895: Dismissed with costs on authority of counsel for appellants. *Mr. A. T. Smythe* for appellant. No appearance for appellees.

No. 257. WESTERN UNION TELEGRAPH COMPANY *v.* CHESTER. Error to the Supreme Court of the State of Pennsylvania. April 27, 1896: Dismissed with costs on the authority of counsel for plaintiff in error. *Mr. Silas W. Pettit* for plaintiff in error. No appearance for the defendant in error.

No. 235. WHEELER *v.* CLOYD. Appeal from the Circuit Court of the United States for the Southern District of Illinois. April 27, 1896: Dismissed for the want of jurisdiction. *Mr. H. Tompkins* for appellants. *Mr. J. C. Clayton*, *Mr. Lemuel Skidmore*, *Mr. Edwin Beecher* and *Mr. Henry C. Whitney* for appellees.

No. 708. WHITE *v.* LENNIG. Error to the Supreme Court of Appeals of the State of Virginia. February 3, 1896: Dismissed for the want of jurisdiction on the authority of *John-*

son v. *Risk*, 137 U. S. 300, and *Eustis* v. *Bolles*, 150 U. S. 361. *Mr. John E. Roller* for plaintiff in error. *Mr. Holmes Conrad* and *Mr. E. H. Conrad* for defendants in error.

No. 809. Wilkey *alias* Davis *v.* United States. Error to the Circuit Court of the United States for the Western District of Arkansas. March 9, 1896: Judgment affirmed. No appearance for the plaintiff in error. *Mr. Attorney General* and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 123. Williams *v.* Wilbur. Error to the Circuit Court of the United States for the District of Kansas. December 11, 1895: Dismissed with costs pursuant to the tenth rule. *Mr. C. O. Tichenor* for plaintiff in error. *Mr. Willard Teller* for defendant in error.

No. 554. Willman *v.* Friedman. Error to the Supreme Court of the State of Idaho. December 23, 1895: Dismissed with costs per stipulation. *Mr. A. L. Rhodes* for plaintiff in error. *Mr. Arthur Brown* for defendant in error.

No. 726. Yancey *v.* Ivy. Error to the Supreme Court of the State of Missouri. May 4, 1896: Dismissed for the want of jurisdiction. *Mr. J. N. Morrison*, *Mr. Warwick Massey Hough* and *Mr. Warwick Hough* for plaintiff in error. *Mr. George G. Vest* for defendant in error.

II.

Summary Statement of Business of the Supreme Court of the United States for October Term, 1895.

Original Docket.

Number of cases	11
Number of cases disposed of	5
Leaving undisposed of	6

Appellate Docket.

Number of cases on appellate docket at close of the October Term, 1894, not disposed of	640
Number of cases docketed during October Term, 1895	382
Total	1022
Number of cases disposed of October Term, 1895	489
Number of cases remaining undisposed of, showing a reduction of 107 cases	533

INDEX.

ALIENS.

1. Detention or temporary confinement, as part of the means necessary to give effect to the exclusion or expulsion of Chinese aliens is valid. *Wong Wing* v. *United States*, 228.
2. The United States can forbid aliens from coming within their borders, and expel them from their territory, and can devolve the power and duty of identifying and arresting such persons upon executive or subordinate officials; but when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. *Ib.*

ALIEN IMMIGRANT.

A contract made with an alien in a foreign country to come to this country as a chemist on a sugar plantation in Louisiana, in pursuance of which contract such alien does come to this country and is employed on a sugar plantation in Louisiana, and his expenses paid by the defendant, is not such a contract to perform labor or service as is prohibited in the act of Congress passed February 26, 1885. *United States* v. *Laws*, 258.

BANKRUPT.

R. obtained a judgment against B. on the law side of the Supreme Court of the District of Columbia. Shortly after he assigned the judgment to S. W., who subsequently became bankrupt, and as such surrendered all his property, including said judgment. G. was duly made his assignee. S. W. died and G. W. was made his executrix. The death of S. W. being suggested on the record, a writ of *scire facias* was issued to revive the judgment, and on return of *nihil* a second writ was issued on which a like return was made. When these proceedings came to the knowledge of B. he filed a bill to set them aside. A demurrer being sustained on the ground that the assignee was not a party the assignee was summoned in; and, upon his death, his successor was made a party on his own motion. After issues were made

by the pleadings, the suit proceeded to a final decree in the Supreme Court of the District, from which an appeal was taken to the Court of Appeals. The latter court reversed the judgment of the court below. On appeal to this court it is *Held*, (1) That the proceedings to revive the judgment were regular; (2) That as the assignee was a party to the proceedings, with his official rights protected, the judgment debtor could not set up that it was not competent for G. W. to originate the proceedings; (3) That no substantial reason was shown why B. should be relieved from the judgment. *Brown* v. *Wygant and Leeds*, 618.

See JURISDICTION, A, 16.

BOUNDARY.

The report of the commissioners appointed October 21, 1895, 159 U. S. 275, to run the disputed boundary line between Indiana and Kentucky, is confirmed. *Indiana* v. *Kentucky*, 520.

CASES AFFIRMED OR FOLLOWED.

Singer Manufacturing Company v. *June Manufacturing Company*, 163 U. S. 169, followed. *Singer Manufacturing Co.* v. *Bent*, 205.

See COURT AND JURY, 5;
REMOVAL OF CAUSES.

CHINESE ALIENS.

See ALIENS.

CONSTITUTIONAL LAW.

1. A statute of a State, requiring a telegraph company to pay a tax upon its property within the State, valued at such a proportion of the whole value of its capital stock as the length of its lines within the State bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the State, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other States; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional. *Western Union Telegraph Co.* v. *Taggart*, 1.
2. The statute of Indiana of March 6, 1893, c. 171, which directs the state board of tax commissioners to take as the basis of valuation of the property within the State of every telegraph company, incorporated in Indiana or in any other State, the proportion of the value of its whole capital stock which the length of its lines within the

State bears to the whole length of all its lines, but, as construed by the Supreme Court of the State, makes it the duty of the tax commissioners to make such deductions, on account of a greater proportional value of the company's property outside the State, or for any other reason, so as to assess its property within the State at its true cash value; and, so construed, is constitutional. *Ib.*

3. A person upon whose oath a criminal information for a libel is filed, and who is found by the jury, as part of their verdict acquitting the defendant, to be the prosecuting witness, and to have instituted the prosecution without probable cause and with malicious motives, and is thereupon adjudged by the court to pay the costs, and to be committed until payment thereof, in accordance with the General Statutes of Kansas of 1889, c. 82, § 326, and who does not appear to have been denied at the trial the opportunity of offering arguments and evidence upon the motives and the cause of the prosecution, is not deprived of liberty or property without due process of law, or denied the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution of the United States. *Lowe* v. *Kansas*, 81.
4. A state statute which authorizes the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage. *Barnitz* v. *Beverly*, 118.
5. The constitutional prohibition upon the passage of state laws impairing the obligation of contracts has reference only to the laws, that is, to the constitutional provisions or to the legislative enactments, of a State, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired. *Hanford* v. *Davies*, 273.
6. The act of Congress of September 20, 1850, c. 61, granted a right of way, and sections of the public lands, to the State of Illinois, and to States south of the Ohio River, to aid in the construction of a railroad connecting the waters of the Great Lakes with those of the Gulf of Mexico, and over which the mails of the United States should be carried. The State of Illinois accepted the act, and incorporated the Illinois Central Railroad Company, for the purpose of constructing a railroad with a southern terminus described as "a point at the city of Cairo." The company accordingly constructed and maintained its railroad to a station in Cairo, very near the junction of the Ohio and Mississippi Rivers; but afterwards, in accordance with statutes of the United States and of the State of Illinois, connected its railroad with a railroad bridge built across the Ohio River opposite a part of Cairo farther from the mouth of that river; and put on a fast mail train carrying interstate passengers and the United States mails from Chicago to New Orleans, which ran through the city of Cairo, but

did not go to the station in that city, and could not have done so without leaving the through route at a point three and a half miles from the station and coming back to the same point; but the company made adequate accommodation by other trains for interstate passengers to and from Cairo. Cairo was a county seat. *Held*, that a statute of Illinois, requiring railroad companies to stop their trains at county seats long enough to receive and let off passengers with safety, and construed by the Supreme Court of the State to require the fast mail train of this company to be run to and stopped at the station in Cairo, was, to that extent, an unconstitutional hindrance and obstruction of interstate commerce, and of the passage of the mails of the United States. *Illinois Central Railroad Co.* v. *Illinois*, 142.

7. The legislation of the State of Georgia, contained in §§ 4578 and 4310 of the Code of 1882, forbidding the running of freight trains on any railroad in the State on Sunday, and providing for the trial and punishment, on conviction, of the superintendent of a railroad company violating that provision, although it affects interstate commerce in a limited degree, is not, for that reason, a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but is an ordinary police regulation, designed to secure the well-being, and to promote the general welfare of the people within the State, and is not invalid by force alone of the Constitution of the United States; but is to be respected in the courts of the Union until superseded and displaced by some act of Congress, passed in execution of the power granted to it by the Constitution. *Hennington* v. *Georgia*, 299.

8. There is nothing in the legislation in question in this case that suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. *Ib.*

9. The appropriations of money by the act of March 2, 1895, c. 189, 28 Stat. 910, 933, to be paid to certain manufacturers and producers of sugar who had complied with the provisions of the act of October 1, 1890, c. 1244, 26 Stat. 567, were within the power of Congress to make, and were constitutional and valid. *United States* v. *Realty Company*, 427.

10. It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the Judicial branch of the Government. *Ib.*

11. The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to pro-

vide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no persons shall be permitted to occupy seats in coaches other than the ones assigned to them, on account of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States. *Plessy v. Ferguson*, 537.

See ALIENS;
INDIANS, 2, 3, 4, 5.

CONTRACT.

A., an alien, sold to B. in New Orleans thirteen bonds of the State of Louisiana, delivered them to him, and received from him payment for them in full. Both parties contemplated the purchase and delivery of valid and lawful obligations of the State, and both regarded the bonds so delivered as such valid and lawful obligations. It turned out that the bonds were absolutely void, having never been lawfully put into circulation. B. thereupon sued A. in the Circuit Court of the United States for the Eastern District of Louisiana, to recover the purchase money paid for them. *Held*, (1) That as the sale was a Louisiana contract, the rights and obligations of the parties must be determined by the laws of that State; (2) That by the civil law, which prevails in Louisiana, warranty, whilst not of the essence, is yet of the nature of the contract of sale, and is implied in every such contract, unless there be a stipulation to the contrary; (3) That by the rule of the common law, both in England and in the United States the doctrine is universally recognized that where commercial paper is sold without indorsement or without express assumption of liability on the paper itself, the contract of sale and the obligations which arise from it, as between vendor and vendee, are governed by the common law, relating to the sale of goods and chattels; and that the undoubted rule is that in such a sale the obligation of the vendor is not restricted to the mere question of forgery *vel non*, but depends upon whether he has delivered that which he contracted to sell, this rule being designated, in England, as a condition of the principal contract, as to the essence and substance of the thing agreed to be

sold, and in this country being generally termed an implied warranty of identity of the thing sold; (4) That whilst the civil law enforces in the contract of sale generally the broadest obligation of warranty, it has so narrowed it, when dealing with credits and incorporeal rights, as to confine it to the title of the seller and to the existence of the credit sold, and, *e converso*, the common law, which restricts warranty within a narrow compass, virtually imposes the same duty by broadening the warranty as regards personal property so as to impose the obligation on the vendor to deliver the thing sold as a condition of the principal contract or by implication of warranty as to the identity of the thing sold; and thus, by these processes of reasoning the two great systems, whilst apparently divergent in principle, practically work substantially to the same salutary conclusions; (5) That B. is entitled to recover the sum so paid by him, with interest from the time of judicial demand. *Meyer* v. *Richards*, 385.

See ALIEN IMMIGRANT;
LIFE INSURANCE;
RAILROAD, 10, 11, 13, 14, 15, 16.

CONTRIBUTORY NEGLIGENCE.

1. When, in an action by a railroad employé against the company to recover damages for injuries suffered while on duty, the inference to be drawn from the facts is not so plain as to make it a legal conclusion that the plaintiff was guilty of contributory negligence, the question whether he was or was not so guilty must be left to the jury. *Northern Pacific Railroad* v. *Egeland*, 93.

2. The defendant in error, plaintiff below, was a common laborer in the employ of the plaintiff in error. When returning from his work on a train, the conductor ordered him and others to jump off at a station when the train was moving about four miles an hour. The platform was about a foot lower than the car step. His fellow-laborers jumped and were landed safely. He jumped and was seriously injured. He sued to recover damages for those injuries. *Held*, that the court below rightly left it to the jury to determine whether he was guilty of contributory negligence. *Ib.*

See NEGLIGENCE;
TORT, 5.

CORPORATION.

See RAILROAD, 9, 10, 11, 14, 17.

COURT AND JURY.

1. It is no error to refuse to give an instruction when all its propositions are embraced in the charge to the jury. *Rio Grande Western Railway Co.* v. *Leake*, 280.

2. It is no error in an action like this to refuse an instruction which singles out particular circumstances, and omits all reference to others of importance. *Ib.*
3. This case was fairly submitted to the jury with no error of law to the prejudice of the defendant. *Ib.*
4. This case was one peculiarly for the jury, under appropriate instructions from the court as to the principles of law by which they were to be guided in reaching a conclusion as to the liability of the railroad company for the death of its employé; and the positions taken to the contrary have no merit. *Texas & Pacific Railway Co.* v. *Gentry*, 353.
5. The ruling in *Simmons* v. *United States*, 142 U. S. 148, that "the judge presiding at a trial, civil or criminal, in any court of the United States, may express his opinion to the jury upon the questions of fact which he submits to their determination" applied to statements by the court below in its charge in this case. *Wiborg* v. *United States*, 632.

See CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

CRIMINAL LAW.

1. Rulings of the court below refusing writs of *subpœna duces tecum* held to work no injury to defendant. *Murray* v. *Louisiana*, 101.
2. The state court, on the trial of the plaintiff in error for murder, permitted to be read in evidence the evidence of a witness taken in the presence of the accused at a preliminary hearing, read to and signed by the witness, the prosecuting officer alleging that the witness was beyond the jurisdiction of the court, and his attendance could not be procured. The bill of exceptions to its allowance was not presented to the trial judge for signature until two weeks after sentence, after refusal of a new trial, and after appeal. The record does not disclose the nature or effect of the testimony so admitted. *Held*, that there is nothing in this record which would authorize this court to convict the Supreme Court of Louisiana of error in that behalf. *Ib.*
3. A person indicted for robbing a mail-carrier of a registered mail package, and of putting the carrier in jeopardy of his life in effecting it, is entitled under Rev. Stat. § 819 to ten peremptory challenges. *Harrison* v. *United States*, 140.
4. The defendant's name need not be correctly spelled in an indictment, if substantially the same sound is preserved. *Faust* v. *United States*, 452.
5. On the trial under an indictment against an assistant postmaster for embezzling money-order funds of the United States, it being proved that he was the son and assistant of the principal postmaster, and as such had the sole management and possession of the money-order business and money-order funds during the entire term, a certified transcript from the office of the Auditor of the Treasury at Wash-

ington, showing the account of the postmaster, is admissible in evidence. *Ib.*

6. It was no error on such trial to refuse to admit evidence tending to show that another person than the defendant, at a time anterior to the time of the commission of the offence charged, had committed another and different offence than the one herein charged, and that said other person had been indicted and convicted thereof. *Ib.*
7. It was within the discretion of the court below to permit a witness who had been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination. *Ib.*
8. The objection that the charge as a whole was misleading is without merit. *Ib.*
9. The sixth assignment is based on the refusal of the court to charge the jury that the embezzlement must be proved to have taken place without the consent of the defendant's principal or employer. It was claimed that as the indictment failed to charge that the defendant embezzled any money without the consent of his principal or employer, and as the postmaster employed the defendant, the defendant's responsibility was to the postmaster, and not to the government. *Held*, that it had no merit. *Ib.*
10. The remaining assignments are without merit. *Ib.*
11. A general verdict of acquittal, in a court having jurisdiction of the cause and of the defendant, upon the issue of not guilty to an indictment undertaking to charge murder, and not objected to before verdict as insufficient in that respect, is a bar to a subsequent indictment against him for the same killing. *United States* v. *Ball*, 662.
12. A verdict in a case submitted to the jury on Saturday may be received and the jury discharged on Sunday. *Ib.*
13. A defendant in a criminal case, who procures a verdict and judgment against him to be set aside by the court, may be tried anew upon the same or another indictment for the same offence of which he was convicted. *Ib.*
14. Whether defendants jointly indicted shall be tried together or separately rests in the sound discretion of the trial court. *Ib.*
15. After a witness in support of a prosecution has testified, on cross-examination, that he had, at his own expense, employed another attorney to assist the attorney for the government, the question "How much do you pay him?" may be excluded as immaterial. *Ib.*
16. Upon a trial for murder by shooting, in different parts of the body, with a gun loaded with buckshot, and after the introduction of conflicting evidence upon the question whether a gun found in the defendant's possession would scatter buckshot, it is within the discretion of the court to decline to permit the gun to be taken out and shot off, in the presence of the deputy marshal, in order to test how it threw such shot. *Ib.*

17. An indictment for murder, which alleges that A, at a certain time and place, by shooting with a loaded gun, inflicted upon the body of B "a mortal wound, of which mortal wound the said B did languish, and languishing did then and there instantly die," unequivocally alleges that B died of the mortal wound inflicted by A, and that B died at the time and place at which the mortal wound was inflicted. *Ib.*

18. The court is not bound, as a matter of law, to set aside a verdict of guilty in a capital case, because no special oath was administered to the officer in charge of the jury, if he was a deputy marshal who had previously taken the oath of office, and no objection to his taking charge of the jury without a new oath was made at any stage of the trial, and the jury were duly cautioned by the court not to separate or to allow any other person to talk with them about the case, and there is nothing tending to show that the jury were exposed to any influence that might interfere with the impartial performance of their duties or prejudice the defendant. *Ib.*

See NEUTRALITY LAWS.

DISTRICT ATTORNEY.

See FEES.

DOWER.

See MINERAL LAND.

DRAWBACK.

The right to a drawback on bituminous coal, imported into the United States and consumed as fuel on a steam vessel engaged in the coasting trade of the United States, which existed before the passage of the tariff act of October 1, 1890, c. 1244, 26 Stat. 567, was taken away by the passage of that bill. *United States* v. *Allen*, 499.

EQUITY.

1. This complaint being, in effect, a bill to quiet title as against an adverse claim, and the plaintiff having thus voluntarily invoked the equity jurisdiction of the court, he is in no position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law, and such an objection comes too late in the appellate tribunal. *Perego* v. *Dodge*, 160.

2. Where a case is one of equitable jurisdiction only, the trial court is not bound to submit issues of fact to a jury; and, if it does so, is at liberty to disregard the verdict and findings of the jury. *Ib.*

3. By reason of his selection of this form of action, and his proceeding to a hearing and decree without objection, the contention of the appellant in respect of his deprivation of trial by jury comes too late. *Ib.*

4. The act of March 3, 1881, c. 140, 21 Stat. 505, was not intended to re-

quire and does not require all suits under Rev. Stat. § 2326, to be actions at law and to be tried by jury. *Ib.*

EVIDENCE.

See CRIMINAL LAW, 5, 7, 15, 16; RAILROAD, 3; INDIANS, 7; TORT, 2, 3, 4.

EXCEPTION.

A statement of facts by the court in a recapitulation of the evidence, based on uncontradicted testimony, no rule of law being incorrectly stated, and the facts being submitted to the determination of the jury, is not open to exception. *Wiborg* v. *United States*, 632.

See PRACTICE, 4.

FEES.

1. Fees allowed by the court to the district attorney for his services in defending *habeas corpus* cases, brought to release from the custody of masters of vessels Chinese emigrants, whom the collector of the port had ordered detained, should be accounted for by him in the returns made by him to the government of the fees and emoluments of his office. *Hilborn* v. *United States*, 342.
2. It would require a strong case to show that services, for which the district attorney is entitled to charge the government a fee, are not also services for the earnings of which he should make return to the government in his emolument account. *Ib.*

FINDING OF FACTS.

See JURISDICTION, A, 21; PRACTICE, 3, 4.

INDIANA.

See BOUNDARY.

INDIANS.

1. The treaty of February 23, 1867, 15 Stat. 513, with the Ottawas and other Indians, introduced the limit of minority upon the inalienability of lands patented to a minor allottee, in that respect changing the provisions of the treaty of July 16, 1862, 12 Stat. 1237; and this limitation was applicable to lands then patented to minors under the treaty of 1867, and cut off the right of guardians to dispose of their real estate during their minority, even under direction of the court of the State in which the land was situated. *Wiggan* v. *Connolly*, 56.
2. The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of the Cherokee nation is not an offence against the United States, but an offence against the

local laws of the Cherokee nation; and the statutes of the United States which provide for an indictment by a grand jury, and the number of persons who shall constitute such a body, have no application. *Talton* v. *Mayes*, 376.

3. The Fifth Amendment to the Constitution does not apply to local legislation of the Cherokee nation, so as to require all prosecutions for offences committed against the laws of that nation to be initiated by a grand jury in accordance with the provisions of that amendment. *Ib.*

4. The question whether a statute of the Cherokee nation which was not repugnant to the Constitution of the United States or in conflict with any treaty or law of the United States had been repealed by another statute of that nation, and the determination of what was the existing law of the Cherokee nation as to the constitution of the grand jury, is solely a matter within the jurisdiction of the courts of that nation, and the decision of such a question in itself necessarily involves no infraction of the Constitution of the United States. *Ib.*

5. The provision in the treaty of February 24, 1869, with the Bannock Indians, whose reservation was within the limits of what is now the State of Wyoming, that "they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon," etc., does not give them the right to exercise this privilege within the limits of that State in violation of its laws. *Ward* v. *Race Horse*, 504.

6. On the trial of a Choctaw Indian for the murder of a negro at the Choctaw Nation in the Indian country, the status of the deceased is a question of fact, to be determined by the evidence, and the burden of proof is on the government to sustain the jurisdiction of the court by evidence. *Lucas* v. *United States*, 612.

7. Statements alleged to have been made by the negro in his lifetime that he did not belong to the Indian country are not admissible for that purpose. *Ib.*

See RAILROAD, 7.

INTEREST.

The rule in cases of tort is to leave the question of interest as damages to the discretion of the jury; but as it is evident from the record that the jury did not allow interest, but based their verdict entirely upon the number of tons of hay destroyed at the market value per ton, this court acquiesces in the disposition made by the Circuit Court of Appeals of the question made in respect of the instruction of the trial court on the subject of interest. *Eddy* v. *Lafayette*, 456.

JUDGMENT.

A decree or judgment by the Circuit Court of Appeals, affirming a decree or judgment of a Circuit Court, without specifying the sum for which

it is rendered, is a final decree or judgment, from which an appeal or writ of error will lie to this court. *Texas & Pacific Railway Co.* v. *Gentry*, 353.

See BANKRUPT.

JURISDICTION.

A. JURISDICTION OF THE SUPREME COURT.

1. In a suit in a state court to quiet title, two claims to title were set up by the plaintiff. The first was that his title had been acquired by adverse possession, sufficient under the local law. On this point the trial court found that, in 1862, the plaintiff's grantor entered into possession of the land in question, and that he and the plaintiff had since been continuously and then were in actual, notorious and adverse possession thereof, under color and claim of title. The second claim was under a deed from husband and wife, executed by the former under an alleged power of attorney from the latter which had been lost without having been recorded. On this point the trial court found that the existence and validity of the power of attorney was established. It entered a decree that the plaintiff was entitled to the possession of the land, that the defendant was not the owner of it, that the cloud be removed, and that the power of attorney be established. On appeal to the Supreme Court of the State this decree was affirmed. The case being brought here by writ of error the Chief Justice of the Supreme Court of the State certified that the question had been duly raised in the trial court whether the said power and the deed made under it, which, by the law at the time of its making were absolutely void, were made valid by the territorial act of February 2, 1888, and whether, if so made valid, it was not in violation of the Fourteenth Amendment to the Constitution. *Held*, that, as it was settled in the State that actual, uninterrupted and notorious possession, under claim of right, was sufficient without color of title, and that a void deed, accompanied with actual occupancy, was sufficient to set the statute of limitations in motion, the judgment could be sustained on the first point, which raised no Federal question, and that consequently this court was without jurisdiction. *Dibble* v. *Bellingham Bay Land Co.*, 63.

2. If the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution of the United States, and another question not Federal has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the Federal question to sustain the decision, this court will not review the judgment. *Ib.*

3. If it appears that the court did in fact base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which

it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction. *Ib.*

4. This result cannot be in any respect controlled by the certificate of the presiding judge, for the office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but it is incompetent to originate the question. *Ib.*
5. If the conflict of a state law with the Constitution and the decision by the state court in favor of its validity are relied on, this must appear on the face of the record before the decision can be reëxamined in this court, and this is equally true where the denial of a title, right, privilege or immunity under the Constitution and laws of the United States, or the validity of an authority exercised under the United States, is urged as the ground of jurisdiction. *Ib.*
6. No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a State to a statute of limitations of a State, and there is no reason for disregarding it in this instance. *Ib.*
7. In order to give this court appellate jurisdiction under the act of March 3, 1891, c. 517, § 5, upon the ground that the case "involves the construction or application of the Constitution of the United States," a construction or application of the Constitution must have been expressed or requested in the Circuit Court. *Cornell* v. *Green*, 75.
8. A decree of the Circuit Court, dismissing on general demurrer, for want of equity, a bill filed by a grantee of land, praying that proceedings for foreclosure, to which his grantor was made a party as executor and as guardian, but not individually, be set aside for the alleged reason that the grantor was not a party to or bound by those proceedings, does not "involve the construction or application of the Constitution of the United States," within the meaning of the act of March 3, 1891, c. 517, § 5. *Ib.*
9. The scheme of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, precludes the contention that certificates of division of opinion in criminal cases may still be had under Rev. Stat. §§ 651 and 697. *United States* v. *Rider*, 132.
10. Review by appeal, by writ of error or otherwise, must be as prescribed by that act, and review by certificate is limited by it to the certificate by the Circuit Courts, made after final judgment, of questions made as to their own jurisdiction; and to the certificate by the Circuit Courts of Appeal of questions of law in relation to which the advice of this court is sought as therein provided; and these certificates are governed by the same general rules as were formerly applied to certificates of division. *Ib.*
11. No appeal lies to this court from a decree of a Circuit Court of the

United States, ordering that the decree of the Circuit Court of Appeals in a suit for a perpetual injunction against infringement of a copyright be made a decree of the Circuit Court to which it was sent down with a mandate after hearing on appeal from the Circuit Court. *Webster* v. *Daly*, 155.

12. In this case application was made by the defendants below, after judgment, to the Supreme Court of Texas for a writ of error to the Court of Civil Appeals for the second district for the purpose of reviewing the judgment of that court, and the application was denied. *Held*, that this court has jurisdiction to reëxamine the judgment on writ of error to the Court of Civil Appeals. *Bacon* v. *Texas*, 207.
13. In case of a change of phraseology in an article in a state constitution, it is for the state courts to determine whether the change calls for a change of construction. *Ib.*
14. Where there are two grounds for the judgment of a state court, one only of which involves a Federal question, and the other is broad enough to maintain a judgment sought to be reviewed, this court will not look into the Federal question. *Ib.*
15. When a state court has based its decision on a local or state question, and this court in consequence finds it unnecessary to decide a Federal question raised by the record, the logical course is to dismiss the writ of error. *Ib.*
16. The objections of a creditor to the discharge of a bankrupt being dismissed for want of prosecution, the creditor filed his petition for revision in the Circuit Court of the United States. Issues were made up and the case heard. The Circuit Court held that the petition must be dismissed and an order to that effect was entered. Thereupon the creditor appealed to the Circuit Court of Appeals, which court dismissed the appeal for want of jurisdiction. Appeal was taken to this court. *Held*, that this court had jurisdiction of such an appeal, when it appeared affirmatively that the amount in controversy exceeded $1000, besides costs, which did not appear in this case. *Huntington* v. *Saunders*, 319.
17. The ruling of the Supreme Court of Illinois, on the issues in this case that the statutes of Illinois contain both a prohibition and a penalty, that the prohibition makes void *pro tanto* every contract in violation thereof, and that while section 11, prohibiting corporations from pleading the defence of usury, may prevent any claim to the benefits of the penalty, it does not give to the other party a right to enforce a contract made in violation of the prohibition, brings the case within the settled law that, where the record discloses that a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, and another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judg-

ment, this court will not review the judgment. *Union National Bank* v. *Louisville, New Albany & Chicago Railway Co.*, 325.

18. In cases brought by appeal from the Supreme Courts of the Territories, this court cannot consider the weight or the sufficiency of the evidence, but only whether the facts found by the court below support the judgment, and whether there was any error in rulings, duly excepted to, upon the admission or rejection of evidence. *Grayson* v. *Lynch*, 468.
19. The statute of the Territory of New Mexico requiring its Supreme Court to review causes in which a jury has been waived in the same manner and to the same extent as if it had been tried by a jury makes no essential change in the previous practice, and cannot affect the power of this court under the act of April 7, 1874, c. 80, 18 Stat. 27. *Ib.*
20. If a court can only review cases tried without a jury as it would review cases tried by a jury, it can only review them for errors apparent upon the record, or incorporated in a bill of exceptions. *Ib.*
21. Where a jury is waived the findings of fact by the court have the same force and effect as the verdict of a jury, and the appellate court will not set aside the findings and order a new trial for the admission of incompetent evidence, if there be other competent evidence to support the conclusion. *Ib.* .

See JUDGMENT.

B. JURISDICTION OF CIRCUIT COURTS OF APPEALS.

The District Court of Alaska is to be regarded as the Supreme Court of that Territory, within the meaning of the 15th section of the act of March 3, 1891, c. 517, 26 Stat. 826, and of the order of this court assigning Alaska to the Ninth Circuit; and the decree of the District Court of Alaska is subject to review by the Circuit Court of Appeals of that circuit. *Steamer Coquitlam* v. *United States*, 346.

C. JURISDICTION OF CIRCUIT COURTS.

1. In determining the jurisdictional amount in an action in a Circuit Court of the United States to recover on a municipal bond, the matured coupons are to be treated as separable independent promises, and not as interest due upon the bond. *Edwards* v. *Bates County*, 269.
2. When it is the purpose to present a case under the clause of the Constitution relating to due process of law, and both parties are citizens of the same State, the grounds upon which a Federal court can take cognizance of a suit of that character and between such parties must be clearly and distinctly stated in the bill. *Hanford* v. *Davies*, 273.

3. Jurisdiction in such case cannot be inferred argumentatively from averments in the pleadings, but the averments must be positive. *Ib.*

D. JURISDICTION OF THE COURT OF CLAIMS.

The Court of Claims had no jurisdiction over this case, as the claim of the defendant in error is a "War Claim," growing out of the appropriation of property by the army while engaged in the suppression of the rebellion. *United States* v. *Winchester & Potomac Railroad Co.*, 244.

KENTUCKY.

See BOUNDARY.

LIFE INSURANCE.

1. A society extending throughout the country, which was divided into lodges, whose members were subject to an annual lodge assessment and had also the right to become members of a separate assessable organization, within the society, called the endowment fund, having had some differences with a member who had paid all his endowment assessments but was in arrear for his dues to his lodge, the supreme head, (called the board of control,) after careful consideration, decided that in view of the fact that the keeper of records and seals of the lodge to which he belonged failed to notify the section of which he was a member of the fact that he was in arrears for dues to his lodge and that the lodge had failed to suspend him in accordance with the law, and that his section of the endowment rank had received his monthly assessments up to the date of his death, the endowment rank was liable for the full amount of the endowment. *Held*, that while the courts are not bound by this construction of the organization, the association has no right to complain if its certificate holders act upon such interpretation, and is not in a position to claim that the ruling was more liberal than the facts of the case or a proper construction of the rules would warrant; and that whether the ruling was right or wrong it established a course of business on the part of the society, upon which its certificate holders had a right to rely. *Knights of Pythias* v. *Kalinski*, 289.
2. The continued receipt of assessments upon an endowment certificate up to the day of the holder's death is, under the circumstances of this case, a waiver of any technical forfeiture by reason of non-payment of lodge dues. *Ib.*

LOCAL LAW.

1. In this case, while there was in form a separate judgment, in favor of each of the persons for whose benefit the action was brought, the statute of Texas creates a single liability on the part of the defendant,

and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children and parents of the persons whose death was caused in any of the specified modes. *Texas & Pacific Railway Co.* v. *Gentry*, 353.

2. In an action under Title 36 of the Revised Statutes of the Territory of Arizona to recover for injuries causing death, brought in the name of the widow of the deceased, for the benefit of herself and of his children and parents, she has no authority to lessen or alter the shares awarded by the jury to the other beneficiaries; and if the jury return a verdict for excessive damages, and she files a remittitur of a large part of the whole verdict, lessening the share awarded to each beneficiary, and reducing to nominal damages the shares of the parents of the deceased, and the court thereupon renders judgment according to the verdict, as reduced by the remittitur, the defendant, upon writ of error, is entitled to have the judgment reversed and the verdict set aside. *Southern Pacific Company* v. *Tomlinson*, 369.

Louisiana. *See* CONTRACT.

MINERAL LAND.

A locator of an unpatented mining claim under the laws of the United States, having only the possessory rights conferred by those laws, has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband. *Black* v. *Elkhorn Mining Co.*, 445.

MORTGAGE.

See CONSTITUTIONAL LAW, 4.

MUNICIPAL BOND.

See JURISDICTION, C, 1.

NEGLIGENCE.

It is only when facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court. *Texas & Pacific Railway Co.* v. *Gentry*, 353.

See CONTRIBUTORY NEGLIGENCE.

NEGOTIABLE PAPER.

See CONTRACT.

NEUTRALITY LAWS.

1. The several acts described in and made punishable by Rev. Stat. § 5286, are stated therein separately and disjunctively, connected by

the conjunction "or." The indictment in this case, charging that the defendants committed some of those acts, connects them by the conjunction "and." No question of duplicity was raised by the defendants' counsel. The trial judge instructed the jury that the evidence would not justify a conviction of anything more than providing the means for, or aiding the military expeditions set forth in the indictment, by furnishing transportation for their men, etc. *Held*, that the verdict could not be disturbed on the ground that more than one offence was included in the same count of the indictment. *Wiborg* v. *United States*, 632.

2. Providing, or preparing the means of transportation for such a military expedition or enterprise as is referred to in Rev. Stat. § 5286, is one of the forms of provision or preparation therein denounced. *Ib.*
3. A hostile expedition, dispatched from a port of the United States, is within the words "carried on from thence." *Ib.*
4. A body of men went on board a tug in a port of the United States, loaded with arms; were taken by it thirty or forty miles and out to sea; met a steamer outside the three line limit by prior arrangement; boarded her with the arms, opened the boxes and distributed the arms among themselves; drilled to some extent; were apparently officered; and then, as preconcerted, disembarked to effect an armed landing on the coast of Cuba, when the United States were at peace with Spain. *Held*, that this constituted a military expedition or enterprise within the provisions of the Revised Statutes. *Ib.*
5. On the question whether the defendants aided the expedition with knowledge of the facts, the jury were instructed that they must acquit unless they were satisfied beyond reasonable doubt that defendants, when they left Philadelphia, had knowledge of the expedition and its objects, and had arranged and provided for its transportation. *Held*, that the defendants had no adequate ground of complaint on this branch of the case. *Ib.*
6. Assuming that a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the declarations of those engaged in it explanatory of acts done in furtherance of its object were competent. *Ib.*

PATENT FOR INVENTION.

1. If, under any circumstances, a patentee can sue to recover for the use of a patented article, made before the letters-patent were granted, he cannot do so when he was not the inventor of the thing patented; when the device had been in public use for more than two years before the patent was applied for; when the alleged use was by the United States; and when the government, so far from agreeing to

pay a royalty for it, had protested against any patent being issued for it. *Kirk* v. *United States*, 49.

2. The Singer machines were covered by patents, some fundamental, some accessory, whereby there was given to them a distinctive character and form which caused them to be known as the Singer machines, as deviating and separable from the form and character of machines made by other manufacturers. *Singer Manufacturing Co.* v. *June Manufacturing Co.*, 169.
3. The word "Singer" was adopted by Singer & Co. or the Singer Manufacturing Company as designative of their distinctive style of machines, rather than as solely indicating the origin of manufacture. *Ib.*
4. The patents which covered them gave to the manufacturers of the Singer sewing machines a substantial monopoly whereby the name "Singer" came to indicate the class and type of machines made by that company or corporation, and constituted their generic description, and conveyed to the public mind the machines made by them. *Ib.*
5. On the expiration of the patent the right to make the patented article and to use the generic name passed to the public with the dedication resulting from the expiration of the patent. *Ib.*
6. On the expiration of a patent one who uses a generic name, by which articles manufactured under it are known, may be compelled to indicate that the articles made by him are made by him and not by the proprietors of the extinct patent. *Ib.*
7. Where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created; and where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements and by other means; subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public, and, therefore, that the name must be accompanied with such indications that the thing manufactured is the work of the one making it, as will unmistakably inform the public of that fact. *Ib.*

PRACTICE.

1. Without denying its power to pass upon a judgment of the Supreme Court of a Territory on a question of practice, in an equity case, this court is not inclined to do so unless it can perceive that injustice has been done. *Salina Stock Co.* v. *Salina Creek Irrigation Co.*, 109.
2. When the assignments of error are very numerous, it is practically found necessary to consider but a few of them. *Grayson* v. *Lynch*, 468.

3. A special finding of facts referred to in acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts upon which the law must determine the rights of the parties. *Ib.*
4. If the findings of fact in such case be general, only such rulings of the court in the progress of the trial can be reversed as are presented by a bill of exceptions, which bill cannot be used to bring up the whole testimony for review. *Ib.*
5. Where a plain error has been committed in a matter vital to defendants, this court is at liberty to correct it, although the question may not be properly raised; and being of opinion that adequate proof of guilty knowledge or participation on the part of the mates is not shown by the record, it reverses the judgment as to them, although no exception was taken. *Wiborg* v. *United States*, 632.

See JURISDICTION, A, 15; LOCAL LAW, 2; RAILROAD, 4.

PRESUMPTION.

See RAILROAD, 3.

PUBLIC LAND.

1. While it is well settled that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final, it is equally true that when, by act of Congress, a tract of land has been reserved from homestead and preëmption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title; and the patent questioned in this case comes within that general rule of invalidity. *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 321.
2. Persons entitled under Rev. Stat. § 2304 to enter a homestead, in case the entry be made for less than 160 acres, may, under § 2306, make an additional entry for the deficiency, which right is transferable. *Webster* v. *Luther*, 331.
3. The instrument executed by Mrs. Robertson through which the defendants in error claim was not forbidden by any act of Congress, and was valid. *Ib.*
4. By the filing of the map of the line surveyed prior to December 24, 1867, for the route of the railroad now known as the Missouri, Kansas and Texas Railway, the route of the road was definitely fixed within the intent and meaning of the act of July 26, 1866, c. 270, 14 Stat. 289, granting lands to aid in its construction; and while the principal object in filing the map was to secure the withdrawal of the lands

granted, it also operated to definitely locate the line and limits of the right of way. *Missouri, Kansas & Texas Railway Co.* v. *Cook*, 491.

5. The grant of the lands and the grant of the right of way were alike grants *in præsenti*, and stood on the same footing; so that, before definite location, all persons acquiring any portion of the public lands after the passage of the act took the same subject to the right of way for the proposed road. *Ib.*

6. The rights of the settler in this case were acquired after the line had been located, and were not affected by the subsequent act of the company in changing the location. *Ib.*

See MINERAL LAND.

RAILROAD.

1. The wrongs specifically charged in the bill in this case are those which were set forth in the suit of *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha Railway Company*, 151 U. S. 1; but there is this difference between the two cases, that in that case the Omaha Company demurred, and on the demurrer a decree was entered against it, whereas, in this case the Omaha Company took issue upon the charge of having committed such wrongs, and the testimony shows that it did not commit them. *Farmers' Loan & Trust Co.* v. *Chicago, Portage & Superior Railway Co.*, 31.

2. The act of the legislature of Wisconsin of 1882, revoking the grant of land to the Portage Company and bestowing it upon the Omaha Company, neither in terms nor by implication burdened the transfer with a continuing obligation for the debts of the Portage Company; and no creditor of the Portage Company had any legal or equitable right to any portion of those lands. *Ib.*

3. The law presumes in the entire absence of evidence, that a railroad employé, in crossing the track of the railroad on foot at night to go to his duty, looks and listens for coming trains before crossing. *Texas & Pacific Railway Co.* v. *Gentry*, 353.

4. It appears by the affidavit of the agent of the plaintiffs in error that he was their agent when service of process was made upon him, and that their allegation that he was not then their agent was therefore untrue. *Eddy* v. *Lafayette*, 456.

5. The second section of the act of March 3, 1887, c. 373, was intended to place receivers of railroads on the same plane with railroad companies, both as respects their liability to be sued for acts done while operating a railroad, and as respects the mode of service; and the service in the present case on an agent of the receivers was sufficient to bring them into court in a suit arising within the Indian Territory. *Ib.*

6. The terms of the summons were in accordance with the provisions of § 4868, Mansfield's Digest of Statutes of Arkansas, under which the summons was issued. *Ib.*

7. This action was brought by the defendants in error to recover the value of a large quantity of hay which it was alleged had been destroyed by a fire caused by sparks escaping from a locomotive through negligence, and falling on a quantity of dry grass and leaves that had been negligently allowed to accumulate on the railroad operated by the plaintiffs in error as receivers. The hay was cut from lands of the Creek nation under direction of Sallie M. Hailey, an Indian, one of the defendants in error, by Lafayette, a white man who was to receive an agreed part of the hay for cutting and curing it. *Held*, (1) That, in the absence of proof to the contrary it must be assumed that Mrs. Hailey was entitled to cut hay upon the land which she occupied in common with other members of the Creek nation; (2) That Lafayette, under his agreement with Mrs. Hailey and his performance of it, acquired an interest in the hay; (3) That an instruction to the jury "that evidence of a railroad company allowing combustible material to accumulate upon its track and right of way which is liable to take fire from sparks escaping from passing engines and communicate it to adjacent property, is sufficient to warrant the jury in imputing negligence to the company" was correct; (4) That there was no error in the treatment given by the Circuit Court of Appeals to the several assignments respecting the trial court's instructions on the subject of the respective duties of the railroad company and of the plaintiffs. *Ib.*

8. The plaintiff, an employé of the railway company, sued to recover for injuries caused to him by the unblocking of a frog, in consequence of which he was thrown down, and an engine passed over him before he could recover himself. There was contradictory testimony as to the condition of the frog before and after the accident. On the trial below the only issue presented was — the condition of the frog at the time of the accident: but the court in substance instructed the jury that if the company had once properly blocked the frog it incurred no liability to its employés by reason of the subsequent displacement of the blocking, unless such displacement was made with its knowledge or had continued for such length of time as to impute notice to it. The same point having been taken in this court, *Held*, (1) That there being a conflict of testimony as to the condition of the frog, that question of fact was properly submitted to the jury; (2) That while the position of law taken by the company in this court cannot be disputed, it was not taken or considered on the trial, and is not open for consideration here; (3) That although the case is not entirely clear, this court is not prepared to hold, on the record, that there was such error as would justify it in disturbing the judgment. *Union Pacific Railway Co.* v. *James*, 485.

9. Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable

themselves from the discharge of the functions, duties and obligations which they have assumed. *Union Pacific Railway Co.* v. *Chicago, Rock Island & Pacific Railway Co.*, 564.

10. The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State, or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing 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*. *Ib.*
11. The contract with the Rock Island Company on the part of the Union Pacific Company which forms one subject of this controversy was one entirely within the corporate powers of the latter company, and, throughout the whole of it there is nothing which looks to any actual possession by the Rock Island Company of any of the Union Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company; and this was an arrangement entirely within the corporate powers of the Union Pacific Company to make, and which was in no respect *ultra vires*. *Ib.*
12. The common object of the act of February 24, 1871, c. 67, regarding the construction of a bridge across the Missouri at Omaha, and the act of July 25, 1866, c. 246, touching the construction of several bridges across the Mississippi, was the more perfect connection of the roads running to the respective bridges on either side; and being construed liberally, as they should be, the scheme of Congress in the act of 1871 was to accomplish a more perfect connection at or near Council Bluffs, Iowa, and Omaha, Nebraska. *Ib.*
13. It being within the power of the Union Pacific Company to enter into contracts for running arrangements, including the use of its track and the connections and accommodations provided for by the contract in controversy, and that contract not being open to the objection that it disables the Union Pacific Company from discharging its duties to the public, it will not do to hold it void, and to allow the Union Pacific Company to escape from the obligations which it has assumed, on the mere suggestion that at some time in the remote future a contingency may arise which will prevent it from performing its undertakings in the contract. *Ib.*
14. Other objections made on behalf of the Union Pacific Company disposed of as follows: (1) The provision in the contract respecting reference does not take from the company the full control of its road; (2) Its acts in constructing its road in Nebraska, not having been

objected to by the State, must, in the absence of proof to the contrary, be deemed valid; (3) The contract is not to be deemed invalid because, during its term, the charter of the Rock Island Company will expire; (4) The Republican Valley Company, being a creation of the Pacific Company, is bound by the contract; (5) The Pacific Company has power, under its charter, to operate the lines contemplated by these contracts, it being a general principle that where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts disapprove of it, but when there is no express prohibition and it is obvious that the contract is one of advantage to the public, the rule is otherwise. *Ib.*

15. The contracts in question were in proper form; signed and executed by the proper executive officers; attested by the corporate seal of the Union Pacific Company; approved and authorized by the executive committee, which had all the powers of the board; and ratified, approved and confirmed by the stockholders at their next annual meeting: and this was sufficient to bind the Union Pacific Company, although no action by the board was had. *Ib.*

16. These contracts were such contracts as a court of equity can specifically enforce and thereby prevent the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure, by electing to pay damages for the breach. *Ib.*

17. The public interests involved in these contracts demand that they should be upheld and enforced. It is to the higher interest of all, corporations and public alike, that it be understood that there is a binding force in all contract obligations; that no change of interest or change of management can disturb their sanctity or break their force; but that the law which gives to corporations their rights, their capacities for large accumulations, and all their faculties, is potent to hold them to all their obligations, and so make right and justice the measure of all corporate as well as individual action. *Ib.*

See CONSTITUTIONAL LAW, 6; LOCAL LAW, 2, 3; CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

REHEARING.

Petitions for rehearing of a case decided March 30, 1896, 162 U. S. 170, are denied. *Telfener* v. *Russ*, 101.

REMITTITUR.

See LOCAL LAW, 2.

REMOVAL OF CAUSES.

Congress has not, by Rev. Stat. § 641, authorized a removal of a prosecution from a state court upon an allegation that jury commissioners or other subordinate officers had, without authority derived from the constitution and laws of the State, excluded colored citizens from

juries because of their race. Said section does not embrace a case in which a right is denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence. For such denials arising from judicial action after a trial commenced the remedy lies in the revisory power of the higher courts of the State, and ultimately in the power of review which this court may exercise over their judgments whenever rights, privileges or immunities claimed under the Constitution or laws of the United States are withheld or violated. The denial of or inability to enforce in the judicial tribunals of a State, rights secured by any law providing for the equal civil rights of citizens of the United States, to which § 641 refers, and on account of which a criminal prosecution may be removed from a state court, is primarily, if not exclusively, a denial of such rights or an inability to enforce them, resulting from the constitution or laws of the State, rather than a denial first made manifest at and during the trial of a case. *Neal* v. *Delaware*, 103 U. S. 370, and *Gibson* v. *Mississippi*, 162 U. S. 565, affirmed to the above points. *Murray* v. *Louisiana*, 101.

SCIRE FACIAS.

See BANKRUPT.

STATUTE.

A. STATUTES OF THE UNITED STATES.

See ALIEN IMMIGRANT;
CONSTITUTIONAL LAW, 6, 9;
CRIMINAL LAW, 3;
DRAWBACK;
EQUITY, 4;
INDIANS, 1;
JURISDICTION, A, 7, 8, 9, 10, 19; B;
NEUTRALITY LAWS, 1, 2, 3;
PUBLIC LAND, 2, 4;
RAILROAD, 5, 12;
REMOVAL OF CAUSES.

B. STATUTES OF STATES AND TERRITORIES.

Arizona. *See* LOCAL LAW, 2.
Arkansas. *See* RAILROAD, 6.
Georgia. *See* CONSTITUTIONAL LAW, 7.
Illinois. *See* CONSTITUTIONAL LAW, 6; JURISDICTION, A, 17.
Indiana. *See* CONSTITUTIONAL LAW, 2.
Kansas. *See* CONSTITUTIONAL LAW, 3, 4.
Louisiana. *See* CONSTITUTIONAL LAW, 11.
New Mexico. *See* JURISDICTION, A, 19.
New York. *See* TAX AND TAXATION, 3.
Texas. *See* LOCAL LAW, 1.
Washington. *See* JURISDICTION, A, 1.
Wisconsin. *See* RAILROAD, 2.

TAX AND TAXATION.

1. The mandates in these cases, (161 U. S. 134,) are recalled, and so much of the judgment of the state court as permits a recovery against the holders of the old stock in the bank is reversed; and the judgment, so far as it permits a recovery for taxes assessed against the holders of the new shares in the bank, is affirmed. *Bank of Commerce* v. *Tennessee*, 416.
2. Personal property, bequeathed by will to the United States, is subject to an inheritance tax under state law. *United States* v. *Perkins*, 625.
3. Under the Statutes of New York the United States are not a corporation, exempted from such inheritance tax. *Ib.*

See CONSTITUTIONAL LAW, 1, 2.

TRADE MARK.

See PATENT FOR INVENTION, 2 to 7.

TORT.

1. In an action to recover for injuries suffered by reason of disease being communicated to herds of plaintiffs' cattle through negligence of the defendants in handling and managing their herds of cattle, allegations concerning the particular spot where the disease was communicated are not material and may be disregarded — especially if never called to the attention of the trial court. *Grayson* v. *Lynch*, 468.
2. Witnesses not experts may testify as to symptoms observed by them in the progress of the disease. *Ib.*
3. The plaintiff being in uncontroverted possession of the land on which his cattle were grazing, it is immaterial in this action whether his possession was lawful. *Ib.*
4. The objections to the admissibility of the testimony of the chief of the veterinary division of the Department of Agriculture, and of others, as experts have no merit. *Ib.*
5. The court was not bound to find, upon the facts, that the plaintiffs were guilty of contributory negligence: what care it was necessary for the plaintiffs to take, and was a proper question for the court. *Ib.*

See INTEREST.

ULTRA VIRES.

See RAILROAD, 10, 11.

VARIANCE.

No variance between the allegations of a pleading and the proofs offered to sustain it is material unless it be of a character to mislead the opposite party. This rule is applied to sundry assignments of error. *Grayson* v. *Lynch*, 468.

WAR CLAIM.

See JURISDICTION, D.

WARRANTY.

See CONTRACT.