UNITED STATES REPORTS

VOLUME 164

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1896

J. C. BANCROFT DAVIS

REPORTER

NEW YORK AND ALBANY
BANKS & BROTHERS, LAW PUBLISHERS
1897

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, 1896.

BEAR LAKE AND RIVER WATER WORKS AND IRRIGATION COMPANY *v.* GARLAND *et al.*

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 48. Argued May 6, 1896. — Decided October 19, 1896.

On the 16th of August, 1889, a statute was in force in the Territory of Utah providing for the creation of mechanic's liens for work done or materials furnished under contracts in making improvements upon land; but, in order to enforce his lien a contractor was required, within 60 days after completion of the contract, to file for record a claim stating his demand, and describing the property to be subjected to it; and no such lien was to be binding longer than 90 days after so filing, unless proper proceedings were commenced within that time to enforce it. On that day G. contracted with an irrigation company to construct a canal for it in Utah. He began work upon it at once, which was continued until completion, December 10, 1890. He claimed, (and it was so established,) that, after crediting the company with sundry payments, there was still due him over $80,000, for which amount he filed his statutory claim on the 23d day of the same December. On the 1st day of October, 1889, the company mortgaged its property then acquired, or to be subsequently acquired, to a trustee to secure an issue of bonds to the amount of $2,000,000, the proceeds of which were used in the construction of the company's works, including the canal. On the 12th of March, 1890, the legislature

of Utah repealed said statute, and substituted other statutory provisions in its place, and enacted that the repeal should not affect existing rights or remedies, and that no lien claimed under the new act should hold the property longer than a year after filing the statement, unless an action should be commenced within that time to enforce it. On the 1st day of May, 1890, C. contracted with the company to do work on its canal, and did the work so contracted for. The balance due G. not having been paid, he brought an action to recover it, making the company, the mortgage trustees, and C. defendants, which action was commenced more than 90 days after the filing of his claim. To this suit C. replied, setting up his mechanic's lien. The court below made many findings of fact, among which were, (29th,) that the right of way upon which the canal was constructed was obtained by the company under Rev. Stat. § 2339; and, (33d,) that the work done by G. and C. respectively had been done with the consent of the company after its entry into possession of the land. Exception was taken to the 29th finding as not supported by the proof. The court below gave judgment in favor of both G. and C., establishing their respective liens upon an equality prior and superior to the lien of the mortgage trustees. *Held:*

(1), That this court will not go behind the findings of fact in the trial court, to inquire whether they are supported by the evidence;

(2), That G.'s action was commenced within the time required by the statutes existing when it was brought;

(3), That the judgment of the court below thus establishing the respective liens of G. and of C. was correct.

A clause in a mortgage which subjects subsequently acquired property to its lien is valid, and extends to equitable as well as to legal titles to such property.

Under Rev. Stat. §§ 2339, 2340, no right or title to land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession, from the mere fact of such possession, unaccompanied by the performance of labor thereon; and, as the title in this case did not pass until the ditch was completed, the mortgage was not a valid incumbrance until after the liens of G. and of C. had attached, and will not be held to relate back for the purpose of effecting an injustice.

The act of March 12, 1890, is to be construed as a continuation of the act in force when the Garland contract was made, extending the time in which an action to foreclose its lien should be commenced; and, as this was done before the time came for taking proceedings to effect a sale under the lien, it was not an alteration of the right or the remedy, as those terms are used in the statute.

THE appellants appealed from a judgment of the Supreme Court of the Territory of Utah, affirming a judgment of the District Court of the First Judicial District of the Territory

in favor of the respondents, William Garland and Corey Brothers & Company.

The action was brought by the plaintiff, William Garland, against the Bear Lake Company, the Jarvis-Conklin Mortgage Trust Company, as trustees, Corey Brothers & Company, and others, for the purpose of enforcing an alleged mechanic's lien in favor of the plaintiff, and against the Bear Lake Company, for work done by the plaintiff for that company in the construction of its canal from its initial point — the Bear River cañon — for a distance of twelve miles on both sides of the river. The complaint alleged that on the 16th of August, 1889, the plaintiff and the Bear Lake Company entered into a contract for the construction by plaintiff of the portion of the work above mentioned, and under that contract the plaintiff commenced work on the 31st of August, 1889, and continued it to and including December 10, 1890. Various payments on account of the work were made the plaintiff, and, after crediting the same, the plaintiff alleged there was still due him from the Bear Lake Company, at the time of filing his claim for a lien, (December 23, 1890,) the sum of $80,250.50, and interest thereon, as set forth in the complaint. The Jarvis-Conklin Mortgage Trust Company and Corey Brothers & Company and the other defendants were made parties to the action as subsequent mortgagees or other incumbrancers. The answer of the Mortgage Trust Company set up the fact that it was the mortgagee in a mortgage executed by the Bear Lake Company to it as trustee on the first day of October, 1889, to secure the payment of $2,000,000 of the bonds of the mortgagor company, and that such mortgage covered all the water rights, franchises, lines of canal and other property upon the whole or any part of which the plaintiff claimed a lien, and that the mortgage also by its terms covered all after-acquired property of every kind. The mortgage was duly recorded in Box Elder County, Utah, November 14, 1889; in Bear Lake County, Idaho, December 24, 1889; in Weber County, Utah, February 6, 1890. The bonds secured by the mortgage were all delivered between October 1, 1889, and February 1, 1891, and in large part paid for, and the balance was to be paid for

by drafts drawn upon the Mortgage Company by the treasurer of the Bear Lake Company as fast as the money was needed to pay for the construction of the works. At the time the plaintiff Garland entered into the contract already mentioned and when he commenced work thereunder, the statutes of Utah provided for a mechanic's lien, under the provisions of which a contractor within sixty days after the completion of his contract was to file for record with the county recorder a claim stating his demand, and giving a description of the property to be subjected to the lien. By § 3814, s. 1065, no lien provided for by the chapter upon liens was to bind any of the property longer than ninety days after the claim was filed, "unless proceedings be commenced in a proper court within that time to enforce the same." 2 Compiled Laws of Utah, 1888, 406, from § 3806 to and including § 3820. The answer further set up the fact that while the above act was in force, and on the 12th of March, 1890, the legislature of Utah passed an act in relation to mechanic's liens, and section 32 thereof repealed the former and above-mentioned lien act, but added the following proviso: "Provided, that the repeal of said acts or parts of acts, or any of them, shall not affect any right or remedy, nor abate any suit or action or proceeding existing, instituted or pending under the laws hereby repealed."

The answer then set forth that the plaintiff did not commence his action to enforce his lien within the ninety days given by the act in force when the work was commenced under the contract, and therefore the lien no longer existed at the time the action was commenced to enforce it.

The answer of Corey Brothers & Company was in the nature of a cross complaint, and set up the fact that they entered into a contract with the Bear Lake Company on the first of May, 1890, to construct certain portions of the canal of the company, and that between such date and the fifth of December, 1890, they did the work provided for in the contract, and on the seventh of January, 1891, they filed their claim for a lien for the balance of the money due them under the contract, (which was about eleven thousand dollars,) and

Argument for Appellants.

they asked for a decree enforcing their lien as a prior incumbrance to that of the mortgage upon the property of the Bear Lake Company.

The Bear Lake Company set up the same facts as a defence against the plaintiff's cause of action that were alleged by the Mortgage Trust Company, and it answered the claim of Corey Brothers & Company by alleging that the mortgage to the Mortgage Trust Company had been executed and duly recorded, and was in existence long before and at the time of the execution of the agreement which Corey Brothers & Company made with the Bear Lake Company, and that, therefore, the lien of Corey Brothers & Company was subsequent and subject to the lien of the mortgage upon the after-acquired property of the Bear Lake Company.

No question arises with reference to the other defendants.

The case came on for trial upon the issues thus found, and the court, after hearing the evidence, gave judgment in favor of plaintiff and of Corey Brothers & Company establishing their liens, respectively, upon an equality, and making them prior and superior to the lien of the Mortgage Trust Company by reason of its mortgage, and decreeing the sale of the property to satisfy such liens. *Garland* v. *Bear Lake Irrigation Co.*, 9 Utah, 350.

Mr. John F. Dillon, (with whom was *Mr. Harry Hubbard* and *Mr. Henry M. Beardsley* on the brief,) for appellants.

I. As to Garland's claim.

(*a*) Whatever right to a lien and remedy Garland may have had, at least as against the Jarvis-Conklin Mortgage Trust Company, existed only under §§ 3806 to 3820 inclusive of the Compiled Laws of Utah, 1888. Those statutes required him to bring his action within ninety days from the time of filing his claim for a lien. He did not bring his action until long after the ninety days had expired, and thus permitted his right and remedy to lapse, and neglected to obtain a lien.

(*b*) He can have no lien under the act of March 12, 1890, prior to the lien of the mortgage. The mortgage was made

October 1, 1889. It was recorded in November and December, 1889, and February, 1890. The mortgage, therefore, was made and recorded, and was an existing lien on March 12, 1890. It is clear, therefore, that the act of March 12, 1890, could not displace this existing lien of the mortgage or give any other lien priority over it. If, therefore, Garland looks to the act of March 12, 1890, for his lien, he must fail, for that act could not give him any lien prior to the lien of the mortgage. *Wabash & Erie Canal Co.* v. *Beers*, 2 Black, 448; *Murray* v. *Gibson*, 15 How. 421; *United States* v. *Heth*, 3 Cranch, 399; *McEwen* v. *Den*, 24 How. 242.

It follows, therefore, that for the labor and material furnished by Garland prior to March 12, 1890, he can have no lien by virtue of the act of that date, and that the mortgage to the Jarvis-Conklin Mortgage Trust Company is prior to any lien which is or can be given to him by the act of March 12, 1890, whether it be for work done prior to March 12, 1890, or for work done after that date. In other words, if the right of Garland to a lien and a remedy therefor depend upon the act of March 12, 1890, he can have no lien prior to the mortgage.

The principle of law is well settled that in case a statute creates a right or liability not known to the common law, and provides a remedy for the enforcement of such right or liability, and limits the time within which the remedy must be pursued, the remedy forms a part of the right or liability and must be pursued within the time prescribed or the right and remedy are both lost. *Boyd* v. *Clark*, 8 Fed. Rep. 849; *Finnell* v. *Southern Kansas Railway*, 33 Fed. Rep. 427; *Halsey* v. *McLean*, 12 Allen, 438; *The Harrisburg*, 119 U. S. 199.

It is also well settled law that in case a repealing statute provides that the right and the remedy under the statute repealed shall not be affected, the repeal leaves both the right and the remedy unaffected, and any person in order to avail himself of the right must pursue the remedy prescribed, and within the time prescribed by the repealed statute. *Wilkerson* v. *Hudson*, 71 Mississippi, 130; *Cochran* v. *Taylor*, 13 Ohio St. 382; *Gilleland* v. *Schuyler*, 9 Kansas, 569; *Wright*

v. *Oakley*, 5 Met. (Mass.) 400; *Fitzpatrick* v. *Boylan*, 57 N. Y. 433.

II. As to Corey Brothers & Company's claim.

Corey Brothers & Company have no lien prior to the mortgage for the reason that their contract was not made until May 1, 1890, and they did not begin work until after that time; whereas the mortgage to the Jarvis-Conklin Mortgage Trust Company was made October 1, 1889, and recorded in November and December, 1889, and February, 1890. The Supreme Court of Utah was mistaken both as to the facts and as to the application of law. The attorney for the Jarvis-Conklin Mortgage Trust Company excepted to finding 29 as follows: "The court erred as to finding of fact 29, for the reason that there is no evidence in this case upon which to base the said facts there stated, nor any one of them. The evidence does not support such finding, and there is no pleading upon which to base the same."

It is well settled that a mortgage can be made of after-acquired property and that the mortgage thus made and recorded has priority over any lien which is subsequent in point of time. *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *Tailby* v. *Official Receiver*, 13 App. Cas. 523; *Holroyd* v. *Marshall*, 10 H. L. Cas. 191; *Pennock* v. *Coe*, 23 How. 117; *McCaffrey* v. *Woodin*, 65 N. Y. 459; *Phillips* v. *Phillips*, 4 DeG., F. & J. 208.

The theory of the Utah court that, although the mortgage covered after-acquired property, yet the parts of the property on which Corey Brothers & Company did their work did not come into existence until such labor was performed, and that therefore they were entitled to a lien prior to the mortgage, is not tenable, for the reason that the equity of the mortgagee is at least equal to that of Corey Brothers & Company, and their mortgage was long prior in time. The mortgage was made in October, 1889, and recorded in November and December, 1889, and February, 1890, and bonds were issued and large sums of money advanced under the mortgage, including sums which went to pay Garland for his work, at least amounting before May 1, 1890, to $386,318.98, all which was long prior

to May 1, 1890, when Corey Brothers & Company began to perform their labor. This prior making of the mortgage and actual advancing of the moneys created an equity, which was, to say the least, equal to that of Corey Brothers & Company.

The Bear Lake Company had title to water rights and rights of way by appropriation long before the contract with Corey Brothers & Company. The court, however, is clearly in error in supposing that as to government land the Bear Lake Company did not have property rights in their canal before the work was performed thereon by Corey Brothers & Company. Long before Corey Brothers & Company made their contract or did any work the company had begun the construction of its canal. Garland, who performed the largest part of the labor in constructing the canal, began his work so long prior thereto as August 31, 1889. The route of the canal had been selected and work had been done thereon by Garland long prior to May 1, 1890. The Bear Lake Company were clearly the owners before May 1, 1890, of all parts of the canal on which work had thus been done prior to that date, and on those parts clearly Corey Brothers & Company were, even on the theories advanced by the Supreme Court of Utah, entitled to no lien.

In the case of *Sullivan* v. *Northern Spy Mining Co.*, 11 Utah, 438, a question arose under Rev. Stat. § 2339, whether in case a person entered upon the public lands of the United States and dug a well, the right of such person to the use of the waters of such well thus acquired by possession was superior to the right of the person who afterwards purchased the land from the United States. The question turned on whether the right to enter upon land for the purpose of digging a well was a right recognized and acknowledged by the "local customs, laws and decisions of courts" of Utah; and the Supreme Court of the Territory of Utah held that it was, and that the person who thus entered upon the land and dug the well had a right to the use of its waters prior to the right of the person who afterwards purchased the land. The court held that the provisions of § 2780 of the Compiled Laws of Utah of 1888 applied. It is clear, therefore, that, "under the laws and cus-

toms and decisions of the courts of Utah," the Bear Lake Company acquired a property right in its water rights and right of way long prior to May 1, 1890.

The following authorities show that in the case of an appropriation of water or water rights, or rights of way therefor the ditch or canal or other work need not be fully completed in order to secure the priority given and recognized by Rev. Stat. § 2339 and by the laws and customs of the Pacific States. It is sufficient if the work has been begun and is being prosecuted with due diligence. *Kelly* v. *Natoma Water Company*, 6 California, 105; *Dyke* v. *Caldwell*, 18 Pac. Rep. 276; *Irwin* v. *Strait*, 18 Nevada, 436.

If the Bear Lake Company was not the owner, then Corey Brothers & Company had no right to the lien under the provisions of the act of March 12, 1890.

In the case of *Nelson* v. *Clerf*, 4 Washington, 405, the court held that under the statute of Washington, which, in this respect, is not substantially different from the statute of Utah, a mechanic's lien cannot be enforced against a working company for the construction of its ditch, unless it appears that the company owns or has an interest in the land through which the ditch is constructed. See *Tritch* v. *Norton*, 10 Colorado, 337, to the same effect.

Corey Brothers & Company entered upon the land and did their work under and in privity with the Bear Lake Company which had long prior thereto made and recorded its mortgage to the Jarvis-Conklin Mortgage Trust Company. Corey Brothers & Company therefore entered with full notice of the mortgage, and, being in privity with the Bear Lake Company, are bound by the estoppel created by the mortgage.

Even on the theory advanced by the Supreme Court of Utah, that if the lands over which the Bear Lake Company constructed its canal were public lands, and if, further, the Bear Lake Company did not acquire title to such public lands until after Corey Brothers & Company began their work, still the decision of the court was erroneous, for the reason that this theory would apply only in the case of lands over which the canal was constructed which were public lands, and on which

Corey Brothers & Company did their work, and the route of the canal was, according to the finding of the court, only in part over public lands. The judgment of the court, therefore, even on its own theory, should, at the most, have been limited to giving a lien to Corey Brothers & Company as respects the public lands over which the canal was constructed by them, but the lien could not attach to even this part for the reason that the statutes of Utah, act of March 12, 1890, make no provision for a lien upon a part of a canal or other work.

Mr. Sanford B. Ladd, (with whom was *Mr. John C. Gage* on the brief,) for Garland, appellee.

Mr. Arthur Brown for Corey Brothers & Company, appellees.

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

The contest in this case lies between the plaintiff and the firm of Corey Brothers & Company on the one hand and the Mortgage Trust Company on the other. The former demand priority of lien for their respective claims over that of the mortgage held by the Mortgage Trust Company upon the property of the Bear Lake Company.

It will be convenient to separately examine these claims.

First. As to the plaintiff's alleged lien. At the time when the plaintiff entered into his contract and commenced work under it the lien law of 1888 was in force, one of the sections of which, § 3810, s. 1061, provided that the lien mentioned in the act was to be preferred to any other which might attach subsequently to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished. As the work of the plaintiff under his contract was commenced on the 31st of August, 1889, and continued up to December, 1890, while the mortgage to the Mortgage Trust Company was not executed until October, 1889, it is conceded by the counsel for the latter company that if the plaintiff had complied in all respects with the pro-

visions of the act of 1888, and had commenced his action to enforce his lien within ninety days from the time when he filed his claim for a lien, (December 23, 1890,) his action could have been maintained and his lien would have had priority. Inasmuch, however, as he failed to commence his action within the time mentioned, it is insisted that the lien had then expired by the express provisions of the act of 1888, § 3814. The plaintiff makes answer to this objection by citing § 21 of the act of the 12th of March, 1890, which reads as follows:

"SEC. 21. No lien claimed by virtue of this act shall hold the property longer than one year after filing the statement firstly described in section 10, unless an action be commenced within that time to enforce the same."

This action was commenced within one year after filing the statement of the plaintiff's claim, and he therefore insists that it was commenced in time, and that his lien should have priority. In that contention he is met by the claim of the Mortgage Company that the section referred to does not affect the plaintiff's case, as the contract between him and the Bear Lake Company was entered into and a large amount of the work was done under it prior to March, 1890, and while the act of 1888 was in force, and that by the express terms of the proviso in § 32 of the act of 1890 the repeal of the act of 1888 did not affect any right or remedy, nor abate any suit or proceeding existing, instituted or pending under the laws thereby repealed.

The terms of the act of 1890 are thus cited as a limitation of the plaintiff to the provisions of the act of 1888. If plaintiff be thus confined he cannot maintain this action, as he did not commence it until some time after the expiration of the ninety days from the date of filing his claim.

Upon comparing the two acts of 1888 and 1890 together, it is seen that they both legislate upon the same subject, and in many cases the provisions of the two statutes are similar and almost identical. Although there is a formal repeal of the old by the new statute, still there never has been a moment of time since the passage of the act of 1888 when these similar

provisions have not been in force. Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modification contained in the new act. This is the same principle that is recognized and asserted in *Steamship Co.* v. *Joliffe*, 2 Wall. 450, 459. In that case there was a repeal in terms of the former statute, and yet it was held that it was not the intention of the legislature to thereby impair the right to fees which had arisen under the act which was repealed. As the provisions of the new act took effect simultaneously with the repeal of the old one, the court held that the new one might more properly be said to be substituted in the place of the old one, and to continue in force, with modifications, the provisions of the old act, instead of abrogating or annulling them and reënacting the same as a new and original act.

It is true that the law in the *Joliffe case* did not contain any saving of or provision for the rights and remedies of the pilot, but the foundation of the reasoning by which the court concluded that the new should be treated as a continuation of the old statute, with modifications, did not rest alone upon this omission. It was chiefly based upon the facts above stated: the similarity of the subjects-matter of the two statutes, and that the effect was a continuation of the old statute as modified by the new, notwithstanding the use of language which formally repealed the old statute.

The omission to provide for the rights of the pilot does not, therefore, detract from the authority of the case for the purpose for which it is here cited.

The two acts in question here are of a similar nature, relating to the same general subject-matter, and making provisions for the creation and enforcement of mechanic's liens. The new act of 1890, although in terms repealing the earlier act, is yet in truth, and for the reasons already given, a continuation of that act with the modifications as provided in the new one. One of those modifications is the extension of the time in which to commence the action to foreclose the lien after the filing of the statement which claims it. Where at the time of

the passage of the new act the proposed lienor has only entered upon the execution of his contract and has not yet completed the work under it, we think that at least as to him the provision enlarging the time in which to commence the action to foreclose the lien is applicable, and there is no retroactive effect thereby given to that provision of the new act.

It may be asked what effect is given under this construction to the language of the proviso contained in § 32 of the act of 1890, already quoted. The answer is that the mere enlargement of the time in which to commence the action, at least in a case where the time had not yet arrived in which to file any statement of the plaintiff's claim for a lien, does not affect any right or remedy provided for in the old act. The right, as that term is used in the statute, consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished. Prior to the arrival of the time when one of these steps was to be taken an alteration of the statute by which the time to take that step might be enlarged was not an alteration of the right or of the remedy, as those terms are used in the statute, nor did it in any way affect either; it was simply an alteration of the mere procedure in the course of an employment of a remedy, the remedy itself remaining untouched or unaffected by such alteration. In this case such an enlargement of time to commence an action was given before the time had arrived in which the action could have been commenced under the old statute. The new statute was prospective in its operation, even as applied to this case. Of course, if the new act had curtailed the time in which to bring the action, after the time had commenced to run under the old statute, totally different considerations would spring up, and what was a mere alteration of procedure, having really nothing to do with a remedy in the one case, might, in the other, most seriously affect it, and hence come within the proviso in question. Under the facts of this case the right or remedy of the plaintiff was not touched, or, in the language of the proviso, was not "affected" by the enlargement of the time in

which to commence the action, and therefore the proviso did not take the plaintiff's case out of the application of the section in the new act providing such enlarged time.

Under the construction given by us to the act of 1890, as a continuation of that of 1888, with modifications, the question as to which act the lien is claimed under is not specially material. In effect, it is one act, and those labors, etc., which were performed before the passage of the act of 1890 are added to those performed thereafter. The lien is really claimed by virtue of the fact that at the time when the contract was entered into the statute of Utah provided such a right or remedy, and although the action to foreclose the lien was commenced under the provisions of the act of 1890, yet the right itself commenced under the old act. That right is not affected by any provision of the new act, and although it is claimed that the right and the remedy must go together under the old act, as they are preserved by the same language, yet, for the reasons already given, the time in which to commence the action is no part of the remedy as that word is used in the proviso, and an extension of that time may be provided for in the new act without in any way affecting the right or remedy of the lienor where the facts are the same as in this case.

It may be assumed that where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost; but it does not, therefore, follow that the plaintiff's right to a lien and to maintain this action must be based solely upon the act of 1888.

We must bear in mind the position of the plaintiff when the act of 1890 was passed. He had not then completed his contract and could not therefore file any statement of claim, nor could he commence any action. The particular time in which he would be allowed to commence his action (provided a sufficient time in fact were given) was, under such circumstances, mere matter of procedure as distinguished from remedy. The

remedy would not thereby be altered, because the remedy consisted in filing the statement and in commencing the action. The time in which to do either would be matter of procedure only. Hence, when the act of 1890 was passed, which enlarged the time in which to commence the action already provided for, such enlargement did not affect any right or remedy of the plaintiff. It did not affect either, because the provision applied only to procedure and not to right or remedy, and therefore the plaintiff could avail himself of the time given him by the act of 1890 in which to commence his action as one of the steps in procedure by which the remedy for a violation of the contract by the enforcement of foreclosure of the lien would be accomplished.

We conclude that the lien of the plaintiff was valid and superior to the mortgage of the Mortgage Trust Company.

Second. We are of the opinion also that the claim of Corey Brothers & Company for a lien superior to that of the Mortgage Trust Company was properly allowed. That company claims a superiority of lien because of the clause in its mortgage by which the Bear Lake Company mortgaged to it, in addition to the property then owned by the Lake Company, all its after-acquired property.

A clause in a mortgage which subjects subsequently acquired property to the lien of the mortgage is a valid clause. *Toledo, Delphos &c. Railroad* v. *Hamilton*, 134 U. S. 296; *Central Trust Co.* v. *Kneeland*, 138 U. S. 414; *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459, 481.

Such a mortgage, as against the mortgagor and subsequent incumbrancers, attaches itself to the after-acquired property as fast as it comes into existence, or as fast as the canal or railroad is built, and the lien of the mortgagee is held to be superior to that of the constructor. The lien of the mortgage extends also to an equitable as well as to a legal title to the property subsequently acquired. 134 and 138 U. S., *supra*.

The company claims that under the principles decided in these cases the lien of its mortgage is superior to the claim of Corey Brothers & Company.

On the contrary, the latter claim to bring their case within

the rule recognized in this court, that even under the after-acquired property clause in a mortgage, if property be burdened with an incumbrance or lien at the very time of coming into the possession or ownership of the mortgagor, such incumbrance remains prior and superior to the lien of the mortgage, although it was actually subsequent thereto in point of time. *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Fosdick* v. *Schall*, 99 U. S. 235, 251.

Some further facts are material to this inquiry, and have been found by the court below. The work done by Corey Brothers & Company is set forth in findings 19 and 23 as made by the trial court. It consisted of work and labor and the furnishing of materials in the construction of the canal from May 1 to December 5, 1890. The canal was constructed on land over which the company had what is termed in the finding the right of way. The land is described in the nineteenth finding, and the manner in which the right of way was acquired is set forth in finding 29, which reads as follows:

"The right of way upon which the canal was constructed, which right of way is described in the finding 19, consisted largely of public land, and was obtained by the defendant, the Bear Lake and River Water Works and Irrigation Company, under and by virtue of the act of Congress of 1866, being section —, Revised Statutes of the United States. A large portion of said right of way was obtained under contract with one Kerr, by which Kerr agreed, upon the construction of said canal through his land, to give said right of way. The other portions of said canals were purchased by the Bear Lake Company at various times from individual proprietors after May 1, 1890."

The section of the Revised Statutes above referred to is section 2339, and it is taken from the ninth section of the act of Congress, c. 262, approved July 26, 1866, 14 Stat. 253, which reads as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and the deci-

sions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed: *Provided, however*, That whenever after the passage of this act any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Congress subsequently passed another act, approved July 9, 1870, c. 235, entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands and for other purposes." 16 Stat. 217, 218.

Section 17 of that act is section 2340 of the Revised Statutes, and part of the section reads as follows:

"SEC. 17. None of the rights conferred by sections five, eight and nine of the act of which this is amendatory shall be abrogated by this act, and the same are hereby extended to all public lands affected by this act; and all patents granted or preëmption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory."

The trial court made one other finding of fact, (the thirty-third,) by which it was found that the work done by Garland and by Corey Brothers & Company was done for the Bear Lake Company, which company, with the consent of the owners of the legal title, entered into possession of the land through which the canal ditches were dug, and then after so entering into possession the company consented to and permitted the plaintiff Garland and also Corey Brothers & Company to do the work under their contracts with the company in digging and excavating the canal.

The counsel for the Mortgage Company excepted to the twenty-ninth finding of the court, on the grounds, 1st, that there was no evidence upon which to base the finding; 2d, the evidence did not support the finding; 3d, there was no plead-

ing upon which to base the same. This exception as to the lack of evidence to support the findings we cannot consider, and we think that the objection as to the pleading is not well taken.

Upon appeal from the Supreme Court of a Territory this court is precluded under the statute from reviewing any question of fact, and the finding of the court below is conclusive upon this court as to all such questions. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment. *Stringfellow* v. *Cain*, 99 U. S. 610; *Neslin* v. *Wells*, 104 U. S. 428; *Eilers* v. *Boatman*, 111 U. S. 356; *Idaho and Oregon Land Co.* v. *Bradbury*, 132 U. S. 509; *Mammoth Mining Co.* v. *Salt Lake Machine Co.*, 151 U. S. 447, 450.

The findings of the trial court are approved and adopted by the Supreme Court of the Territory by a general judgment of affirmance. *Neslin* v. *Wells*, *supra*.

We must, therefore, in the examination of the question now under consideration be confined to the facts as found by the trial court, approved as they have been by the general affirmance of the judgment by the Supreme Court of the Territory.

So far as the public land is concerned, over or through which these ditches for the canal were dug, the statutes above cited create no title, legal or equitable, in the individual or company that simply takes possession of such land. The government enacts that any one may go upon its public lands for the purpose of procuring water, digging ditches for canals, etc., and when rights have become vested and accrued which are recognized and acknowledged by the local customs, laws and decisions of courts, such rights are acknowledged and confirmed. Under this statute no right or title to the land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession from the mere fact of such possession unaccompanied by the performance of any labor thereon.

Undoubtedly rights as against third persons are acquired

by priority of possession, and the government will and does recognize such rights as between those parties. This is the principle running through the cases cited by the counsel for appellants. In *Sullivan* v. *Northern Spy Mining Co.*, 11 Utah, 438, which is one of those cases, the priority of possession of the person who entered upon the public land and dug the well was recognized as thereby making a superior title to the use of the water from the well over that acquired by a person who was the subsequent purchaser of the land from the government. In that case the well had been dug and the condition fulfilled. If no well had ever been dug, and a reasonable time for digging it had passed, the mere priority of possession would have given no superior title to the land over that acquired by the grantee from the government. It is the doing of the work, the completion of the well, or the digging of the ditch, within a reasonable time from the taking of possession, that gives the right to use the water in the well or the right of way for the ditches of the canal upon or through the public land. Until the completion of this work, or, in other words, until the performance of the condition upon which the right to forever maintain possession is based, the person taking possession has no title, legal or equitable, as against the government. What, if any, equitable claims a party might have upon the government who did a large amount of work, but finally failed to complete the necessary amount to secure the water or right of way, it is not necessary to determine or discuss. Those equities would not, in any event, amount to an *equitable title* to the right of way or to the use of the water, and so need not be here considered.

The Bear Lake Company, therefore, never had any legal or equitable title to the land over or through which the ditch for the canal was dug, as against the government, until the ditch was completed. As the ditch was completed by the labor of the contractor, and the very title of the mortgagor thereto was itself created by his labor, the lien attached to the property as it was created and came into being, and arose coincident with the ownership of the ditch by the mortgagor, and the property came into the hands of the mortgagor burdened

with this lien, which remains superior to that of the mortgage. The point is that the mortgagor never had any claim or title, of a legal or equitable nature, to the land upon which this work was done during the whole time that the work was going on, and when the title did thereafter vest in the Bear Lake Company by virtue of the work done by Corey Brothers & Company, it became burdened with the lien created by virtue of the work so done upon it. If prior to the doing of the work the Bear Lake Company had simply purchased the land, or entered into any such agreement with the owner thereof as gave it an equitable title to the same, then the property would not have come to the Bear Lake Company burdened with any lien, and the work thereafter done upon it in the shape of digging the ditch, etc., would not have given ground for any priority of lien as against the mortgage of the Trust Company.

The material fact to remember is that the sole title to the land or the right of way, which the Bear Lake Company has, whether legal or equitable, is transferred to that company only by virtue of the work previously done upon the land by the constructors, who thereby fulfil the condition upon the performance of which such transfer or the right of such transfer depended. Under these circumstances it is proper to say that the title to the land was transferred subject to the constructors' lien for the work which made the transfer possible and by means of which it was accomplished. The claim is also urged that, even upon the theory of the appellees, the title to the portion of the land or right of way upon which Garland the plaintiff had worked had passed to the Bear Lake Company, and had come under the lien of the mortgage before any work was done by the Corey Brothers & Company firm, and as to that portion of the work the claim is made that the firm could have no lien prior to the mortgage. The fact is that at the time when the firm commenced work in May, 1890, the plaintiff Garland had not completed his work, and did not complete it until along in December following. The title had not therefore passed to the Bear Lake Company when Corey Brothers & Company commenced their work.

Opinion of the Court.

Nor is there any priority given to the mortgage as claimed by the appellants by reason of the provision contained in that portion of § 19 of the act of 1890, which reads as follows:

"All such liens shall relate back to the time of the commencement to do work or to furnish materials and shall have priority over any and every lien or incumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which the lienor under this act had no notice. Nothing herein contained shall be construed as impairing any valid incumbrance upon any such land duly made and recorded before such work was commenced, or the first of such materials were furnished."

The very question in issue is whether the mortgage was a valid incumbrance upon any after-acquired land prior to these liens. Inasmuch as the title to the right of way did not pass until the completion of the work, we hold the mortgage was not a valid incumbrance upon such right of way until that time, and that the title came to the Bear Lake Company burdened with the lien claimed by the lienor which attached to the property at the very moment of and simultaneously with the vesting of such title in the company and in priority to the lien of the mortgage.

This principle is in entire harmony with that laid down in the already cited cases of *Galveston Railroad* v. *Cowdrey*, 11 Wall. and *Toledo, Delphos &c. Railroad* v. *Hamilton*, 134 U. S., and with the cases therein referred to. In neither of the above-mentioned cases did the title to the property come into the hands of the company burdened with any lien. Most of the property in the first above-cited case came to the company before any work was done, and a small portion only was purchased by it after the work was done, and it was held that the lien of the mortgage upon the property as after acquired was superior to that of the constructor who did the work. His work did not transfer the title or create the condition upon which the vesting of the title could take place in the mortgagor, and consequently there was no basis for the claim that the property came to the mortgagor burdened with the lien.

In the *Toledo case* the dock was built upon property to which the mortgagor had a good equitable title and which was covered by the mortgage, just the same as if the title were a legal one, and it was held that the dock became subject to the lien of the mortgage as prior and superior to any lien of the mechanics for construction. It was urged in that case that at the time the mechanic's lien was claimed to have been created, the legal title to the property sought to be affected was not in the railroad company, but was in one George W. Ballou, and, therefore, the mortgage of the property by the railroad company created no legal lien, and although by the decree of foreclosure the legal title was transferred to the mortgagor, yet it was transferred subject to the burden of the mechanic's lien. The court held that the mortgagor had the equitable title to the property before foreclosure, and that the mortgage given by the mortgagor covered property to which it had an equitable title as well as property to which it had a legal title. In the case at bar the mortgagor never had any title at all, legal or equitable, until after the work had been performed by the constructors, and only then by virtue and through the means of such work.

This case bears great similarity to that of *Botsford* v. *New Haven, Middletown &c. Railroad*, 41 Connecticut, 454, the principle of which case was approved in *Toledo &c. Railroad* v. *Hamilton*, *supra*. The mortgage executed by the company in the *Connecticut case* covered after-acquired property. After the execution of the mortgage it entered into an agreement with the owner of land by which the owner agreed to thereafter convey the land to the company upon condition that the depot of the company should be established thereon and other things done in connection therewith. The court held that the agreement amounted to a conditional sale, and that no title to the property passed to the railroad company unless and until it performed the conditions. Hence it was held that the lien acquired by the constructor of the depot, who was employed by the railroad company for that purpose, attached to the land, and that when the title subsequently came to the railroad company by reason of the performance

of the conditions by it, the land came burdened with the lien upon it in favor of the constructor of the depot, and such lien was therefore superior to the lien of the mortgage.

It is said that in any event the title which finally vested in the Bear Lake Company by virtue of the completion of the work, as claimed by the respondents, relates back to the time when possession of the land over which the right of way existed was first taken, and that such possession was taken by the Bear Lake Company prior to any work being done by either the plaintiff Garland or by the defendants Corey Brothers & Company, and the title thus became subject to the lien of the mortgage before the work was done by the lienors. This doctrine of relation, by which it is claimed that the lien of the mortgage attached to the right of way prior to the lien of the constructor, is a fiction only. It is indulged in for the purpose of thereby cutting off intervening adverse claims of third parties against the right or title set up and acquired by the first possessor. It will not be indulged in for the purpose of thereby effecting an injustice by subjecting the right of way to the prior lien of a mortgage, when the existence of the title to the right of way in the Bear Lake Company was made possible only after and by the labor of the lienors. In such case the actual fact will be considered and not the fiction.

It is also said that the mortgagee occupies a position superior in equity to that of the Corey firm because the mortgage was executed and on record a long time before the firm did any work upon the ditches, and it must have known, or at any rate notice from the record will be imputed to the firm, that the mortgage lien was in existence. The answer to this position is that under the law as above stated, the firm knew that prior to the completion of the work by it, the Bear Lake Company would have no title and the mortgage would not be a lien upon the property, and that when the work was completed the title would pass to the Bear Lake Company burdened with the lien of the firm, and such lien would be superior to that of the mortgage. To one occupying the position of these lienors, the mortgage was not in existence. Upon the same principle the mortgagee would know that it could acquire no lien on

this property superior to that of the lienors, and that the title to the property created by the lienors would come to the Bear Lake Company burdened with their lien. It is plain that in this light the equity of the lienors is superior to that of the mortgagee, and their lien should, if possible, be preferred.

The general principle upon which the lien of Corey Brothers & Company upon the right of way over the public lands is claimed as being prior to that of the mortgage, also applies to and covers the case of the land procured by the Bear Lake Company from Kerr, and mentioned in the foregoing twenty-ninth finding of fact. It was a conditional gift by Kerr to the company of the right of way, to take effect and be valid upon the construction of the canal through the lands of Kerr. As to the portion of the land which was obtained by purchase by the Bear Lake Company at various times from individual proprietors after May 1, 1890, the finding is too general upon which to predicate error calling for a reversal of the whole judgment. The party alleging error should clearly show it, and where it is of a kind that ought not to carry a reversal of the whole judgment because of it, he should in that case show the amount of the error and the extent to which it affected the judgment. Here the case is barren of any finding as to the extent of the purchase from private individuals and whether the purchases were made prior to the work being done or after the same had been performed. Interpreting the thirtieth finding of the court upon this subject as being one of fact, we should say the purchase was not fully accomplished nor was the title finally transferred until after the work had been done. The thirtieth finding is as follows: "All the right of way of the Bear Lake and River Company, as described in finding 19, was acquired by said Bear Lake and River Water Works and Irrigation Company after the mechanic's lien of the plaintiff William Garland and the mechanic's lien of the defendants Corey Brothers & Company attached to the same." The appellants criticise this finding as a conclusion of law. It is made by the court as one of fact, and it may be there is some matter of fact mixed with a legal conclusion. At any rate, the whole matter is left in some uncertainty as to the

exact facts relating to the purchase of the right of way after May 1, 1890, and as to the extent of such purchases from individuals, and as to the conditions upon which the purchases were made.

They may have been made under such circumstances as to bring them directly within the principle of the case last cited. If so, the lands would be subject to a lien to the same extent as the lands otherwise acquired.

We will not in such case indulge in any presumptions unfavorable to the judgment and for the purpose of reversing it, unless they are natural and probable and such as ought to be drawn from the facts actually found by the court below. We do not find this to be the case here.

As another answer to the claim of Corey Brothers & Company, the appellants assert that if the Bear Lake Company were not the owner of the right of way over or through the public lands or lands of Kerr, or of the other individuals, until after the completion of the work, then of course it was not owner thereof at the time when the contract with Corey Brothers & Company was entered into, and in that case they would be entitled to no lien under the act of March 12, 1890.

The first section of that act provides "that whoever shall do work or furnish materials by contract, express or implied, with the owner of any land, to any amount," shall be entitled to a lien. The same section also provides that for the purposes of the act "any person having an assignable, transferable or conveyable interest or claim in or to any land, building, structure, or other property mentioned in this act, shall be deemed an owner."

We think the Bear Lake Company was such an owner as comes within the meaning of the statute of 1890, providing for a lien. Although without a legal or an equitable title until the work was done, yet the Bear Lake Company, when the work was completed, became such owner, and in the mean time and after the execution of the contract with Corey Brothers & Company and with the plaintiff Garland it occupied such a position with regard to the property as brings it within the equity of the statute for the purpose of the lien for

work done, and we think such lien when the work was completed and the statement of claim filed was superior to the lien of the mortgage.

Our conclusion is that the whole judgment should be

Affirmed.

AMERICAN ROAD MACHINE COMPANY *v.* PENNOCK AND SHARP COMPANY.

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

No. 27. Argued March 30, 31, 1896. — Decided October 19, 1896.

Letters patent No. 331,920, issued to George W. Taft, December 8, 1885, for a machine for making, repairing and cleaning roads, are void, if not for anticipation, for want of invention in the patented machine.

In equity. Decree dismissing the bill. Plaintiffs appealed. The case is stated in the opinion.

Mr. Frederick P. Fish for appellant. *Mr. W. K. Richardson* was on his brief.

Mr. L. L. Bond for appellees. *Mr. A. H. Adams*, *Mr. C. E. Pickard* and *Mr. J. L. Jackson* were on his brief.

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

This was a bill for infringement of claims four, ten, eleven and thirteen of letters patent No. 331,920, issued to George W. Taft, December 8, 1885, for a "machine for making, repairing and cleaning roads."

The defences were want of patentable novelty; anticipation; and non-infringement. On hearing, the Circuit Court, held by Judge Butler, entered a decree dismissing the bill. 45 Fed. Rep. 252.

The application was filed May 6, 1885, and the specification declared —

"The objects of my present invention are to provide an efficient and convenient 'stiff-angled' or non-reversible road-machine in which the ends of the blade are positively sustained against the working strain, while permitted vertical adjustment by means of push-bars extending from the rear of the machine to the back of the blade; also, to provide in a non-reversible road-machine a vertically-swinging thrust-frame and push-bar arrangement that will permit the required adjustments of the scraper in relation to the plane of the road; also, to provide in a road-machine a hand-wheel operating device for imparting motion to the blade-elevating mechanism, whereby the respective ends of the blade can be raised and depressed in a quick, easy, and convenient manner; also, to provide an improved lifting mechanism for elevating and depressing the blade; also, to afford facilities in a road-machine, in connection with the hand-wheel operating devices, of a brake or stop device for retaining the hand-wheel, lifting mechanism, and blade at position of adjustment."

Then followed the drawings and the description, omitting a part of which, the specification thus continued:

"The front end of the blade D is suspended by a bar or link G from the arm of a lever H that is arranged along the side of the machine and fulcrumed at *h* on a support A^3 that projects from the carriage frame. The rear arm of said lever is provided with a gear segment H^1 that meshes with an actuating pinion I, by which the arm of the lever may be moved up and down for raising and depressing the front end of the lever and blade. The rear end of the blade is connected by a link G^1 to a vertically sliding rack J that meshes with an actuating pinion I^1 and is guided by a flanged friction roll K pivoted on a suitable bracket or support connected to the carriage frame A. The pinion I that operates the lever H may be provided with flanges $i\ i^1$ for embracing the sides of the internally toothed segment H^1 and thus serving to guide and retain said segment and its lever H in proper relation therewith as it is moved up and down by the rotation of the hand-wheel M.

The rack J and its guide-roll K are *preferably* fitted to each other by intermatching grooved and flanged surfaces, as indicated in Figs. 3 and 3 and the operating pinion I^1 is provided with flanges *j* to embrace the sides of the rack, so that said rack is confined and guided in proper relations as it slides up and down and works with but little friction or resistance when adjusting the blade.

"Hand-wheels M and M^1 are provided for imparting motion to the respective pinions I I^1, or operating gear of the blade-lifting mechanism, when elevating and depressing the blade or adjusting the blade to differently inclined positions in relation to the plane of the road, these wheels may be made some three feet in diameter, more or less, with round or other formed rims that can be conveniently grasped by the hand at any part of their periphery. In the present instance the hand-wheels and their pinions are respectively attached to each other or formed on the same hub; they are mounted on a shaft L that extends across the carriage A, and is supported in bearings on suitable standards *l* l^1. One of the wheels (M, or M^1) is arranged to turn loose on shaft L, so that the two wheels can be revolved independently of each other for separately adjusting either end of the blade required. The rims of the hand-wheels are made sufficiently heavy to act as a balance against the weight of the blade-lifting devices, so that the momentum of the wheel will greatly assist the operator in the manipulation of the machine. Short shafts or studs may be used in lieu of shaft L as journals for the hand-wheels and gears if desired. I prefer however to have the shaft extend across the machine as it makes a stronger and more rigid construction.

"Brake mechanism is arranged in connection with the carriage for stopping and retaining the hand-wheels to hold the blade at any position of adjustment. Said brake mechanism may be made, as indicated, with levers *n*, having one end fulcrumed beneath the platform at *n'*, and the other provided with a pad or shoe, N, to press against the rim of the hand-wheel, a suitable spring, *s*, being connected therewith to give the required holding pressure. A foot piece or pedal, P, ar-

ranged at a convenient position enables the attendant to depress the lever and brake-shoe by placing his foot thereon when he desires to throw off the brake for releasing the hand-wheel.

"In lieu of connecting the hand-wheel and blade-lifting bar or lever by means of a toothed pinion and rack, said parts may be connected by a strap or chain, (one or more,) one end whereof connects with the lift bar or lever, while the other end is arranged to wind onto the pinion or hub on the hand-wheel, or onto a sheave geared to the hand-wheel hub.

"The operation of this road-machine is obvious from the drawings and foregoing description. The operator, standing upon the platform A, when he desires to raise or depress either end of the blade, places his foot upon the brake-pedal P corresponding to the end to be adjusted, and grasping the rim of the wheel where it is most convenient to his hand, swings it backward or forward, (accordingly as required,) with a free and easy action, and to a greater or less extent, as desired, then releases the pedal and the brake or stop is automatically applied by its spring *s*.

"A hand-wheel, in combination with and for imparting motion to mechanism for elevating and depressing the scraper or blade in a road-machine, is of great practical utility and advantage, as it enables the operator to handle and control the machine with greater ease and facility than with a lever handle or crank, and does not necessitate his taking an awkward or constrained position at any part of the action. The rim of the wheel, acting by its momentum as a balance-wheel, also enables the operator by a quick movement to suddenly throw the blade completely up from the ground to avoid contact of large stones or other obstructions while the machine is in motion. Said rim also serves as a continuous seat for the stop or brake, so that the adjustment can be held with the blade at any degree of elevation desired.

"A hand-wheel *adapted to act by its peripheral momentum, or as a balance-wheel, for assisting or augmenting the throw or movement when adjusting the scraper*, in combination with *the scraper-blade and* blade-adjusting mechanism, for the purpose specified, is an important feature of my invention.

"Hand-wheels may be employed for elevating and depressing the scraping-blade in a road-machine, in combination with connections or lifting devices of other construction and arrangement from those herein shown, with beneficial results, and I so intend to employ said hand-wheels; and I have in other applications (see serial Nos. 167,212 and 173,968) for letters patent described and claimed certain combinations in which other forms of lifting mechanism are employed for effecting the vertical adjustment of the blade.

"*I am aware that a railroad snow-plow or track-clearer has heretofore been patented, in which the plow was braced from the car-axle by parallel braces rigidly connected to the plow; and that a swinging transverse scoop or shovel pivoted between the ends or rearwardly-extending braces of equal length, and in connection with a wheeled carriage, has also been shown in another patent. I am also aware that other patents exhibit road-scrapers wherein braces or links are shown which connect blade-supporting standards in rear of the blade, with one of the side bars of the carriage-frame. Such devices I do not therefore herein claim, as neither of them attain the results incident to my improvement — viz., perfect flexibility of adjustment with direct support or thrust under all conditions of use and positions of adjustment.*"

[The foregoing words in italics were inserted by way of amendment, the disclaimer being preceded by the statement: "Regarding the 1st claim for recognition of the state of the art, insert at the end of the descriptive part of specification, page 9, the following clause, viz."]

Of the fifteen claims, the first, fourth, fifth, tenth, eleventh and twelfth were:

"1. In a machine for grading and clearing roads, the combination, with a scraper-bar or blade suspended from the carriage between its front and rear wheels, of thrust-bars extending from the axle or rear of said carriage and attached to the back of said scraper near its ends by connecting-joints that permit upward and downward adjustment at each end of the scraper-blade independent of the other, substantially for the purpose set forth."

"4. In a road-grading machine, a hand-wheel in combination with the blade-elevating devices, for imparting motion to said devices, when raising and depressing the blade, substantially as hereinbefore set forth.

"5. In a machine for grading and cleaning roads, the combination, with the scraper-blade, supported by a push frame at the rear of said blade, and blade-elevating mechanism connected therewith, of a hand-wheel for imparting motion to said elevating mechanism for effecting the upward and downward adjustment of the blade, substantially as hereinbefore set forth."

"10. In a road-machine the standards l l^1 and shift L in combination with the carriage, blade-lifting devices, and operating wheels and pinions, as and for the purposes set forth.

"11. The flanged guide-roll K and flanged pinion l^1, in combination with the rack J, blade D and carriage frame A, and hand-wheel M^1, substantially as and for the purpose set forth.

"12. In combination with the blade-elevating lever H having the internally toothed segment H^1, of an operating pinion I, provided with flanges, *i*, for guiding said segment, substantially as set forth."

The application was examined by the Patent Office, and the following objections were made:

"If claim 1 is to stand, the state of the art as shown in patents 226,686, Sweatt, Apr. 20, 1880 (self-load'g carts); 52,028, Carncross, Jan. 16, 1866; 191,287, Jefferson, May 29, 1877, and 288,261, Raab, Nov. 13, 1883 (wheeled scrapers), must be recognized.

"Claim 4 is met in patent 220,812, Day, Oct. 21, 1879 (same). Furthermore the devices of patents 297,861, Smith, April 29, 1884; 275,614, Edwards & Durkee, April 10, 1883, and 135,475, Ham, Feb'y 4, 1873 (ex. carrier).

"As to claim 5, in view of the patents 160,535, McCall, Watkins, Scott, M'ch 9, 1875, and 296,138, Cook, Apr. 1, 1884 (wheeled scrapers), the claim does not present patentable novelty, these, with the patent of Day, showing that, broadly considered, a hand-wheel and a lever are equivalent substitutes.

"Claims 10, 11 and 12 are met in patent of Cary, 152,072, June 16, 1874 (self-load'g carts).

"Patent 145,736, Humphreys, Dec. 23, 1873 (ex. carrier), may also be referred to as showing the state of the art in connection with claim 11.

"Claim 15 is met in patent of Carncross above cited."

Thereupon the specification was amended as before pointed out, and applicant further said:

"Regarding the fourth and fifth claims, in the references cited, patent No. 220,812, it is shown that a small hand-wheel mounted on a vertical shaft and adapted for winding up a rope or chain in manner similar to a car-brake has been used for bodily lifting a diagonal scraper or snow-plow on a railroad car, both ends of the scraper being lifted simultaneously; further, in other patents it is shown that wheels having a series of projecting handles or pins are employed in connection with means for lifting the plow and conveyer in ditching machines. Neither of these devices, it is thought, embody the features which applicant desires to secure, and while there is no question but that the present wording of said claim is met by these references, yet it is believed that applicant has a point to which these former inventions have not attained.

"The claims are hereafter amended with this feature in view, viz., that in applicant's invention the wheel is designed and adapted to be worked in combination with a diagonal blade and as a balance or momentum wheel, so that a quick throw of the wheel with the hand will by the weight of the periphery of the wheel, augment the action, or carry the blade mechanism up or down to a greater extent than the mere movement of the hand."

The fourth and fifth claims were amended; the tenth, eleventh and twelfth cancelled and two others substituted; and the fifteenth was erased.

The fourth, tenth, eleventh and thirteenth claims of the patent as issued read:

"4. The combination, with a diagonal scraper supported in connection with a wheeled carriage and adapted for upward and downward adjustment independently at either of its ends,

of an operating-wheel (or wheels) for effecting such adjustment, adapted to act as a momentum or fly-wheel, as set forth, whereby the peripheral weight of said wheel is utilized to assist in the adjustment of the blade, substantially as hereinbefore explained."

"10. In a road-machine, the combination of a scraper-blade adapted for upward and downward adjustment at its respective ends, an operating hand-wheel (or wheels) connected therewith for effecting such adjustment, and a brake (or brakes) acting against said wheel to arrest movement thereof and retain the parts, substantially as set forth.

"11. In a wheel road-scraper, the combination of a scraper-blade adapted for upward and downward adjustment at its respective ends, an operating-wheel (or wheels) connected therewith for effecting such adjustment and adapted for developing peripheral momentum for throwing the blade up or down, and a brake acting against said wheel to arrest the movement thereof and retain the parts in position, substantially as set forth."

"13. In a road-machine, the combination, with an oblique scraper suspended beneath a carriage or body mounted on front and rear wheels, of means for imparting independent upward and downward adjustment at the respective ends of said scraper provided with hand-wheel and pinion devices for imparting movement thereto, and stops or brake devices acting in connection with said hand-wheels for retaining the parts at positions of adjustment, substantially as described."

Thus it appears that the patentee acquiesced in the ruling of the Patent Office that the application of hand-wheels to a road-grading machine, for imparting motion to the devices for raising and depressing the scraper-blade, was old, and, for the purpose of obtaining his patent, restricted his claims in this particular to momentum or balance wheels.

And it is with reference to the momentum feature, treated as an element in all the claims, that the case must be disposed of.

Momentum is the quantity of motion in a moving body, and is proportioned to the quantity of matter multiplied into its velocity.

All revolving wheels possess momentum, but momentum wheels, so called, as balance or fly-wheels, are wheels whose momentum is utilized in the operation of machinery by a sufficient accumulation of force, through the weight and velocity of the wheel combined, to overcome the effects of temporary loss of power.

The knowledge was common that when a continuous power is applied, but the resistance to be overcome is unequal, a fly or balance-wheel will store some of the power expended during the operation and not needed at one stage, and give it out at another.

This familiar principle is thus expressed in the specification: "The rims of the hand-wheels are made sufficiently heavy to act as a balance against the weight of the blade-lifting devices, so that the momentum of the wheel will greatly assist the operator in the manipulation of the machine."

The momentum wheel of the patent is described in appellant's brief as being "a wheel having such peripheral weight, in relation to the weight of the scraper-blade to be lifted, that it will continue in rotation after the hand of the operator is removed, so as to enable him to secure a new grasp of the wheel to continue the lifting process."

Appellant's expert, Mr. Brevoort, puts it thus: "In the case of the Taft invention, the peripheral momentum was relied upon to continue the blade of a road-scraper in its upward motion so that the operator could again grasp the wheel to give further rotative force thereto without the blades falling and without the necessity of locking the wheel to enable him to get another grip thereon." And the patentee testifies: "The object of making the wheel with the heavy rim was that there might be sufficient momentum generated in the hand-wheel to make a continuous rotary motion of the wheel when it was desired to raise the blade over an obstacle, like a rock or a 'thank-you-ma'am,' or when approaching a cross-walk on a street. This we could not do with levers, if the lever had sufficient leverage to give this operation; and by making the rim of these wheels heavy I secured that ability to cause a continuous motion of the hand-wheel. After giving it one

impulse from the hand, I could reach forward and give it a second without applying a break or stop to the wheel, thus keeping up a continuous motion of the hand-wheel until I had raised the blade as high as desired."

In short, as the ordinary hand-wheels used for the same or analogous purposes in similar constructions were old, the claim of patentable novelty rests on the proposition that Mr. Taft was the first to increase their weight and apply them as momentum wheels in a common device for regulating road-scrapers to secure the well-known result attendant on the use of such wheels.

Was he the first to do this, and, if so, did such increase of weight involve patentability?

The record contains a number of prior patents of road machines in which the vertical adjustment of the scraper-blade is effected by levers on each side of the machine, with connecting mechanism to each end of the blade, the actuation of either lever raising one end of the blade, and of both, raising the blade as a whole.

The patent of Read of November 25, 1873, shows a reversible scraper-blade adjustable up and down at either end; adjustable laterally in respect of side projection of its blade; susceptible of being raised quickly at either end or as an entirety; carried by a four-wheeled frame; and directly controlled by levers through suspending cords or bars, the rear ends of the levers being adapted to be held by catches or uprights projecting up from the frame of the machine.

The McCall, Watkins and Scott patent of March 9, 1875, has a push-bar reversible scraper, with hand-levers and stops for the vertical adjustment of the scraper-blade and hand-wheels for steering.

The Cook patent of September 22, 1885, has a scraper supported by a wheeled frame and moved by push-bars, and capable of being raised and lowered at either end independently by means of racks connected to the scraper, and pinions, operated by levers, which engage the racks and move them up and down.

These lever machines were all operative, and these and

other patents were introduced in evidence as showing that wheeled frames; reversible and non-reversible blades; levers of various forms for adjusting either or both ends of the blade; stops for locking the levers in place; stops and various other devices for connecting the levers with the blades; were all well known; but as this is conceded we need spend no time upon them.

It should, however, be observed that broadly considered a hand-wheel and a lever are substantial equivalents in these devices. The wheel is a continuous lever. The rim enables the operator to lay hold at any point desired, and takes the place of a number of levers. But it is denied that momentum hand-wheels are the equivalents of levers.

Other prior patents adduced illustrate the use of hand-wheels, cranks and momentum wheels.

Dyson's patent of June 2, 1868, for a "street scraper" has a triangular frame, D, having slots in which the bars slip up and down freely, to which the scraper-blades are pivoted. The dirt is gathered up within this triangle and deposited by the operation of the rear part of a frame, E. The triangular frame D is raised by a crank-wheel with a crank connected by cords with two wheels in such manner as to revolve both wheels simultaneously, and the whole scraper is thereby raised and retained by the engagement of the crank with a catch. The experts differ as to whether these wheels can be used as hand-wheels if so desired as well as by means of the cords as described in the patent.

The Carey patent of June 16, 1874, for an improvement in scrapers, has a scraper or dirt scoop; a rack attached to a lever which carries the scraper; a pinion engaging the rack to raise and lower the scraper; a crank handle, as an equivalent for a hand-wheel, to turn the pinion, and a lock to hold the devices in their adjusted position.

The Taft machine seems to embrace the connecting devices of this patent, but it has a shaft with a hand-wheel instead of with a crank.

April 10, 1883, Edwards & Durkee obtained a patent for an improvement in grading and ditching machines, in which

all the adjustments are made by hand-wheels. This has a plough-beam and a carrying apron or belt, and, "by arranging the several hand-wheels, as shown and described," the operator "can raise and lower either end of the plow-beam independent of the other, and raise or lower the apron as required."

The patent of Elmer H. Smith of April 29, 1884, for a ditching machine, shows a plough "consisting of an inclined flat plate," supported by a wheeled frame, and raised and lowered by means of a hand-wheel and pinion acting upon a rack connected to the lever which carries the blade. The blade is operated by a single hand-wheel, in this resembling the fourth, tenth and eleventh claims under consideration, which call for "an operating wheel (or wheels)," although it is testified that "in no case could the adjustments described in the patent be effected by a single wheel."

May 28, 1878, letters patent No. 204,205, for an "improvement in track clearers," were issued to Augustus Day. This was a device "for effectually clearing street railways from snow and ice, so arranged that the snow will not only be cleared away from the face of the rails, but also from between the rails and a suitable distance on each side of the track," it being so spread and packed as not to be left "in ridges or snowbanks along the street."

It has a diagonal scraper suspended beneath a wheel carriage and provided with a lifting mechanism consisting of a chain or rope wound upon the shaft by means of a hand-wheel, there being several hand-wheels for effecting the different adjustments of the scraper-blade, which is raised at either end at the will of the operator.

This concurs with the mechanism thus described in the Taft specification: "In lieu of connecting the hand-wheel and blade-lifting bar or lever by means of a toothed pinion and rack, said parts may be connected by a strap or chain, (one or more,) one end whereof connects with the lift-bar or lever, while the other end is arranged to wind onto the pinion or hub on the hand-wheel, or onto a sheave geared to the hand-wheel hub."

Day's patent of October 21, 1879, No. 220,812, for "snow-

plows," has a diagonal scraper suspended beneath a wheeled carriage and capable of being raised and lowered by a chain or cord wound upon a shaft turned by a hand-wheel, the shaft having a locking device consisting of a ratchet-wheel and a dog. There is but one hand-wheel which raises and lowers both ends of the scraper together, while the previous Day patent had two hand-wheels and chains for raising and lowering the two ends of the scraper independently. The substance to be dealt with was snow, and rails and their bed, with some distance on each side, the surface to be cleared, but so as not to encumber the circumjacent highway. In view of the work to be done, light hand-wheels might be sufficient, yet if momentum as a positive aid were found necessary, their weight could be increased.

The Boone patent of October 21, 1851, shows a windlass with drums for winding up cords to raise weights, with a wheel and pinion and suitable gearing for turning the drums, and a brake stop.

The Lyon patent of August 6, 1878, for improvement "in combined ship's pump and windlass" has very heavy momentum hand-wheels for operating either pumps or a winding drum. Apparently these wheels are heavier for the same diameter than the Taft hand-wheels.

The Tyler patent of February 14, 1882, for "friction brake for steering wheels" shows a momentum hand-wheel for operating the rudder of a vessel, and a pedal brake for holding the wheel in any desired position. The wheel is not described in the specifications as a momentum wheel, but, as it is such in fact, this is not material.

Appellee's expert Bates testifies that such wheels "are commonly used as momentum wheels and have been as long ago as 1871. The operator gives them an impulse and their momentum carries them on."

It is not controverted that a heavy wheel with a crank pin at the side, such as shown, was a common and very well-known form of construction for the specific purpose of applying momentum to a crank.

The wheels employed in landing ferry-boats and the ancient

spinning-wheels, instanced by the District Judge, readily recur as illustrations of the use of momentum in the continuance of motion. Indeed, it is admitted that all wheels for raising, winding up and hoisting, if the load is light enough, "are capable of performing some movement after the hand of the operator has left them," and the principle does not depend upon the extent of the aid thus given to propulsion.

We find then that hand-wheels in the regulation of scraper-blades for ditching, grading, street and road clearing were old, and that this was true of the utilization of momentum when required by the exigencies of the case, as in capstan-wheels, crank-shaft wheels, rudder-regulating wheels, pump-operating wheels, and so on. Every one knew that momentum propelled the capstan-wheel, the rudder-wheel, the pump-wheel, the spinning-wheel, after the hand of the operator was withdrawn.

The law of nature was familiarly understood that any moving body tends to continue in motion with a force proportionate to its speed and weight; and it was well known that the function of fly-wheels and balance-wheels was, in the language of Mr. Brevoort, "to absorb energy when the machine is moving at greater speed with the least resistance, and to give it out again when the parts meet with greater resistance."

The Circuit Court was of opinion that the use in road-machines of wheels made heavier in the adjustment of momentum to resistance was not a new use of momentum wheels in working machinery, and that the difference in weight in hand-wheels performing the service of rotary levers was a difference in degree and not in kind. And the contention as to infringement confirms this view.

Mr. Bates describes appellee's machine as "composed of a wheeled frame or carriage, beneath which is suspended a turn-table and to this turn-table the scraper-blade is attached. The turn-table is suspended by rods from the ends of a bar which extends across the machine and is capable of vertical motion between uprights. The bar is supported by being pivoted near each end to the lower end of a rack-bar. The rack-bars are moved up and down by pinions on horizontal

shafts, the shafts extending back toward the rear of the machine. At their rear ends are bevel gears which mesh with pinions on cross-shafts, and there is a hand-wheel on each cross-shaft to turn it. There is also a band-wheel on each cross-shaft, which is embraced by a friction band or band-brake. The band is connected to a spring-treadle so that the operator can loosen it by putting his foot on the treadle. The hand-wheels are small wheels comparatively, similar to those used on car-brakes, and are certainly much too light to act as fly-wheels or momentum-wheels against such a weight as that of the scraper and turn-table and attachments. Besides this, the strain on this weight is a constant one, always acting in the same direction upon the hand-wheels. The scraper is moved forward by means similar to ordinary plow-beams, which are connected with the turn-table, the turn-table being connected with the front of the machine, or rather to the king bolt by a draft-ring and link. There is no device for acting with a thrust upon the scraper-wheel."

Without subjecting the evidence to critical examination, it is enough that it is admitted that these hand-wheels are smaller and lighter than those of appellant, and that to make out infringement it is requisite to construe the patent in suit as covering all wheels whose momentum can be utilized in operating a roadmaking machine.

On the one hand it is contended that appellee's hand-wheels are not momentum wheels at all and that the continued motion of the blade is due to earth pressure and not to momentum; while, on the other, this is denied, and it is insisted that these wheels are to be treated as momentum wheels because they will store up "a useful amount of energy to make them continue their further movement, when the hand of the operator is taken therefrom," provided "the operator shall give to the wheel a rapid and vigorous pull, moving it while his hand is upon it at a greater speed than it afterwards maintains."

We can hardly doubt that similar manipulation of many of the old wheels would produce the same result, and if there could be infringement if this were not so, there would be anticipation if it were.

But the decision of the Circuit Court rested on the want of invention, and in that conclusion we concur.

"The whole essence of the Taft invention," says appellant's counsel, is the application of momentum to carry the wheel along "sufficiently to enable the operator to take a new grasp, (as explained by Mr. Brevoort,) without clamping the wheel to prevent its running backward."

Did increasing the weight of the hand-wheels in this class of road machines, in order to correct the tendency of smaller wheels to reverse, involve patentable novelty?

We do not think so. The use of hand-wheels as a substitute for straight levers in this class of machinery was old, and, whether the wheels were light or heavy, (and heavy wheels were old,) they alike performed the service of rotary levers.

The patentee had acquiesced in the rejection of his claim for a road machine with a blade that was elevated or depressed by a hand-wheel operating through suitable gearing, and could not claim the benefit thereof, or of an equivalent construction of the claims allowed. To make the hand-wheels heavier was to increase their capacity, but the same end was accomplished by substantially the same means. The means were old, and their enlargement by a common method to attain a better result in the particular instance merely carried forward the original idea, and was nothing more than would occur to the experienced mechanic.

It appears to us that, it being seen that the tendency to reverse would prove objectionable in the proposed machine, the suggestion that the hand-wheels should be made heavier in order, by greater momentum, to correct that tendency, as it was well known increase in weight coupled with adequate rotative force would, sprang naturally from the expected skill of the maker's calling, and that this use of the heavier wheel did not make the mechanism in any proper sense a new thing evolved by the inventive faculty.

The substitution of the heavier wheel was not the product of a creative mental conception, but merely the result of the exercise "of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility

of manipulation which results from its habitual and intelligent practice."

Decree affirmed.

UNITED STATES *v.* GILLIAT.

APPEAL FROM THE COURT OF CLAIMS.

No. 535. Submitted October 13, 1896. — Decided October 26, 1896.

It was the intention of Congress, by the language used in the act of August 23, 1894, c. 307, 28 Stat. 424, 487, to refer to the Court of Claims simply the ascertainment of the proper person to be paid the sum which it had already acknowledged to be due to the representatives of the original sufferers from the spoliation, and not that the decision which the Court of Claims might arrive at should be the subject of an appeal to this court; and that when such fact had been ascertained by the Court of Claims, upon evidence sufficient to satisfy that court, it was to be certified by the court to the Secretary of the Treasury, and such certificate was to be final and conclusive.

This was one of the claims originating in the depredations committed by French cruisers upon the commerce of American citizens prior to the year 1800, commonly called French Spoliation Claims. Pursuant to the provisions of the act of January 20, 1885, c. 25, 23 Stat. 283, the claim mentioned in this proceeding (among many others of a like nature) was presented to the Court of Claims, and that court made an award, advising the payment of the claim, which was reported to Congress, pursuant to the act above mentioned, and Congress, by the act of March 3, 1891, c. 540, § 4, 26 Stat. 862, 897, 900, appropriated money "to pay the findings of the Court of Claims on the following claims for indemnity for spoliations by the French prior to July 31, 1801," (among others, on page 900,) "on the ship Hannah, Richard Fryer, master, namely, . . . to John A. Brimmer, administrator of John Gilliat, deceased, $35,840.44." By the last clause in the act (page 908) Congress added a proviso as a condition to the payment of the awards mentioned

therein, which reads as follows: "*Provided*, That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the Court of Claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursement of the awards."

John A. Brimmer, the administrator to whom, by the act of 1891, the appropriation was ordered to be paid upon the condition above recited, was unable to comply with the same, and Congress by the act of August 23, 1894, c. 307, 28 Stat. 424, 487, enacted "that the sum of $35,840.44, appropriated to be paid to John A. Brimmer, Jr., administrator of John Gilliat, deceased, in the act entitled 'An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June 30, 1891, and for prior years and for other purposes,' be paid to the person or persons entitled to recover and receive the same, to be ascertained by the Court of Claims upon sufficient evidence and certified to the Secretary of the Treasury." Proceeding under the above enactment, Charles G. Gilliat, the appellee, presented his petition to the Court of Claims for the payment of one third of the sum named, on the ground that he was a grandson of one of the three original sufferers by reason of the seizure of the ship Hannah, above mentioned, and had been duly appointed administrator *de bonis non* of the estate of his grandfather by the chancery court of the city of Richmond and State of Virginia. The Attorney General answered the petition of the claimant, denied the allegations therein, and asked judgment that the petition be dismissed.

Upon the hearing the Court of Claims decided that the petitioner was the administrator of the estate of Thomas Gilliat, who was one of the three members of the firm of Gilliat & Taylor, the original sufferers, and that the peti-

tioner represented the descendants and next of kin of the above-mentioned Thomas Gilliat, and the court certified to the Secretary of the Treasury for payment to such administrator to the extent of one third of the sum of $35,840.44, appropriated by the act of March 3, 1891, being the sum of $11,946.81, which was the extent of the interest of Thomas Gilliat in the partnership of Gilliat & Taylor. The Attorney General in his notice of appeal described the certificate of the Court of Claims, which it made to the Secretary of the Treasury, pursuant to the above act of March 3, 1891, as a judgment, and as such assumed to appeal therefrom to the Supreme Court of the United States. The notice of appeal was filed and allowed in open court by the Chief Justice of the Court of Claims, and the record being before this court, a motion was made to dismiss the appeal.

Mr. Frank W. Hackett for the motion.

Mr. Assistant Attorney General Dodge and *Mr. Charles W. Russell* opposing.

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

The appellee moves to dismiss the appeal in this proceeding on the ground that the action of the Court of Claims was conclusive under the special statute of August 23, 1894, c. 307, 28 Stat. 424, 487, providing for the hearing of the question of fact by the court as to what person was entitled to recover and receive the amount appropriated to be paid to John A. Brimmer, Jr., under the act of March 3, 1891, c. 540, § 4. 26 Stat. 862, 900.

We think the appeal should be dismissed. The original act of Congress of January 20, 1885, by which the claimants in the spoliation cases were referred to the Court of Claims, gave no power to that court to enter judgment upon its finding. By section 6 of that act, the finding and report of the court were to be taken merely as advisory as to the law and facts

found, and were not to conclude either the claimant or Congress. No appeal, therefore, could be taken from the report of the Court of Claims made to Congress under that act. The liability of the government for the payment to those entitled to it of the amount of damages sustained by them by reason of the capture of the ship Hannah and its cargo, owned by the firm of Messrs. Gilliat & Taylor, was found by the Court of Claims and reported to Congress pursuant to the act of 1885, and the appropriation was subsequently made by that body for the payment of such damages. The person to whom the appropriation was made was unable to receive the same, because of his inability to comply with the proviso contained in the act of appropriation. For the purpose of ascertaining the person who might be entitled to recover and receive the sum already appropriated by Congress for the payment of the damages described, Congress passed the act referring to the Court of Claims that single question, and that court, after having ascertained the fact upon sufficient evidence, was by the act directed to certify the same to the Secretary of the Treasury. As the action of the Court of Claims upon the original claim made under the act of 1885 was not the subject of an appeal to this court, but was simply advisory in its nature, the whole matter being left to the discretion of Congress, we think it clear that it was not the intention of that body to permit an appeal from the finding of the Court of Claims upon the subsidiary question as to the particular person to whom the appropriation already made by Congress should be paid.

It was undoubtedly the intention of Congress, by the language used in the act of 1894, to refer to the Court of Claims simply the ascertainment of the proper person to be paid the sum which it had already acknowledged to be due to the representatives of the original sufferers from the spoliation, and it was not intended that the decision which the Court of Claims might arrive at should be the subject of an appeal to this court. We think Congress intended that when such fact had been ascertained by the Court of Claims, upon evidence sufficient to satisfy that court, the fact was to be certified by the

court to the Secretary of the Treasury, and such certificate was to be final and conclusive.

The case resembles in some aspects that of *Ex parte Atocha*, 17 Wall. 439. It differs from *Vigo's case: Ex parte United States*, 21 Wall. 648, because the original claim was never referred to the Court of Claims for such judicial action as should terminate in a judgment, but it was only referred to it by Congress for the purpose of receiving what is termed its advisory conclusions, upon which Congress would proceed in its discretion.

But aside from either of the above cited cases, the nature of the original claim and the manner in which it has been treated by Congress, and the language of the appropriation, as contained in the act of 1894, all clearly lead to the conclusion that Congress intended the decision of the Court of Claims to be final, and that the Secretary of the Treasury should pay upon receipt of the certificate provided for in the act.

The motion to dismiss the appeal is, therefore, granted, and the

Appeal dismissed.

UNITED STATES *v.* HEWECKER.

CERTIFICATE OF DIVISION IN OPINION FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 547. Submitted October 13, 1896. — Decided October 26, 1896.

Sections 651 and 697 of the Revised Statutes, relating to certificates of division in opinion in criminal cases were repealed by the judiciary act of March 3, 1891, 26 Stat. 826, both as to the defendants in criminal prosecutions, and as to the United States; and certificates in such cases cannot be granted upon the request either of the defendants or of the prosecution. *Rider* v. *United States*, 163 U. S. 132, on this point adhered to.

MOTION to dismiss. The case is stated in the opinion.

Mr. Abram J. Rose for the motion.

Mr. Assistant Attorney General Dickinson opposing.

Opinion of the Court.

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

Hewecker was indicted for the murder of one Miller, on January 17, 1892, in the bay of Havana, off the island of Cuba, on board an American vessel, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, in the Circuit Court of the United States for the Southern District of New York, that district being the district in which he was found and into which he was first brought. To the indictment he entered a special plea in the nature of a plea in abatement, to the effect that the indictment was not found until March 10, 1896; that Miller died January 21, 1892, in Cuba, without the United States, and that under and by virtue of section 1043 of the Revised Statutes of the United States he could not be prosecuted or tried; that from January 17, 1892, until the date of the finding of the indictment he had not fled from justice but had been confined in a prison at Havana, Cuba, upon a charge of assault inflicted in that city; and that therefore the offence with which he was charged by the indictment was barred by the statute of limitations. To this plea the United States interposed a demurrer and argument was had thereon, whereupon the judges of the Circuit Court, the court being held by a Circuit Judge and a District Judge, announced that they were divided in opinion upon certain questions of law arising on the demurrer, and the points upon which the judges disagreed were at the request of the United States certified to this court. The case was submitted on a motion to dismiss.

By the judiciary act of March 3, 1891, it was provided that this court should not have appellate jurisdiction by appeal, by writ of error, or otherwise, over the Circuit Courts, except according to the provisions of the act; and jurisdiction was specifically given in "cases of conviction for a capital or otherwise infamous crime."

In *Rider* v. *United States*, 163 U. S. 132, we decided that sections 651 and 697 of the Revised Statutes in relation to certificates of division of opinion in criminal cases were repealed

for the reasons given therein. It is true that in that case the defendants had been found guilty and that the certificate of division was on a motion for new trial. The general rule was that this court could not, upon a certificate of division of opinion, acquire jurisdiction of questions relating to matters of pure discretion in the Circuit Court, and, therefore, that a certificate on a motion for new trial would not lie, but where the questions presented went directly to the merits of the case it had been held that jurisdiction might be entertained. *United States* v. *Rosenburgh*, 7 Wall. 580. And accordingly we did not dismiss the certificate because made on a motion for new trial, since the maintenance of the information at all depended on the points certified.

In this case it is contended that the right of the United States to proceed upon a certificate of division was not brought before us in that case and that the reasons assigned by us for that decision are not clearly applicable here. But we are unable to arrive at any other conclusion and see no reason for a different opinion on the general question than there expressed.

By the act of March 3, 1891, appellate jurisdiction on error was given in all criminal cases either to this court or the Circuit Court of Appeals in favor of the accused, and, as to them, sections 651 and 697 of the Revised Statutes did not remain in force. And if the sections were repealed so far as defendants were concerned, we think it follows that this was so as to the United States, and that a certificate which could not be granted upon the request of the defendants could not be granted on the request of the prosecution.

In *United States* v. *Sanges*, 144 U. S. 310, it was held that the act of 1891 did not confer upon the United States the right to sue out a writ of error in any criminal case, and as that right was given in favor of the accused in all such cases, and review by certificate done away with without any specific saving in favor of the United States, we are of opinion that the reasoning in *Rider* v. *United States* applies, and that the act furnishes the exclusive rule. The appellate jurisdiction was increased in many respects by that act and was curtailed in others, and while enlarged in criminal cases in favor of

defendants, it was at the same time circumscribed as to the United States by the specific provisions relating to the particular subject, conceding that under the Revised Statutes the remedy by certificate was open to be availed of by the United States.

Certificate dismissed.

UNITED STATES *v.* KURTZ.

APPEAL FROM THE COURT OF CLAIMS.

No. 530. Submitted October 13, 1896. — Decided October 26, 1896.

A clerk of a Circuit Court who is directed by the court to keep a criminal final record book, in which are to be recorded indictments, informations, warrants, recognizances, judgments and other proceedings, in prosecutions for violating the criminal laws of the United States, is not entitled, in computing folios, to treat each document, judgment, etc., as a separate instrument, but should count the folios of the record as one instrument continuously from beginning to end.

A clerk's right to a docket fee, as upon issue joined, attaches at the time such issue is in fact joined, and is not lost by the subsequent withdrawal of the plea which constituted the issue; and this rule applies to cases in which, after issue joined, the case is discontinued on *nol. pros.* entered.

When a list of the jurors, with their residences, is required to be made by the order or practice of the court, and to be posted up in the clerk's office or preserved in the files, and no other mode of compensating the clerk is provided, it may be charged for by the folio.

The clerk is also entitled to a fee for entering an order of court directing him as to the disposition to be made of moneys received for fines, and for filing bank certificates of deposit for fines paid to the credit of the Treasurer of the United States.

This was a petition by Kurtz, who was clerk and commissioner of the Circuit Court for the Eastern District of Wisconsin, for fees alleged to have been earned by him in both capacities.

The case resulted in the allowance of a large number of disputed items, and a final judgment in favor of the petitioner in the sum of $165.10. The government appealed, and

assigned as error the allowance of certain items specifically set forth in the opinion.

Mr. Assistant Attorney General Dodge for appellants.

Mr. Charles C. Lancaster for appellee.

Mr. Justice Brown delivered the opinion of the court.

1. The first assignment of error is taken to the allowance to the petitioner of clerk's fees for recording in the final record books the entries and proceedings in various criminal cases, consisting of the indictment or information, warrants, recognizances, judgments and other proceedings, as required by rule of court, at fifteen cents per folio. It seems that these records were made by him in compliance with a rule of the Circuit Court adopted November 3, 1890, requiring the clerk to keep a criminal final record book, in which should be recorded "the indictment or information, and all recognizances, warrants, process, (except writs of subpœna and proceedings thereunder,) judgments, and other proceedings in every prosecution for violation of the criminal laws of the United States." For making up these records the clerk charged a fee of fifteen cents per folio in pursuance of the eighth subdivision of Rev. Stat. § 828, which entitles him to this amount "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, return or report." The only objection was to the clerk's method of computing folios by treating each document, judgment, order and direction of the court as a separate instrument for the enumeration of folios, instead of counting the folios of the record as one instrument continuously from beginning to end.

The assignment is well taken. By his method of computation the clerk charges for each entry, many of which are less than a dozen words in length, as for one hundred words. This may be proper where the charge is made under the first clause of the paragraph "for entering any return, rule,

order," etc., upon the journal of the court, but the evident intent of the statute is that for the purpose of making up the record as a history of the case the entire record shall be taken as one instrument.

2. The next item to which the government objects is to the allowance for making dockets, indexes, taxing costs, etc., in nine cases, in which defendants at first pleaded not guilty, and at a later day, with no steps or proceedings intervening, withdrew such plea, pleaded guilty, and judgment was entered upon such plea.

In this connection section 828 provides as follows:

"For making dockets and indexes, issuing venire, taxing costs and all other services, on the trial or argument of a cause where issue is joined and testimony given, three dollars."

For like services "in a cause where issue is joined, but no testimony is given, two dollars."

For like services "in a cause which is dismissed or discontinued, or where judgment or decree is made or rendered without issue, one dollar."

The argument of the government is that as the plea of not guilty, which constituted the issue, was withdrawn, and a plea of guilty subsequently entered, upon which judgment was rendered, the case should be treated as one in which no issue was ever joined, and that the condition in which the case stands when finally disposed of is the criterion for the fee to be charged — in other words, if the case be finally disposed of upon a plea of guilty, regardless of the issue previously joined, the clerk is only entitled to the fee which would have been allowed him if no issue had ever been joined.

While we have held that a docket fee is not taxable until the case is finally disposed of, *United States* v. *McCandless*, 147 U. S. 692, 694, ¶ 3, we are still of the opinion that the clerk's right to the docket fee as upon issue joined attaches at the time such issue is in fact joined, and is not lost by the subsequent withdrawal of the plea which constituted the issue. Even when the clerk is allowed three dollars, there is no requirement that judgment shall be entered upon the issue, but

only that testimony shall be given, the only difference between the first and second paragraphs being that testimony must be taken to entitle the clerk to three dollars, while, where none is taken, he is entitled to two dollars. If the position of the government be sound it would seem to follow that, if the defendant plead not guilty and a jury trial be had, and the jury disagree, or, before verdict actually rendered, the defendant withdraw such plea and enter a plea of guilty, the clerk is entitled to no more than he would have been if the defendant had pleaded guilty upon first being arraigned. We think this could not have been the design of the statute.

3. The next item differs from the last only in the fact that, after issue was joined, the case was subsequently discontinued upon *nol. pros.* entered. Literally it falls within the third paragraph of a cause "dismissed or discontinued"; but, we think that clause applies only to those cases where the case is dismissed or discontinued before issue has been joined, and that, as in the previous case, the clerk's right to the larger docket fee attaches at the time issue is joined. There is somewhat more doubt as to the construction of this paragraph than the last; but upon the whole we think that it was the design of the statute to allow the larger docket fee in every case where issue was joined in the course of the proceedings.

4. Objection is made to a folio charge for making a record of the names of jurors with their residences, as drawn by the jury commissioner. In the case of *United States* v. *King*, 147 U. S. 676, 678, we held that the statute creating jury commissioners, act of June 30, 1879, c. 52, 21 Stat. 43, did not make the clerk of the court such commissioner, although it required him to act with the commissioner in selecting the names of jurors, and placing them in the jury box; and that a new duty was thereby imposed upon him as clerk, for which no compensation was provided by law. The question in that case was whether the clerk was entitled to a per diem fee of five dollars for services in selecting jurors, in analogy to the compensation allowed to the jury commissioner; and it was held that he was not. But it was not intended in that case to hold that the clerk was bound to forego any of his ordinary

fees as clerk, simply because he was aiding the jury commissioner in the performance of a new duty; and it seems to us that if the practice in that court requires the clerk to make a record of the names of jurors with their residences, or to do any other incidental work, in connection with the names of the jurors drawn, he is entitled to charge for that as for "making a record." It does not appear that a list of the jurors with their residences is strictly a part of the records of the court; but assuming that such list is required to be made by the order or the practice of the court, and posted up in the clerk's office, or preserved in the files, and no other method of compensating the clerk is provided, we think it may be properly charged for by the folio.

5. The final objection of the government is made to an item for entering an order of court, directing the clerk as to what disposition to make of the money received for fines in certain cases, and for filing thirteen certificates of deposit of the bank for fines paid in to the credit of the Treasurer of the United States. The claim of the government is that the statutory fee of one per cent. "for receiving, keeping and paying out money in pursuance of any statute, or order of court," covers all incidental services in this connection, including the entry of all orders for the payment of the money, and a filing of all receipts given by the persons to whom it is paid.

We think, however, the commission of one per cent. was intended to compensate the clerk for his services and responsibility in the receipt, the safe-keeping and the proper disbursement of the money, and was not intended to deprive him of fees to which he would have been entitled if the money had been kept and disbursed by another officer. As the charge seems to be equitable, and has the sanction, not only of the Court of Claims, but of several other courts, we are not disposed to disturb it. *Goodrich* v. *United States*, 42 Fed. Rep. 392, 394; *Van Duzee* v. *United States*, 48 Fed. Rep. 643, 646.

It results that, for the error of the Court of Claims in respect to the first item, its judgment must be

Reversed, and the case remanded for a new judgment in conformity to this opinion.

SALTONSTALL *v.* BIRTWELL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 257. Argued April 24, 27, 1896.—Decided October 26, 1896.

In 1888, when the goods were imported to recover back the duties paid upon which this action was brought, a right of action accrued to an importer if he paid the duties complained of in order to get possession of his merchandise, and if he made his protest, in the form required, within ten days after the ascertainment and liquidation of the duties.

In October, 1888, Joseph Birtwell brought an action in the Circuit Court of the United States for the District of Massachusetts, against Leverett Saltonstall, collector of the customs for the revenue district of Boston, to recover excess of duties paid under protest on importations. The trial resulted in a judgment for Birtwell, which was brought on error to this court, where the same was reversed and the case was returned to the Circuit Court for a new trial. 150 U. S. 417.

In June, 1894, the case was again called for trial in the Circuit Court, and again resulted in a judgment for Birtwell. The case then went, by writ of error, to the United States Circuit Court of Appeals for the First Circuit, which court affirmed the judgment of the Circuit Court.

In April, 1895, the cause was removed into the Supreme Court by virtue of a writ of *certiorari*. The return to the writ set forth a stipulation between the counsel for the respective parties that the certified copy of the record of the cause in the Circuit Court of Appeals for the First Circuit, on file in the Supreme Court, should be treated as the return to the writ. That record discloses that, at the trial in the Circuit Court, the following proceedings took place:

"It is hereby agreed that trial by jury may be waived in the above-entitled case, and that the same may be tried and determined by the court without the intervention of a jury, as

provided in sects. 649 and 700 of the Revised Statutes of the United States.

"J. P. TUCKER,
"*Attorney for Plaintiff.*
"SHERMAN HOAR,
"*Attorney for Defendant and United States Attorney.*

"Issue being joined, this cause came on to be heard by the court, the Honorable Le Baron B. Colt, Circuit Judge, sitting.

"On October 2, 1894, at the time of the hearing the following admission on the part of the defendant is filed:

"It is hereby admitted that the 432 pieces of iron and the four pieces of iron — the proper classification of which for duty under the tariff act of March 3, 1883, is in question in the above-entitled case — are for the purposes of this case, and for this case alone, 'manufactures not specially enumerated or provided for in' said 'act, composed wholly of iron,' within the meaning of schedule C (paragraph 216, Treasury Compilation) of said act, and are subject to duty under said paragraph at the rate of forty-five per centum ad valorem.

"This admission as to the classification and nature of said pieces of iron is made to apply to this case and to this case alone, and the United States and the defendant are not to be estopped or prejudiced thereby in any other case whatsoever.

"SHERMAN HOAR,
"*United States Attorney.*

"At the same time the following motion for finding is filed by defendant:

"The defendant moves the court to rule that on all the evidence in this case, including the written admission of the defendant now on file in said case, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he paid to the defendant under protest, and for the purpose of obtaining his merchandise, according to the provisions of law in

force at the time of his importation, the duties he now seeks to recover.

"And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he complied with the provisions of law relative to protest, in force at the time of his said importation.

"And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case.

"And the defendant moves also that the court find generally for him.

"SHERMAN HOAR,
"*United States Attorney.*

"Said motion is thereupon overruled by the court and judgment ordered to be entered for the plaintiff.

"On the thirteenth day of October the following findings of fact are filed by the court:

"The court finds the following facts:

"1. That on Feb. 27, 1888, the plaintiff, Joseph Birtwell, imported ex steamship 'Jan Breydel,' from a foreign country into the port of Boston, and entered at the custom-house at said port, certain iron, described in the entry as '432 pieces in manufactures of iron for the third floor of the Boston court-house,' drilled and fitted complete, as required by plan, and painted.

"2. That on the fourteenth day of March, 1888, the said plaintiff imported ex steamship 'Petre De Connick,' from a foreign country into port of Boston, and entered at the custom-house in said Boston, certain iron, described in the entry as '4 riveted girders in iron, complete framing of third floor of Boston court-house.'

"3. That the defendant, collector of said port of Boston, estimated the duties on both of said importations under the provision of schedule C of the tariff act of March 3, 1883, which reads as follows: 'Iron or steel beams, girders, joists,

angles, channels, car-truck channels, TT, columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound.'

"4. That on Feb. 29, 1888, subsequently to said estimation of duties, for the purpose of obtaining said 432 pieces of iron, the plaintiff paid duties thereon at the rate exacted by the defendant, amounting to the sum of $2889.29.

"5. That on March 14, 1888, subsequently to said estimation of duties, for the purpose of obtaining said four pieces of iron, the plaintiff paid duties thereon at the rate exacted by the defendant, amounting to the sum of $166.75.

"6. That the plaintiff actually obtained said 432 pieces of iron and said four pieces of iron at the time when he paid the estimated duties thereon, respectively.

"7. That on the fourth day of April, 1888, the defendant collector liquidated the duties on said 432 pieces of iron at the same rate and under the same provisions of law at which he had estimated said duties; and on the tenth day of April, 1888, said collector liquidated the duties on said four pieces of iron at the same rate and under the same provisions of law at which he had estimated said duties.

"8. That on the fourth day of April, 1888, the plaintiff filed with the defendant collector a protest in writing, setting forth distinctly and specifically the grounds of his objection to the rate of duty at which the duties on said 432 pieces of iron had been liquidated by the defendant collector; and on the tenth day of April, 1888, the plaintiff filed with the defendant collector a protest in writing, setting forth distinctly and specifically the grounds of his objection to the rate of duty assessed by the collector upon said four pieces of iron, and in each of said protests the plaintiff claimed that said 432 pieces of iron and said four pieces of iron, respectively, were dutiable under that portion of schedule C of the tariff act of 1883, which is in the words following: 'Manufactures, articles or wares not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, cop-

per, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per cent. ad valorem;' and these protests were the only written protests filed by the plaintiff with the defendant in this case.

"9. The plaintiff took an appeal from the decision of the defendant collector on both the said importations to the Secretary of the Treasury within due time, and the Secretary of the Treasury having sustained the defendant collector in both cases, the defendant brought this suit in due time, and filed with the attorney of the defendant a bill of particulars in compliance with the requirements of section 3012 of the Revised Statutes of the United States.

"10. I find as a fact that in connection with his testimony as to making entries of said importations the plaintiff testified: 'I deposited what they demanded under protest.'

"11. On the question of the nature and dutiable character of said 432 pieces of iron and said four riveted girders of iron, there being on record in said case an admission of the defendant in the following language:

"'It is hereby admitted that the 432 pieces of iron and the four pieces of iron — the proper classification of which for duty, under the tariff act of March 3, 1883, is in question in the above-entitled case — are for the purposes of this case, and for this case alone, "manufactures not specially enumerated or provided for in" said "act, composed wholly of iron," within the meaning of paragraph 216 of said act, and are subject to duty under said paragraph at the rate of forty-five per centum ad valorem.

"'This admission as to the classification and nature of said pieces of iron is made to apply to this case and to this case alone, and the United States and the defendant are not to be estopped or prejudiced thereby in any other case whatsoever;' I find that said 432 pieces of iron and said four pieces of iron were dutiable at the rate of forty-five per centum ad valorem, as claimed by the plaintiff.

"12. The value of said 432 pieces of iron was $2647; the value of said four pieces of iron was $216; and the excess of

duties paid over duties due is, on said 432 pieces of iron, $1698.14, and on said four pieces of iron, $69.55.

"13. The court finds that the plaintiff is entitled to recover the sum of $1767.69, and interest from the date of the writ and costs.

"LE BARON B. COLT,
"*Circuit Judge.*

"On the same day the following bill of exceptions is allowed and ordered to be filed:

"This was an action to recover the amount of certain duties alleged to have been illegally exacted of the plaintiff by the defendant, collector of the port of Boston, upon certain pieces of iron imported by the plaintiff into said port in the year 1888. The pleadings in the case are hereby referred to and made a part of this bill of exceptions. The parties, by their attorneys of record, filed with the clerk a stipulation in writing, waiving a jury. This case came on to be heard before the Honorable Le Baron B. Colt, Circuit Judge, at the May term, 1894.

"The court made thirteen special findings of fact, which are hereby referred to and made a part of this bill of exceptions.

"Joseph Birtwell, the first witness called by the plaintiff, testified that on February 27, 1888, he imported from Antwerp by the steamship Jan Breydel, into the port of Boston, and entered at the custom-house at said port, 432 pieces of manufactures of iron; and that on the fourteenth day of March, 1888, he imported from Antwerp by the steamship Petre De Connick, into said port of Boston, and entered at the custom-house at said port, four riveted girders.

"By agreement of counsel, naval office copies produced by the witness Birtwell of the entries of said two lots of iron, and triplicate copies of the consular invoices thereof offered by him in evidence, were admitted in lieu of the originals, or collector's copies.

"The witness Birtwell then further testified that on the date of importation and entry, in the case of each of said two

lots of iron, the defendant collector estimated the duties thereon at one and one-quarter cents per pound, and the third finding of fact of said Circuit Court shows that said estimation was under that provision of schedule C of the tariff act of March 3, 1883, which reads as follows: 'Iron or steel beams, girders, joists, angles, channels, car-truck channels, TT, columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound.' He further testified that on February 29, 1888, for the purpose of obtaining said 432 pieces of iron, he paid the duties estimated thereon by the defendant collector, amounting to the sum of $2889.29, and that on March 14, 1888, for the purpose of obtaining said four riveted girders, he paid the duties estimated thereon by the defendant, amounting to the sum of $166.75, and that he actually obtained said 432 pieces of iron and said four riveted girders at the times when he paid the estimated duties thereon, respectively.

"From one of the entries referred to above, offered by the plaintiff and received in evidence, it appeared that the defendant collector liquidated the duties on said 432 pieces of iron on the fourth day of April, 1888, at the same rate and under the same provisions of law at which he had estimated said duties; and from the seventh finding of fact of said Circuit Court, it appears that on the tenth day of April, 1888, the defendant collector liquidated the duties on said four riveted girders at the same rate and under the same provisions of law at which he had estimated said duties.

"The examination of the witness Birtwell was then suspended, and the plaintiff called Miss Clara Kenrick. She testified that she had for many years been the protest clerk in the custom-house at the port of Boston, and was said clerk during the year 1888, and that it was her duty to receive and care for protests filed by importers against the rate of duty exacted by the collector of said port upon their importations of merchandise.

"The entries of the plaintiff of the two lots of merchandise

in question, referred to above, were then shown to Miss Kenrick and identified by her as naval office copies of the entries made by the plaintiff of the two lots of merchandise in question, and the stamps thereon, showing the dates of payment of the estimated duties and of the liquidation, were explained by the witness, corroborating the witness Birtwell, to mean what has been stated above.

"The witness was then asked: 'What is understood by the custom-house clerks as the liquidation of an entry?' She testified: 'Well, the duties are figured on the entry and the entry goes to the naval office for examination, then comes back to another clerk, who puts the stamp on — "liquidated" — and completes the liquidation.'

"Two papers were then handed to the witness by the attorney for the plaintiff, and she was asked if there was anything upon them to show when they were filed at the custom-house. She testified that there were stamps upon each of said papers indicating the dates, respectively, at which they were received at the custom-house. She further testified that the date upon one of the papers which related to the plaintiff's importation of said 432 pieces of iron by the steamship Jan Breydel was April 4, 1888, and that the date upon the other paper which related to the plaintiff's importation of said four riveted girders by the steamship Petre De Connick was April 10, 1888, and she testified that said papers were the protests in writing filed by the plaintiff with the defendant collector against the rate of duty exacted by him upon said importations.

"She was then asked the following question by the counsel for the plaintiff: 'What were your duties in relation to protests filed at that time, so far as the time within which and when they should be filed was concerned?' The question was objected to by the counsel for the defendant, but the court overruled the objection and permitted the witness to answer, and the defendant then and there duly excepted.

"The answer of the witness to said question was as follows: 'The instructions of the department as to when protests should be received have varied from time to time. At some times we have been instructed to receive them at any time from the

date when the entry was made up to the end of ten days after liquidation. At other times we have been instructed to receive them only within ten days after liquidation.'

"The witness was then asked by the counsel for the plaintiff the following question: 'Can you, from your memory, tell which of those practices was in vogue at this time in 1888?' Her reply was, 'I think the last one.' The witness then testified further that she was the clerk who received protests; that she made certain entries in a book regarding them, giving the place from which the goods were imported, the date when the protests were received, the name of the importer, and the subject of the protest and appeal; the name of the vessel, the date of entry, whether the entry is duty paid or bonded, the date of liquidation and the date of filing the protest and appeal, and then it was her duty to send the protest to the deputy collector of customs; that the protests were required to be filed in duplicate, and that the original protest and appeal are sent to the deputy collector of customs and the duplicate protest retained by the witness; and that the original protest and appeal are afterwards sent by the deputy collector to the Secretary of the Treasury at Washington; that in some cases the deputy collector of customs sent protests to the appraisers and did not send protests to the Secretary of the Treasury, unless the report of the appraisers confirmed the decision of the collector, and that the decision of the Secretary of the Treasury upon protests and appeals is sent to the collector of customs from whom they have been received.

"The witness then identified two papers as the appeals to the Secretary of the Treasury filed by the plaintiff with the defendant collector in the matter of the decision of the defendant as to the rate of duty chargeable upon defendant's [?] said two importations.

"Up to this point the papers containing the protests and appeals referred to above had not been formally offered in evidence by the plaintiff. Counsel for the plaintiff then formally offered in evidence the two papers identified by the witnesses Birtwell and Kenrick as the protest filed by the plaintiff with the defendant collector against the rate of duty

Statement of the Case.

exacted by the defendant upon the plaintiff's said two importations of iron.

"The papers were objected to by the attorney for the defendant on the ground that, from the testimony in the case and from the dates stamped upon said papers, it appeared that they had been filed by the plaintiff with the defendant collector too late to be good and valid protests under the law in force at the time of said importations; but the court overruled the objection and admitted the papers, whereupon the defendant then and there duly excepted.

"It is not deemed necessary to set out said two papers verbatim, inasmuch as the only objection to their admission was the objection just stated, it being conceded by the defendant that said papers complied with the provisions of law regarding protests in all respects, except the time at which they were filed with said defendant collector. Miss Kenrick then gave further testimony which, however, is not material for the purpose of this bill of exceptions.

"At this point the defendant placed on file an admission in writing in the words following:

"'It is hereby admitted that the 432 pieces of iron and the four pieces of iron — the proper classification of which for duty under the tariff act of March 3, 1883, is in question in the above-entitled case — are for the purposes of this case and for this case alone, "manufactures not specially enumerated or provided for in" said "act, composed wholly of iron," within the meaning of schedule C (paragraph 216, Treasury Compilation) of said act, and are subject to duty under said paragraph at the rate of forty-five per centum ad valorem.

"'This admission as to the classification and nature of said pieces of iron is made to apply to this case and to this case alone, and the United States and the defendant are not to be estopped or prejudiced thereby in any other case whatsoever.'

"The four pieces of iron referred to in said admission are what are referred to herein as four riveted girders.

"On cross-examination, the witness Kenrick testified that she had no personal knowledge whatever in regard to the

practice at any time at other ports than the port of Boston in the matter of the time of receiving protests.

"The examination of the witness Birtwell was then resumed, but his further testimony contained nothing material for the purpose of this bill of exceptions.

"Upon the conclusion of the plaintiff's evidence, and after the plaintiff had rested, the counsel for the defendant stated that he had no evidence to offer on behalf of the defendant, and thereupon rested.

"The counsel for the defendant then filed a motion in writing in the words following:

"'The defendant moves the court to rule that on all the evidence in this case, including the written admission of the defendant now on file in said case, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he paid to the defendant under protest, and for the purpose of obtaining his merchandise according to the provisions of law in force at the time of his importation, the duties he now seeks to recover;

"'And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case, inasmuch as he has failed to show that he complied with the provisions of law relative to protest in force at the time of his said importations.

"'And said defendant moves the court to rule that on all the evidence in this case, including the aforesaid admission of the defendant, the plaintiff has failed to prove his case.

"'And the defendant moves also that the court find generally for him.'

"The court overruled the motion and the defendant duly excepted.

"This bill of exceptions having been tendered for signature and allowance to the judge presiding at said cause at the same term of court at which said special findings were rendered, and within the time allowed by the court therefor, the same is now hereby signed and allowed as a further statement of

the exceptions taken and reserved by the said defendant at the said trial, and is hereby made a part of the record in the said cause.

"The within bill of exceptions is allowed this twelfth day of October, 1894.

"LE BARON B. COLT,
"*Circuit Judge.*

"Also on the same day the following judgment is entered:

"It is thereupon considered by the court, to wit, Oct. 13, 1894, the Honorable Le Baron B. Colt, Circuit Judge, sitting, that the said Joseph Birtwell, plaintiff, recover of the said Leverett Saltonstall, defendant, the sum of $2433.40 damages and $156.50 costs."

Mr. Attorney General and *Mr. Assistant Attorney General Whitney* for plaintiffs in error.

Mr. J. P. Tucker and *Mr. Edward Hartley* for defendant in error.

Mr. Henry E. Tremain and *Mr. Mason W. Tyler*, by leave of court, filed a brief in behalf of interested parties.

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

This was a suit brought by Birtwell, an importer, against the collector of customs at Boston, to recover certain duties alleged to have been overcharged upon goods imported in 1888.

It is conceded, on the part of the government, that the classification and rate of duty adopted by the collector, and affirmed on appeal by the Secretary of the Treasury, were erroneous, and that the classification contended for by the importer was proper. The plaintiff was accordingly entitled to recover if payment of the duties was made by the importer for the purpose of obtaining possession of his mer-

chandise, and if the protest, which must be made in order to give an importer a right of action against a collector for duties claimed to have been illegally exacted, was made in time, as provided by law.

It was affirmatively found, in the Circuit Court, that the duties were paid by the importer in order to get possession of the goods, and no objection has been urged in this court to the correctness of that finding. The question principally discussed is, whether the plaintiff gave timely and sufficient notice of protest and dissatisfaction with the decision of the collector. The record discloses that when the gross estimates were made, as provided in section 2869 of the Revised Statutes, the importer paid the amounts thereof, and that subsequently, when the duties on the respective invoices were liquidated, protests in writing in the form required were filed.

The United States claim that the protests, to be efficacious, should have been made at or before the time the payments were made according to the gross estimates. This position was overruled by the trial court, 63 Fed. Rep. 1004, and the same view prevailed in the Circuit Court of Appeals. 33 U. S. App. 52.

It is unnecessary, at this time, to enter into a minute examination of the several enactments on this subject, as they have been so frequently and recently discussed in several opinions of this court cited in the arguments of counsel. *Barney* v. *Watson*, 92 U. S. 449; *United States* v. *Schlesinger*, 120 U. S. 109; *Davies* v. *Miller*, 130 U. S. 284, and *Barney* v. *Rickard*, 157 U. S. 352, may be particularly mentioned. Our present task is to apply the conclusions of those cases to the one in hand, and we can add but little to the opinion of the Circuit Court of Appeals.

Without repeating the history of the prior statutes, it is sufficient, for the determination of this case, to advert to the phraseology of sections 2931 and 3011 of the Revised Statutes and of the act of February 27, 1877, c. 69, 19 Stat. 240, 247, respectively as follows:

"SEC. 2931. On the entry of any vessel, or of any merchan-

dise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well as in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive, and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

"SEC. 3011. Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain

an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing and signed by the claimant or his agent was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed."

Section 3011 was, by the act of February 27, 1877, amended as follows:

"Section three thousand and eleven is amended by striking out all after the word 'protest,' in the eighth line, and by adding the words 'and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.'"

Section 3011, as so amended, therefore reads as follows:

"Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

Undeniably, the general purpose of this legislation was to secure to the importer, who, in order to get possession of his merchandise, has paid duties which he alleges to have been in excess of those authorized by law, a remedy in the nature of an action at law to recover back any such excess, and to the United States a notice in writing, setting forth distinctly and specifically the grounds of objection to the amount claimed; and to provide, in respect to time, that such notice must be given within ten days after the ascertainment and liquidation of the duties and that the action must be brought within ninety days after the decision on appeal by the Secretary of the Treasury.

Opinion of the Court.

There is no apparent reason, in the way of advantage or disadvantage to the United States, why the notice or protest should be made at any particular juncture, if made before the appeal to the Secretary.

The moneys paid by the importer, in order that he may get possession of his merchandise, are forthwith paid into the Treasury of the United States, and the function of the protest to warn the government of the fact of dissatisfaction and to commit the importer to a specific statement of the grounds of his objection is equally performed, whether made at the time of such payment or within ten days after the ascertainment and liquidation of the duties.

In *Davies* v. *Miller*, 130 U. S. 284, the contention on the part of the government was that the notice of dissatisfaction with the decision of the collector of customs, required by the act of June 30, 1864, to be given "within ten days after the ascertainment and liquidation of the duties," could not be efficiently given before the final ascertainment and liquidation of the duties as stamped upon the entry. But this court held that the notice might be validly given at any time after the entry of the goods and the collector's original estimate of the amount of the duties, saying:

"The purpose is as well accomplished by giving the notice as soon as the goods have been entered and the duties estimated by the collector as by postponing the giving of the notice until after the final ascertainment and liquidation of the duties have been made and stamped upon the entry. The clause requiring the importer to give such notice 'within ten days after the ascertainment and liquidation of the duties' must, therefore, according to the fair and reasonable interpretation of the words as applied to the subject-matter, be held to fix only the *terminus ad quem*, the limit beyond which the notice shall not be given, and not to fix the final ascertainment and liquidation of the duties as the *terminus a quo*, or the first point of time at which the notice may be given."

We think that the fair and reasonable import of section 2931 and of section 3011, as they stood in 1888, when these goods were imported, was that a right of action accrued to

the importer if he paid the duties complained of in order to get possession of his merchandise, and if he made his protest in the form required, within ten days after the ascertainment and liquidation of the duties.

That Congress, in 1877, amended section 3011, by striking out the provision that the protest should be made and delivered at or before payment, was a legislative declaration that thereafter such provision should not exist or apply.

It is urged that the phrase "under protest," in the first part of section 3011, is inconsistent with this view. But it is not unusual, in a succession of statutes on the same subject-matter, amending or modifying previous provisions, that a word or phrase may remain, although rendered useless or meaningless by the amendments. Such words are merely vestigial, and should not be permitted to impair or defeat the fair meaning of the enactment.

However, we do not think that, in this instance, there is any real inconsistency. The transaction treated of in this legislation is an entire one, beginning with the entry of the merchandise, and continuing through the appraisement, the liquidation of the duties, the payment, the protest, the appeal, to the trial of the action, and may properly be spoken of as one in which the payment is made under protest, or made in a process in which a protest is made. "Payment under protest" means a transaction where protest has been made in accordance with the requirement of section 2931, and not "at or before payment" of the estimated duties.

This view of the subject renders it unnecessary to consider what effect ought to be given, in the case before us, to the practice of the Treasury, either by way of departmental construction or by way of estoppel. Nor do we consider it incumbent on us to consider whether there was error in the Circuit Court, as a matter of practice, in directing judgment upon the special findings in favor of the importer. No such error was assigned in the Circuit Court, or was considered in the Court of Appeals, but it first appeared in the application for the writ of *certiorari*.

Dissenting Opinion: Fuller, C. J., Field, Harlan, Brewer, JJ.

The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is

Affirmed.

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

At common law money unlawfully exacted by a collector of taxes or duties could be recovered back in an action of assumpsit brought against him, but to sustain the action the money must have been paid under duress. Duties are voluntarily paid if paid without objection. The finding in this case that the importer paid for the purpose of obtaining these pieces of iron is no more than would be true in any case, and does not show, in the absence of expressed objection, that the payment of the particular amount was made by the importer *in invitum*.

As construed by this court in *Cary* v. *Curtis*, 3 How. 236, the act of March 3, 1839, c. 82, § 2, 5 Stat. 339, 348, took away the common law right of action to recover moneys paid under duress of goods; but it was restored by the act of February 26, 1845, 5 Stat. 727, the provisions of which were carried forward as § 3011 of the Revised Statutes. The common law action continued as before save that it was subject to certain new restrictions. In the revision of 1873–4, act of February 27,

In the revision of 1873–4, § 3011 read as follows: "Any person who shall have made payment under protest, and in order to obtain possession of merchandise imported for him, to any collector or person acting as collector, of any money as duties when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing and signed by the claimant or his agent was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed."

Protest was required to show that the legality of the demand was not conceded when payment was made, and the words "at or before payment" were merely declaratory and redundant.

June 30, 1864, 13 Stat. 214, c. 171, an act was passed, the fourteenth section of which was carried forward as section 2931 of the Revised Statutes, as follows:

"§ 2931. On the entry of any vessel, or of any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal shall be final and conclusive; and such vessel, or merchandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. No suit shall be maintained in any court for the recovery of any duties alleged to have been erroneously or illegally exacted, until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless the decision of the Secretary shall be delayed more than ninety

days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains."

This act of 1864 added a new restriction, namely, that an action should not lie until a certain proceeding had been prosecuted in the Treasury Department. It did not abolish the common law action but established the rule of the finality of the collector's decision unless appealed from in a certain way. Many reasons existed for this statute, as in addition to the former, such as the doing away with prospective protests and the securing, when the goods were warehoused, of early notification to the government of objections to the duties, if any, instead of being delayed until protest made on payment when the goods were withdrawn; but it is enough that this court has already ruled that sections 2931 and 3011 coexist and must be construed together. *United States* v. *Schlesinger*, 120 U. S. 109, 114. The language of Judge Lowell in *Schlesinger's case* on circuit (13 Fed. Rep. 682, 684) is apposite:

"It is safe to say, I think, that no case has been decided in which, under objection, a plaintiff has ever recovered of a collector, or of any one else, a payment which was not in the legal sense coerced. It is not mentioned in every case because it is one of those familiar facts which are taken for granted. Does the act of 1864, now Rev. Stat. § 2931, change all this? I think not. That act is not an enabling but a limiting and restricting act. It does not purport to tell us when an action may be maintained, but only that the decision of the department shall be final unless certain things be done."

It may be observed that two written protests or notices of specific objections were not generally, if ever, necessary, for the notice required by § 2931 might be given at the time of paying the money

The Revised Statutes did not change the action recognized by the act of 1845, substantially, or relax any of its requirements, and although it is true, as said in *Arnson* v. *Murphy*, 109 U. S. 238, that the specified action was regulated by express statutory provisions, yet the conditions that the pay-

ment must be made under protest and to obtain the goods still remained, and so it has been several times decided. *Porter* v. *Beard*, 124 U. S. 429; *United States* v. *Schlesinger*, 120 U. S. 109.

The question really is, then, whether the restrictions were relaxed by the act of February 27, 1877, 19 Stat. 240. That act is entitled "An act to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia," and declares "that for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, Anno Domini, one thousand eight hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein. . . . Section three thousand and eleven is amended by striking out all after the word 'protest' in the eighth line, and by adding the words 'and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one.'" This made section 3011 read as follows: "Any person who shall have made payment under protest and in order to obtain possession of merchandise imported for him, to any collector, or person acting as collector, of any money as duties, when such amount of duties was not, or was not wholly, authorized by law, may maintain an action in the nature of an action at law, which shall be triable by jury, to ascertain the validity of such demand and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest and appeal shall have been taken as prescribed in section twenty-nine hundred and thirty-one."

This amendment was held by the Circuit Court of Appeals to have revolutionized the law as to the recovery back of moneys voluntarily paid, and to allow payments made without objection to be recovered if grounds of objection were afterwards discovered. And yet the statute, as amended, preserved the express requirement that payments to be recovered back must be made "under protest and in order to obtain possession" of the goods. In other words, the amendment pre-

served so much of the act of 1845 as announced the common law rule and omitted so much as established new restrictions, referring instead to the restrictions of 1864. If the intention had been to change the common law rule the words "under protest" would have been stricken out, and it seems to me a most dangerous and wholly inadmissible rule of construction to treat them as accidentally retained traces of something that had ceased to be. The words "at or before the payment" were omitted, but, as already said, these were merely declaratory and redundant, and that was undoubtedly the reason of the omission. The last clause of section 3011 as amended refers to the notice in writing required by section 2931, and is simply a cross reference to the additional requirement that the Treasury proceeding shall be had before the action is commenced. In my opinion the action remained an action in the nature of a common law action, and governed by the principles of the common law, except as otherwise specifically provided. Indeed section 3011 as it now stands is unambiguous on its face, and does not call for construction unless in respect of the character of the protest; and that need not be considered, as the finding of facts must be taken to mean that no protest at all was made at the time these duties were paid and the pieces of iron obtained by the importer. I cannot accept the conclusion that under this act the importer can recover on a payment not made under duress, and think that such duress cannot be said to exist in the absence of any objection to making the payment.

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

McELROY *v.* UNITED STATES.

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

No. 402. Submitted October 13, 1896. — Decided November 2, 1896.

G., B., H., C., S. and J. were indicted April 16 for assault with intent to kill EM.; also, on the same day, for assault with intent to kill SM.; also, May 1, for arson of the dwelling house of EM.; and, on the same 16th of April, G., B. and H. were indicted for arson of the dwelling house of BM. The court ordered the four indictments consolidated. All the defendants except J. were then tried together, and the trials resulted in separate verdicts of conviction, and the prisoners so convicted were severally sentenced to terms of imprisonment. *Held*, that the several charges in the four indictments were for offences separate and distinct, complete in themselves, independent of each other, and not provable by the same evidence; and that their consolidation was not authorized by Rev. Stat. § 1024.

Such a joinder cannot be sustained where the parties are not the same, and where the offences are in nowise parts of the same transaction, and depend upon evidence of a different state of facts as to each or some of them.

THE case is stated in the opinion.

Mr. William M. Cravens for plaintiffs in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

George McElroy, John C. W. Bland, Henry Hook, Charles Hook, Thomas Stufflebeam and Joe Jennings were indicted in the district Court for the Western District of Arkansas for assault with intent to kill Elizabeth Miller, April 16, 1894, the indictment being numbered 5332; also for assault with intent to kill Sherman Miller, on the same day, the indictment being numbered 5333; also for arson of the dwelling house of one Eugene Miller, May 1, 1894, the indictment being numbered 5334. Three of these defendants, namely,

George McElroy, John C. W. Bland and Henry Hook, were also indicted for the arson of the dwelling house of one Bruce Miller, April 16, 1894, the indictment being numbered 4843. It does not appear that Jennings was tried. The court ordered the four indictments consolidated for trial, to which each of the five defendants duly excepted. Trial was then had and resulted in separate verdicts finding the defendants guilty, and, after the overruling of motions for new trial and in arrest, they were severally sentenced on each indictment to separate and successive terms in the penitentiary, and sued out this writ of error.

The consequence of this order of consolidation was that defendants Stufflebeam and Charles Hook were tried on three separate indictments against them and three other defendants, consolidated with another indictment against the other defendants for an offence with which the former were not charged, while an indictment for feloniously firing the dwelling house of one person on a certain day was tried with an indictment for arson committed a fortnight after in respect of the dwelling house of another person.

Section 1024 of the Revised Statutes is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The order of consolidation under this statute put all the counts contained in the four indictments in the same category as if they were separate counts of one indictment, and we are met on the threshold with the inquiry whether counts against five defendants can be coupled with a count against part of them or offences charged to have been committed by all at one time can be joined with another and distinct offence committed by part of them at a different time.

The statute was much considered in *Pointer* v. *United States*,

151 U. S. 396, 403. In that case the defendant was charged in different counts with two murders alleged to have been committed on the same day and in the same county and district, and moved to quash on that ground, which motion was denied. Before the case was opened to the jury for the government the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. The motion was overruled, and he was required to go to trial upon all the counts. Upon the conclusion of the evidence the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him, but this motion was overruled. The jury found separate verdicts of guilty of each murder as charged in the appropriate count. This court, speaking through Mr. Justice Harlan, said: "While recognizing as fundamental the principle that the court must not permit the defendant to be embarrassed in his defence by a multiplicity of charges embraced in one indictment and to be tried by one jury, and while conceding that regularly or usually an indictment should not include more than one felony, the authorities concur in holding that a joinder in one indictment, in separate counts, of different felonies, at least of the same class or grade, and subject to the same punishment, is not necessarily fatal to the indictment upon demurrer or upon motion to quash or on motion in arrest of judgment, and does not, in every case, by reason alone of such joinder, make it the duty of the court, upon motion of the accused, to compel the prosecutor to elect upon what one of the charges he will go to trial." It was decided that it could not be held from anything on the face of the indictment that the trial court erred or abused its discretion in overruling the defendant's motion to quash the indictment, or his motions for an election by the government between the two charges of murder. The indictment showed that the two murders were committed on the same day, in the same county and district, and with the same kind of an instrument, and these facts justified the trial court in forbearing at the beginning of the trial to compel an election. And when the evidence was closed it appeared

therefrom that the two murders were committed at the same place, on the same occasion, and under such circumstances that the proof in respect of one necessarily threw light upon the other; and that "there was such close connection between the two felonies, in respect of time, place and occasion, that it was difficult, if not impossible, to separate the proof of one charge from the proof of another." As it was apparent that the substantial rights of the accused were not prejudiced by the action of the trial court, we declined to reverse on the ground of error therein.

It will be perceived that the two offences were charged against one and the same defendant, and that the case disclosed such concurrence as to place, time and circumstances as rendered the proof the same as to both, and made the two alleged murders substantially parts of the same transaction.

In the case at bar, the two indictments for assault with intent to kill on April 16, 1894, and the indictment for arson on May 1, 1894, were against all of the defendants, while the indictment for arson committed April 16, 1894, the same day of the alleged assaults with intent to kill, was against three of the defendants and not against the others.

On the face of the indictments there was no connection between the acts charged as committed April 16 and the arson alleged to have been committed two weeks later, on which last occasion the government's testimony, according to the record, showed that the two defendants Charles Hook and Thomas Stufflebeam were not present. The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.

The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offences which might be properly joined, because they were substantive offences, separate and distinct, complete in themselves and independent of each other, committed at different times and

not provable by the same evidence. In cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence, or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offence or restrict the evidence to one transaction. *Young* v. *The King*, 3 T. R. 98, 106; *Reg.* v. *Heywood*, Leigh & Cave C. C. 451; Tindal, C. J., *O'Connell* v. *Reg.*, 11 Cl. & Fin. 241; *Reg.* v. *Ward*, 10 Cox C. C. 42; *Rex* v. *Young*, Russ. & Ry. 280; *Reg.* v. *Lonsdale*, 4 Fost. & Fin. 56; *Goodhue* v. *People*, 94 Illinois, 37; *State* v. *Nelson*, 8 N. H. 163; *People* v. *Aiken*, 66 Michigan, 460; *Williams* v. *State*, 77 Alabama, 53; *State* v. *Hutchings*, 24 S. C. 142; *State* v. *McNeill*, 93 N. C. 552; *State* v. *Daubert*, 42 Missouri, 242; 1 Bish. Cr. Proc. § 259. Necessarily where the accused is deprived of a substantial right by the action of the trial court, such action, having been properly objected to, is revisable on error.

It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts.

Under the third clause relating to several charges "for two or more acts or transactions of the same class of crimes or offences," it is only when they "may be properly joined" that the joinder is permitted, the statute thus leaving it for the court to determine whether in any given case a joinder of two or more offences in one indictment against the same person "is consistent with the settled principles of criminal law," as stated in *Pointer's case.*

It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants

should be affirmed because there is nothing in the record to show that they were prejudiced or embarrassed in their defence by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offences are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defence, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute and did not rest in mere discretion.

Judgment reversed as to all the defendants and cause remanded with directions to grant a new trial and for further proceedings in conformity with this opinion.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM concurred in the reversal as to Stufflebeam and Charles Hook only.

UNITED STATES *v.* McMAHON.

McMAHON *v.* UNITED STATES.

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

Nos. 356, 357. Argued October 21, 1896. — Decided November 2, 1896.

The fees to which a marshal is entitled, under Rev. Stat. § 829, for attending criminal examinations in separate and distinct cases upon the same day and before the same commissioner, are five dollars a day; but when he attends such examinations before different commissioners on the same day he is entitled to a fee of two dollars for attendance before each commissioner.

A special deputy marshal, appointed under Rev. Stat. § 2021, to attend

before commissioners and aid and assist supervisors of elections, is entitled to an allowance of five dollars per day in full compensation for all such services.

The marshal of the Southern District of New York, who transports convicts from New York City to the state penitentiary in Erie County in the Northern District of New York is entitled to fees at the rate of ten cents per mile for the transportation, instead of the actual expense thereof.

A marshal is not entitled to a fee of two dollars for serving temporary and final warrants of commitment.

These were writs of error sued out by both parties, to review a judgment of the Circuit Court of Appeals for the Second Circuit, affirming, except in one particular, a judgment of the Circuit Court for the Southern District of New York for $4843.60 in favor of the petitioner McMahon, for fees and disbursements as marshal for that district, from July 7, 1885, to January 12, 1890. The opinion of the Court of Appeals is found in 26 U. S. App. 687.

The assignments of error filed by both parties are set out in the opinion of the court.

Mr. Assistant Attorney General Dodge for the United States. *Mr. Felix Brannigan* was on his brief.

Mr. Richard Randolph McMahon for McMahon.

Mr. Justice Brown delivered the opinion of the court.

In these cases the government assigns as error —

1. The allowance of a charge of two dollars per day for attending criminal examinations in separate and distinct cases upon the same day; these examinations being on some days all before the same commissioner, and on others before different commissioners. The evidence does not disclose how much of this amount is applicable to each class of cases.

By Rev. Stat. § 829, the marshal is allowed "for attending the Circuit and District Courts, . . . and for bringing in and committing prisoners and witnesses during the term, five dollars a day," and "for attending examinations before a commissioner, and bringing in, guarding and returning prisoners

charged with crime, and witnesses, two dollars a day; and for each deputy, not exceeding two, necessarily attending, two dollars a day." If the fee were two dollars for attending examinations simply, it might well be held that he was entitled to that amount for each examination, though there were a dozen in a single day; but as the allowance is not for each examination but for each day, we think it clear that the marshal is only entitled to a single fee. It is scarcely possible to suppose that he would be allowed but five dollars for attending court, irrespective of the number of cases disposed of or of the number of prisoners brought in and committed, and yet be allowed separate fees in each case before a commissioner, which in the aggregate might be double the amount allowed for attending court. *McCafferty* v. *United States*, 26 C. Cl. 1.

But when a marshal attends examinations before two different commissioners on the same day, we think he is entitled to his fee of two dollars for attendance before each commissioner. In the case of *United States* v. *Erwin*, 147 U. S. 685, we held that a district attorney was entitled to charge a *per diem* for services before a commissioner upon the same day that he was allowed a *per diem* for attendance upon court; and the argument controlling our opinion in that case is equally applicable here. It is true that in that case the charge was for attending before the court and before a single commissioner upon the same day; but where the officer attends before two or more commissioners, who may hold their sessions at a distance from each other, we see no reason why he should not be entitled to a fee in the case of each commissioner.

2. The allowance of two dollars per day to special deputy marshals for attendance before a commissioner on November 2, 1886, "said day being an election day." The finding is that for his service upon this day each deputy marshal received a *per diem* of five dollars. It is not directly found by the Circuit Court that these special deputies were appointed pursuant to Rev. Stat. § 2021, Title XXVI, but as it is so admitted in the briefs of counsel, and as this title makes the

only provision for the appointment of special deputies, we may assume that to be the fact. The duties of such special deputies, who are appointed by the marshal to aid and assist the supervisors of election, are fixed by §§ 2021, 2022 and 2023. They are in general to keep the peace, support and protect the supervisors of the election in the discharge of their duties, preserve order, to arrest and take into custody any person offending against the law, when (§ 2023) "the person so arrested shall forthwith be brought before a commissioner . . . for examination of the offences alleged against him." By § 2031, "there shall be allowed and paid to . . . each special deputy marshal who is appointed and performs his duty under the preceding provisions, compensation at the rate of five dollars per day for each day he is actually on duty, not exceeding ten days."

As it appears by these sections that the attendance of the deputy before the commissioner is incidental to his service in arresting the fraudulent voter and taking him before the commissioner, we think it is covered by the *per diem* provided by § 2031. The allowance of five dollars per day was evidently intended to be full compensation for all services performed by him as such deputy. The assignment is well taken.

3. Exception is also taken to the allowance of fees at the rate of ten cents per mile for transporting convicts from New York City to the state penitentiary in Erie County, in the Northern District of New York, instead of the actual expense of such transportation. By Rev. Stat. § 829, the marshal is allowed "for transporting criminals, ten cents a mile for himself and for each prisoner and necessary guard," with the following exception: "for transporting criminals convicted of a crime in any District or Territory, where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another District or Territory designated by the Attorney General, the reasonable actual expense of the transportation of the criminals, the marshal and the guards, and the necessary subsistence and hire." It appears that no prison in the State of New York has been expressly designated by the Attorney General for the confine-

ment of Federal convicts, but by the state law it is the duty of the keepers of state prisons to receive and keep such convicts, when sentenced to imprisonment therein by any court of the United States sitting within the State. Literally, the service charged for in this case does not fall within the second paragraph of the above section, since it does not appear that there is no penitentiary available within the Southern District of New York, nor does it appear that the penitentiary in Erie County has been designated by the Attorney General for the confinement of Federal convicts.

There are other provisions of law, however, which it is necessary to consider in this connection. By Rev. Stat. § 5540, originally enacted in 1856, "where a judicial district has been or may hereafter be divided (New York was originally a single district, act of September 24, 1789, c. 20, 1 Stat. 73), the Circuit and District Courts of the United States shall have power to sentence any one convicted of an offence punishable by imprisonment at hard labor to the penitentiary within the State, though it be out of the judicial district in which the conviction is had." Moreover, by Rev. Stat. § 5541, originally enacted in 1865, "in every case where any person convicted of any offence against the United States is sentenced to imprisonment for a period longer than one year, the court . . . may order the same to be executed in any state jail or penitentiary within the District or State where such court is held," etc., and by Rev. Stat. § 5542 a similar provision is made where the convict is sentenced to imprisonment and confinement to hard labor.

By a subsequent act of July 12, 1876, c. 183, 19 Stat. 88, amending Rev. Stat. § 5546, convicts "whose punishment is imprisonment in a District or Territory where, at the time of conviction, . . . there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined . . . in some suitable jail or penitentiary in a convenient State or Territory to be designated by the Attorney General," in which case the marshal is only allowed the reasonable actual expenses of transportation, etc.; "but if, in the opinion of the Attorney General, the expense of trans-

portation from any State . . . in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, . . . then it shall be lawful so to confine them therein for the period designated in their respective sentences." We see no reason to suppose that this act was intended to repeal Rev. Stat. §§ 5540, 5541 and 5542, since the act is a mere reënactment of original § 5546, enacted in 1864 (one year *before* § 5541), except that it permits the place of confinement of the convict to be changed, whenever the penitentiary to which he is sentenced becomes unsuitable or unavailable at any time during the term of imprisonment; and by a further clause, permission is given the Attorney General to change the place of imprisonment whenever it is necessary for the preservation of the health of the prisoner, or the place of confinement becomes insecure, or the prisoner is cruelly or improperly treated.

Upon the other hand, it appears to us that it was the intention of Congress that these several provisions should be read together, and that the restriction of the marshal to his expenses of transportation was only designed to apply where the Attorney General has found that there is no available penitentiary within the district, and has designated a prison in another district for that purpose. It does not necessarily follow that, because a portion of his travel was outside his district, he is limited to his expenses, since the first paragraph of § 829, above quoted, is a general provision allowing him mileage with the exception provided for in the next paragraph. As the travel was actually made, the marshal is presumed to have earned his mileage, and the burden is upon the government to show that the transportation falls within the excepted clause. While the authority of the marshal, as such, is confined to his district, it may be lawfully extended by the United States to other districts for special purposes, such, for instance, as the service of a subpœna, for which it has usually been held the marshal was entitled to mileage, though the service was made outside his district.

Sections 5540 to 5542 were apparently designed to apply to cases where the State contains more than one district, while

§ 5546 was probably intended, notwithstanding the use of the words "District or Territory," in the first clause, to apply to the not infrequent cases where there is no suitable penitentiary within the State, in which case the court is authorized to commit the convict to some suitable penitentiary "in a convenient State or Territory, to be designated by the Attorney General." This power has been frequently exercised by courts of the Western States by committing prisoners to penitentiaries in the Northern or Eastern States. Where the penitentiary is located in the same State, it would seem reasonable that the marshal should be entitled to his mileage, though the state prison may happen to be in another district, since it may be in fact quite as near to the place where his court is held, as it is to the place where the court is held in the district of its actual location.

Why these convicts were sent to a penitentiary outside the district in which they were tried does not appear, but we are bound to presume that the action of the court in that particular was taken for a good and sufficient reason, and was dictated by what it conceived to be the best interests of the government. As, under §§ 5541 and 5542, it was within the discretion of the court to sentence the convicts to any penitentiary within the State, the mileage was properly allowed.

4. The last item to which exception is taken by the government is to a charge of two dollars for serving temporary and final warrants of commitment. As the court had previously disallowed a charge of $503 for serving temporary warrants of commitment, the allowance of this item was probably an oversight. In *United States* v. *Tanner*, 147 U. S. 661, we held that the marshal was not entitled to charge for mileage in serving warrants of commitment, upon the ground that he was allowed ten cents mileage for his own transportation and that of his prisoner, and that the delivery of such warrants to the warden of the penitentiary was not a "service" within the meaning of § 829. We have seen no reason to change our views in that particular. The word "service" in this connection ordinarily implies something in the nature of an

act or proceeding adverse to the party served, or of a notice to him, and we think was not intended to cover the case of a warrant deposited with the warden of a penitentiary as a voucher or authority for detaining the prisoner. Moreover, it is scarcely possible that Congress could have intended to allow the marshal ten cents a mile for his own travel when accompanying a prisoner, and at the same time to allow him six cents for carrying the warrant of commitment with him; or to allow him fifty cents for a commitment of the prisoner and also two dollars for serving a warrant of commitment, when the commitment would not be valid without the warrant, and the commitment and service of the warrant are contemporaneous acts. As the *per diem* of the marshal for attendance before the court or commissioner includes "the bringing in, guarding and returning prisoners charged with crime," and as, by § 1030, "no writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney, for which no fee shall be charged by the clerk or marshal," and no such warrant appears to be necessary under the practice in the State of New York, the issue of such warrants, except perhaps the first one, appears to be unnecessary.

In the case of the writ sued out by McMahon the plaintiff assigns as error the action of the Court of Appeals in rejecting a charge for serving temporary warrants of commitment issued by a commissioner; but as this is covered by the point last decided, it is unnecessary to consider it.

It results that in the case of the United States v. *McMahon the judgment of the Court of Appeals must be reversed, and the case remanded for a new judgment in conformity with this opinion.*

PARSONS v. VENZKE.

ERROR TO THE DISTRICT COURT OF RICHLAND COUNTY, STATE OF NORTH DAKOTA.

No. 264. Submitted October 13, 1896. — Decided November 2, 1896.

The action of local land officers on charges of fraud in the final proof of a preëmption claim does not conclude the government, as the General Land Office has jurisdiction to supervise such action, or correct any wrongs done in the entry. *Orchard* v. *Alexander*, 157 U. S. 372, affirmed and followed to this point.

The jurisdiction of the General Land Office in this respect is not arbitrary or unlimited, or to be exercised without notice to the parties interested; nor is it one beyond judicial review, under the same conditions as other orders and rulings of the land department.

The seventh section of the act of March 3, 1891, c. 561, 26 Stat. 1098, providing that "all entries made under the preëmption, homestead, desert-land or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance," refers only to existing entries, and does not reach a case like the present, where the action of the land department in cancelling the entry and restoring the land to the public domain took place before the passage of the act.

On July 25, 1892, the United States issued a patent for the land in controversy to Gustav Venzke, one of the defendants in error. The other defendants in error are his mortgagees. On January 11, 1883, one Willis B. Simpkins made a preemption entry of the land, and received a receiver's final receipt, the land at that time being public and subject to preemption entry under the laws of the United States. On February 8, 1883, he conveyed the land to Charles J. Wolfe, through whom, by foreclosure of a mortgage, plaintiff in error acquired her title.

Statement of the Case.

On September 26, 1884, W. W. McIlvain, a special agent of the land department of the United States, reported to the Commissioner of the General Land Office at Washington, as the result of his investigations, that the preëmption entry of Simpkins had been fraudulently and unlawfully made. Proceedings for an investigation of this charge were ordered before the local land officers. Notice was duly given by publication. Simpkins made no appearance, but the plaintiff in error appeared by attorneys. The investigation was carried on in the local land office and thereafter in the General Land Office at Washington, and the proceedings reviewed by the Secretary of the Interior, the plaintiff in error being a party to all those proceedings. They resulted in a cancellation of the entry on the ground that it had been fraudulently and unlawfully made; and the land was restored to the public domain.

Thereafter Venzke took the proceedings which culminated in the patent; whereupon the plaintiff in error commenced this suit in the District Court of Richland County, North Dakota, to have him charged as trustee of the legal title for her benefit. In that court a decree was entered in favor of the defendants, which, having been affirmed by the Supreme Court of the State, has been brought here on writ of error.

On March 3, 1891, Congress passed an act, c. 561, 26 Stat. 1095, 1098, § 7 of which contains this provision:

"And all entries made under the preëmption, homestead, desert-land or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to *bona fide* purchasers, or incumbrancers, for a valuable consideration, shall, unless, upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance."

Mr. Seth Newman for plaintiff in error. *Mr. S. B. Pinney* and *Mr. J. E. Robinson* were on his brief.

Mr. W. H. Standish for defendants in error. *Mr. S. H. Snyder* and *Mr. Curtiss Sweigle* were on his brief.

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

Counsel for plaintiff in error challenge the power of the Commissioner of the General Land Office or the Secretary of the Interior to cancel and set aside a preëmption entry after the local land officers have approved the evidences offered of settlement and improvement, received the purchase money and issued the receiver's final receipt. They contend that except in certain specified cases, which are not material for consideration here, the action of the local land officers concludes the government, and the General Land Office has no jurisdiction to supervise such action or correct any wrongs done in the entry.

Subsequently to the issuing of the writ of error in this case this precise question was presented to this court, *Orchard* v. *Alexander*, 157 U. S. 372, and the jurisdiction of the land department was affirmed; a jurisdiction not arbitrary or unlimited, nor to be exercised without notice to the parties interested, nor one beyond judicial review under the same conditions as other orders and rulings of the land department.

In this case the entryman was brought in by due publication of notice, and the real party in interest appeared. The contest was carried through the land department, from the lowest to the highest officer, and there is nothing in the record which brings the case within the rules so often laid down for a judicial reversal of the decisions of that department.

Much reliance is placed upon the seventh section of the act of March 3, 1891, *supra*, and it is contended that before any adverse rights were created Congress ratified and confirmed the entry made by Simpkins. We think that statute inapplicable. It was passed long after the action of the land department in cancelling the entry and restoring the land to the

public domain, and when there was no subsisting entry to be confirmed. The theory of the plaintiff in error is that the act applies to all entries which had ever been made prior thereto, whether subsisting or cancelled. But clearly it refers to only subsisting entries. An entry is a contract. Whenever the local land officers approve the evidences of settlement and improvement and receive the cash price they issue a receiver's receipt. Thereby a contract is entered into between the United States and the preëmptor, and that contract is known as an entry. It may be, like other contracts, voidable; and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and while subject to such entry it cannot be appropriated to any other person, or for any other purposes. It would not pass under a land grant, no matter how irregular or fraudulent the entry. When by due proceedings in the proper tribunal the entry is set aside and cancelled, the contract is also terminated. The voidable contract has been avoided. There is no longer a contract, no longer an entry, and the land is as free for disposal by the land department as though no entry had ever been attempted. The term used in the section, "confirmed," implies existing contracts which, though voidable, have not been avoided, and not contracts which once existed but have long since ceased to be. If the act is not limited to existing entries, existing contracts, then it must apply to all entries, all contracts, no matter when made or how long since cancelled, or what rights have been acquired by others since the cancellation. It would apply to an entry cancelled years before, although the land had since been entered and patented to another; and would carry a mandate to the land department to execute a patent to one whose claims had been adjudged fraudulent, and in disregard of the rights created in reliance upon that adjudication. No such intention can be imputed to Congress. The statute, as its language implies, refers only to existing entries, and does not reach a case like the present.

The judgment is

Affirmed.

CENTRAL PACIFIC RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 46. Argued and submitted October 21, 1896. — Decided November 9, 1896.

For several years in succession before the commencement of this action the Central Pacific Railroad Company transported the mails of the United States on its roads. During the same period post office inspectors, commissioned by the department, under regulations which required the railroads "to extend facilities of free travel" to them, were also transported by the company over its roads. During all this period the railroad company presented to the department its claim for the transportation of the mail without setting up any claim for the transportation of the inspectors, and the said claims for mail transportation were, after such presentation, from time to time, and regularly, adjusted and paid on that basis. This action was then brought in the Court of Claims to recover for the transportation of the inspectors. Until it was commenced no claim for such transportation had ever been made on the United States. *Held*, that, without deciding whether the claim of the department that its inspectors were entitled to free transportation was or was not well founded, the silence of the company, and its acquiescence in the demand of the government for such free transportation operated as a waiver of any such right of action.

THE case is stated in the opinion.

Mr. Joseph K. McCammon and *Mr. Charles H. Tweed* for appellant submitted on their brief.

Mr. Solicitor General for appellees.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The Central Pacific Railroad Company owned or leased, and operated numerous railroad lines, which may be generally described as, (1) those which were constructed by the aid of bonds from the United States; (2) lines of the Southern Pacific Railroad Company to which lands were granted by the acts of Congress of July 27, 1866, c. 278, § 18, 14 Stat. 292, and of March 3, 1871, c. 22, § 23, 16 Stat. 573, and the act of July

25, 1866, c. 242, 14 Stat. 239; (3) other railroads constructed without the aid of bonds from the government. All the subsidized portions of claimant's railroads transported for a number of years prior to the filing of this claim many post office inspectors, formerly designated as special agents, travelling on government business, for which services the company has received no pay from the government and never demanded any before making and filing the claim in suit. If the claimant is entitled to be paid therefor, the amount is between twenty-five and twenty-six thousand dollars.

The post office inspectors for whose transportation the claimant now asks compensation were commissioned by the Postmaster General, travelled on the business of the Post Office Department as such inspectors, and were furnished transportation by the claimant upon the production of their commissions, which were in the following form:

"Post Office Department,
"United States of America.

"To whom it may concern:

"The bearer hereof (name of special or inspector) is hereby designated a post office inspector of this department, and travels by my direction on its business. He will be obeyed and respected accordingly by mail contractors, postmasters, steamboats, stages and others connected with the postal service. Railroads, steamboats, stages and other mail contractors are required to extend facilities of free travel to the holder of this commission.

———— ————,
"*Postmaster General.*

"Washington, ——, 188–."

The regulations of the department were during the time such transportation was furnished as follows:

"On routes where the mode of conveyance admits of it the special agents of the Post Office Department, also post office blanks, mail bags, locks and keys, are to be conveyed without extra charge.

"Railroad companies are required to convey, without spe-

cific charge therefor, all mail bags, post office blanks and stationery supplies. Also to convey free of charge all duly accredited special agents of the department on exhibition of their credentials."

The claimant transported these officials for more than six years prior to the filing of this claim, upon the production of their commissions, and made no claim for compensation for such transportation up to the filing of its claims therefor in the Court of Claims. No protest was ever made by or on behalf of claimant to the government, because of this claim for the free transportation of these officials, as contained in their commissions. The Court of Claims, among other facts, found that "it has always been assumed by the Post Office Department that the carriage of inspectors upon the exhibition of their credentials in the form before stated was an acquiescence by the railway companies with the regulations of the department, and that the regulation was a notice to the company that there was no implied agreement on the part of the United States or of the department to pay for the transportation of such inspectors, but that such transportation was to be deemed an incident of their carriage of the mails. That in all cases where written contracts have been made with companies the contracts have provided for the transportation of their agents; but in cases of what are called 'recognized service' — that is, where the companies carry the mails for the compensation fixed by law without express contracts being made — the department has relied upon the regulation, the terms of the commission and the long-established usage to secure the transportation of these officers." The Court of Claims decided that the claimant was not entitled to recover, and dismissed its petition. 28 C. Cl. 427.

The claimant cites some sections in other statutes than those above referred to, as applicable to the different classes of railroads owned or leased by claimant. Section 6 of the act of July 1, 1862, c. 120, 12 Stat. 489, 493, is one of them, and it reads as follows:

"*And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds

at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;)" etc.

Section 11 of the act of July 27, 1866, c. 278, 14 Stat. 292, 297, is another, and it reads as follows:

"*And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

Section 5 of the act of July 25, 1866, c. 242, 14 Stat. 239, 240, is in substance the same as section 6 of the act of 1862 above recited. This section applies to the case of the California and Oregon Railroad, one of the lessees of the claimant.

The argument upon the part of appellant is that by these various sections the government entered into a contract with the claimant to pay for the services rendered, and the claimant agreed to transport the mails at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service, and in the case of the Southern Pacific Railroad, one of the lessees, it was to perform such services subject to such regulations as Congress might impose, restricting the charges for such government transportation. It is urged that under these various sections applicable to the various companies forming the Central Pacific Railroad Company nothing is left to the judgment of or the regulation by the Postmaster General, nor has Congress, at any time, delegated or attempted to delegate to him the right to refuse payment of compensation to any of the railroads for the transportation of government officials; that as to all of claim-

ant's railroads, whether subsidized or unsubsidized, no department of the government is entitled to demand free transportation for any of its officers or employés, and that the regulation of the Post Office Department, demanding free transportation for post office inspectors, is simply void as being an attempt to take private property without just compensation.

It is not necessary in this case to construe the meaning of the various sections of the statutes cited by counsel for claimant. Whether the Post Office Department had or had not the right to demand free transportation for the post office inspectors appointed by the Postmaster General is, in the view we take of this case, beside the question. By the regulations of the Post Office Department, the right was assumed as existing, and the demand contained in the commissions, for free transportation for the holders of the commissions was, when acquiesced in by the company, an acknowledgment on its part of the existence and validity of the right. The company was informed by the contents of the commission that the right of free transportation was claimed, and when it was accorded pursuant to the claim, and no demand made for payment, at the time or for years thereafter until the commencement of this suit, such acquiescence amounts to a clear and conclusive waiver on the part of the company of any right to now demand such payment. If the company intended to deny such right or to dispute the validity of the demand, it should have taken some step to that end at an early date, so that the government might know that its claim was disputed instead of being acknowledged. This was not done. On the contrary, when the demand was made the company acceded to it without objection, the inspectors were transported in accordance with the demands of the government, and no notice whatever given to any one that the company disputed or intended to thereafter dispute the validity of the demand. It cannot be possible that it could silently acquiesce in this claim on the part of the government and continue for years the free transportation of these inspectors, and then suddenly make a demand for payment for their transportation for all that time,

just the same as if it had always disputed the claim and demanded compensation for the transportation.

It is insisted, however, that the principle has been decided in favor of the company in the case of the *Union Pacific Railroad* v. *United States*, 104 U. S. 662. We think the contention is untenable. The case cited was one where the services claimed were of a nature described in section 6 of the act of 1862 (*supra*), and, in the absence of any other fact, the government was clearly liable to pay for them as prescribed in that act. But the government insisted that the rule of compensation allowed under section 6 of the act had been changed by subsequent legislation. It therefore required the company to perform the services and then undertook to pay for them at the reduced rate which the government alleged subsequent legislation called for. The company objected, and this court held that the section alluded to was, in substance, a contract, and that the claim of the government that its terms were altered by subsequent legislation was without foundation, and that the company was entitled to be paid, as prescribed in the sixth section, a reasonable compensation, which if not agreed upon was to be arrived at upon consideration of all the facts material to the issue, not to exceed the amounts paid by private parties. The company at all times disputed the amount of compensation it was entitled to as claimed by the government for services confessedly within the description of section 6, and it never acquiesced in the ruling of the government that the rate had been altered by subsequent legislation, but protested against it. Notwithstanding these facts, the government claimed that the company having performed the services required of it, with notice of the subsequent law, Rev. Stat. § 4002, must be taken to have assented to those terms in spite of its protest, but it was held that the Revised Statutes did not apply, and therefore they did not alter the contract, nor did they give to the Postmaster General any authority to insist that the contract, as evidenced by section 6 of the act mentioned, was not binding. It was stated in the opinion that "as the company, by its terms, was bound to render the service, if required, its compliance cannot be

regarded as a waiver of any of its rights. The service cannot be treated as voluntary, in the sense of submission to exactions believed to be illegal, so as to justify an implied agreement to accept the compensation allowed; for according to the terms of the obligation, which it did recognize and now seeks to enforce, it had no option to refuse performance when required. But it might perform, rejecting illegal conditions attached to the requirement, and save all its rights."

One of the material facts lacking in the case at bar was present in the case cited, viz., the continuous claim on the part of the company as to its right, its ever present dispute with the government in regard to the correctness of the claim, and its protest against the government's construction of the law. Instead of that we have absolute silence on the part of the claimant here for many years and a peaceful acquiescence in the demand made by the government for the free transportation of these officials.

It is also urged that the Court of Claims erred in its finding that the railroad company carried United States mails under the provisions of § 4002, Rev. Stat., and amendatory acts, which services were recognized and payments made therefor from time to time by the defendant under the provisions of said section. It is said that that section does not apply to the case of the Central Pacific company, but that section 6, above mentioned, of the act of 1862 does apply, and counsel cites the case above commented upon of *Union Pacific Railroad* v. *United States*, 104 U. S. 662, as conclusive of that point. It is immaterial, so far as the question in this case is concerned, whether the payments to the company were made under section 4002, or under section 6 of the act of 1862, the material fact being that during all these years the company has presented its accounts to the government for services in the transportation of the mails and for the use of the telegraph, and that it has made no claim in any of these years for compensation for the services described in its petition to the Court of Claims. Whether the services for which the company has been paid were performed under the act of 1862 or under the Revised Statutes, the material fact is that the company has

claimed and been awarded compensation for certain services in connection with the mails, and at the same time has failed to make any charge or claim for services connected with the transportation of post office inspectors. Such omission is further evidence of waiver. We are satisfied that no cause of action arises in favor of the company for compensation for the transportation of post office inspectors upon the facts developed in this case.

The judgment of the Court of Claims was right, and it must be

Affirmed.

SANDY WHITE *v.* UNITED STATES.

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

No. 375. Submitted October 19, 1896. — Decided November 9, 1896.

The record showed an indictment, arraignment, plea, trial, conviction and the following recital: "This cause coming on to be heard upon the motion in arrest of judgment, and after being argued by counsel *pro* and *con*, and duly considered by the court, it is ordered that the said motion be, and the same is hereby denied. The defendant, Sandy White, having been convicted on a former day of this term, and he being now present in open court and being asked if he had anything further to say why the judgment of the court should not be pronounced upon him sayeth nothing, it is thereupon ordered by the court that the said defendant, Sandy White, be imprisoned in Kings county penitentiary, at Brooklyn, New York, for the period of one year and one day, and pay the costs of this prosecution, for which let execution issue." *Held*, that this was a sufficient judgment for all purposes.

Entries made by a jailor of a public jail in Alabama, in a record book kept for that purpose, of the dates of the receiving and discharging of prisoners confined therein, made by him in the discharge of his public duty as such officer, are admissible in evidence in a criminal prosecution in the Federal courts, although no statute of the State requires them.

When a jury has been properly instructed in regard to the law on any given subject, the court is not bound to grant the request of counsel to charge again in the language prepared by counsel, or if the request be given

before the charge is made, the court is not bound to use the language of counsel, but may use its own language so long as the correct rule upon the subject requested be given.

THE case is stated in the opinion.

Mr. J. A. W. Smith for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was indicted in the District Court of the United States for the Southern Division of the Northern District of Alabama for presenting false, fictitious and fraudulent claims against the United States to one A. R. Nininger, a marshal of the United States for the Northern District of that State, for the purpose of obtaining payment of the fees of certain witnesses alleged to have been brought before a United States commissioner for that district, when in truth the witnesses had not attended, and the fees had not been paid. The defendant pleaded not guilty, and upon trial was found guilty as charged in the indictment. The defendant was sentenced to be imprisoned in the Kings county penitentiary, at Brooklyn, New York, for the period of one year and one day, and to pay the costs of the prosecution. He sued out a writ of error from this court, and now assigns three grounds for a reversal of the conviction. First, That there was no judgment upon which the defendant could be properly sentenced; second, the trial court erred in receiving in evidence entries made in a book kept by the jailor, James Morrow; third, the trial court erred in refusing to charge, as requested, in regard to the effect to be given to evidence of good character.

In regard to the first objection, we think it not well founded. The objection seems to be that there is no statement in the sentence showing what the offence is of which the defendant is convicted, and also that the record shows no *judgment* because the language used amounted only to a recital by the clerk as to what the court did, and not to a judgment pro-

nounced by the court as the judgment of the law. The record shows an indictment, arraignment, plea, trial, conviction and the following recital:

"This cause coming on to be heard upon the motion in arrest of judgment, and after being argued by counsel *pro* and *con*, and duly considered by the court, it is ordered that the said motion be, and the same is hereby denied."

"The defendant, Sandy White, having been convicted on a former day of this term, and he being now present in open court and being asked if he had anything further to say why the judgment of the court should not be pronounced upon him sayeth nothing, it is thereupon ordered by the court that the said defendant, Sandy White, be imprisoned in Kings County penitentiary, at Brooklyn, New York, for the period of one year and one day, and pay the costs of this prosecution, for which let execution issue."

This we think was a sufficient judgment for all purposes. The record fully and plainly shows what the offence is, of which the defendant was convicted, and the language used shows that the sentence was the judgment of the court, and of the law, pronounced upon the defendant on account of the conviction upon the indictment. *Pointer* v. *United States*, 151 U. S. 396, 417.

Second. The second alleged error consists in receiving in evidence upon the trial of the case the entries in a book kept by a witness who was the jailor of one of the jails in Alabama. Upon the trial it became necessary to show that one L. W. Andrews, admitted to be a colored man, was neither examined as a witness on the 6th of December, 1892, in Jefferson County, Alabama, before one William H. Hunter, Circuit Court commissioner, nor was he there present on that day. Witnesses who were there and examined on that occasion testified on this trial that Andrews was not examined and was not present before the commissioner on the day mentioned. The government then produced one James Morrow as a witness, who, being sworn, testified that he was jailor of Jefferson County, Alabama, and that he had brought with him a book of dates of receiving in and discharging prisoners from the county jail

of that county. He further testified that according to the entries in the book, L. W. Andrews, colored, was placed in jail under a commitment of W. H. Hunter, United States commissioner, on the 28th day of November, 1892, and that he was in that jail on the 6th day of December, 1892, but that, independently of the record, witness had no distinct recollection of Andrews being in jail on that day. The witness further stated that the book was a book kept by him as jailor, and the entries therein as to said Andrews were made by him in his own handwriting, and that the book was kept by him because, as jailor, he was required to keep such a jail book. The defendant objected to the introduction in evidence of the book or the entries therein, on the ground that there was no law in Alabama requiring such a record to be kept, and it could only be used as a private memorandum to refresh the recollection of the witness. The court overruled the objection, and the defendant duly excepted. The witness then was allowed to and did read to the jury the entries in the book showing that Andrews was in jail on the 6th of December, 1892, and the defendant duly excepted to the ruling of the court allowing such entries to be read.

We think no error was committed by the trial court in thus ruling. It was not necessary that a statute of Alabama should provide for the keeping of such a book. A jailor of a county jail is a public officer, and the book kept by him was one kept by him in his capacity as such officer and because he was required so to do. Whether such duty was enjoined upon him by statute or by his superior officer in the performance of his official duty, is not material. So long as he was discharging his public and official duty in keeping the book, it was sufficient. The nature of the office would seem to require it. In that case the entries are competent evidence. 1 Greenl. Ev. §§ 483, 484.

It is obvious that the nature of the office of jailor requires not only the actual safekeeping of the prisoners committed to his charge, but that in order to the proper discharge of those duties some list should be kept by him or under his supervision showing the names of those received and discharged,

together with the dates of such reception and discharge. If there were a clerk whose duty it was to keep such a book instead of the jailor, then the entries so made by that clerk would be evidence in and of themselves. But the jailor, who was a witness, testified that it was his duty to himself to keep such book, and the entries were, therefore, within the rule in regard to official entries. The sections of the Criminal Code of Alabama cited below show the necessity for the keeping of such a book by the jailor. (Secs. 4537, 4538, 4539, 4555.) In speaking of entries in books which are evidence in and of themselves, Greenleaf, in section 484 (*supra*), mentions many kinds of such entries, and among them he includes prison registers, and cites the cases of *Rex* v. *Aickles*, 1 Leach's Cr. Cas. 4th ed. 438, and *Salte* v. *Thomas*, 3 B. & P. 188, as authority. Those cases hold that the prison books are evidence to prove the period of the commitment and discharge of a prisoner, although the second case holds that the cause of the commitment cannot be thus shown as the commitment itself is the best evidence of the cause. The same principle as to the admissibility of entries made by an official is held in *Evanston* v. *Gunn*, 99 U. S. 660, 665.

The ruling of the trial court was, therefore, correct.

As to the third ground, it appears by the record that the defendant offered to prove his good character for the last twenty years, whereupon the district attorney admitted his good character. All the evidence being in, the defendant prayed the court to charge the jury as follows: "The evidence of good character, when established by the evidence in a case, taken in connection with all the other evidence, may generate a reasonable doubt of the guilt of the defendants." The court refused to give this charge and the defendant excepted. The court in its oral charge said to the jury: "It is admitted in this case that the defendants are men of good character, the law presuming every defendant to have a good character, and the jury may consider such good character and give it such weight as they see proper, under all the evidence in the case that defendant is entitled to a reasonable doubt." Assuming that the request stated the proper rule in regard to

evidence of good character, we are of opinion that the charge as given to the jury by the trial court amounted in substance to the charge as requested.

When a jury has been properly instructed in regard to the law on any given subject, the court is not bound to grant the request of counsel to charge again in the language prepared by counsel, or if the request be given before the charge is made, the court is not bound to use the language of counsel, but may use its own language so long as the correct rule upon the subject requested be given. When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, although the court unnecessarily added that the law presumed every defendant to have a good character. The charge gave the jury the right to give weight enough to the evidence to generate a reasonable doubt of the guilt of the defendant, and a substantial compliance with the request was made, although not in the very words thereof.

The record reveals no error, and the judgment must be

Affirmed.

PRESS PUBLISHING COMPANY *v.* MONROE.

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

No. 489. Submitted October 19, 1896. — Decided November 9, 1896.

In an action between citizens of different States, brought in the Circuit Court of the United States, for the violation of an author's common law right in his unpublished manuscript, and in which the defendant relies on the Constitution and laws of the United States concerning copyrights, and, after judgment against him in the Circuit Court, takes the case by writ of error to the Circuit Court of Appeals, he is not entitled, as of right, to have its judgment reviewed by this court under the act of March 3, 1891, c. 517, § 6.

Statement of the Case.

THIS was an action brought in the Circuit Court of the United States for the Southern District of New York by Harriet Monroe against the Press Publishing Company for the wrongful publication of an unpublished manuscript.

The complaint alleged that the plaintiff was a citizen of the State of Illinois, and a resident in the city of Chicago; and that the defendant was a citizen of the State of New York, a resident in the city of New York, and a corporation created and existing by force of and under the laws of that State, and having its chief place of business in that city, and its business that of editing, publishing, selling and distributing a newspaper called The World.

The complaint further alleged that prior to September, 1892, the plaintiff had composed and written out in manuscript, but had not published, a lyrical ode, the work of her intellect and imagination; that on September 23, 1892, a committee of the World's Columbian Exposition made an agreement with the plaintiff, whereby, for a good consideration, they were licensed by her to use the ode, for the sole purpose of having it read or sung, or partly read and partly sung, on the public occasion of the dedicatory ceremonies of that exposition in the city of Chicago on October 21, 1892; that the general ownership of the literary production, with the right of unlimited publication after that date, remained in the plaintiff; that during the ten days preceding said 23d of September, she delivered to the committee the manuscript of the ode, for the purpose expressed in the agreement of license, and with the injunction that the manuscript should be held secret, in order that the plaintiff's right of property should be preserved inviolate, and especially that premature publication should be avoided; and that the utmost care was taken, both by the plaintiff and by the committee, to prevent or forestall piratical attempts on the part of newspapers; but that the defendant, through its officers and agents, between September 14 and September 23, 1892, surreptitiously obtained from the rooms of the committee the manuscript, or a copy thereof, and sent the same to its office in New York, and, disregarding a protest sent by the plaintiff by telegraph, published in its paper of September 25

the ode, with many errors, making portions of the poem appear meaningless, and with a grotesquely incorrect analysis, calculated to produce a false and ludicrous impression of the work; and that these wrongful acts of the defendant deprived the plaintiff of gains she would otherwise have received from the sale of the ode, and damaged her reputation as an author, and were a wilful, wanton and unlawful trespass upon her rights, and subjected her to shame, mortification and great personal annoyance; and alleged damages in the sum of $25,000.

A motion by the defendant, at the commencement of the trial, to compel the plaintiff "to elect between the two causes of action set forth in the complaint," was denied by the court as immaterial, because the plaintiff's counsel declared in open court that "there is but one cause of action stated in the complaint, to wit, literary piracy of a manuscript before publication, and a violation of a common law right."

At the trial, the plaintiff introduced evidence tending to support the allegations of the complaint (except that no evidence of pecuniary damage was offered) and put in evidence a receipt, signed by the plaintiff, and in these terms:

"Received, Chicago, the 23d day of September, 1892, from the World's Columbian Exposition, one thousand dollars ($1000) in full payment for ode composed by me. It is understood and agreed that said Exposition Company shall have the right to furnish copies for publication to the newspaper press of the world, and copies for free distribution if desired, and also may publish same in the official history of the dedicatory ceremonies: and, subject to the concession herein made, the author expressly reserves her copyright therein."

The plaintiff testified that portions of the ode consisted of lyrical songs intended to be set to music and sung by the chorus, and that the rest was to be read; that a musical composer was engaged to write the music for the portions to be sung, and she gave him permission to publish those portions, because it was necessary for rehearsals by the chorus, and they were published in connection with the music; but that she

never, before the dedication day, gave any permission for the publication or public use of any other part of the poem.

The plaintiff also testified that in May, 1892, she applied to the librarian of Congress for a copyright of the ode, and deposited with him a copy of its title only; and on October 22, the day after the dedicatory ceremonies, and not before, deposited with him two copies of the ode.

At the close of the whole evidence, the defendant moved the court to direct a verdict for the defendant, upon the grounds that the plaintiff had failed to show title to the ode; that she had disposed of her rights of property in the ode to the World's Columbian Exposition; that, in view of the contemplated publication in the newspapers, there could be no valid retention of any copyright; that any newspaper publication was an infringement of the rights of the Exposition, and not of the plaintiff; and that the only reservation in the contract between her and the Exposition was of her copyright, and, in view of the fact that no copyright was taken out until after October 21, there had been no infringement of her copyright; and upon the further grounds "that the plaintiff has failed to make out a cause of action, in that this is an action founded upon a statute which authorizes the maintaining of an action for damages occasioned to the plaintiff, and, in view of the fact that there is no evidence in this case of the plaintiff's having suffered damage, no cause of action has been made out;" and "that the statutes and Constitution of the United States have taken away the common law right, and all remedies, except under the statutes of the United States."

The court overruled this motion, as well as a subsequent motion to instruct the jury accordingly; and instructed the jury as follows:

"The action is not an action of libel. It is an action to recover damages for the alleged violation of the plaintiff's copyright in her unpublished manuscript ode. It is an action for an injury to property.

"Copyright is of two kinds. The first is the common law right of an author or proprietor of an unpublished manuscript

to the possession and control of his or her manuscript, and to direct and control the circulation of the copies which he or she may make or cause to be made for his or her use, prior to the publication thereof. It is the original ownership of the manuscript, and of the copies which the author or proprietor has made for his or her use, before it is given to the public. Statutory copyright is the exclusive right granted by statute to the owner or proprietor of a printed book or other printed publication to publish, print and sell copies of the book or publication, for a specific period of time. If the statutory formalities have been complied with, the right becomes complete upon the publication of the book.

"This case is not one of statutory copyright. While some of the preliminaries to the establishment of such a right had been taken, the right was not complete, and on September 24, 1892, did not exist. On that day, a copy of the unpublished manuscript came into the possession of the defendant. It had not then been published, although typewritten copies had been made for the examination and use of the musical composer, and for the examination of the committee whose duty it was to approve the work. This circulation of copies did not amount to what the law calls publication.

"The exclusive owner or proprietor of an unpublished manuscript has the exclusive right to its possession, and to direct and control its use — the same right which the owner of any other article of personal property has to its ownership and use. The trespasser upon that right is liable in damages."

The court further instructed the jury that the Exposition, by the terms of its contract with the plaintiff, "had the legal right to distribute copies to the newspaper press, and for free publication, before as well as after the day of dedication;" but that, "subject to those concessions, the author reserved her other rights of copyright therein;" and that the plaintiff, upon the evidence in the case, might recover exemplary damages against the defendant.

The defendant excepted to the instructions given, and to the refusal to instruct as requested. The jury returned a verdict for the plaintiff in the sum of $5000, and judgment

was rendered thereon, which was affirmed by the Circuit Court of Appeals. 38 U. S. App. 410. The defendant thereupon sued out the present writ of error, and a motion was now made to dismiss it for want of jurisdiction.

Mr. George H. Yeaman and *Mr. Henry S. Monroe* for the motion.

Mr. John M. Bowers opposing.

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

Of suits of a civil nature, at law or in equity, the Circuit Courts of the United States have original jurisdiction, by reason of the citizenship of the parties, in cases between citizens of different States or between citizens of a State and aliens; and by reason of the cause of action, "in cases arising under the Constitution or laws of United States, or treaties made or which shall be made under their authority," including, of course, suits arising under the patent or copyright laws of the United States. Act of August 13, 1888, c. 866, § 1; 25 Stat. 433; Rev. Stat. § 629, cl. 9. In order to give the Circuit Court jurisdiction of a case as one arising under the Constitution, laws or treaties of the United States, that it does so arise must appear from the plaintiff's own statement of his claim. *Colorado Co.* v. *Turck*, 150 U. S. 138; *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Oregon &c. Railway* v. *Skottowe*, 162 U. S. 490; *Hanford* v. *Davies*, 163 U. S. 273.

From final judgments of the Circuit Court in civil suits an appeal or writ of error lies to this court, or to the Circuit Court of Appeals. It lies directly to this court in any case in which the jurisdiction of the Circuit Court is in issue; and in such case the question of jurisdiction only is certified to and decided by this court. It also lies directly from the Circuit Court to this court in cases involving the construction or application of the Constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States,

or in which the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States; and in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case. Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828; *Horner* v. *United States*, 143 U. S. 570; *Chappell* v. *United States*, 160 U. S. 499.

From final judgments of the Circuit Court in all other civil suits an appeal or writ of error lies to the Circuit Court of Appeals; and the judgments rendered thereon by the Circuit Court of Appeals are final (unless this court, by writ of certiorari or otherwise, orders the whole case to be brought up for its decision) in all cases in which the jurisdiction of the Circuit Court "is dependent entirely upon the parties being aliens and citizens of the United States, or citizens of different States;" as well as in cases arising under the patent laws, or under the revenue laws. In all other civil actions (including those arising under the copyright laws of the United States), if the matter in controversy exceeds $1000, besides costs, there is, as of right, an appeal or writ of error to bring the case to this court. Act of March 3, 1891, c. 517, § 6.

This plaintiff in error, having been defeated in the Circuit Court, did not bring the case directly to this court, as one involving the construction or application of the Constitution of the United States, or upon any other of the grounds specified in section 5 of the act of 1891. But it took the case, under section 6, to the Circuit Court of Appeals, and having been again defeated in that court, now claims, as of right, a review by this court of the judgment of the Circuit Court of Appeals.

The judgment of the Circuit Court of Appeals being made final in all cases in which the jurisdiction of the Circuit Court is dependent entirely upon the parties being citizens of different States, but not final in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1000, the test of the appellate jurisdiction of this court over the case at bar is whether it was one arising under the copyright laws of the United States, or was one in which

the jurisdiction of the Circuit Court wholly depended upon the parties being citizens of different States.

The complaint, alleging that the plaintiff was a citizen of Illinois and the defendant a citizen of New York, and claiming damages in a sum of more than $2000, showed that the Circuit Court had jurisdiction of the case by reason of the parties being citizens of different States. The plaintiff, in her complaint, did not claim any right under the Constitution and laws of the United States, or in any way mention or refer to that Constitution or to those laws; and, at the trial, she relied wholly upon a right given by the common law, and maintained her action upon such a right only. It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Co.* v. *Turck*, above cited, is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals.

The jurisdiction of the Circuit Court having been obtained and exercised solely because of the parties being citizens of different States, the judgment of the Circuit Court of Appeals was final, and the writ of error must be

Dismissed for want of jurisdiction.

FALLBROOK IRRIGATION DISTRICT *v.* BRADLEY.

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

No. 355. Argued January 23, 24, 27, 1896. — Decided November 16, 1896.

In a suit, brought in a Circuit Court of the United States by an alien against a citizen of the State in which the court sits, claiming that an act about to be done therein by the defendant to the injury of the plaintiff, under authority of a statute of the State, will be in violation of the Constitution of the United States, and also in violation of the constitution of the State, the Federal courts have jurisdiction of both classes of questions; but, in exercising that jurisdiction as to questions arising

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under the state constitution, it is their duty to be guided by and follow the decisions of the highest court of the State; (1), as to the construction of the statute; and (2), as to whether, if so construed, it violates any provision of that constitution. *Loan Association* v. *Topeka*, 20 Wall. 655, shown to be in harmony with this decision.

The statute of California of March 7, 1887, to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes, and the several acts amendatory thereof having been clearly and repeatedly decided by the highest court of that State not to be in violation of its constitution, this court will not hold to the contrary.

Davidson v. *New Orleans*, 96 U. S. 97, 104, cited and affirmed to the point that "whenever by the laws of a State or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use.

What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject-matter.

The irrigation of really arid lands is a public purpose, and the water thus used is put to a public use; and the statutes providing for such irrigation are valid exercises of legislative power.

The land which can be properly included in any irrigation district under the statutes of California is sufficiently limited to arid, unproductive land by the provisions of the acts.

Due process of law is furnished, and equal protection of the law given in such proceedings, when the course pursued for the assessment and collection of taxes is that customarily followed in the State, and when the party who may be charged in his property has an opportunity to be heard.

The irrigation acts make proper provisions for a hearing as to whether the petitioners are of the class mentioned or described in them; whether they have complied with the statutory provisions; and whether their lands will be benefited by the proposed improvement. They make it the duty of the board of supervisors, when landowners deny that the signers of a petition have fulfilled the requirements of law, to give a hearing or hearings on that point. They provide for due notice of the proposed

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presentation of a petition; and that the irrigation districts when created in the manner provided are to be public corporations with fixed boundaries. They provide for a general scheme of assessment upon the property included within each district, and they give an opportunity to the taxpayer to be heard upon the questions of benefit, valuation and assessment; and the question as to the mode of reaching the results, even if in some cases the results are inequitable, does not reach to the level of a Federal constitutional problem. In all these respects the statutes furnish due process of law, within the meaning of that term as used in the Fourteenth Amendment to the Constitution of the United States.

This was an appeal from the United States Circuit Court for the Southern District of California. The case is reported in 68 Fed. Rep. 948. The action was commenced in that court by defendants in error, the plaintiffs below, for the purpose of procuring an injunction restraining defendant Tomlins, the collector of the irrigation district, from giving a deed to it of the premises belonging to plaintiff, Mrs. Bradley, based on a sale of her land made by the collector for the non-payment of a certain assessment upon such lands under the act incorporating the irrigation district, and to set aside such assessment, and for other relief.

The following, among other facts, were set up in the plaintiffs' second amended bill in equity: The plaintiffs are aliens and subjects of Great Britain, residing in San Diego County, California. The irrigation district is a corporation organized pursuant to the laws of California, and doing business at Fallbrook, San Diego County. Matthew Tomlins was the collector of the corporation at the time of the commencement of the suit, and it has been doing business as and claims to be a corporation under "An act providing for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes," approved March 7, 1887, as such act has been since amended.

The original act, which is commonly known as the Wright Act, and was so cited by counsel in their arguments, was enacted on the 7th of March, 1887, and will be found in the laws of California, at page 29. It contained 47 sections.

Sections 1, 2, 3 and 4 were amended by an act of March 20,

1891, Laws of 1891, page 142, so as to read as in that act set forth.

Sections 5, 6, 7, 8 and 9 stand as originally enacted.

Section 10 was amended by the act of February 16, 1889, Laws of 1889, page 15, so as to read as in that act set forth.

Sections 11 and 12 were amended by the said act of March 20, 1891, so as to read as in that act set forth.

Sections 13 and 14 stand as originally enacted.

Section 15 was amended by another act of March 20, 1891, Laws of 1891, page 147, so as to read as in that act set forth.

Section 16 remains as originally enacted.

Section 17 was amended by the act of March 11, 1893, Laws of 1893, page 175, so as to read as in that act set forth.

Section 18 was amended by the act of March 21, 1891, Laws of 1891, page 244, so as to read as in that act set forth.

Sections 19, 20 and 21 remain as originally enacted.

Section 22 has been twice amended: (1) by the said act of February 16, 1889, Laws of 1889, page 15: (2) by the said act of March 20, 1891, Laws of 1891 page 147. It now stands as so amended in 1891.

Section 23 was amended by said act of March 20, 1891, Laws of 1891, page 147. It now reads as in that act set forth.

Sections 24, 25 and 26 were amended by the act of March 21, 1891, Laws of 1891, page 244. They now read as in that act set forth.

Section 27 of said act was amended by the act of February 16, 1889, Laws of 1889, page 15. It now reads as so amended.

Sections 28, 29, 30, 31, 32, 33 and 34 stand as originally enacted.

Section 35 was amended by said act of March 20, 1891, Laws of 1891, page 142. It now reads as so amended.

Sections 36, 37, 38, 39, 40 and 41 stand as originally enacted.

Section 42 was amended by the act of March 20, 1891, Laws of 1891, page 142. It now reads as so amended.

Sections 43, 44, 45, 46 and 47 have not been changed.

The material sections of the act, as amended by the other acts just stated, are set forth in the margin herein.[1]

The legislature also passed two acts, approved February 16, 1889, called, respectively, the "Inclusion" and the "Exclusion" act, by which means were provided, in the first

[1] "SEC. 1. Whenever fifty, or a majority of the holders of title or evidence of title, to lands susceptible of one mode of irrigation from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district, under the provisions of this act, and when so organized such district shall have the powers conferred, or that may hereafter be conferred, by law upon such irrigation districts. The equalized county assessment roll next preceding the presentation of a petition for the organization of an irrigation district, under the provisions of this act, shall be sufficient evidence of title for the purposes of this act.

"SEC. 2. A petition shall first be presented to the board of supervisors of the county in which the lands, or the greatest portion thereof, is situated, signed by the required number of holders of title, or evidence of title, of such proposed district, evidenced as above provided, which petition shall set forth and particularly describe the proposed boundaries of such district, and shall pray that the same may be organized under the provisions of this act. The petitioners must accompany the petition with a good and sufficient bond, to be approved by the said board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the bondsmen will pay all the said costs in case said organization shall not be effected. Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of such proposed district lie within another county or counties, then said petition and notice shall be published in a newspaper published in each of said counties. When such petition is presented, the said board of supervisors shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all; and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries: *Provided*, That said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of the said board, be benefited by irrigation by said system be included within such district: *Provided*, That any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application of the owner to said board, have such

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named act, for including lands within an irrigation district which had not been included in the petition when first presented to the board of supervisors; and in the second named act, for excluding from a district already formed some portion of the land which then formed part of such district. An

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lands included in said district. Said board shall also make an order dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth and fifth, and one director, who shall be a freeholder in the division and an elector and resident of the district, shall be elected by each division: *Provided*, That if a majority of the holders of title, or evidence of title, evidenced as above provided, petition for the formation of a district, the board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large. Said board of supervisors shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this act. Such notice shall describe the boundaries so established, and shall designate a name for such proposed district, and said notice shall be published for at least three weeks prior to such election in a newspaper published within said county; and if any portion of such proposed district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots which shall contain the words 'Irrigation District — Yes,' or 'Irrigation District — No,' or words equivalent thereto, and also the names of persons to be voted for to fill the various elective offices hereinafter prescribed. No person shall be entitled to vote at any election, held under the provisions of this act, unless he shall possess all the qualifications required of electors under the general election laws of this State.

"SEC. 3. Such election shall be conducted as nearly as practicable in accordance with the general laws of this State: *Provided*, That no particular form of ballot shall be required. The said board of supervisors shall meet on the second Monday next succeeding such election, and proceed to canvass the votes cast thereat, and if upon such canvass it appear that at least two-thirds of all the votes cast are 'Irrigation District — Yes,' the said board shall, by an order entered on its minutes, declare such territory duly organized as an irrigation district, under the name and style theretofore designated, and shall declare the persons receiving, respectively, the highest number of votes for such several offices to be duly elected to such offices. And no action shall be commenced or maintained, or defence made, affecting the validity of the organization, unless the same shall have been commenced or made within two years after the making and entering of said order. Said board shall cause a copy of such order, duly certified, to be immediately filed for record in the office of the county recorder of each

examination of those acts does not become material in this case.

The plaintiff, Mrs. Bradley, is the owner of certain real estate described in complainants' bill, which is included within

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county in which any portion of such lands are situated, and must also immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie; and no board of supervisors of any county, including any portion of such district, shall, after the date of the organization of such district, allow another district to be formed including any of the lands in such district, without the consent of the board of directors thereof; and from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying in accordance with law, and shall hold such offices respectively until their successors are elected and qualified. For the purposes of the election above provided for, the said board of supervisors must establish a convenient number of election precincts in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such district. In any district the board of directors thereof may, upon the presentation of a petition therefor, by a majority of the holders of title or evidence of title of said district, evidenced as above provided, order that on and after the next ensuing general election for the district there shall be either three or five directors, as said board may order, and that they shall be elected by the district at large, or by divisions, as so petitioned and ordered; and after such order such directors shall be so elected."

(Sections 4 to 10, inclusive, provide for the election of officers of the company and for their giving bonds, and are not material here.)

"SEC. 11. On the first Tuesday in March next following their election, the board of directors shall meet and organize as a board, elect a president from their number and appoint a secretary, who shall each hold office during the pleasure of the board. The board shall have the power, and it shall be their duty to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers and employés as may be required, and prescribe their duties; establish equitable by-laws, rules and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purposes of this act. The said by-laws, rules and regulations must be printed in convenient form for distribution in the district. And it is hereby expressly provided that all waters distributed for irrigation purposes shall be apportioned ratably to each land owner upon the basis of the ratio which the last assessment of such owner for district purposes within said district bears to the whole sum assessed upon the district: *Provided*, That any land owner may assign the right to the whole or any portion of the waters so apportioned to him.

the lines of the irrigation district. The bill sets forth the various steps taken under the irrigation act for the purpose of forming the irrigation district, and it alleges the taking of

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"SEC. 12. The board of directors shall hold a regular monthly meeting in their office on the first Tuesday in every month, and such special meetings as may be required for the proper transaction of business: *Provided,* That all special meetings must be ordered by a majority of the board. The order must be entered of record, and five days' notice thereof must, by the secretary, be given to each member not joining in the order. The order must specify the business to be transacted, and none other than that specified must be transacted at such special meeting. All meetings of the board must be public, and three members shall constitute a quorum for the transaction of business; but on all questions requiring a vote there shall be a concurrence of at least three members of said board. All records of the board shall be open to the inspection of any elector during business hours. The board and its agents and employés shall have the right to enter upon any land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary branches for the same, on any lands which may be deemed best for such location. Said board shall also have the right to acquire, either by purchase or condemnation or other legal means, all lands and waters and water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances. In case of purchase, the bonds of the district hereinafter provided for may be used at their par value in payment; and in case of condemnation the board shall proceed, in the name of the district, under the provisions of title seven of part three of the Code of Civil Procedure. Said board may also construct the necessary dams, reservoirs and works for the collection of water for said district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each land owner in said district for irrigation purposes. The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."

(Sections 13 and 14 are not material.)

"SEC. 15. For the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of this act, the board of directors of any such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has

all steps necessary therefor, including the election of officers as provided in the act; that the board of directors submitted to the electors the question, whether a special assessment for

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been exhausted by expenditures herein authorized therefrom, and the board deem it necessary or expedient to raise additional money for said purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of such district possessing the qualifications prescribed by this act, the question whether or not the bonds of said district in the amount as determined shall be issued. Notice of such election must be given by posting notices in three public places in each election precinct in said district for at least twenty days, and also by publication of such notice in some newspaper published in the county where the office of the board of directors of such district is required to be kept, once a week for at least three successive weeks. Such notices must specify the time of holding the election, the amount of bonds proposed to be issued; and said election must be held, and the result thereof determined and declared in all respects as nearly as practicable in conformity with the provisions of this act governing the election of officers: *Provided*, That no informalities in conducting such an election shall invalidate the same, if the election shall have been otherwise fairly conducted. At such election the ballots shall contain the words 'Bonds — Yes,' or 'Bonds — No,' or words equivalent thereto. If a majority of the votes cast are 'Bonds — Yes,' the board of directors shall cause bonds in said amount to be issued; if a majority of the votes cast at any bond election are 'Bonds — No,' the result of such election shall be so declared, and entered of record. And whenever thereafter said board in its judgment deems it for the best interests of the district that the question of issuance of bonds in said amount, or any amount, shall be submitted to said electors, it shall so declare of record in its minutes, and may thereupon submit such questions to said electors in the same manner and with like effect as at such previous election. . . ."

(The remainder of the section provides for the maturing and payment of the bonds, and is not material.)

(Section 16 is not material.)

"SEC. 17. Said bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments, as hereinafter provided. . . ."

"SEC. 18. The assessor must, between the first Monday in March and the first Monday in June, in each year, assess all real property in the district to the persons who own, claim or have the possession or control thereof, at its full cash value. He must prepare an assessment book, with appropriate headings, in which must be listed all such property within the district, in which must be specified, in separate columns, under the appropriate head:

"*First.* — The name of the person to whom the property is assessed. If

$6000 should be made for the purpose of defraying the expenses of organization, and that the electors approved of such assessment and the proper proceedings were thereafter taken

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the name is not known to the assessor, the property shall be assessed to 'unknown owners.'

"*Second.* — Land by township, range, section or fractional section, and when such land is not a Congressional division or subdivision, by metes and bounds, or other description sufficient to identify it, giving an estimate of the number of acres, locality and the improvements thereon.

"*Third.* — City and town lots, naming the city or town, and the number and block, according to the system of numbering in such city or town, and the improvements thereon.

"*Fourth.* — The cash value of real estate other than city or town lots.

"*Fifth.* — The cash value of improvements on such real estate.

"*Sixth.* — The cash value of city and town lots.

"*Seventh.* — The cash value of improvements on city and town lots.

"*Eighth.* — The cash value of improvements on real estate assessed to persons other than the owners of the real estate.

"*Ninth.* — The total value of all property assessed.

"*Tenth.* — The total value of all property after equalization by the board of directors.

"*Eleventh.* — Such other things as the board of directors may require.

"Any property which may have escaped the payment of any assessment for any year shall, in addition to the assessment for the then current year, be assessed for such year with the same effect and with the same penalties as are provided for such current year."

(Section 19 is not material.)

"SEC. 20. On or before the first Monday in August in each year, the assessor must complete his assessment book and deliver it to the secretary of the board, who must immediately give notice thereof, and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than twenty nor more than thirty days from the first publication of the notice, and in the meantime the assessment book must remain in the office of the secretary for the inspection of all persons interested.

"SEC. 21. Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from day to day, as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them, and the board may change the valuation as may be just. The secretary of the board shall be present during its sessions and note all changes made in the valuation of property, and in the names of the persons whose property is assessed, and

by which to assess the property owners, and that plaintiff's, Mrs. Bradley's, assessment amounted to $51.31, which she refused to pay because the act was, as alleged, unconstitutional and void.

The bill further states that the collector then proceeded to enforce the collection by a sale of the land, and did sell it to the irrigation district, but that no deed has been given to the

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within ten days after the close of the session he shall have the total values, as finally equalized by the board, extended into columns and added.

"SEC. 22. The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of —— Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act, in the same manner and with the like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases.

"SEC. 23. The assessment upon real property is a lien against the property assessed from and after the first Monday in March for any year, and the lien for the bonds of any issue shall be a preferred lien to that for any subsequent issue, and such lien is not removed until the assessments are paid or the property sold for the payment thereof."

(Sections 24 to 30, inclusive, provide for collecting the assessments and for the sale of the lands of those not paying, the giving of deeds upon such sale, and for the redemption of the lands so sold and for the character of the deed as to its being *prima facie* evidence, and in some cases conclusive evidence of the regularity of the proceedings, and such sections and the remainder of the act are not material to the present inquiry.)

Statement of the Case.

district by the collector, and an injunction is asked to restrain the execution and delivery of any deed by such collector, because of the alleged invalidity of the act under which the proceedings were taken.

The bill also alleged a proposed issue of bonds to the amount of $400,000, subject to the decision of the electors at an election proposed to be held under the provisions of the act.

Various reasons are set out in the bill upon which are based the allegation of the invalidity of the act, among which, it is stated, that the law violates the Federal Constitution in that it amounts to the taking of the plaintiff's property without due process of law. It is also stated that the act is in violation of the state constitution in many different particulars, which are therein set forth.

The bill also asks that the assessment may be set aside and all the proceedings declared void on the ground of the invalidity of the act itself.

The defendants demurred to the first bill of the complainant and the demurrer was overruled. The complainants were granted leave to serve a second amended bill to which the defendants put in an answer, denying many of the material allegations of the bill, and claiming the entire validity of the act.

The case came on for hearing before the Circuit Judge by consent, upon the second amended bill of complainants, and defendants' answer thereto, and the court gave judgment against the defendants because of the unconstitutionality of the irrigation act, it being, as held, in violation of the Federal Constitution, as the effect of such legislation by the State was to deprive complainants of their property without due process of law. The decision of the Circuit Judge was given for the reasons stated by him in his opinion rendered upon the argument of the demurrer to the bill of complainants, and some of the facts stated in the bill and admitted by the demurrer were denied in the answer subsequently served by the defendants. The sole ground of the decision was, however, the unconstitutionality of the act, as above stated. From

the judgment entered upon the decision of the Circuit Judge the irrigation district appealed directly to this court by virtue of the provisions of § 5, c. 517 of the Laws of 1891, 26 Stat. 826, which give an appeal from the Circuit Court direct to the Supreme Court "in any case that involves the construction or application of the Constitution of the United States"; and also "in any case in which the constitution or law of a State is claimed to be in contravention to the Constitution of the United States."

The case was argued in this court with *Tregea* v. *Modesto Irrigation District*, No. 13, *post*, 179.

Mr. A. L. Rhodes (*Mr. R. Percy Wright*, *Mr. John R. Aitken* and *Mr. Samuel F. Smith* were with him on his brief) for appellants. He cited *Atchinson &c. Railroad* v. *Wilson*, 33 Kansas, 223; *Baltimore & Potomac Railroad* v. *Fifth Baptist Church*, 137 U. S. 568; *Burnett* v. *Sacramento*, 12 California, 76; *Hamilton Bank* v. *Dudley*, 2 Pet. 492; *Central Irrigation District* v. *De Lappe*, 79 California, 351; *Crall* v. *Poso Irrigation District*, 87 California, 140; *Clement* v. *Everest*, 29 Michigan, 19; *Chambers County* v. *Clews*, 21 Wall. 317; *Cleveland* v. *Tripp*, 13 R. I. 50; *Kentucky Railroad Tax cases*, 115 U. S. 321; *Coster* v. *Tide Water Co.*, 3 C. E. Green, 54; *Daily* v. *Swope*, 47 Mississippi, 367; *Dayton Mining Co.* v. *Seawell*, 11 Nevada, 408; *Elmwood* v. *Marcy*, 92 U. S. 289; *Emery* v. *San Francisco Gas Co.*, 28 California, 345; *East Hartford* v. *Hartford Bridge Co.*, 10 How. 511; *Gut* v. *Minnesota*, 9 Wall. 35; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Lux* v. *Haggin*, 69 California, 255; *Madera Irrigation District*, 92 California, 296; *Modesto Irrigation District* v. *Tregea*, 88 California, 334; *Mulligan* v. *Smith*, 59 California, 206; *Mobile County* v. *Kimball*, 102 U. S. 691; *McMillan* v. *Anderson*, 94 U. S. 37; *Oury* v. *Duffield*, 1 Arizona, 509; *Palmer* v. *McMahon*, 133 U. S. 660; *Pittsburgh* v. *Backus*, 154 U. S. 421; *People* v. *Turnbull*, 93 California, 630; *People* v. *Selma Irrigation District*, 98 California, 206; *People* v. *Hagar*, 52 California, 171; *Excelsior Planting Co.* v. *Tax Collector*, 39 La. Ann. 455; *People* v. *Brooklyn*, 4

N. Y. 419; *Quint* v. *Hoffman*, 103 California, 506; *Reclamation District* v. *Gray*, 95 California, 601; *Reclamation District* v. *Turner*, 104 California, 334; *Swamp Land District* v. *Silver*, 98 California, 53; *Stockton & Vigalia Railroad* v. *Stockton*, 41 California, 147; *Spaulding* v. *North San Francisco Homestead Ass'n*, 87 California, 40; *Spencer* v. *Merchant*, 125 U. S. 345; *Tregea* v. *Owens*, 94 California, 318; *Turlock Irrigation District* v. *Williams*, 76 California, 360; *Talbot* v. *Hudson*, 82 Mississippi, 422; *Tide Water Co.* v. *Coster*, 3 C. E. Green, 518; *Williams* v. *School District*, 33 Vermont, 271; *Williams* v. *Detroit*, 2 Michigan, 570; *Wurtz* v. *Hoagland*, 114 U. S. 606.

Mr. Benjamin Harrison for appellants.

Mr. William D. Guthrie and *Mr. Clarence A. Seward*, by leave of court, filed a brief on behalf of holders of bonds issued under the irrigation laws of California.

Mr. George H. Maxwell for appellees.

I. The broad question of the power of arid States to carry out a state policy of irrigation is not involved here, and this power will be unimpared, though the Wright Act be unconstitutional. Any State, by the exercise, within well-established constitutional limitations, of its power of general taxation for a public purpose, or of assessment for a local improvement upon lands benefited, may provide for the irrigation of its arid lands. *Regents* v. *Williams*, 9 G. & J. 365.

II. The Wright Act vested in self-constituted petitioners power to determine the expediency, fix the boundaries and thereby control the organization and operations of irrigation districts, and without a hearing to subject private property to burdens of assessment amounting to confiscation, giving to communities power to assess without limit, and without any regard to benefits, for an alleged public use, which is in fact private, the one class of property selected to bear these burdens. No law could so violate natural justice and constitutional rights,

and operate successfully. It is communism and confiscation under the guise of law. *McCulloch* v. *Maryland*, 4 Wheat. 316, 428; *Cullen* v. *Glendora Water Co.*, 39 Pac. Rep. 769.

III. Assessments for local public improvements are an exercise of the general power of taxation, but are controlled by principles and constitutional limitations different from those governing taxation for revenue for governmental purposes. The principle that private property shall not be taken for public use without just compensation, which limits the exercise of the power of eminent domain, likewise limits this power of assessment, because such assessments are levied in the exercise of the sovereign power of the people to provide for the general public welfare, and the only ground upon which their levy upon specific property instead of upon the whole public can be justified is that the property assessed is specially benefited, and thus receives compensation for the burdens imposed upon it. *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190, 197; *McCulloch* v. *Maryland*, 4 Wheat. 316, 431; *State* v. *Newark*, 3 Dutcher, (27 N. J. Law,) 185; *Madera case*, 92 California, 296; *Tide Water Co.* v. *Coster*, 3 Green, (18 N. J. Eq.) 518; *Hammett* v. *Philadelphia*, 65 Penn. St. 146; *In re Washington Avenue*, 69 Penn. St. 352; *In re Morewood Avenue*, 159 Penn. St. 20; *Stuart* v. *Palmer*, 74 N. Y. 183; *Raleigh* v. *Peace*, 110 N. Car. 32; *Creighton* v. *Manson*, 27 California, 613; *White* v. *Saginaw*, 67 Michigan, 33; *Birmingham* v. *Klein*, 89 Alabama, 461; *Bridgeport* v. *N. York & N. Haven Railroad*, 36 Connecticut, 255; *Cheaney* v. *Hooser*, 9 B. Mon. 330.

IV. The power of assessment for local public improvements is based upon special benefits to the property assessed, and is limited to property benefited by the improvement, and the assessments must be apportioned according to benefits. Property not benefited by the improvement cannot be subjected to assessments for its construction, and assessments cannot be levied in excess of such benefits. These limitations are the law of the land, established by a long current of judicial decisions, resting upon fundamental principles of natural justice and constitutional government. Under the Wright Act the assessments are not based upon or apportioned according to

benefits. Property not benefited is assessed, and the burdens of assessment are perpetual and not limited to benefits. *Madera case, ubi sup.; In re Market St.*, 49 California, 546; *Sharp* v. *Speir*, 4 Hill, 76; *Macon* v. *Patty*, 57 Mississippi 378, and cases cited; *Stuart* v. *Palmer*, 74 N. Y. 183; *Canal Bank* v. *Albany*, 9 Wend. 244; *In re William and Anthony Streets*, 19 Wend. 678; *In re Flatbush Ave.*, 1 Barb. 286; *In re Morewood Avenue*, 159 Penn. St. 20; *Allegheny City* v. *Western Penn. Railroad*, 136 Penn. St. 375; *Pittsburgh's Petition*, 138 Penn. St. 401; *Hale* v. *Kenosha*, 29 Wisconsin, 599; *Johnson* v. *Milwaukee*, 40 Wisconsin, 315; *Tide Water Co.* v. *Coster*, *ubi sup.* and cases cited; *Kean* v. *Driggs Drainage Co.*, 16 Vroom, (45 N. J. Law,) 91; *Reynolds* v. *Paterson*, 19 Vroom, (48 N. J. Law,) 435; *State* v. *Kearney*, 55 N. J. Law, 463; *Norfolk* v. *Chamberlain*, 89 Virginia, 196; *Hanscom* v. *Omaha*, 11 Nebraska, 37; *State* v. *Ramsey County Court*, 33 Minnesota, 295; *People* v. *Brooklyn*, 23 Barb. 175; *Elwood* v. *Rochester*, 43 Hun, 102; *Clark* v. *Dunkirk*, 12 Hun, 181; *S. C.* 75 N. Y. 612.

V. Benefits to justify assessment must be special, direct, immediate and certain. Under the Wright Act, city and town property, covered with buildings, and permanently devoted to uses excluding the possibility of irrigation, and lands and property incapable of being irrigated, and all improvements on any real property, which are required to be separately assessed, are included in irrigation districts, and assessed for the construction of an irrigation system from which they cannot derive any benefit except such uncertain possibility of collateral, indirect and remote advantage as might result from the irrigation of other property in the neighborhood. Such remote and indirect benefit will not warrant an assessment on any land for a proposed public improvement. *Hanscom* v. *Omaha*, *People* v. *Brooklyn*, and *Clark* v. *Dunkirk*, *ubi sup.; In re Morewood Avenue*, 159 Penn. St. 20; *Friedenwald* v. *Baltimore*, 74 Maryland, 116; *State* v. *Newark*, 3 Dutcher, 185; *In re Fourth Avenue*, 3 Wend. 452; *Thomas* v. *Gain*, 35 Michigan, 155.

VI. The assessments levied under the Wright Act are an exercise of the power of assessment for local improvement, and

their constitutionality must be determined under the principles controlling this power of assessment, as distinguished from principles applicable only to general taxation or eminent domain, or the exercise of the police power or power to regulate a common use or provide for a common improvement among several owners. The decisions sustaining the Wright Act, and the cases cited and arguments advanced in its support, rest upon wrong premises and false reasoning, because they utterly confuse the principles governing these different branches of the exercise of the power of the State, and though conceding the Wright Act to be an exercise of the power of assessment, seek to maintain it under principles and authorities applicable only to general taxation or eminent domain or the police power. *Davidson* v. *New Orleans*, 96 U. S. 97; *Norfolk* v. *Chamberlain*, 89 Virginia, 196; *Hammett* v. *Philadelphia*, 65 Penn. St. 146; *Head* v. *Amoskeag M'f'g Co.*, 113 U. S. 9, 26; *Wurts* v. *Hoagland*, 114 U. S. 606, 614.

VII. The legislature in the exercise of its power of assessment for a local public improvement has power primarily to determine the necessity for the improvement, to determine what property will be benefited thereby, to designate the district within which the assessments are to be collected and to fix the mode of their apportionment; but this power is not without restriction, or in all cases conclusive and beyond judicial control. It is only where the legislature, or the subordinate body to whom its power may be delegated, has exercised its judgment in the determination of a question of fact relating to any of these matters, which has been committed to its discretion, that its action is conclusive, and even then it is not necessarily so if it has acted in an arbitrary, oppressive or fraudulent manner or has in any way acted in excess of its power. Whenever, as is the case of the Wright Act, it appears that a principle of law has been violated, as by the inclusion of lands clearly not benefited, or by the application of a wrong basis of apportionment, the legislative action will be held void by the courts, because in excess of its powers. *Spencer* v. *Merchant*, 125 U. S. 345; *People* v. *Brooklyn*, 23 Barb. 166; *Paulsen* v. *Portland*, 16 Oregon, 450; *Mason* v. *Spencer*, 35 Kansas,

512; *State* v. *Ramsey County*, 33 Minnesota, 295; *Merrill* v. *Humphrey*, 24 Michigan, 170; *Chicago* v. *Burtice*, 24 Illinois, 489; *Atlanta* v. *Gate City Street Railway*, 80 Georgia, 276; *Spring Valley Water Works* v. *San Francisco*, 82 California, 286; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Elwood* v. *Rochester*, 43 Hun, 102; *Hassen* v. *Rochester*, 65 N. Y. 516; *People* v. *Jefferson County*, 55 N. Y. 604; *Graham* v. *Conger*, 85 Kentucky, 582; *Thomas* v. *Gain*, 35 Michigan, 155; *Le Roy* v. *New York*, 20 Johns. 429; *In re Protestant Epis. School*, 75 N. Y. 324; *Masters* v. *Portland*, 24 Oregon, 161.

VIII. The Wright Act violates general principles of constitutional law, by which this court will unquestionably be guided in this case, as it is one of original federal jurisdiction; but these same principles are a part of the general law of the land, and when they are violated in the taking of private property it is taken without due process of law, and its owner is deprived of the equal protection of the law, and may claim the protection of the Federal Constitution, no matter whether the case be one of original federal jurisdiction or an appeal from a state court. *Sharpless* v. *Philadelphia*, 21 Penn. St. 147; *Murray* v. *Hoboken Land & Improvement Co.*, 18 How. 272; *Hurtado* v. *California*, 110 U. S. 516; *Railroad Tax cases*, 13 Fed. Rep. 722; *Davidson* v. *New Orleans*, 96 U. S. 97.

IX. A hearing is essential to due process of law; and whenever an assessment district is to be created by any subordinate legislative body, and assessments are to be levied on lands therein for the construction of a local public improvement, every landowner must have a hearing, at some stage of the proceedings, before the assessment becomes a final charge against his land, at which he may show that his lands are not or will not be benefited by the proposed improvement, or that the assessment against him is not in proportion to benefits or is in excess of benefits; and this hearing must be given as a matter of right, before a tribunal having power and whose duty it shall be to exclude the lands or relieve them from assessment if not benefited, or if the assessments are in excess of or not proportionate to benefits, then to readjust them or declare them invalid; and the landowner cannot be deprived

of this right to a hearing by any determination of the legislature fixing in advance an arbitrary basis of apportionment, with reference to unknown future conditions, as to which the legislature could have had no knowledge upon which to base the exercise of any judgment or discretion in reaching its determination, or by clothing the assessment district in the guise of a public corporation. *King's River Reclamation Dist.* v. *Phillips*, 39 Pac. Rep. 630, 41 Pac. Rep. 335; *Remsen* v. *Wheeler*, 105 N. Y. 573; *People* v. *Henion*, 64 Hun, 471; *Paulsen* v. *Portland*, 149 U. S. 30; *Stuart* v. *Palmer*, 74 N. Y. 183; *Dyar* v. *Farmington*, 70 Maine, 515; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; *Howell* v. *Tacoma*, 3 Wash. 711.

X. It is contended in support of the Wright Act that the hearing before the supervisors, when they are to hear the petition for the formation of the district, affords to the landowner all the opportunity for a hearing to which he is entitled upon the question of benefits, and consequently that the act does not in this respect take property without due process of law. This cannot be so, for the reason that under the provisions of the act as construed by the Supreme Court of California it is practically impossible for any facts to be established at this hearing by any objecting landowner which would give him the right or which would make it the duty of the board, upon the ground that his lands were not benefited, or upon any ground whatsoever, to exclude any lands which had been included in the boundaries of the proposed district as fixed by the petitioners in the petition for its organization.

XI. The radical changes from the Wright Act, which have been made in the irrigation district laws of Nebraska, Idaho and Oregon, which were framed in the light of experience with the practical operations of the Wright Act, strongly support our argument that the unconstitutional features of the Wright Act make it impossible for any such law to operate successfully, and show that these later statutes have sought to eliminate those unconstitutional features of the Wright Act which have given rise to its most grievous oppressions, and

which will work the practical destruction of any law embodying such provisions.

XII. It is a settled principle of universal law, and is the law of the land in this nation, that the right to compensation whenever private property is taken for public use, is an incident to the exercise of that power, and inseparably connected with it. Any attempt of any legislature to levy assessments on property not compensated by special benefits or in excess of such benefits, or not proportionate to benefits, for the purpose of constructing a local public improvement for the general public welfare, is therefore an excess of legislative power, and clearly a violation of the Fourteenth Amendment.

Mr. Joseph H. Choate for appellees.

The constitution of California provides by Art. 1, § 1, that acquiring, possessing and protecting property are inalienable rights; and by § 14, that "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner." Our main contention is that the Wright Act is in violation of the Fourteenth Amendment of the Constitution of the United States, which provides — "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."

We insist that it violates each of these clauses; and, also that, in its treatment of private property, it violates those uniform constitutional provisions for the protection of private property which are found alike in the constitution of California and those of all the other States.

I. Before coming to the special methods pursued in the Wright Act, we submit that any law of any State which sought to accomplish the objects of that act would be obnoxious to the constitutional provisions which we invoke, for that act plainly attempts to provide for the taking of private property for a private use.

In *Bank of Columbia* v. *Okely*, 4 Wheat. 235, the court say,

(p. 244,) "As to the words from Magna Charta incorporated into the constitution of Maryland — [No freeman ought to be . . . deprived of his . . . property but by the judgment of his peers or the law of the land] — after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice."

Whoever, then, undertakes to take away my property must show the authority of law for doing so; not an arbitrary edict of the legislature, but a legitimate exercise of legislative power, as restrained by the established principles of private rights and distributive justice — a law of the land, which does not deny to me the equal protection of the laws.

And further, where money is sought to be taken by the State from an individual by the exercise of the power of taxation in any form, or however that power may be defined, it must be for the purpose of expenditure for a public object or use, and the test of the validity of a law enacted for that purpose must necessarily be the essential character of the direct object of the expenditure proposed. "The incidental advantage to the public, or to the State, which results from the promotion of private interests and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary." *Lowell* v. *Boston*, 111 Mass. 461.

Examining the Wright Act by the light of these principles we find it to be an act to raise a fund by levy upon all the landholders of a given district, whether their lands need irrigating or not, and whether they desire to have them irrigated or not, to be expended in procuring water for the irrigation of all the lands in the district, so as to make it cheaper for those of them who do desire it than if they had to irrigate their own lands at their own individual expense.

The pecuniary relief of such of the landholders is thus the direct and immediate object of the intervention of the State

by the exercise of the power of taxation. This object is as strictly private as it was in any of the famous cases which have condemned similar attempts to wrest money from citizens by force of law for private use, and the resulting benefits to the public are quite as indirect and uncertain as in any of those.

In *Lowell* v. *Boston*, 111 Mass. 454, an act to loan the credit of the city of Boston to individual sufferers by the great fire, to enable them to rebuild, each on his own property, was condemned. In *Loan Association* v. *Topeka*, 20 Wall. 655, this court pronounced against an act of Kansas "to authorize cities and counties to issue bonds for the purpose of building bridges, aiding railroads, water power or other works of internal improvement." In *State* v. *Osawkee*, 14 Kansas, 418, the Supreme Court of Kansas held an act of the legislature of that State authorizing the issue of township bonds to provide means for furnishing destitute citizens with food and with seed to be unconstitutional. The Supreme Court of Maine holds the same doctrine. *Allen* v. *Jay*, 60 Maine, 124. See also *Waterloo Woolen Manufacturing Company* v. *Shanahan*, 128 N. Y. 345; *Shoemaker* v. *United States*, 147 U. S. 282; *In re Niagara Falls & Whirlpool Railroad*, 108 N. Y. 375; *In re Jacobs*, 98 N. Y. 98; *Concord Railroad* v. *Greely*, 17 N. H. 47.

As the present case is plainly governed by the principles laid down in these leading cases, so it is not only distinguishable, but is in its essential nature absolutely distinct from all the classes of cases where local improvements have been held to be for public use, or have been sustained as a just exercise of the police power, or on other special and peculiar grounds. It was in reliance upon those classes of cases that the learned Supreme Court of California maintained the constitutionality of the law, while the United States Circuit Judge, adhering to the cardinal rules already laid down, declared it to be against first principles, and in direct violation of the constitutional prohibition whose protection we invoke.

We do not dispute that the legislature may by taxation or assessment provide for a local public improvement for the

benefit of a portion of the State; nor do we question that the legislature might, in the lawful exercise of this power, provide for the irrigation of arid lands, unproductive without irrigation. The operations of the Wright Act are, however, not limited to such unproductive lands, but include all lands, no matter how fertile or productive; and we deny that the furnishing of a fertilizer for the already productive lands of individual proprietors to make them more productive is or can be, in any possible legal sense, a public improvement; and we deny that the nine-tenths of the people of the locality who are not landholders have or can have any interest in such business, or that they can receive any benefit therefrom other than such as is, upon every principle of law, reason and common sense, strictly indirect, incidental and consequential. This is in the very nature of things. See *Scuffletown Fence Company* v. *McAllister*, 12 Bush, 312; *Anderson* v. *Kerns Drainage Co.*, 14 Indiana, 199; *McQuillen* v. *Hatton*, 42 Ohio St. 202; *Reeves* v. *Wood County*, 8 Ohio St. 333; *In re Niagara Falls & Whirlpool Railroad*, 108 N. Y. 375.

Nor is the contention of the Supreme Court of California aided by calling the unique entity, brought into existence by this statute under the name of Irrigation District, a public corporation. If the essential thing sought to be accomplished is the taking of the property or money of one citizen for the private benefit of another, it matters not whether the agency created for the purpose be called a public or private corporation, or a commission.

A corporation armed with the power to tax for the purpose of converting private grazing or farm lands into vineyards or orchards, with or without the will of the owner, takes private property for purely private uses, by whatever name it may be called.

In *Beach* v. *Leahy*, 11 Kansas, at p. 31, Mr. Justice Brewer, speaking of school districts, lays down the principle that — "The mere fact that these organizations are declared in the statute to be bodies corporate, has little weight. We look behind the name to the thing named. Its character, its rela-

tions and its functions determine its position, and not the mere title under which it passes."

The cases in which the organization of districts for local improvement and the forced contributions of landholders therein by taxation or assessment for the common benefit have been upheld, as a legitimate exercise of legislative power, all differ from this Wright Act in this — that in all those cases there was a common interest, a common necessity or a common benefit, the promotion of which was obviously the direct and immediate object of the proposed expenditure, while here such direct and immediate object is the fertilization by water, at the common expense, of the lands of those owners who desire their lands to be irrigated, the interest of each being absolutely distinct and independent.

The Reclamation District Act differs from the Wright Act in every particular in which we claim the latter to be unconstitutional. In the Reclamation District Act there was no unlawful delegation of legislative power; the object of the act was a purpose in which every landholder had a common interest, and was for the permanent reclamation of lands otherwise not only useless, but a menace to the public health. The Reclamation Act gave the supervisors discretion to act upon the hearing of the petition. Then, too, only the land to be reclaimed was assessed, and that tax was proportionate to the whole expense and to the benefit received. Moreover, the tax was only to be collected by suit, in which any defence going to the validity of the tax could, of course, be set up. In all of these fundamentally important particulars, and others, did the Reclamation Act differ from the Wright Act.

It was said by the court in *Loan Association* v. *Topeka*, and has often been repeated, that, "in deciding whether in the given case the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and proper use of the government, whether state or municipal;" and that "what-

ever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government."

Surely, it will not be pretended that this novel and utterly unique statute was sanctioned by previous use or acquiescence, or ever had a precedent in legislation, or that it approximates in any degree to the exercise of legislative power for a governmental purpose.

The drainage cases, represented by the case of *Wurts* v. *Hoagland*, 114 U. S. 606, well illustrate the force of Mr. Justice Miller's rule just quoted, and are in striking contrast to the case at bar.

The sound and well-reasoned conclusion there, drawn from the early New Jersey cases, is, that "the drainage of large tracts of swamp and low lands upon proceedings instituted by some of the proprietors of the lands, to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health), as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense."

Certainly, the proprietors of adjoining lands, already arable and devoted to the raising of wheat or other grain, or in use for grazing, which they are content and desire to continue to cultivate or use in that way, cannot be brought into the category here instanced by an application of some of their neighbors to compel them to have their lands irrigated in common with the petitioners.

But the court in *Wurts* v. *Hoagland* immediately follows up this statement of the rule applicable to drainage cases by

the further statement that "the case comes within the principle upon which this court upheld the validity of general mill acts in *Head* v. *Amoskeag M'f'g Co.*, 113 U. S. 9."

In that interesting case the court declined to decide or to consider the question whether the erection and maintenance of mills for manufacturing purposes under a general mill act could be upheld as a taking of private property for public use in the constitutional sense, but, after a careful review of the Massachusetts and New Hampshire cases from the beginning, rested the decision on the following proposition: "Upon principle and authority, therefore, independently of any weight due to the opinions of the courts of New Hampshire and other States, maintaining the validity of general mill acts as taking private property for public use in the strict constitutional meaning of that phrase, the statute under which the Amoskeag Manufacturing Company has flowed the land in question is clearly valid as a just and reasonable exercise of the power of the legislature, having regard to the public good in a more general sense, as well as to the rights of the riparian proprietors, to regulate the use of the water power of running streams, which, without some such legislation, could not be beneficially used."

No suggestion, therefore, can be found in the drainage or the mill acts, as interpreted by this court, which will countenance these irrigation acts as the legitimate exercise of legislative power for public or governmental purposes.

The government exercises and grants eminent domain with considerable liberality wherever the public purpose is sufficient to demand it. The most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable. The power is much more like to that of the public police than that of taxation; it goes but a step further, and that in the same direction.

It is this principle upon which the mill acts are based, *Murdock* v. *Stickney*, 8 Cush. 113, and it is analogous to the common law way of necessity. It has nothing to do with public use in the sense that applies to taxation. It rests on

the nature of the property and the fact that there must of necessity be a kind of joint use.

In certain cases, therefore, of arid tracts of land needing only water to render it fruitful, such a power might, perhaps, be invoked by the owners for easements for canals or aqueducts, in order to obtain that water. In such a case a full price is paid by the irrigator for whatever he takes, and no one is deprived of property without an equivalent. But to tax all landowners whether their land is arid or not, whether they will or not, in a district the bounds of which were determined by irresponsible petitioners, is, we submit, a very different matter. In such a case many a landowner may be and is deprived of his property — either in money or land — with no possible remuneration. Under the power of eminent domain he is made to exchange his land for other property, its exact legal equivalent. Under the Wright Act he is made invariably to give it up, because he can in such case, by no possibility, get any legal equivalent; for when his land is gone he can have no irrigation. It is, therefore, the veriest sophistry to seek to uphold this act upon the principles which apply to eminent domain.

The immemorial and universally recognized right of every man to occupy and use his own land for such purposes as he sees fit, provided only that the land itself, or the condition in which he puts it, or the use which he makes of it, does not injure his neighbor, in which indeed the essential right of private property consists, cannot be invaded by his neighbor or by the State for the private benefit of his neighbor, for that is the very thing in which the taking of his property without due process of law consists.

The act here in question really proposes to furnish water as a commodity to the several landholders in the district for use upon their lands, as they may prefer, and cannot be distinguished in principle from an act which should provide for furnishing to the farmers of a district, for use or for sale, guano or other like fertilizers, or trees for planting, with an ultimate view to the promotion of the general prosperity of the neighborhood. Nor can it be distinguished in principle

from an act providing for the erection of farm houses, or farm barns, or fences throughout a district by a forced levy on the landholders under the authority of the State in order to promote the growth of the neighborhood. See *Gaines* v. *Buford*, 1 Dana, 481.

Finally, in dealing in the water as merchandise, the statute here in question bears the distinct form of a statute for private, as distinguished from public, use.

Any landowner — and landowners only — can have it, to use or to sell, but, of course, they cannot be compelled to take or to use it.

In *Jones* v. *Water Commissioners of Detroit*, 34 Michigan, 273, where a tax was levied upon vacant lots for the purpose of raising money to pay for water bonds, the court, in holding the tax invalid, said: "No one can be compelled to take water unless he chooses, . . . and citizens may take it or not as the price does or does not suit them."

But in the Wright Act the citizen is compelled to pay for the water whether he wants it or not. He is to be taxed in proportion to the amount of water which he might have if he chose to use it. So that the benefit does not accrue to the land by the construction of the improvement, but by the use of the improvement which the owner cannot be compelled to make. But in all drainage, reclamation, levee and protection statutes the benefit does accrue to the landowner by the mere making of the improvement. He cannot help being benefited. The same benefit accrues to the public.

We submit, therefore, that the Wright Act does violate the fundamental principles on which the right to the ownership and use of private property rests, takes from the citizen money to expend for the private use of his neighbors, does this without due process of law, and that it exceeds the legitimate authority of the legislature to accomplish the end sought by it, in any form or by any methods.

II. But, assuming for the sake of argument, that the legislature itself might, without exceeding its constitutional powers, map out a district of the State, which did not require irrigation, and enact that it should, nevertheless, be irrigated

at the common expense of the landowners, so as to make it more productive, for their common benefit, and to promote the settlement and prosperity of that section of the State, we submit that it cannot abdicate its own responsibility and reach that result by the means and in the method provided by the Wright Act. That act will be found to involve a delegation by the legislature of the sovereign power of government to private citizens, which is quite as fatal to the act under the constitutional prohibitions, whose aid we invoke, as any other attempt to exceed the constitutional bounds of legislative power.

This brings into view the unique and, as we believe, wholly unprecedented features of the scheme contrived by this act for the oppression of the farmers of California. We think that the statute books of all States and nations outside of California, prior to 1887, will be searched in vain, without finding another such example, and especially in view of the construction which has been given to certain details of this statute by the Supreme Court of California.

The all-important question of the expediency of forming an irrigation district is determined, not by the legislature, nor by any public body or officer, but by the self-constituted body of petitioners, subject only to a vote of the qualified electors of the proposed district, who may or may not have any interest in the lands or the subject-matter, and nine-tenths of whom, as a matter of course, will have no interest. Practically, the vital question of the boundaries of the district is determined in the same way; for the functions of the supervisors in the matter of boundaries are really perfunctory.

As to the petitioners, they must be fifty, or a majority of the landholders of the district proposed by themselves. Thus, according to the construction of the act contended for by its advocates, two landholders, each owning a city lot, may be a majority vested with this power over one proprietor owning ten square miles; or fifty tenants in common of a town lot may institute the proceedings and exercise the vast power involved over five thousand proprietors of vast tracts of land who may have no desire or need for irrigation; for a majority

is only required in the event of there being a less number of proprietors within the district than one hundred, and, if there be five thousand proprietors, a minority consisting of no more than fifty may proceed by petition.

II. The supervisors have no power to determine whether there shall be an irrigation district or not. They cannot reject the petition, but must proceed to establish and define the boundaries, and, although a nominal power is given them to make such changes in the proposed boundaries as they may find to be proper, the proviso substantially nullifies this apparent power, for the proviso declares that they shall not modify the boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by the petitioners, which is susceptible of irrigation by the same system of works applicable to other lands in such proposed district.

In the *Modesto case*, 88 California, 334, 353, the Supreme Court, referring to the clause, "Nor shall any land which will not, in the judgment of the said board, be benefited by irrigation by said system be included within such district," held as follows: "We construe the law to mean that the board may include in the boundaries of the district all lands which in their natural state would be benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots which are thereby rendered unfit for cultivation, at the same time that their value for other purposes may have been greatly enhanced. *So construed*, we can see no objections to the law upon constitutional grounds or grounds of expediency. As to owners of such property, it seems reasonable to assume that they must participate indirectly at least in any benefits the district may derive from the successful inauguration of a system of irrigation; but aside from this the law contains an express provision designed to secure to them a benefit exactly corresponding to any burden to which they may be subjected in that . . . every taxpayer receives a portion of all the water distributed exactly equivalent to his proportion of the total tax levied,

and this water is his to use or to sell as he may elect, so that if his lot is not fit for cultivation he nevertheless gets a full equivalent for the tax assessed to him." The distinction between the words "susceptible of irrigation" in the first portion of the clause and the words "benefited by irrigation by said system," as thus construed, will not be overlooked. It is clear, therefore, that the board of supervisors not only has no power to pass upon the question of the expediency of forming the district, but has no practical power to prescribe its boundaries.

Before considering the legal question involved, the court should consider the practical working of this scheme of irrigation. The scheme may in some cases result in an abundant supply of water. In all cases it will result in an abundant supply of bonds, assessments, liens and sales for non-payment. The provision is for the creation of a nondescript quasi or semi-quasi public corporation for the purpose of managing the irrigation of private property. The board of directors of this corporation may not and probably will not include a single landholder.

Patronage, plunder and bonds without limit are the obvious tendency and result, if not the direct object of the act. Towns and villages, however solidly built, may be included, and practically are included in the districts proposed. The Supreme Court of California has made this remark in regard to districts formed under the Wright Act: "We can imagine the formation of an irrigation district under that statute with its boundaries confined to the limits of an incorporated city, or to those of a Swamp Land District where irrigation would be productive of injury and of no benefit." *Woodward* v. *Fruitvale Sanitary Dist.*, 99 California, 554. In a still later case it said: "The few checks provided by the statute against the reckless or improvident creation of bond liens . . . on all the lands in one of these irrigation districts, largely by the votes of electors who own no part of such lands, should be strictly enforced in favor of the owners of such lands." *Cullen* v. *Glendora Co.*, 39 Pac. Rep. 769.

We submit, with all confidence, that this novel mode of

constituting districts for assessment is an unlawful delegation of legislative power, and is in its very nature one of those exercises of the powers of government, unrestrained by the established principles of private rights and of distributive justice, which this court has declared to be the thing which constitutes the taking of a man's property without due process of law.

The authorities for the proposition upon which we now rely are quite numerous and very emphatic. The leading case, by reason of the ability and high character of the court from which it emanates, is *People* v. *Bennett*, 29 Michigan, 451. The Supreme Court of Michigan there laid it down as a generally recognized principle never to be lost sight of, that, while the law may extend great facilities to persons and communities desirous of becoming incorporated, "yet a compulsory incorporation can only come from direct legislative action, or the action of such persons or bodies as may by the law of the land be vested with sufficient delegated authority to bind the community;" and further held that while it is manifest that one of the first and most vital questions involved in a public corporation is that of boundaries, and while of course it would be natural and for the interest of a compact body of inhabitants to be converted into a village for purposes of government, yet "it would be tyrannical to allow them to determine for themselves what property should be made tributary to their local interests, in which the rest of the town has no concern. . . . But it is not in the power of a legislature to abdicate its functions, or to subject citizens and their interests to the interference of any but lawful public agencies. The judicial power must be vested in courts. Such legislative and local authority as can be delegated at all, must be delegated to municipal corporations or local boards and officers. The definition of corporate bounds is second in importance to no corporate interests whatever. If it can be delegated at all so as to include any but single settlements, it must be delegated to somebody recognized by the constitution as capable of receiving such authority and having local jurisdiction over the territory to be incorporated. It is impossible to sustain a dele-

gation of any sovereign power of government to private citizens or to justify their assumption of it."

The conclusion is inevitable from an examination of the authorities, that a delegation by the legislature of its power to lay out districts for public improvement to the irresponsible petitioners and to the majority of the electors in the district designated by the petitioners, is manifestly illegal and unconstitutional. *Board of Com'rs of Wyandotte County* v. *Abbott*, 52 Kansas, 148; *Parks* v. *Board of Com'rs of Wyandotte County*, 61 Fed. Rep. 436; *McCabe* v. *Carpenter*, 102 California, 469; *People* v. *Parks*, 58 California, 624; *Ex parte Wall*, 48 California, 279. The Wright Act finds no support in any of the cases which have sustained the laying out of improvement districts of any kind by the State, or by municipal or other authorities representing the State and exercising governmental power on behalf of the State, as a proper method of taxing or taking property for public use.

III. Assuming again, for the sake of the argument, that the Wright Act, so far as it provides for the organization of irrigation districts by means of a petition of fifty or a majority of the landholders of the district proposed in the petition, approved by a vote of the majority of the electors of the district, is a legitimate exercise of legislative power so as to constitute to that extent due process of law for the taking of private property by taxation, we submit that there is a further fatal defect in the act, in that it permits the whole cost to be levied by the board of directors of the district upon all of the real estate of the district according to value, with no reference to the degree of benefit conferred, all of which is done without due process of law and without compensation to the owner, and herein it violates the constitutional provisions whose aid we invoke.

Here again the legislature does not decide or declare that in the irrigation of a particular district described by it, or to be described by a municipal or other public authority properly representing it, the assessment shall be according to the value as in its judgment the nearest approximation to benefit; but it decides and declares that in any district that may be described

by petitioners and created by qualified electors the assessment according to value shall prevail. We submit that this method of taxation is purely arbitrary and capricious, contrary to the fundamental principles of taxation, and that it deprives the statute of the character of due process.

In his opinion in the *Madera case*, 92 California, 324, Mr. Justice Harrison says: "All taxation has its source in the necessities of organized society, and is limited by such necessity, and can be exercised only by some demand for the public use or welfare. And whether the tax be by direct imposition for revenue, or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit."

Under the Wright Act neither the legislature nor any subordinate or local legislative body determines what property will be benefited, either "by designating the district" or by designating "the property upon which" the assessment "is to be imposed." As we have shown, this power of designation and determination is practically vested in the petitioners. They may include any lands susceptible of irrigation, or which, under the construction given to the statute by the Supreme Court of California in the *Modesto case*, would be even indirectly benefited thereby, by the increased productiveness of adjoining property, or which were, in their natural state, susceptible of irrigation.

Mr. Justice Harrison further says in his opinion in the *Madera case:* "It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the act unconsti-

tutional because it provides that such property shall be assessed."

We submit that this statement of the law is simply revolutionary of all established principles, precedents and cases upon this subject, and that the true principle is directly to the contrary. As was said by Chief Justice Shaw, in *Wright* v. *Boston*, 9 Cush. 233, the principle is that: "When certain persons are so placed as to have a common interest amongst themselves, but in common with the rest of the community, laws may be justly made, providing that, under suitable and equitable regulations, those common interests shall be so managed that those who enjoy the benefits shall equally bear the burden."

See also *Tide Water Co.* v. *Coster*, 18 N. J. Eq. 518; *Stuart* v. *Palmer*, 74 N. Y. 183; *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160, 169; *Brandenstein* v. *Hoke*, 101 California, 131; *Macon* v. *Patty*, 57 Mississippi, 378; *People* v. *Brooklyn*, 4 N. Y. 419; *Hammett* v. *Philadelphia*, 65 Penn. St. 146; *In re Washington Avenue*, 69 Penn. St. 352.

The concluding sentence in the last case is entirely apposite. "There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions" [referring to the usual constitutional limitations] "that covers it with an ægis of protection against all unjust, unreasonable and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power or that of eminent domain, where for the good of the whole people, burdens may be imposed or property taken. I admit that the power to tax is unbounded by any express limit in the constitution — that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good, further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation is bounded in its exercise by its own nature, essential characteristics and purpose. It must therefore visit all alike in a reasonably

practical way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is confiscation, not taxation; extortion, not assessment, and falls within the clearly implied restriction in the Bill of Rights."

Later Pennsylvania cases still more forcibly affirm this doctrine. *Allegheny City* v. *Western Penn. R.*, 138 Penn. St. 375; *Pittsburgh's Petition*, 138 Penn. St. 401; *Morewood Avenue*, 159 Penn. St. 20; *Park Ave. Sewers*, 169 Penn. St. 433. See also *State* v. *Newark*, 37 N. J. Law, 415; *Stuart* v. *Palmer*, 74 N. Y. 183; *Thomas* v. *Gain*, 35 Michigan, 155; *People* v. *Jefferson County Court*, 55 N. Y. 604; *Cypress Pond Draining Co.* v. *Hooper*, 2 Met. (Ky.) 350; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701.

IV. Assuming again, for the sake of the argument, that the statute in question is a valid exercise of legislative power in respect to the formation of the district by the means and through the agencies provided, and that the mode of assessment can be regarded as due process of law, we claim that the total want of an opportunity to be heard on the question of the expediency of forming the district, on the question of boundaries, on the questions of cost and scheme of improvement, and on the question of benefit received, deprives the act of the constitutional character of due process of law as it has been heretofore defined by this court.

The only hearing accorded to the landholder, from the beginning to the end of the scheme, from the time of the filing of the petition until his land is sold out for non-payment of assessment, is the very scanty right of being heard upon the question of the valuation of his own property, and perhaps of other property, included in the district. That is accorded to him apparently as an idle form; for even in respect to that limited point, if he cannot be heard on the question of benefit received, the hearing is utterly nugatory.

The principle has been thus stated by the Supreme Court of California: "It is a principle which underlies all forms of government by law that a citizen shall not be deprived of life, liberty, or property, without due process of law. The legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him and for a full opportunity of time, place and tribunal to be heard in defence of his rights. This constitutional guarantee is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative or executive in its nature." *Mulligan* v. *Smith*, 59 California, 230.

(*a*) In regard to the fundamental question as to whether there shall be an irrigation district, there is no hearing because the supervisors to whom the petition is to be presented have no power to consider or determine that question.

It is idle, we submit, to say as the Supreme Court of California does, that in this respect the grievance of the landholder is the same as is suffered by everybody within the limits of a municipal or school district whose organization and boundaries are to be determined by a popular vote of the residents of the proposed district. There is no resemblance whatever between the cases.

(*b*) There is no hearing, as matter of right, accorded to the landholder upon the question of boundaries. He may get notice, it is true, if he happens to take the local paper, that the petition is to be presented, but there is no right given him to present objections, and no duty imposed upon the supervisors to hear his objections.

The right to be heard in tax cases is a constitutional one and indefeasible, and applies to these special assessments for local improvements. *County of Santa Clara* v. *Southern Pacific Railway*, 18 Fed. Rep. 385; *Scott* v. *Toledo*, 36 Fed. Rep. 385; *Meyers* v. *Shields*, 61 Fed. Rep. 713; *Ulman* v. *Baltimore*, 72 Maryland, 587; *Railroad Tax cases*, 13 Fed. Rep. 722; *Stuart* v. *Palmer*, 74 N. Y. 183.

(*c*) As to the scheme of irrigation and its practicability and cost there is no pretence that these landholders who are to pay are to be consulted or to have a hearing in any respect whatever.

The audacious claim is made on the part of the upholders of the system that the mere right of being heard each on the value of his own land, without more, and without any right to be heard on the total cost or the proportional burden which he is to bear, or the benefit which he is to receive, is sufficient to uphold the act.

In answer to this objection, or rather in answer to the more limited objection that the act makes no provision for a hearing to be granted to the owners of the land prior to the organization of the district, it is claimed by Mr. Justice Harrison, in his opinion in the *Madera case*, 92 California, 323, that the proceeding up to that point is merely for the creation of a public corporation, which is to be invested with certain political duties which it is to exercise in behalf of the State. He claims that it has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such a question to a popular vote; that it would be competent for the legislature to enact it without such a submission; and that it has as much power to create the district in accordance with the will of a majority of the electors.

We care not by what name the legal entity created by the act may be called, whether a public or a quasi or a semi-quasi, or, as it has been called by one learned judge, a bastard public-private corporation, but we do deny most emphatically that the function with which it is invested, the duties which it is to discharge are in any manner political duties to be exercised in behalf of the State.

It is nothing more or less than a service to be rendered to the landowners of the district for their own account without any intervention or interest of the public. It is for these landowners that the directors are to procure and furnish the water for use or for sale. It is for them and at their expense that they are to issue the bonds. It is for them that the directors are to mortgage the property acquired and to con-

stitute the plant of irrigation works. There is nothing public about it; and if there is any force in the points we have already presented, there is no force in this contention of that learned judge.

We do not think that, within any of the cases that have been adjudicated by this court, the landholders can be denied a hearing on all these important matters, and must put up with the idle and almost formal hearing of the question of the valuation of each landowner's individual piece of property. The spirit of the constitutional rule is that they shall have real bread in the matter of a hearing, and this would put them off with nothing but a stone. We invoke the decisions of this court already made in support of the proposition that there must be an actual hearing on the real merits, and not a mere formal one on a strictly side issue, in order to give to the proceedings the character of due process of law. *Kennard* v. *Morgan*, 92 U. S. 480; *McMillen* v. *Anderson*, 95 U. S. 37; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Wurts* v. *Hoagland*, 114 U. S. 606; *Cincinnati, New Orleans & Texas Railroad* v. *Kentucky*, 115 U. S. 321; *Walston* v. *Nevin*, 128 U. S. 578; *Lent* v. *Tillson*, 140 U. S. 316; *Spencer* v. *Merchant*, 125 U. S. 345.

In the latter case this rule is laid down: "If the Legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Even an act imposing a tax and declaring what lands should be deemed to be benefited, recognized the right of the landholders to be heard upon the validity of the assessment, and its apportionment among the different parcels of the class which the legislature had conclusively determined to be benefited.

We think that no case can be found supporting a statute which deprives citizens of their property with no other right to be heard than upon the question of value of their own property, which is arbitrarily made the basis of assessment without any regard to actual benefit received, against the objection that such a statute is not due process of law.

(*d*) The claim that the Confirmation Act, approved March 16, 1889, is a cure for the objection of want of notice and hearing is properly disposed of by the suggestion of Ross, C. J., in the *Fallbrook case*, that it gives no right of hearing to the landholder, but is merely a proceeding to be taken, not by the landholder, but by the directors at their option.

Mr. John F. Dillon, (*Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief,) for appellants. He cited, *Turlock Irrigation District* v. *Williams*, 76 California, 360; *Central Irrigation District* v. *De Lappe*, 79 California, 351; *Crall* v. *Poso Irrigation District*, 87 California, 140; *Modesto Irrigation District* v. *Tregea*, 88 California, 334; *In re Madera Irrigation District*, 92 California, 296; *Tregea* v. *Owens*, 94 California, 317; *People* v. *Selma Irrigation District*, 98 California, 206; *Rialto Irrigation District* v. *Brandon*, 103 California, 384; *Quint* v. *Hoffman*, 103 California, 506; *Woodruff* v. *Perry*, 103 California, 611; *Fallbrook Irrigation District* v. *Abila*, 106 California, 355; *Cullen* v. *Glendora Water Co.*, 39 Pac. Rep. 769; *Page* v. *Board of Supervisors of Los Angeles County*, 85 California, 50; *People* v. *Hagar*, 52 California, 171; *Shelby* v. *Guy*, 11 Wheat. 361; *Jackson* v. *Chew*, 12 Wheat. 153; *Green* v. *Neal*, 6 Pet. 291; *Roberts* v. *Lewis*, 153 U. S. 367; *Nesmith* v. *Sheldon*, 7 How. 812; *Van Rensselaer* v. *Kearney*, 11 How. 297; *Webster* v. *Cooper*, 14 How. 488; *Leffingwell* v. *Warren*, 2 Black, 599; *Detroit* v. *Osborne*, 135 U. S. 492; *Hagar* v. *Reclamation District*, 111 U. S. 701; *Missouri* v. *Lewis*, 101 U. S. 22; *Chicago Union Bank* v. *Kansas City Bank*, 136 U. S. 223; *Grand Trunk Railway* v. *Ives*, 144 U. S. 408; *Bauserman* v. *Blunt*, 147 U. S. 647; *May* v. *Tenney*, 148 U. S. 60.

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

The decision of this case involves the validity of the irrigation act enacted by the legislature of the State of California and set forth in the above statement of facts. The principal

act, passed in 1887, has been amended once or twice by subsequent legislation, but in its main features it remains as first enacted. The title of the act indicates its purpose. It is admitted by all that very large tracts of land in California are in fact "arid lands," which require artificial irrigation in order to produce anything of value. There are different degrees, however, in which irrigation is necessary, from a point where, without its use, the land is absolutely uncultivable, to where, if not irrigated artificially, it may yet produce some return for the labor of the husbandman in the shape of a puny and unreliable crop, but nothing like what it could and would do if water were used upon it. There are again other lands which, if not irrigated, will still produce the ordinary cereal crops to a more or less uncertain extent, but which, if water be used artificially upon them at appropriate times, are thereby fitted to and will produce much more certain and larger crops than without it, and will be also rendered capable of producing fruit and grapes of all kinds, of first-rate quality and in very large quantities. What is termed the "arid" belt is said in the Census Bulletin, No. 23, for the census of 1890, to extend from Colorado to the Pacific Ocean, and to include over 600,000,000 acres of land.

Of this enormous total, artificial irrigation has thus far been used only upon about three and a half million acres, of which slightly over a million acres lie in the State of California. It was stated by counsel that something over thirty irrigation districts had been organized in California under the act in question, and that a total bonded indebtedness of more than $16,000,000 had been authorized by the various districts under the provisions of the act, and that more than $8,000,000 of the bonds had been sold and the money used for the acquisition of property and water rights and for the construction of works necessary for the irrigation of the lands contained in the various districts.

Whether these statements are perfectly accurate or not is a matter of no great importance, as it has been assumed by all that numbers of districts have been formed under the act and a very large indebtedness already incurred, and that more

will be necessary before all the districts will be placed in an efficient working condition. All these moneys, if the act be valid, must eventually be repaid from assessments levied upon the lands embraced within the respective districts, while the annually recurring interest upon these moneys is also to be paid in the same way. Taking the California act as a model, it was also stated and not contradicted that several of the other States which contain portions of the arid belt (seven or eight of them) had passed irrigation acts, and that proceedings under them were generally awaiting the result of this litigation. The future prosperity of these States, it was claimed, depended upon the validity of this act as furnishing the only means practicable for obtaining artificial irrigation, without the aid of which millions and millions of acres would be condemned to lie idle and worthless, which otherwise would furnish enormous quantities of agricultural products and increase the material wealth and prosperity of that whole section of country. On the other hand, it has been asserted, with equal earnestness, that the whole scheme of the act will, if carried out to the end, result in the practical confiscation of lands like those belonging to the appellees herein for the benefit of those owning different kinds of land upon which the assessments for the water would be comparatively light, and the benefits resulting from its use far in excess of those otherwise situated. Such results, it is said, are nothing more than taking by legislation the property of one person or class of persons and giving it to another, which is an arbitrary act of pure spoliation, from which the citizen is protected, if not by any state constitution at least by the Federal instrument, under which we live and the provisions of which we are all bound to obey.

These matters are only alluded to for the purpose of showing the really great practical importance of the question before the court to the people of California, and of those other States where similar statutes have been passed. Important not alone to the public, but also and specially important to those landowners whose lands are not only to be irrigated but are also to be assessed for the payment of the cost of the construction of the works necessary for supplying the water.

This court fully appreciates the importance of the question, and its decision has been reached after due reflection upon the subject and after a careful examination of the authorities bearing upon it.

The form in which the question comes before the court in this case is by appeal from a decree of the United States Circuit Court for the Southern District of California, perpetually enjoining the collector of the irrigation district from executing a deed conveying the land of the plaintiff, Maria King Bradley, under a sale made of such land pursuant to the provisions of the act under consideration. The grounds upon which relief was sought were that the act was in violation of the Federal Constitution and also of the constitution of the State of California. The decree is based upon the sole ground that the act violates the Federal Constitution in that it in substance authorizes the taking of the land of the appellee "without due process of law." Coming before the court in this way, we are not confined in our review of the decision of the lower court within the same limits that we would be if the case were here on error from the judgment of a state court.

The jurisdiction of the United States Circuit Court in this case was based upon the fact that the plaintiffs were aliens and subjects of Great Britain, and that court therefore had the same jurisdiction as a state court would have had to try the whole question and to examine and decide not only as to its conformity with the Federal Constitution, but in addition whether the act were a violation of the state constitution, and whether the provisions of the act itself had been complied with. In exercising that jurisdiction it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest state court upon the construction of the statute, and upon the question whether as construed the statute violated any provision of the state constitution. The same duty rests upon this court, and it has been so determined from the earliest period of its history. If the act of the state legislature as construed by its highest court conflicts with the Federal Constitution or with any valid act of Congress, it is the duty of the Circuit Court and of this court to so decide, and to thus enforce

the provisions of the Federal Constitution. The following are some of the numerous cases in which this principle has been announced and carried into effect: *Shelby* v. *Guy*, 11 Wheat. 361; *Nesmith* v. *Sheldon*, 7 How. 812; *Van Rensselaer* v. *Kearney*, 11 How. 297; *Webster* v. *Cooper*, 14 How. 488; *Leffingwell* v. *Warren*, 2 Black, 599; *Hagar* v. *Reclamation District No.* 108, 111 U. S. 701, 704; *Detroit* v. *Osborne*, 135 U. S. 492.

We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law. The contrary has not been held in this court by the case of *Loan Association* v. *Topeka*, 20 Wall. 655. In that case a statute of Kansas was held invalid because by its provisions the property of the citizen under the guise of taxation would be taken in aid of a private enterprise, which was a perversion of the power of taxation. The case was brought in the United States Circuit Court for the District of Kansas, and was decided by that court in favor of the city. There had been no decision of the highest state court upon the question whether the act violated the constitution of Kansas, and consequently there was none to be followed by the Federal court upon that question. This court held that a law taxing the citizen for the use of a private enterprise conducted by other citizens was an unauthorized invasion of private rights. Mr. Justice Miller said that there were such rights in every free government which were beyond the control of the State. The ground of the decision was as stated, that the act took the property of the citizen for a private purpose, although under the forms of taxation. In thus holding, there was no over-

ruling or refusing to follow the decisions of the highest court of the State respecting the constitution of its own State.

We are, therefore, practically confined in this case to the inquiry whether the act in question, as it has been construed by the state courts, violates the Federal Constitution.

The assertion that it does is based upon that part of the Fourteenth Amendment to the Constitution, which reads as follows: "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."

Referring to the amendment, above quoted, the appellees herein urge several objections to this act. They say, First, that the use for which the water is to be procured is not in any sense a public one, because it is limited to the landowners who may be such at the time when the water is to be apportioned, and the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the State. Second. They assert that under the act in question the irrigation of lands need not be limited to those which are in fact unproductive, but that by its very terms the act includes all lands which are susceptible of one mode of irrigation from a common source, etc., no matter how fertile or productive they may already be, and it is denied that the furnishing of a fertilizer for lands of individual proprietors which are already productive, in order to make them more productive, is in any legal sense a public improvement. Third. It is also objected that under the act the landowner has no right to demand and no opportunity is given him for a hearing on the question whether his land is or can be benefited by irrigation as proposed; also, that he has no right to a hearing upon the question whether the statute has been complied with in the preliminaries requisite to the formation of the district. Fourth. That the basis of assessment for the cost of construction is not in accordance with and in proportion to the benefits conferred by the improvement. And, finally, that land which cannot, in fact, be benefited may yet under the act be placed in one of the irrigation districts and assessed upon its value to pay the cost of

construction of works which benefit others at his expense. These are the main objections urged against the act.

It has often been said to be extremely difficult to give any sufficient definition of what is embraced within the phrase "due process of law," as used in the constitutional amendment under discussion. None will be attempted here. It was stated by Mr. Justice Miller, in *Davidson* v. *New Orleans*, 96 U. S. 97, 104, that there was "abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." Of course, no such jurisdiction exists or is claimed to exist by the parties here. It is at the same time most difficult to set certain and clear bounds to the right of this court and consequently to its duty to review questions arising under state legislation with reference to this amendment as to due process of law.

It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the States would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case. *Mobile County* v. *Kimball*, 102 U. S. 691, 704; *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512, 520. We reiterate the statement made in *Davidson* v. *New Orleans*, *supra*, that "whenever by the laws of the State or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode

of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Coming to a review of these various objections, we think the first, that the water is not for a public use, is not well founded. The question, what constitutes a public use, has been before the courts of many of the States and their decisions have not been harmonious, the inclination of some of these courts being towards a narrower and more limited definition of such use than those of others.

There is no specific prohibition in the Federal Constitution which acts upon the States in regard to their taking private property for any but a public use. The Fifth Amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government, as has many times been decided. *Spies* v. *Illinois*, 123 U. S. 131; *Thorington* v. *Montgomery*, 147 U. S. 490. In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government.

Is this assessment, for the non-payment of which the land of the plaintiff was to be sold, levied for a public purpose? The question has, in substance, been answered in the affirmative by the people of California, and by the legislative and

judicial branches of the state government. The people of the State adopted a constitution which contains this provision:

"*Water and Water Rights* — SEC. 1. The use of all water now appropriated or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use and subject to the regulation and control of the State in the manner to be prescribed by law." Constitution of California, ART. 14.

The latter part of § 12 of the act now under consideration, as amended in March, 1891, reads as follows:

"The use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."

The Supreme Court of California has held in a number of cases that the irrigation act is in accordance with the state constitution, and that it does not deprive the landowners of any property without due process of law; that the use of the water for irrigating purposes under the provisions of the act is a public use, and the corporations organized by virtue of the act for the purpose of irrigation are public municipal corporations organized for the promotion of the prosperity and welfare of the people. *Turlock Irrigation District* v. *Williams*, 76 California, 360; *Central Irrigation District* v. *De Lappe*, 79 California, 351; *In re Madera Irrigation District*, 92 California, 296.

We do not assume that these various statements, constitutional and legislative, together with the decisions of the state court, are conclusive and binding upon this court upon the question as to what is due process of law, and, as incident thereto, what is a public use. As here presented these are questions which also arise under the Federal Constitution, and we must decide them in accordance with our views of constitutional law.

It is obvious, however, that what is a public use frequently

and largely depends upon the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned.

To provide for the irrigation of lands in States where there is no color of necessity therefor within any fair meaning of the term, and simply for the purpose of gratifying the taste of the owner, or his desire to enter upon the cultivation of an entirely new kind of crop, not necessary for the purpose of rendering the ordinary cultivation of the land reasonably remunerative, might be regarded by courts as an improper exercise of legislative will, and the use might not be held to be public in any constitutional sense, no matter how many owners were interested in the scheme. On the other hand, in a State like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power. The people of California and the members of her legislature must in the nature of things be more familiar with the facts and circumstances which surround the subject and with the necessities and the occasion for the irrigation of the lands than can any one be who is a stranger to her soil. This knowledge and familiarity must have their due weight with the state courts which are to pass upon the question of public use in the light of the facts which surround the subject in their own State. For these reasons, while not regarding the matter as concluded by these various declarations and acts and decisions of the people and legislature and courts of California, we yet, in the consideration of the subject, accord to and treat them with very great respect, and we regard the decisions as embodying the deliberate judgment and matured thought of the courts of that State on this question.

Viewing the subject for ourselves and in the light of these considerations we have very little difficulty in coming to the same conclusion reached by the courts of California.

The use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be

formed or carried into effect. In general, the water to be used must be carried for some distance and over or through private property which cannot be taken *in invitum* if the use to which it is to be put be not public, and if there be no power to take property by condemnation it may be impossible to acquire it at all. The use for which private property is to be taken must be a public one, whether the taking be by the exercise of the right of eminent domain or by that of taxation. *Cole* v. *Le Grange*, 113 U. S. 1. A private company or corporation without the power to acquire the land *in invitum* would be of no real benefit, and at any rate the cost of the undertaking would be so greatly enhanced by the knowledge that the land must be acquired by purchase, that it would be practically impossible to build the works or obtain the water. Individual enterprise would be equally ineffectual; no one owner would find it possible to construct and maintain water works and canals any better than private corporations or companies, and unless they had the power of eminent domain they could accomplish nothing. If that power could be conferred upon them it could only be upon the ground that the property they took was to be taken for a public purpose.

While the consideration that the work of irrigation must be abandoned if the use of the water may not be held to be or constitute a public use is not to be regarded as conclusive in favor of such use, yet that fact is in this case a most important consideration. Millions of acres of land otherwise cultivable must be left in their present arid and worthless condition, and an effectual obstacle will therefore remain in the way of the advance of a large portion of the State in material wealth and prosperity. To irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to the landowners, or even to any one section of the State. The fact that the use of the water is limited to the landowner is not therefore a fatal objection to this legislation. It is not essential that the entire community or even any considerable portion thereof should directly enjoy or participate in an improvement in order to constitute a

public use. All landowners in the district have the right to a proportionate share of the water, and no one landowner is favored above his fellow in his right to the use of the water. It is not necessary, in order that the use should be public, that every resident in the district should have the right to the use of the water. The water is not used for general, domestic or for drinking purposes, and it is plain from the scheme of the act that the water is intended for the use of those who will have occasion to use it on their lands. Nevertheless, if it should so happen that at any particular time the landowner should have more water than he wanted to use on his land, he has the right to sell or assign the surplus or the whole of the water as he may choose.

The method of the distribution of the water for irrigation purposes, provided for in section 11 of the act, is criticised as amounting to a distribution to individuals and not to lands, and on that account it is claimed that the use for irrigation may not be achieved, and therefore the only purpose which could render the use a public one may not exist. This claim we consider not well founded in the language and true construction of the act. It is plain that some method for apportioning the use of the water to the various lands to be benefited must be employed, and what better plan than to say that it shall be apportioned ratably to each landowner upon the basis which the last assessment of such owner for district purposes within the district bears to the whole sum assessed upon the district? Such an apportionment, when followed by the right to assign the whole or any portion of the waters apportioned to the landowner, operates with as near an approach to justice and equality as can be hoped for in such matters, and does not alter the use from a public to a private one. This right of assignment may be availed of also by the owner of any lands which, in his judgment, would not be benefited by irrigation, although the board of supervisors may have otherwise decided. We think it clearly appears that all who by reason of their ownership of or connection with any portion of the lands would have occasion to use the water, would in truth have the opportunity to use it

upon the same terms as all others similarly situated. In this way the use, so far as this point is concerned, is public because all persons have the right to use the water under the same circumstances. This is sufficient.

The case does not essentially differ from that of *Hagar* v. *Reclamation District*, 111 U. S. 701, where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the Federal Constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That indeed is one ground for interposition by the State, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9, 22; *Wurtz* v. *Hoagland*, 114 U. S. 606, 611; Cooley on Taxation, 617, 2d ed. If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.

Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that in draining swamp lands it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and the kind of land. Some of the swamp lands may not be nearly so wet and worthless as some others, and yet all may be so situated as to be benefited by the reclamation, and

whether it is so situated or not must be a question of fact. The same reasoning applies to land which is, to some extent, arid instead of wet. Indeed, the general principle that arid lands may be provided with water and the cost thereof provided for by a general tax or by an assessment for local improvement upon the lands benefited, seems to be admitted by counsel for the appellees. This necessarily assumes the proposition that water used for irrigation purposes upon lands which are actually arid is used for a public purpose, and the tax to pay for it is collected for a public use, and the assessment upon lands benefited is also levied for a public purpose. Taking all the facts into consideration, as already touched upon, we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use.

Second. The second objection urged by the appellees herein is that the operations of this act need not be and are not limited to arid, unproductive lands but include within its possibilities all lands, no matter how fertile or productive, so long as they are susceptible "in their natural state" of one mode of irrigation from a common source, etc. The words "in their natural state" are interpolated in the text of the statute, by the counsel for the appellees, on the assumption that the Supreme Court of California has thus construed the act in *Modesto Irrigation District* v. *Tregea*, 88 California, 334. The objection had been made in that case that it was unlawful to include the city of Modesto in an irrigation district. The court, per Chief Justice Beatty, said that the legislature undoubtedly intended that cities and towns should in proper cases be included in irrigation districts, and that the act as thus construed did not violate the state constitution. The learned Chief Justice also said:

"The idea of a city or town is of course associated with the existence of streets to a greater or less extent, lined with shops and stores, as well as of dwelling-houses, but it is also a notorious fact that in many of the towns and cities of California there are gardens and orchards inside the corporate boundaries, requiring irrigation. It is equally notorious that in many dis-

tricts lying outside of the corporate limits of any city or town there are not only roads and highways, but dwelling-houses, outhouses, warehouses, and shops. With respect to these things, which determine the usefulness of irrigation, there is only a difference of degree between town and country. . . . It being equally clear and notorious as matter of fact that there are cities and towns which not only may be benefited by irrigation, but actually have in profitable use extensive systems for irrigating lands within their corporate limits, it cannot be denied that the supervisors of Stanislaus County had the power to determine that the lands comprising the city of Modesto would be benefited by irrigation and might be included in an irrigation district. . . .

"In the nature of things, an irrigation district must cover an extensive tract of land, and no matter how purely rural and agricultural the community may be, there must exist here and there within its limits a shop or warehouse covering a limited extent of ground that can derive no direct benefit from the use of water for irrigation. Here, again, the difference between town and country is one of degree only, and a decision in the interest of the shop owners in towns, that their lots cannot be included in an irrigation district, would necessarily cover the case of the owner of similar property outside of a town. It is nowhere contended by the appellant that in organizing irrigation districts it is the duty of the supervisors to exclude by demarcation every tract or parcel of land that happens to be covered by a building or other structure which unfits it for cultivation, and certainly the law could not be so construed without disregarding many of its express provisions, and at the same time rendering it practically inoperative. We construe the law to mean that the board may include in the boundaries of the district all lands which *in their natural state would be* benefited by irrigation and are susceptible of irrigation by one system, regardless of the fact that buildings or other structures may have been erected here and there upon small lots, which are thereby rendered unfit for cultivation at the same time that their value for other purposes may have been greatly enhanced."

We do not see in this construction, the meaning of which is apparent from the foregoing quotations from the opinion, any substantial difference, favorable to the appellees, from the act without the interpolation of those words.

As an evidence of what can be done under the act it is alleged in the complaint in this suit that the plaintiff is the owner of forty acres of land in the district, and that it is worth $5000, and that it is subject to beneficial use without the necessity of water for irrigation, and that it has been used beneficially for the past several years for purposes other than cultivation with irrigation. These allegations are admitted by the answer of the defendants, who nevertheless assert that if a sufficient supply of water is obtained for the irrigation of the plaintiff's land, the same can be beneficially used for many purposes other than that for which it can be used without the water for irrigating the same.

What is the limit of the power of the legislature in regard to providing for irrigation? Is it bounded by the absolutely worthless condition of the land without the artificial irrigation? Is it confined to land which cannot otherwise be made to yield the smallest particle of a return for the labor bestowed upon it? If not absolutely worthless and incapable of growing any valuable thing without the water, how valuable may the land be and to what beneficial use and to what extent may it be put before it reaches the point at which the legislature has no power to provide for its improvement by that means? The general power of the legislature over the subject of providing for the irrigation of certain kinds of lands must be admitted and assumed. The further questions of limitation, as above propounded, are somewhat legislative in their nature, although subject to the scrutiny and judgment of the courts to the extent that it must appear that the use intended is a public use as that expression has been defined relatively to this kind of legislation.

The legislature by this act has not itself named any irrigation district, and, of course, has not decided as to the nature and quality of any specific lands which have been included in any such district. It has given a general statement as to what

conditions must exist in order to permit the inclusion of any land within a district. The land which can properly be so included is, as we think, sufficiently limited in its character by the provisions of the act. It must be susceptible of one mode of irrigation, from a common source and by the same system of works, and it must be of such a character that it will be benefited by irrigation by the system to be adopted. This, as we think, means that the amount of benefit must be substantial and not limited to the creation of an opportunity to thereafter use the land for a new kind of crop, while not substantially benefiting it for the cultivation of the old kind, which it had produced in reasonable quantities and with ordinary certainty and success, without the aid of artificial irrigation. The question whether any particular land would be thus benefited is necessarily one of fact.

The legislature not having itself described the district, has not decided that any particular land would or could possibly be benefited as described, and, therefore, it would be necessary to give a hearing at some time to those interested upon the question of fact whether or not the land of any owner which was intended to be included would be benefited by the irrigation proposed. If such a hearing were provided for by the act, the decision of the tribunal thereby created would be sufficient. Whether it is provided for will be discussed when we come to the question of the proper construction of the act itself. If land which can, to a certain extent, be beneficially used without artificial irrigation, may yet be so much improved by it that it will be thereby and for its original use substantially benefited, and, in addition to the former use, though not in exclusion of it, if it can then be put to other and more remunerative uses, we think it erroneous to say that the furnishing of artificial irrigation to that kind of land cannot be, in a legal sense, a public improvement, or the use of the water a public use.

Assuming for the purpose of this objection that the owner of these lands had by the provisions of the act, and before the lands were finally included in the district, an opportunity to be heard before a proper tribunal upon the question of bene-

fits, we are of opinion that the decision of such a tribunal, in the absence of actual fraud and bad faith, would be, so far as this court is concerned, conclusive upon that question. It cannot be that upon a question of fact of such a nature this court has the power to review the decision of the state tribunal which has been pronounced under a statute providing for a hearing upon notice. The erroneous decision of such a question of fact violates no constitutional provision. The Circuit Court in this case has not assumed to undertake any such review of a question of fact.

The difference between this case and the case of *Spencer* v. *Merchant*, 125 U. S. 345, is said by counsel for appellees to consist in the fact that in the *Spencer case* the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only, and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this court is prepared to review all questions of fact of this nature decided by a state tribunal, where the claim is made that the judgment was without any evidence to support it or was against the evidence, then we must be concluded by the judgment on such a question of fact, and treat the legal question as based upon the facts as found by the state board. Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute. *Kelly* v. *Pittsburg*, 104 U. S. 78.

In view of the finding of the board of supervisors on this question of benefits, assuming that there has been one, this court cannot say as a matter of law that the lands of the

plaintiff in this case have not been or cannot be benefited by this proposed irrigation. There can be no doubt that the board of supervisors (if it have power to hear the question of benefits, as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the constitutional requirement in such case. In speaking of a board of supervisors, Mr. Chief Justice Waite in *Spring Valley Water Works Company* v. *Schottler*, 110 U. S. 347, 354, said: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule." In that case the board was to fix the price of water, while in this it is to determine the fact of benefits to lands. The principle is the same in each case.

It may be that the action of the board upon any question of fact as to contents or sufficiency of the petition, or upon any other fact of a jurisdictional nature, is open to review in the state courts. It would seem to be so held in the *Tregea case* decided in 1891. 88 California, 334.

If the state courts would have had the right to review these findings of fact, jurisdictional in their nature, the United States Circuit Court had the same right in this case, but it has not done so, its judgment being based upon the sole ground that the act was a violation of the Fourteenth Amendment of the Federal Constitution. Upon the question of fact as to benefits, decided by the board, it is held in the *Tregea case* that its decision is conclusive. 88 California, *supra*. Whether a review is or is not given upon any of these questions of fact (if the tribunal created by the State had power to decide them, and if an opportunity for a hearing were given by the act), is a mere question of legislative discretion. It is not constitutionally necessary in such cases to give a rehearing or an appeal. *Missouri* v. *Lewis*, 101 U. S. 22; *Pearson* v. *Yewdall*, 95 U. S. 294.

Very possibly a decision by the statutory tribunal which in-

cluded tracts of land within the district that plainly could not by any fair or proper view of the facts be benefited by irrigation, would be the subject of a review in some form and of a reversal by the courts, on the ground that the decision was based not alone upon no evidence in its favor, but that it was actually opposed to all the evidence and to the plain and uncontradicted facts of common knowledge, and was given in bad faith. In such case the decision would not have been the result of fair or honest, although grossly mistaken judgment, but would be one based upon bad faith and fraud, and so could not be conclusive in the nature of things. A question of this kind would involve no constitutional element, and its solution would depend upon the ordinary jurisdiction of courts of justice over this class of cases. It is not pretended that such jurisdiction has been invoked or exercised here. As was said by Mr. Justice Miller in *Davidson* v. *New Orleans*, *supra*, where the objection was made that part of the property was not in fact benefited, "this is a matter of detail with which this court cannot interfere if it were clearly so; but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which are within their bounds." To the same effect, *Spencer* v. *Merchant*, 125 U. S. 345; *Lent* v. *Tillson*, 140 U. S. 316, 333.

In regard to the matters thus far discussed, we see no valid objection to the act in question.

Third. We come now to the question of the true construction of the act. Does it provide for a hearing as to whether the petitioners are of the class mentioned and described in the act and as to their compliance with the conditions of the act in regard to the proceedings prior to the presentation of the petition for the formation of the district? Is there any opportunity provided for a hearing upon notice to the landowners interested in the question whether their lands will be benefited by the proposed irrigation? We think the right to a hearing in regard to all these facts is given by the act, and that it has been practically so construed by the Supreme Court of California in some of the cases, above cited from the reports of that court and in the cases cited in the briefs of

counsel. We should come to the same conclusion from a perusal of the act. The first two sections provide for the petition and a hearing. The petition is to be signed by a majority of the holders of title to lands susceptible of one mode of irrigation, etc. This petition is to be presented to the board of supervisors at a regular meeting, and notice of intended presentation must be published two weeks before the time at which it is to be presented. The board shall hear the same, shall establish and define the boundaries, although it cannot modify those described in the petition, so as to except from the district lands susceptible of irrigation by the same system of works applicable to the other lands in the proposed district, and the board cannot include in the district, even though included in the description in the petition, lands which shall not, in the judgment of the board, be benefited by irrigation by said system.

If the board is to hear the petition upon notice, and is not to include land which will not, in its judgment, be benefited by irrigation by the system, we think it follows as a necessary and a fair implication that the persons interested in or who may be affected by the proposed improvement have the right under the notice to appear before the board and contest the facts upon which the petition is based, and also the fact of benefit to any particular land included in the description of the proposed district.

It is not an accurate construction of the statute to say that no opportunity is afforded the landowner to test the sufficiency of the petition in regard to the signers thereof and in regard to the other conditions named in the act; nor is it correct to say that the power of the board of supervisors is, in terms, limited to making such changes in the boundaries proposed by the petitioners as it may deem proper, subject to the conditions named in the act.

When the act speaks of a hearing of the petition, what is meant by it? Certainly it must extend to a hearing of the facts stated in the petition, and whether those who sign it are sufficient in number and are among the class of persons mentioned in the act as alone having the right to sign the same.

The obvious purpose of the publication of the notice of the intended presentation of the petition is to give those who are in any way interested in the proceeding an opportunity to appear before the board and be heard upon all the questions of fact, including the question of benefits to lands described in the petition. As there is to be a hearing before the board, and the board is not to include any lands which in its judgment will not be benefited, the plain construction of the act is that the hearing before the board includes the question as to the benefits of the lands, because that is one of the conditions upon which the final determination of the board is based, and the act cannot in reason be so construed as to provide that while the board is to give a hearing on the petition it must nevertheless decide in favor of the petitioners, and must establish and define the boundaries of the district, although the signers may not be fifty, or a majority of the holders of title, as provided by the act, and notwithstanding some other defect may become apparent upon the hearing.

This provision that the board "shall establish and define such boundaries" (section 2) cannot reasonably or properly be held to mean that the boundaries must be established notwithstanding any or all of the defects above mentioned have been proved upon the hearing. The language of the sections taken together plainly implies that the board is to establish and define the boundaries only in case the necessary facts appear upon the hearing which the act provides for.

It cannot be supposed that the act, while providing for a hearing of the petition, yet, at the same time, commands the establishment and defining of the boundaries of a district, notwithstanding the fact that the hearing shows a failure on the part of the petitioners to comply with some or all of the conditions upon which the right to organize is placed by the same act.

Such an absurdity cannot be imputed to the legislature. It cannot be doubted that, by the true construction of the act, the board of supervisors is not only entitled, but it is its duty, to entertain a contest by a landowner in respect to the question whether the signers of the petition fulfil the requirements

described in the first section of the act, and if the board find in favor of the contestant upon that issue, it is the duty of the board, under the provisions of the statute, to deny the petition and dismiss the proceedings. Otherwise, what is the hearing for? And if upon a hearing of the question of benefits to any land described in the petition it appears to the board that such lands will not be benefited, it is the duty of the board to so decide, and to exclude the lands from the district. The inclusion of any lands is, therefore, in and of itself a determination (after an opportunity for a hearing) that they will be benefited by the proposed irrigation.

We have said that the Supreme Court of California has substantially decided these questions in the same way. This appears, among others, in the case of the *Modesto Irrigation District* v. *Tregea*, above referred to. The court uses this language in that case:

"The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former, and we cite as conclusive on this point *People* v. *Hagar*, 52 California, 181; *S. C.* 66 California, 60. Many decisions to the same effect are cited in the briefs of counsel, but we deem it unnecessary to refer to them here."

In the case of *People* v. *Hagar*, 52 California, 171, 182, it was held that the board of supervisors, on presentation of the petition, was to hear and determine the question of jurisdiction, and whether the allegations of the petition were true. An approval and confirmation of the petition and the establishment of the district was held to be a conclusive judgment by the board that the lands mentioned and in question were swamp lands; that the petitioners held the proper evidences of title thereto, and *that the lands would be benefited by the reclamation.* These jurisdictional facts, it was held, must exist before the district could lawfully be established.

The provision for a hearing in the irrigation act is similar, and the condition therein that lands which in the judgment of the board are not benefited shall not be included, renders

the determination of the board including them after a hearing a judgment that such lands will be benefited by the proposed plan of irrigation.

The publication of a notice of the proposed presentation of the petition is a sufficient notification to those interested in the question and gives them an opportunity to be heard before the board. *Hagar* v. *Reclamation District*, 111 U. S. 701; *Lent* v. *Tillson*, 140 U. S. 316; *Paulsen* v. *Portland*, 149 U. S. 30.

The formation of one of these irrigation districts amounts to the creation of a public corporation, and their officers are public officers. This has been held in the Supreme Court of California. *In re Madera Irrigation District*, 92 California, 296; *People* v. *Selma District*, 98 California, 206.

There is nothing in the essential nature of such a corporation, so far as its creation only is concerned, which requires notice to or hearing of the parties included therein before it can be formed. It is created for a public purpose, and it rests in the discretion of the legislature when to create it, and with what powers to endow it.

In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created, if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included within the boundaries of the district. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing district whose boundaries are fixed, not by the legislature, but, after a hearing, by the board of supervisors, subject to the final approval by the people in an election called for that purpose. It has been held in this court that the legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no con-

stitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i.e.*, the amount of the tax which he is to pay. *Paulsen* v. *Portland*, 149 U. S. 30, 41. But when as in this case the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefited, and the decision of that question is submitted to some tribunal (the board of supervisors in this case), the parties whose lands are thus included in the petition are entitled to a hearing upon the question of benefits, and to have the lands excluded if the judgment of the board be against their being benefited. Unless the legislature decide the question of benefits itself, the landowner has the right to be heard upon that question before his property can be taken. This, in substance, was determined by the decisions of this court in *Spencer* v. *Merchant*, 125 U. S. 345, 356, and *Walston* v. *Nevin*, 128 U. S. 578. Such a hearing upon notice is duly provided for in the act.

Then, as to a hearing upon the question of apportionment, the act, in sections 18, 20 and 21, provides a general scheme for the assessment upon the property included in the district, and it also provides for a notice by publication of the making of such assessment, and an opportunity is given to the taxpayer to be heard upon the question of the valuation and assessment, and to make such objections thereto as he may think proper, and after that the assessors are to decide.

Thus the act provides for a hearing of the landowner both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of the valuation and assessment of and upon his land included in the district. As to other matters, the district can be created without notice to any one. Our conclusion is that the act, as construed, with reference to the objections considered under this third head, is unassailable.

Fourth. The fourth objection and also the objection above alluded to as the final one, may be discussed together, as

they practically cover the same principle. It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the works, is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.

Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the state constitution, yet as the state court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an *ad valorem* assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21 and 22 of the act be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the state legislature, and with which this court ought

to have nothing to do. The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law.

In the case of *Davidson* v. *New Orleans*, *supra*, the assessment, with which this court refused to interfere, was for a local improvement (reclaiming swamp lands), and by § 8 of the act of the legislature of Louisiana, passed in 1858, Laws of Louisiana, 1858, 114, such an uniform assessment was levied upon "the superficial or square foot of lands situate within the draining section or district of such board" as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot, although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail so far as this court was concerned, *i.e.*, it was not a constitutional question, and therefore was not reviewable here. 96 U. S. at page 106.

In *Walston* v. *Nevin*, 128 U. S. 578, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the landowner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This court held the objection not well founded and that the matter was for the decision of the legislature, to which body the discretion was committed of providing for payment of the improvement.

We refer to the case of *Cleveland* v. *Tripp*, 13 R. I. 59, decided in 1880, as one which treats this subject with much ability. The act provided for the construction of a sewer in the city of Providence and directed the laying of an assessment upon the abutting lands of a certain sum for each front foot and another sum for each square foot extending back 150 feet. The claim was made that such a mode of assessment

did not apply the tax in proportion to the benefits received, and was unequal and unfair, and therefore unconstitutional. The court, while admitting the complaints of inequality to be well founded, yet held the act to be within the power of the legislature.

There are some States where assessments under such circumstances as here exist and made upon an *ad valorem* basis have been held invalid, as an infringement of some provision of the state constitution, or in violation of the act under which they were levied. Counsel have cited several such in the briefs herein filed. We do not discover, and our attention has not been called to any case in this court where such an assessment has been held to violate any provision of the Federal Constitution. If it do not, this court can grant no relief.

The method of assessment here provided for may not be the best which could have been adopted in order to accomplish the most equal and exact justice which the nature of the case permits. But none the less we are unable to say that it runs counter to any provision of the Federal Constitution, and we must for that reason hold the objection here considered to be untenable.

An objection is also urged that it is delegating to others a legislative right, that of the incorporating of public corporations, inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law.

We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act.

After careful scrutiny of the objections to this act we are compelled to the conclusion that no one of such objections is well taken. The judgment appealed from herein is therefore

Statement of the Case.

Reversed and the cause remanded to the Circuit Court of the United States for the Southern District of California for further proceedings not inconsistent with this opinion.

MR. CHIEF JUSTICE FULLER and MR. JUSTICE FIELD dissented.

TREGEA *v.* MODESTO IRRIGATION DISTRICT.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 13. Argued January 23, 24, 27, 1896. — Decided November 16, 1896.

The laws of California authorize the bringing of an action in its courts by the board of directors of an irrigation district, to secure a judicial determination as to the validity of the proceedings of the board concerning a proposed issue of bonds of the district, in advance of their issue. The Modesto District was duly organized under the laws of the State, and its directors, having defined the boundaries of the district, and having determined upon an issue of bonds for the purpose of carrying out the objects for which it was created, as defined by the laws of the State, commenced proceedings in a court of the State, seeking a judicial determination of the validity of the bonds which it proposed to issue. A resident of the district appeared and filed an answer. After a hearing, in which the defendant contended that the judgment asked for would be in violation of the Constitution of the United States, the proceedings resulted in a judgment in favor of the district. Appeal being taken to the Supreme Court of the State, it was there adjudged that the proceedings were regular, and the judgment, with some modifications, was sustained. The case being brought here by writ of error, it is *Held*, that a Federal question was presented by the record, but that the proceeding was only one to secure evidence; that in the securing of such evidence no right protected by the Constitution of the United States was invaded; that the State might determine for itself in what way it would secure evidence of the regularity of the proceedings of any of its municipal corporations; and that unless in the course of such proceedings some constitutional right was denied to the individual, this court could not interfere on the ground that the evidence might thereafter be used in some further action in which there might be adversary claims.

ON March 7, 1887, the legislature of the State of California passed an act, (Stat. Cal. 1887, 29,) whose scope and purpose were disclosed in the first section:

Statement of the Case.

"SEC. 1. Whenever fifty, or a majority of freeholders owning lands susceptible of one mode of irrigation from a common source, and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of an irrigation district under the provisions of this act, and when so organized such districts shall have the powers conferred, or that may hereafter be conferred, by law upon such irrigation districts."

This act was amended in 1889 and 1891, (Stat. Cal. 1889, 15; 1891, 53, 142, 147, 274,) the amendments looking to a mere perfection of the system. In a general way it may be remarked that the system contemplated was substantially this: Upon petition of the requisite number of inhabitants of a proposed district and publication of notice the board of supervisors of the county in which the district, or the larger portion of it, was situated was required to examine into the matter at a regular meeting, and after its determination to give notice and call an election, at which all the electors of the proposed district were entitled to vote. If two-thirds of the votes cast were in favor thereof an order was to be entered on the minutes of the board declaring the proposed district organized into a municipal corporation. Provision was made for directors, three or five in number, to be elected from separate divisions or from the district at large, who constituted the governing board of the new corporation. They had charge of the construction of the irrigation works, of the levy of taxes, and the borrowing of money. They were authorized to submit to the voters the question of issuing bonds for a specified amount, such bonds to be the obligations of the district, and to be paid by taxation in the ordinary manner of discharging municipal obligations. Section 12 reads that "the use of all water required for the irrigation of the lands of any district formed under the provisions of this act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of this act, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner prescribed by law."

Statement of the Case.

This was simply carrying into the statute the language of the state constitution, section 1, article 14, which is as follows:

"SEC. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the control and regulation of the State, in the manner to be prescribed by law."

The constitutionality of this law has been settled in the case of *Fallbrook Irrigation District* v. *Bradley*, *ante*, 112, just decided, which was argued with this case.

On February 16, 1889, two acts were passed, (Stat. Cal. 1889, 18, 21,) for changing the boundaries of irrigation districts by taking in adjacent territory or excluding some of the territory within the original boundaries. On March 16, 1889, (Stat. Cal. 1889, 212,) a further act was passed authorizing action in the courts at the instance of the board of directors for a judicial determination of the validity of the proceedings in respect to the issue of bonds, and this, if desired, before the bonds had been actually disposed of. The purpose of this act is thus stated by the Supreme Court of California, in the opinion filed in the present case:

"As the validity of the bonds when issued depends upon the regularity of the proceedings of the board and upon the ratification of the proposition by a majority of the electors, it is matter of common knowledge that investors have been unwilling to take them at their par value while all the facts affecting their validity remain the subject of question and dispute."

"To meet this inconvenience, for the security of investors, and to enable the irrigation districts to dispose of their bonds on advantageous terms, the supplemental act under which this proceeding was instituted was passed."

In the summer of 1887 the Modesto Irrigation District was organized under authority of the act of March 7, 1887. The conformity of the proceedings taken in its organization to the requirements of the act is not denied. The area of the district as organized was 108,000 acres. The board of directors, after

estimating and determining that $800,000 were necessary for the proper construction of the irrigation works, ordered a special election to be held on December 14, 1887, to enable the voters of said district to pass upon the question of the issue of bonds to that amount. The election was had, and resulted in a large majority in favor of the issuing of the bonds; out of 515 votes cast, 439 were in the affirmative. On January 3, 1888, the board of directors met at a regular meeting and ordered the bonds of the district to the amount of $800,000 to be issued in the manner and form prescribed by law. On or about June 4, 1889, certain parties owning tracts of land within the boundaries of the irrigation district proceeded under the terms of the exclusion act to petition for an exclusion of their lands from its limits. These proceedings culminated in an order of July 20, 1889, excluding a tract of 28,000 acres, and leaving only 80,000 acres within the district. On July 31, 1889, no bonds having as yet been issued under the order of January 3, 1888, the board of directors entered a new order for the issue of bonds to the amount of $400,000. The resolution which was passed described the denomination and form of the bonds thus to be issued, and directed that notice be given that sealed proposals would be received up to September 3, 1889, for the purchase of such bonds. On August 1, 1889, the day after the entry of the last order, a petition was filed by the board of directors in the Superior Court of Stanislaus County, seeking a judicial determination, in accordance with the act of March 16, 1889, of the validity of the proposed issue of bonds. The petition as filed set forth only the order of July 31, 1889, for the issuance of bonds to the amount of $400,000, and asked that they be declared valid. In these proceedings Tregea, a resident of the district, appeared and filed an answer. The case, as between the board of directors and Tregea, came on for trial on October 21, 1889, and, after the testimony had all been received and during the argument, the plaintiffs were permitted to amend their petition so to include therein the order of the directors of January 3, 1888, for the issue of $800,000 in bonds, and a prayer for the confirmation thereof. No one had notice of this

Statement of the Case.

amendment except the defendant Tregea. He demanded that, in consequence of such amendment, a trial should be had *de novo*, but the court overruled his application, granted leave to file an amended answer, and permitted further evidence only in respect to the new matter set out in such amended pleadings. On November 29, 1889, written findings of fact and conclusions of law were filed and judgment entered, which judgment was in the following language:

"Wherefore, by reason of the law and the finding aforesaid, it is ordered, adjudged and decreed, that the proceedings by and under the direction of the board of supervisors of said county which are recited in the said findings, which were had for the organization of said irrigation district, the boundaries of which are described in said finding, including in said proceedings the election in said finding mentioned, which was held for the purpose of determining whether said proposed district should be organized as an irrigation district, be, and the same hereby are, approved and confirmed; and it is further ordered, adjudged and decreed that the proceedings had by and under the direction of the said board of directors which are recited in said petition and said findings, which were had for the purpose of the issue and sale of the bonds of said district to the amount of eight hundred thousand dollars, including in said proceedings the said election mentioned in said petition and findings, which was held for the purpose of determining whether the bonds of said district should be issued; also the proceedings by and under the direction of said board, which are recited in said findings, by which a certain tract of land in said findings described, which was included within the boundaries of said district as it was organized as aforesaid, was excluded from said district, and by which the boundaries of said district are defined and described as said boundaries were and remained upon and after the exclusion from said district of said tract of land, which said boundaries are in said findings described, and also the proceedings by and under the direction of said board by which it was ordered that bonds of said district to the amount of four hundred thousand dollars, parcel of said amount of eight hundred thousand dollars of

said bonds, be offered for sale in the manner provided by law, be, and each and all of said proceedings is, and are hereby, approved and confirmed; and it is further ordered, adjudged and decreed that the said Modesto Irrigation District, ever since its organization as aforesaid, has been and now is a duly and legally organized irrigation district, and that said irrigation district possesses full power and authority to issue and sell from time to time the bonds of said irrigation district to the amount of eight hundred thousand dollars."

The defendant appealed from this judgment and decree to the Supreme Court of the State which, on March 19, 1891, modified the decree of the Superior Court by striking out so much thereof as confirmed the order of January 3, 1888, for the issue of $800,000 of bonds of the district, and, as so modified, affirmed it. The opinion of that court is found in 88 California, 334. To reverse this judgment of the Supreme Court of the State the defendant sued out a writ of error from this court.

Mr. Thomas B. Bond for plaintiff in error. *Mr. J. J. Scrivner* and *Mr. George W. Schell* were on his brief.

Mr. John H. Boalt, as *Amicus Curiæ*, filed a brief in the interest of plaintiff in error.

Mr. A. L. Rhodes for defendant in error.

Mr. Benjamin Harrison for defendant in error.

Mr. C. C. Wright for defendant in error. *Mr. Joseph H. Call* was on his brief.

Mr. John F. Dillon for defendant in error. *Mr. Harry Hubbard* and *Mr. John M. Dillon* were on his brief.

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

A motion was made to dismiss this case on the ground of the lack of a Federal question. It appears from the opinion

of the Supreme Court of the State that the defendant contended before it that the attempt to bind the reconstituted district — that is, the district diminished by the exclusion of 28,000 acres, and in which his property was situated — by a vote of the district prior to such exclusion in respect to the issue of bonds, was in violation of section 10, article I of the Constitution of the United States; and that it overruled and denied such contention. So there was considered by the Supreme Court of the State the distinct question of an alleged conflict between the proceedings confirmed by the decree of the lower court and rights claimed under the Constitution of the United States, and the decision was against those rights. Further, the real contention of the defendant was and is that the operation of this statute is to deprive him of property without due process of law. The burden of his case from the first has rested in the alleged conflict between proceedings had under the irrigation statute and the Federal Constitution; so that beyond the express declaration in the opinion of the Supreme Court of the State, we may look to the real matter in dispute, and these unite in forbidding us to say that no Federal question was presented. The motion to dismiss on that ground must be overruled.

But going beyond this matter, we are confronted with the question whether, in advance of the issue of bonds and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. For, notwithstanding the adjudication by the courts of the State in favor of the validity of the order made for the issue of four hundred thousand dollars of bonds, and, notwithstanding any inquiry and determination which this court might make in respect to the matters involved, there would still be no contract executed; no obligation resting on the district. All that would be accomplished by our affirmance of the decision of the state court would be an adjudication of the right to make a contract, and, unless the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor

of the court would be spent in determining a mere barren right — a purely moot question.

We are not concerned with any question as to what a State may require of its judges and courts, nor with what measures it may adopt for securing evidence of the regularity of the proceedings of its municipal corporations. It may authorize an auditor or other officer of state to examine the proceedings and make his certificate of regularity conclusive evidence thereof, or it may permit the district to appeal to a court for a like determination, but in either event it is a mere proceeding to secure evidence.

The directors of an irrigation district occupy no position antagonistic to the district. They are the agents and the district is the principal. The interests are identical, and it is practically an *ex parte* application on behalf of the district for the determination of a question which may never in fact arise. It may be true, as the Supreme Court say, that it is of advantage to the district to have some prior determination of the validity of the proceedings in order to secure the sale of its bonds on more advantageous terms, but that does not change the real character of this proceeding.

This is not the mere reverse of an injunction suit brought by an inhabitant of the district to restrain a board from issuing bonds, for in such case there is an adversary proceeding. Underlying it is the claim that the agent is proposing to do for his principal that which he has no right to do, and to bind him by a contract which he has no right to make; and to protect his property from burden or cloud the taxpayer is permitted to invoke judicial determination. If in such suit an injunction be granted, as is prayed for, the decision is not one of a moot question, but is an adjudication which protects the property of the taxpayer.

The power which the directors claim is a mere naked power, and not a power coupled with an interest. It is nothing to them, as agents, whether they issue the bonds or not; they neither make nor lose by an exercise of the alleged power; and if it be determined that the power exists, still no burden

is cast upon the property of the district because no bonds are issued save by the voluntary act of the board.

It may well be doubted whether the adjudication really binds anybody. Suppose the judgment of the court be that the proceedings are irregular, and that no power has been by them vested in the district board, and yet notwithstanding such decision the board issues, as provided by the act, the negotiable bonds of the district, will a *bona fide* purchaser of those bonds be estopped by that judgment from recovering on the bonds against the district? The doctrine of *lis pendens* does not apply. Neither is any such adjudication binding in respect to negotiable paper unless the party purchases with knowledge of the suit or the decree. *Warren County* v. *Marcy*, 97 U. S. 96; *Brooklyn* v. *Insurance Company*, 99 U. S. 362; *Orleans* v. *Platt*, 99 U. S. 676; *Cass County* v. *Gillett*, 100 U. S. 585; *Empire* v. *Darlington*, 101 U. S. 87; *Thompson* v. *Perrine*, 103 U. S. 806; *Carroll County* v. *Smith*, 111 U. S. 556; *Scotland County* v. *Hill*, 112 U. S. 183.

The case of *Carroll County* v. *Smith* is instructive on this question. In that case, before the issue of the bonds in suit, an injunction had been issued by the chancery court of the county enjoining the county officials from issuing and delivering the bonds, which injunction was afterwards sustained and made perpetual by the judgment and decree of the Supreme Court of the State. Notwithstanding which the county officials fraudulently and illegally issued the bonds, and this court sustained a judgment on those bonds in favor of a *bona fide* holder, saying in the opinion: "The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens*. *Warren County* v. *Marcy*, 97 U. S. 96. It is not alleged in the plea that the defendant in error had actual notice of the litigation, or of the grounds on which it proceeded, or that any injunction was served upon the board of supervisors; and, if he had, that notice would have been merely of the question of law, of

which, as we have seen, he is bound to take notice, at all events, and which is now for adjudication in this case."

The case of *Scotland County* v. *Hill*, *supra*, contains nothing in conflict with this, for that determines only the effect of actual notice of the pendency of a suit, the point of the decision being expressed in these words of the Chief Justice:

"The case of *Warren County* v. *Marcy*, 97 U. S. 96, decides that purchasers of negotiable securities are not chargeable with *constructive* notice of the pendency of a suit affecting the title or validity of the securities; but it has never been doubted that those who buy such securities from litigating parties, with *actual* notice of the suit do so at their peril, and must abide the result the same as the parties from whom they got their title."

But if a judgment in such a proceeding as this cannot be invoked by the district as *res judicata* in an action brought against it by the holders of bonds thereafter wrongfully issued, can a judgment in favor of the power be invoked by the holder of such bonds as conclusive upon the district upon the ground of *res judicata?* In order to create estoppel by judgment must there not be mutuality? We do not mean to intimate that it may not have effect as evidence, like the certificate of an auditor declared by a legislature to be conclusive, but is it not simply as evidence and not as *res judicata?*

Some light may be thrown on this question by reference to a matter of a somewhat kindred nature. In States which provide for the organization of corporations under general statute different modes of procedure are prescribed. In some States it is sufficient for the parties desiring to incorporate to prepare a charter, acknowledge it before some official, and file it with the secretary of state, or other public officer, and the certificate of such officer is made the evidence of the incorporation. In other States the parties may file a petition in some court, and that court upon presentation thereof examines into the propriety of the incorporation, and if satisfied thereof enters a decree declaring the petitioners duly incorporated, and the copy of such decree is the evidence of the incorporation. Does the difference in procedure between these two

cases create any essential difference in character? Is the one executive and the other judicial? Suppose, in the latter case, the statute had provided that either one of the petitioners might appeal from the decree of a lower to the Supreme Court of the State, in order to obtain a final adjudication in favor of the propriety of such incorporation, would this court entertain a suit in error to reverse such adjudication by the highest court of the State? Would it not be held in effect, whatever the form, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action? It seems to us that this proceeding is after all nothing but one to secure evidence, that in the securing of such evidence no right protected by the Constitution of the United States is invaded, that the State may determine for itself in what way it will secure evidence of the regularity of the proceedings of any of its municipal corporations, and that unless in the course of such proceeding some constitutional right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims. So on this ground, and not because no Federal question was insisted upon in the state court, the case will be

Dismissed.

Mr. Justice Harlan, Mr. Justice Gray and Mr. Justice Brown are of opinion that, as the judgment of the state court was against a right and privilege specially set up and claimed by the plaintiff in error under the Constitution of the United States, such judgment, if not modified or reversed, will conclude him, if not all holders of taxable property in the Modesto Irrigation District, in respect of the Federal right and privilege so alleged; consequently, it is the duty of this court to determine, upon its merits, the Federal question so raised by the pleadings and determined by the judgment of the state court. They are also of opinion that the principles announced in *Fallbrook Irrigation District* v. *Bradley, etc.*, just decided, sustain the conclusions of the state court upon this Federal question and require the affirmance of its judgment.

WISCONSIN CENTRAL RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 21. Argued October 15, 16, 1896. — Decided November 16, 1896.

The changes made in the grants to Wisconsin in the act of May 5, 1864, to aid in the construction of railroads from those made to that State by the act of June 3, 1856, rendered necessary some modifications of provisos 1 and 3 of § 1, and of §§ 2, 3 and 4 of the latter act, and they were accordingly reënacted in homologous provisos and sections of the act of 1864; but as the 2d proviso of § 1 and § 5 of the act of 1856 required no modification, they were not reënacted, but the terms and conditions contained therein were carried forward by reference, as explained in detail in the opinion of the court.

Statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee.

An intention to surrender the right to demand the carriage of mails over subsidized railroads at reasonable rates, assumed in construing a statute of the United States, is opposed to the established policy of Congress.

The terms and conditions imposed on the grant under which the plaintiff in error holds embraced the condition that the mail should be carried at such rates as Congress might fix; and § 13 of the act of July 12, 1876, was applicable.

The Postmaster General, in directing payment of compensation for mail transportation, does not act judicially.

The action of executive officers in matters of account and payment cannot be regarded as a conclusive determination, when brought in question in a court of justice.

The government is not bound by the act of its officers, making an unauthorized payment, under misconstruction of the law.

Parties receiving moneys, illegally paid by a public officer, are liable *ex æquo et bono* to refund them; and there is nothing in this record to take the case out of the scope of that principle.

The forms of pleading in the Court of Claims do not require the right to recover back moneys so illegally paid to be set up as a counterclaim in an action brought by the party receiving them to recover further sums from the government.

An act of Congress of March 3, 1873, c. 231, 17 Stat. 556, prescribed the rates of compensation for the transportation of the mails on the basis of the average weight, and by an act

of July 12, 1876, c. 179, 19 Stat. 78, the compensation was directed to be readjusted by the Postmaster General as specified on and after July 1, 1876. Section 13 of this act provided "that railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

By an act approved June 3, 1856, c. 43, 11 Stat. 20, Congress granted to the State of Wisconsin lands to aid in the construction of certain railroads northward and northwestward in said State, ultimately reaching the west end of Lake Superior, the land granted being every alternate odd-numbered section for six sections in width on each side of the roads respectively. Section 5 of this act provided: "That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: *Provided*, That until such price is fixed by law, the Postmaster General shall have the power to determine the same." Some or all of the roads contemplated in this act not having been constructed, Congress, by act of May 5, 1864, c. 80, 13 Stat. 66, again granted lands to the State of Wisconsin for three different general lines of railroads, the line covered by section 3 of the act, being the one in controversy. By this act alternate odd-numbered sections for ten sections in width, instead of six, were granted "upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June 3, 1856."

The two acts in parallel columns, the words in each and not in the other being printed in italics, are as follows:

Act of June 3, 1856.	*Act of May* 5, 1864.
	SEC. 1. [This section grants land to aid in the construction of a railroad from Saint Croix River or Lake to Lake Superior.]

SECTION 1. That there be, and is hereby, granted to the State of Wisconsin for the purpose of aiding in the construction of a railroad from *Madison, or Columbus, by the way of Portage City to the Saint Croix River or Lake between townships twenty-five and thirty-one, and from thence to the west end of* Lake Superior; *and to Bayfield; and also from Fond du Lac on Lake Winnebago, northerly to the state line,* every alternate section of land designated by odd numbers for *six* sections in width on each side of said roads, *respectively.*

But in case it shall appear that the United States have, when the lines or routes of said roads *are* definitely fixed, sold any sections or parts thereof granted as aforesaid, or that the right of preëmption has attached to the same,

SEC. 2. [This section grants land to aid in the construction of a railroad from Tomah to Saint Croix River or Lake.]

SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the State of Wisconsin, for the purpose of aiding in the construction of a railroad from

Portage City, Berlin, Doty's Island, or Fond du Lac, as said State may determine, in a northwestern direction, to Bayfield, and thence to Superior, on Lake Superior, every alternate section of *public* land, designated by odd numbers, for *ten* sections in width on each side of said road, *upon the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six.* But in case it shall appear that the United States have, when the line or route of said road *is* definitely fixed, sold, *reserved, or otherwise disposed of* any sections or parts thereof, granted as aforesaid, or that the right

then it shall be lawful for any agent or agents, *to be* appointed by the governor *of said State*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *so* much land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption has attached, as aforesaid, which lands (thus selected in lieu of those sold and to which preemption has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by *the* State *of Wisconsin* for the use and purpose aforesaid:

Provided, That the lands to be so located shall in no case be further than *fifteen* miles from the line of *the* road*s in each case, and selected for* and *on account of said roads:*

Provided further, *That the* of preëmption *or homestead* has attached to the same, *that* it shall be lawful for any agent or agents *of said State*, appointed by the governor *thereof*, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tier of sections above specified, *as* much *public* land in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of preëmption *or homestead* has attached as aforesaid, which lands (thus selected in lieu of those sold and to which *the right of* preëmption *or homestead* has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by *said* State, *or by the company to which she may transfer the same*, for the use and purpose aforesaid: *Provided*, That the lands to be so located shall in no case be further than *twenty* miles from the line of *said* road.

lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever:

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

SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which, *by such grant*, shall remain to the United States, within *six* miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of

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

SEC. 4. *And be it further enacted*, That the sections and parts of sections of lands which shall remain to the United States within *ten* miles on each side of said roads shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of the said *re-*

said lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 3. *And be it further enacted*, That the said lands hereby granted *to said State* shall be subject to the disposal of the *legislature thereof*, for the purposes aforesaid, and no other;

and the said railroads *shall* be and remain public highways for the use of the Government of the United States free from toll or other charge *upon* the transportation of property or troops of the United States.

SEC. 4. *And be it further enacted, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of roads, respectively, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of either of said roads are completed, then* *served* lands become subject to private entry until the same have been first offered at public sale at the increased price.

SEC. 8. *And be it further enacted*, That the said lands hereby granted shall, *when patented as provided in section seven of this act*, be subject to the disposal of the *companies respectively entitled thereto*, for the purposes aforesaid, and no other, and the said railroads be, and *shall* remain public highways for the use of the Government of the United States, free from *all* toll or other charge, *for* the transportation of *any* property or troops of the United States.

SEC. 7. *And be it further enacted, That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title*

another like quantity of land hereby granted may be sold; and so from time to time until said roads are completed;

to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: Provided, however, That no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States.

and if said road*s are* not completed within ten years,

Sec. 9. *And be it further enacted, That* if said road *mentioned in the third section aforesaid is* not completed within ten years *from the time of the passage of this act, as provided herein, no further patents shall be issued to said company for said lands, and*

no further sale*s* shall be

no further sale shall be made,

made, and the land unsold shall revert to the United States.

and the lands unsold shall revert to the United States.

SEC. 5. *And be it further enacted, That the time fixed and limited for the completion of said roads in the act aforesaid of June three, eighteen hundred and fifty-six, be, and the same is hereby extended to a period of five years from and after the passage of this act.*

SEC. 5. *And be it further enacted, That the United States mail shall be transported over said roads, under the direction of the Post Office Department, at such price as Congress may, by law, direct: Provided, That until such price is fixed by law, the Postmaster General shall have the power to determine the same.*

The road constructed upon the line indicated in section 3 of the act of 1864 was originally that of two companies, which were afterwards consolidated and became the Wisconsin Central Railroad Company. These roads were constructed by the Phillips and Colby Construction Company, who apparently were to have control and operation of the road until fully equipped and delivered to the railroad company. The time for completion having been extended, portions of said roads were completed, equipped and operated in 1875 and carried mails under the management of the construction company up to some time prior to December 27, 1877, when notice was given of the turning over of the roads to the Wisconsin Central Railroad Company, and from that time the mails have been carried by that company. Commencing in 1875 and

continuing until July, 1879, the Postmaster General allowed and paid for the carriage of the mails the customary rates paid to non-land-grant companies. Upon the informal opinion of the Assistant Attorney General for the Post Office Department, the Postmaster General issued an order, June 2, 1880, directing that from July 1, 1879, the pay should only be at the rate provided by Congress for land-grant roads, namely, eighty per cent of the full amount. January 26, 1881, upon a reconsideration, orders were issued recalling the order of June 2, 1880, whereupon the department returned to the earlier practice and paid full rates for the carriage of the mails until January 8, 1884, when Postmaster General Gresham again adopted the construction of June 2, 1880, and applied the same to the compensation of these roads from and after July 1, 1883, and that construction has been applied from thence hitherto, and payment made at the rate of eighty per cent of the amount paid non-land-grant roads.

In addition to reducing the pay for carrying the mails for the current and subsequent years, namely, from July 1, 1883, the Postmaster General restated the account for the carriage of the mails prior to July 1, 1883, both during the period when they were carried by the construction company and during the period from about December, 1877, to July 1, 1883, in which they were carried by the Wisconsin Central Railroad Company and deducted out of moneys which had been earned since July 1, 1883, the excess over the eighty per cent rate which had been paid during the previous years.

Suit was brought in the Court of Claims May 26, 1887, by the Wisconsin Central Railroad Company against the United States to recover an alleged balance due as compensation for carrying the mails. The Court of Claims allowed the railroad company $6448.80 as being the amount deducted from the claimant's earnings in 1886 and 1887 for payments in excess of the eighty per cent rate made to the construction company while that company was operating the roads, but the Court of Claims held that Postmaster General Gresham's construction was correct, and that the claimant was restricted to the eighty per cent rate, and, therefore, disallowed the

Argument for Appellant.

claim for the money withheld against the excess and also the amount of the claim for the period subsequent to July 1, 1883. The sums which had been paid to claimant in excess of the eighty per cent rate and which were deducted from subsequently earned pay, amounted to $12,532.43. The twenty per cent subsequent to July 1, 1883, was $16,343.58.

The Court of Claims gave judgment in favor of the Wisconsin Central Railroad Company for $6448.80, and the railroad company appealed. The United States did not appeal.

The opinion of the court, by Nott, J., is reported 27 C. Cl. 440.

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

I. The grant made by the act of 1864 was not upon condition that the mails should be carried at such rates as Congress might fix.

That act contains no express condition for the transportation of the mail, and the circumstances leading to its passage show that Congress did not intend to impose such a condition. The intention of Congress is to be ascertained from the facts attending the passage of the act, as well as from its language. *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46; *Caledonian Railway* v. *North Bristol Railway*, 6 L. R. App. Cas. 114.

The facts show that Congress did not intend to impose this condition. Such an intention is not inconsistent with the policy of Congress. *Union Pacific Railroad* v. *United States*, 104 U. S. 662. This condition was not incorporated by reference in the act of 1864; and an analysis of that act shows that no such incorporation was intended. See *McRoberts* v. *Washburne*, 10 Minnesota, 23. The structure of the act indicates that the words "terms and conditions" did not refer to the provision in the act of June 3, 1856. *Atkins* v. *Disintegrating Co.*, 18 Wall, 272; *In re Cambrian Railways Com-*

pany's Scheme, L. R. 3 Ch. App. 278; *Thompson* v. *Farrer*, L. R., 9 Q. B. D. 372; *People* v. *Davenport*, 91 N. Y. 574.

The language used does not require a construction imposing such a condition. If it does, the words in question should be disregarded as inconsistent with the general scope of the act. *Ebbs* v. *Boulnois*, 10 Ch. App. 479; *People* v. *Davenport*, 91 N. Y. 574; *Ross* v. *Barland*, 1 Pet. 655.

The construction contended for by the claimant was adopted by the Post Office Department contemporaneously with the passage of the act of July 12, 1876, c. 179, and should be followed. *United States* v. *Alabama Great Southern Railroad*, 142 U. S. 615.

II. Even if § 13 of the act of July 12, 1876 be held applicable to the Wisconsin Central Railroad, payments made under a different construction of the act of May 5, 1864, cannot now be used to defeat the claim for money confessedly earned.

(*a*) The order of the Postmaster General to withhold this money on account of alleged past overpayments involved a reversal of the decisions of his predecessors. Such reversal was in defiance of the well established rule that the decisions of executive officers involving the construction of a law are final upon the same executive department, not as to the rule of law decided, but as to the decision of the particular case, and hence was illegal. *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *Kendall* v. *Stokes*, 3 How. 87; *Ex parte Randolph*, 2 Brock. 447; *Stotesbury* v. *United States*, 146 U. S. 196; *United States* v. *Stone*, 2 Wall. 525; *Shepley* v. *Cowan*, 91 U. S. 330; *Moore* v. *Robbins*, 96 U. S. 530; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165; *Waddell* v. *United States*, 25 C. Cl. 323; *Armstrong* v. *United States*, 29 C. Cl. 148; *Cotton* v. *United States*, 29 C. Cl. 207.

(*b*) Such alleged overpayments would not even have entitled the government to recover by suit the money paid, because the money was paid, in the main, after a deliberate consideration of the question involved by the Postmaster General, to whom the duty of deciding it was committed, and the accounts with the claimant covering the period in which such overpayments are alleged to have been made had been settled. *Elliott* v.

Swartwout, 10 Pet. 137; *Lamborn* v. *County Commissioners*, 97 U. S. 181; *Brisbane* v. *Dacres*, 5 Taunt. 143; *Midland Great Western Railway* v. *Johnson*, 6 H. L. Cas. 798; *Marshall* v. *Collett*, 1 Younge & Col. (Exch.) 232; *Trigge* v. *Lavallée*, 15 Moore P. C. 270; *Clarke* v. *Dutcher*, 9 Cowen, 674; *United States Bank* v. *Daniel*, 12 Pet. 32; *Rogers* v. *Ingham*, 3 Ch. D. 351; *Queen* v. *Lord Commissioners of Treasury*, 16 Q. B. 357; *Wayne County* v. *Randall*, 43 Michigan, 137; *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488; *Griswold* v. *Hazard*, 141 U. S. 260; *Hunt* v. *Rousmanier*, 8 Wheat. 174; 1 Pet. 1; *McArthur* v. *Luce*, 43 Michigan, 435; *Onandaga Supervisors* v. *Briggs*, 2 Denio, 26; *Hillborn* v. *United States*, 27 C. Cl. 547; 163 U. S. 342; *Patterson* v. *United States*, 28 C. Cl. 321; *United States* v. *Barker*, 12 Wheat. 559; *Brent* v. *Bank of Washington*, 10 Pet. 596; *United States Bank* v. *United States*, 2 How. 711; *The Siren*, 7 Wall. 152; *Smoot's case*, 15 Wall. 36; *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *Bostwick*, 94 U. S. 53; *United States* v. *State Bank*, 96 U. S. 30; *McKnight* v. *United States*, 98 U. S. 179; *Badeau* v. *United States*, 130 U. S. 439. In the last case the court say: "but inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which, *ex æquo et bono*, he ought to return."

(*c*) Even if the government had the right to recover by suit the money so paid, such right could not be availed of in this proceeding, as the government entered a general traverse, and did not file any counter claim. *United States* v. *Burns*, 12 Wall. 246; *Clark* v. *United States*, 95 U. S. 539; *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Carr*, 132 U. S. 644; *United States* v. *Stahl*, 151 U. S. 366.

Mr. Assistant Attorney General Dodge for appellees.

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

Appellant contends that it was not subject to the eighty per cent rate, and hence that it is entitled to recover both the

items disallowed by the Court of Claims; and also that, even if this position be untenable, it should not have been charged with amounts which had already been settled and paid under the view that the company was not so restricted, and should have been awarded the sum of $12,532.43 withheld.

The act of 1864 expressly provided that the grant was made upon "the same terms and conditions as are contained in the act granting lands to said State to aid in the construction of railroads in said State, approved June three, eighteen hundred and fifty-six," and that act contained in its fifth section the following: "That the United States mail shall be transported over said roads under the direction of the Post Office Department at such price as Congress may by law direct, provided that until such price is fixed by law, the Postmaster General shall have the power to determine the same."

But it is argued that the "terms and conditions" referred to do not embrace the terms and conditions prescribed by section 5, because the general subject-matter of every other section of the act of 1856 was expressly reënacted, and therefore it must be inferred that Congress intended to express in the act of 1864 all the terms and conditions which were imposed upon the grant thereby made; or that, in any event, the words should be limited to the terms and conditions of section 1 of the act of 1856.

The difficulty is that to hold that all the terms and conditions imposed upon the grant were specifically expressed in the act of 1864 itself would be to render the reference to the act of 1856 meaningless and to eliminate, by interpretation, the words "upon the same terms and conditions as are contained in" that act; and we are of opinion that the explicit language of the statute cannot thus be done away with.

The existence of terms and conditions in the act of 1856 left wholly unmodified by the reënactments of the act of 1864 preclude the argument that the words so used are without meaning; and, moreover, the settled rule is that statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee.

Reference to the two acts will show that the changes in the

new grant rendered necessary some modification of the first and third provisos of the first section and of sections 2, 3 and 4 of the act of 1856 (which embody some, but not all, of the terms and conditions), and they were accordingly reënacted in homologous provisos and sections of the act of 1864, but as the second proviso of section 1 and section 5 required no modification they were not reënacted, and the terms and conditions contained therein were carried forward by reference.

Thus for the first proviso of section 1 of the act of 1856, the first proviso of the third section of the act of 1864 was substituted in order to enlarge the fifteen-mile limit to twenty, and section 6 of the act of 1864 was substituted for the third proviso in order to provide for the exclusion of mineral lands from the grant. So the second section of the act of 1856 was reënacted in the fourth section of the act of 1864 to change the six miles on each side of the road to ten; and section 3 of the act of 1856 was reënacted in section 8 of the act of 1864 to provide for the difference between the patenting to the State under the earlier act and the patenting direct to the companies under the last act, while section 4 of the act of 1856 was reproduced in section 7 of the act of 1864 with the alterations rendered necessary, not only by the change in patenting, but by the increased dimensions of the grant. The fact that the provision for the free transportation of troops and property of the United States, contained in section 3 of the first act, appeared substantially unchanged in the eighth section of the last act is of no significance, as the purpose of the reënactment had no relation to that requirement. The second proviso of section 1 and section 5 of the act of 1856 were not reënacted manifestly because no change was required, and the provision of section 3 of the act of 1864 that the grant should be subjected to *the same* terms and conditions as the grant by the act of 1856, dispensed with the necessity of repetition. Giving this operation to the plain language of that provision, as we must, involves no inconsistency in respect of the terms and conditions contained in the provisos and sections which were reënacted, since the reënactment was due to the necessity of modification arising

under the new grant and indicated no intention to withdraw any of the original terms and conditions.

An intention to surrender the right to demand the carriage of the mails over the subsidized roads at reasonable charges would be opposed to the policy established by well-nigh uniform Congressional legislation on the subject, and although there may have been departures from that policy in a few instances, under exceptional circumstances, none of them justify the contention that such departure was intended here.

We think it follows, also, that there is no room for concluding that the words "the same terms and conditions as are contained in" the act of 1856, should be confined to the terms and conditions contained in the first section of that act, or rather in its second proviso, as the first and third provisos were reënacted. The three provisos of the granting section of the act of 1856 did not embody all the terms and conditions imposed on that grant, and as the grant of the act of 1864 was subjected to the same terms and conditions as those of the prior act, and it was as true of the reënacted sections as it was of the reënacted provisos, that they were alike reënacted to adapt the last act to the changes in the extent and manner of the new grant, we regard the suggestion which would restrict the words used to the second proviso and exclude the fifth section as obviously inadmissible.

Nor are we able to concur in the view that the general policy of the act of 1864 was inconsistent with the imposition of the duty of transporting the mails. The argument is that the grant of 1856 was not sufficiently favorable to induce the building of the roads and that, therefore, Congress in 1864 deemed it proper and necessary to make a more favorable grant and did so in part by dispensing with this duty, but this will not do, for the inducements were made greater by adding two-thirds more land, and at the same time it was expressly provided that the increased grant should be subject to the same terms and conditions as the earlier one. We find nothing in the record to give color to the suggestion that in addition to the increase of the grant Congress intended to surrender the rights of the government in respect of mail

transportation. *Wisconsin Central Railroad* v. *United States*, 159 U. S. 46.

Some reliance is placed by appellant on departmental construction, but we may dismiss that contention with the observation that we do not consider the true construction as doubtful, and that the departmental construction referred to was neither contemporaneous nor continuous. *United States* v. *Alabama Southern Railroad*, 142 U. S. 615; *United States* v. *Healey*, 160 U. S. 136.

We agree entirely with the Court of Claims that the terms and conditions imposed on this grant embraced the condition that the mail should be carried at such rates as Congress might fix, and that section 13 of the act of July 12, 1876, c. 179, 19 Stat. 78, was applicable. The item of $16,343.48 was properly disallowed as was also the item of $12,532.43, unless the latter was recoverable by reason of some ground of objection to its extinguishment by the application of the sums unlawfully paid to and received by the company.

And as to that it is insisted that such application cannot be made because it was not competent for the Postmaster General to withhold the moneys, thus paid without authority of law, as the previous directions to make the payments were decisions binding on the department; because the payments were voluntarily made on due consideration and deliberation and the accounts settled; and because no counterclaim was filed.

The Postmaster General in directing payment of compensation for mail transportation, under the statutes providing the rate and basis thereof, does not act judicially, and whatever the conclusiveness of executive acts so far as executive departments are concerned, as a rule of administration, it has long been settled that the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice. *United States* v. *Harmon*, 43 Fed. Rep. 560, by Mr. Justice Gray; *S. C.* 147 U. S. 268; *Hunter* v. *United States*, 5 Pet. 173; *United States* v. *Jones*, 8 Pet. 387; *United States* v. *Bank of Metropolis*, 15 Pet. 377.

In the latter case, which was a suit upon negotiable drafts accepted by the Postmaster General (the authority to do so being assumed for the purpose of the case), and which was decided after the passage of the act of July 2, 1836, c. 270, 5 Stat. 80, 83, whose seventeenth section was carried forward as section 4057 of the Revised Statutes, Mr. Justice Wayne, delivering the opinion of the court, discussed the power of a succeeding Postmaster General to revise the action of his predecessor as to credits, as follows:

"The third instruction asked the court to say, among other things, if the credits given by Mr. Barry, were for extra allowances, which the said Postmaster General was not legally authorized to allow, then it was the duty of the present Postmaster General to disallow such items of credit. The successor of Mr. Barry had the same power, and no more, than his predecessor, and the power of the former did not extend to the recall of credits or allowances made by Mr. Barry, if he acted within the scope of official authority given by law to the head of the department. This right in an incumbent of reviewing a predecessor's decisions, extends to mistakes in matters of fact arising from errors in calculation, and to cases of rejected claims, in which material testimony is afterwards discovered and produced. But if a credit has been given, or an allowance made, as these were, by the head of a department, and it is alleged to be an illegal allowance, the judicial tribunals of the country must be resorted to, to construe the law under which the allowance was made, and to settle the rights between the United States and the party to whom the credit was given.

"It is no longer a case between the correctness of one officer's judgment and that of his successor. A third party is interested, and he cannot be deprived of a payment on a credit so given, but by the intervention of a court to pass upon his right. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute, and it may be done by the direction of the incumbent of the department. The act of 2d July, 1836, entitled 'An act to change the organization of the Post Office Department,' is only affirmative of the antecedent right of the government

to sue, and directory to the Postmaster General to cause suits to be brought in the cases mentioned in the seventeenth section of that act. It also excludes him from determining, finally, any case which he may suppose to arise under that section. His duty is to cause a suit to be brought. Additional allowances, the Postmaster General could make under the forty-third section of the act of March 2, 1825 (3 Story, 1985); and we presume it was because allowances were supposed to have been made contrary to that law, that the seventeenth section of the act of 2d July, 1836, was passed. In this last, the extent of the Postmaster General's power in respect to allowances, is too plain to be mistaken.

"We cannot say that either of the sections of the acts of 1825, and 1836, just alluded to, covers the allowances made by Mr. Barry to Reeside. But if the Postmaster General thought they did, and that such a defence could have availed against the rights of the bank to claim these acceptances, as credits in this suit, the same proof which would have justified a recovery in an action by the United States, would have justified the rejection of them as credits when they are claimed as a set off."

The view thus indicated that executive decisions in cases like the present are not binding on the courts has been repeatedly affirmed and steadily adhered to. *Gordon* v. *United States*, 1 C. Cl. 1; *McElrath* v. *United States*, 12 C. Cl. 201; *Duval* v. *United States*, 25 C. Cl. 46; *Steele* v. *United States*, 113 U. S. 128; *United States* v. *Burchard*, 125 U. S. 176; *United States* v. *Stahl*, 151 U. S. 366. And it has been often applied in the instance of the improvident issue of patents: *United States* v. *Stone*, 2 Wall. 525; *United States* v. *Minor*, 114 U. S. 233; *Mullan* v. *United States*, 118 U. S. 271; *Wisconsin Railroad Co.* v. *Forsythe*, 159 U. S. 46.

In *Steele* v. *United States*, the Navy Department in contracting with the claimant for certain work upon vessels, delivered to him certain old materials at the agreed price of $2000, which was considerably less than the true value. In his suit for payment on the contract it was contended that the delivery of these materials to him at an agreed price was

without warrant of law, and that the materials having been disposed of should be accounted for by the claimant at their true value. This contention was sustained, and this court said: "The fact that the account of the appellant was settled by the officers of the Navy Department, by charging him with the value of the old material at $2000, is no bar to the recovery of its real value by the government. The whole transaction was illegal, and appellant is chargeable with knowledge of the fact."

In *United States* v. *Burchard*, the claimant, an engineer officer, retired October 26, 1874, and entitled to half sea pay, was paid from said date up to April 1, 1878, at a higher rate, whereby he received $425 in excess of that allowed by law, his pay at that rate being passed from time to time by both the disbursing officers in the Navy Department and by the accounting officers. After April 1, 1878, he was paid at a lower rate, which this court held to be the legal rate. He brought suit for the difference after 1878, and the government counterclaimed for the $425 paid to him prior to that time. His petition was dismissed, and the court held the government could recover the overpayment for the prior period. Mr. Chief Justice Waite, speaking for the court, observed that in no event was he entitled to more than half sea pay, and that all over that which he got was by a mistake of the accounting officers, and said: "It only remains to consider whether the amount which has thus been paid, or as much thereof as is embraced in the counterclaim, can be recovered back in this action, and we are of the opinion that it can. The action was brought by Burchard to recover a balance claimed to be due on pay account from the date of his retirement. He had been paid according to his present claim until April 1, 1878, and consequently there was nothing to complain of back of that date. But in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be corrected and properly charged against credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more.

If they did, it was in violation of the law, and he has no right to keep what he thus obtained. Whether the government can in any case be precluded from reclaiming money which has been paid by its disbursing and accounting officers under a mistake of law, is a question which it is not now necessary to decide any more than it was in *McElrath* v. *United States*, 102 U. S. 426, 441, when it was suggested. This is a case where the disbursing officers, supposing that a retired officer of the navy was entitled to more than it turns out the law allowed, have overpaid him. Certainly under such circumstances the mistake may be corrected."

In *United States* v. *Stahl*, the claimant, a naval officer, upon a difference of opinion as to the law, had been overpaid in the grade then occupied by him, and sued for a deficiency claimed to exist in his previous grade. This court sustained his contention as to the previous grade, and held that he had been entitled in that grade to the increased compensation, but that the excessive payments which had been made to him in the latter grade should be deducted from any sum which might be found due him in the former.

In *Mullan* v. *United States*, a suit to vacate a patent which had been granted for certain coal lands, the court held that the mistake was one of law, but that nevertheless it having been committed and the patent given for lands which the land officers were not authorized to patent, the patent could be annulled by the court. And Mr. Chief Justice Waite said: "It is no doubt true that the actual character of the lands was as well known at the Department of the Interior as it was anywhere else, and that the Secretary approved the lists, not because he was mistaken about the facts, but because he was of opinion that coal lands were not mineral lands within the meaning of the act of 1853, and that they were open to selection by the State; but this does not alter the case. The list was certified without authority of law, and, therefore, by a mistake against which relief in equity may be afforded. As was said in *United States* v. *Stone*, 2 Wall. 525, 535: 'The patent is but evidence of a grant, and the officer who issues it acts ministerially and not judicially. If he issues a patent for

land reserved from sale by law, such patent is void for want of authority. But one officer of the land office is not competent to cancel or annul the act of his predecessor. That is a judicial act, and requires the judgment of a court.'"

In *Wisconsin Central Railroad Co.* v. *Forsythe*, which was an action of ejectment to recover certain lands claimed to have been included within its grant, but which defendant insisted were outside of its grant and subject to private entry, this court said: "But further, it is urged that this question of title has been determined in the land department adversely to the claim of the plaintiff. This is doubtless true, but it was so determined, not upon any question of fact, but upon the construction of the law; and such matter, as we have repeatedly held, is not concluded by the decision of the land department."

As a general rule, and on grounds of public policy, the government cannot be bound by the action of its officers, who must be held to the performance of their duties within the strict limits of their legal authority, where by misconstruction of the law under which they have assumed to act, unauthorized payments are made. *Whiteside* v. *United States*, 93 U. S. 247; *Hawkins* v. *United States*, 96 U. S. 689, and cases before cited. The question is not presented as between the government and its officer, or between the officer and the recipient of such payments, but as between the government and the recipient, and is then a question whether the latter can be allowed to retain the fruits of actions not authorized by law, resulting from an erroneous conclusion by the agent of the government as to the legal effect of the particular statutory law under or in reference to which he is proceeding.

Section 4057 of the Revised Statutes reads: "In all cases where money has been paid out of the funds of the Post Office Department under the pretence that service had been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representa-

tions, or by the mistake, collusion or misconduct of any officer or other employé in the postal service, the Postmaster General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

Undoubtedly the word "mistake," as used in this section, includes an erroneous conclusion in the construction or application of a statute. And, this being so, as the duty is devolved on the Postmaster General to cause suit to be brought where money has been illegally paid by reason of misconstruction or misapprehension of the applicable law, it follows that he must be regarded as empowered to reconsider prior decisions to determine whether such a mistake has been committed or not. If in his judgment money has been paid without authority of law and he has money of the same claimant in his hands, he is not compelled to pay such money over and sue to recover the illegal payments, but may hold it subject to the decision of the court when the claimant sues. *United States* v. *Carr*, 132 U. S. 644; *Gratiot* v. *United States*, 15 Pet. 336; *Steele* v. *United States*, *United States* v. *Burchard*, *United States* v. *Stahl*, *supra*. And in that way multiplicity of suits and circuity of action are avoided.

It is unnecessary to go into a discussion of the exceptions which may exist between private parties to the rule that moneys paid through mistake of law cannot be recovered back.

This branch of the case was disposed of by the Court of Claims on the authority of *Duval* v. *United States*, 25 C. Cl. 46. It was there held that "the items of the several statements upon which the Sixth Auditor certifies balances due for carrying the mails ordinarily, and in the absence of special circumstances, may be regarded as running accounts, at least while the parties continue the same dealings between themselves; and that money paid in violation of law upon balances certified by the accounting officers generally may be recovered back by counterclaim or otherwise where no peculiar circumstances appear to make such recovery inequitable and unjust." The mistake was, indeed, treated as one of fact, the Post Office officials erroneously assuming through oversight that the

road in question had not been aided by grants of land, but the governing principle in the case before us is the same.

Reference was made to *Barnes* v. *District of Columbia*, 22 C. Cl. 366, 394, wherein it was ruled, Richardson, C. J., delivering the opinion, that "The doctrine that money paid can be recovered back when paid in mistake of fact and not of law does not have so general application to public officers using the funds of the people as to individuals dealing with their own money where nobody but themselves suffer for their ignorance, carelessness, or indiscretion, because in the former case the elements of agency and the authority and duty of officers, and their obligations to the public, of which all persons dealing with them are bound to take notice, are always involved." We concur in these views, and are of opinion that there is nothing on this record to take the case out of the scope of the principle that parties receiving moneys illegally paid by a public officer are liable *ex æquo et bono* to refund them.

The petition sets forth, among other things, that the Postmaster General wrongfully and unlawfully withheld the $12,532.43 out of moneys due petitioner, which was, therefore, entitled to recover the full amount; and to each and every allegation of the petition the government interposed a general traverse. It is now said that a counterclaim or set off should have been pleaded, but the record does not disclose that this objection was raised below, while the findings of fact show that the entire matter was before the court for, and received, adjudication. Moreover, it has been repeatedly held that the forms of pleading in the Court of Claims are not of so strict a character as to require omissions of this kind to be held fatal to the rendition of such judgment as the facts demand. *United States* v. *Burns*, 12 Wall. 246, 254; *Clark* v. *United States*, 95 U. S. 539, 543; *United States* v. *Behan*, 110 U. S. 338, 347; *United States* v. *Carr*, 132 U. S. 644, 650.

Judgment affirmed.

Mr. Justice Peckham dissented on the question of the right of the government to offset the alleged overpayments prior to July 1, 1883.

UNITED STATES *v.* VERDIER.

APPEAL FROM THE COURT OF CLAIMS.

No. 49. Argued October 20, 1896. — Decided November 16, 1896.

In actions in the Court of Claims interest prior to the judgment cannot be allowed to claimants, against the United States; but the provisions of Rev. Stat. § 966 peremptorily require it to be allowed to the United States, against claimants, under all circumstances to which the statute applies, and without regard to equities which might be considered between private parties.

THIS was a petition by the administrator of James R. Verdier, deceased, for the payment of a balance of $1300.41 claimed to be due him upon a readjustment of his accounts as postmaster at Beaufort, South Carolina, from July 1, 1866, to April 30, 1869.

Upon a hearing in the Court of Claims that court made the following findings of fact:

"1. James R. Verdier was a duly qualified postmaster at Beaufort, S. C., from July 1, 1866, to the 30th day of April, 1869.

"2. Upon his retirement from office he appeared as indebted to the United States, on the face of his postal accounts, in the sum of $929.20. June 28, 1870, an action was brought by the United States against him on his official bond, in the United States District Court of South Carolina, to recover said sum, and July 5, 1870, the jury returned a verdict in favor of the United States for the sum of $1063.20, which verdict was, upon motion of Verdier's attorney, set aside.

"October 31, following, the attorney for said Verdier consented that the case be submitted to the court, and upon said date the jury returned a verdict in favor of the United States against Verdier for the sum of $1059.03; the costs were $36.80; total, $1095.83. Judgment thereon was duly signed January 25, 1871.

"3. November 3, 1885, application was made to the Postmaster General by the administrator for a review and read-

justment of decedent's salary as postmaster aforesaid, under the provisions of the act of March 3, 1883, c. 119, 22 Stat. 487. December 23, 1885, said salary was readjusted and the sum of $2892.84 found due said decedent's estate. August 4, 1886, c. 903, a sum of money was appropriated by Congress to pay this and similar allowances. 24 Stat. 256, 307, 308.

"4. March 4, 1887, decedent's postal account was audited by the Auditor for the Post Office Department, who charged his account with the aforesaid judgment and interest thereon from July 5, 1870, to August 4, 1886 (the date of appropriation), and costs of suit, the total thereof being the sum of $2296.77, and deducted this sum from the amount of salary credited to said account, showing a balance of $596.07.

"June 20, 1887, the United States attorney for the aforesaid district was instructed to satisfy said judgment, which was accordingly done July 25, 1887.

"5. The sum of $596.07 was paid plaintiff, who gave the following receipt:

Transfer draft.

"'Mailed Sept. 14, 1887. Received Sept. 26, 1887, the transfer draft of the Third Assistant Postmaster General, No. 4655, for 596 dollars .07 cents in my favor on the postmaster at New York, State of N. Y., to the

"'W. J. Verdier, *Administrator.*'"

Upon these facts the court found as a conclusion of law that the petitioner was entitled to recover in the sum of $1233.57, 28 C. Cl. 268, for which amount judgment was entered and the United States appealed.

Mr. Assistant Attorney General Dodge for appellants. *Mr. Assistant Attorney Capers* was on his brief.

Mr. Harvey Spalding for appellee.

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

Opinion of the Court.

The contest in this case is really over a question of interest. Upon the termination of his services as postmaster, Verdier was found, upon the face of his accounts, to be indebted to the government. Suit was brought against him upon his bond, and a verdict obtained July 5, 1870, for $1063.20, which was subsequently set aside; but the action ultimately resulted in a judgment against him, rendered January 25, 1871, in the sum of $1095.83.

By Rev. Stat. § 966, "interest shall be allowed on all judgments in civil causes recovered in a circuit or district court . . . in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as allowed by law on judgments recovered in the courts of such State." We see no reason why this section, or § 3624, fixing the rate of interest upon delinquent accounts of public officers at six per cent, does not apply to this case. Verdier was, therefore, properly charged with interest upon the judgment. *Amis* v. *Smith*, 16 Pet. 303.

By the act of July 1, 1864, c. 197, 13 Stat. 335, the system which had theretofore prevailed of paying postmasters by a commission upon the receipts of their offices was changed; and postmasters were divided into five classes, and paid by a salary gauged by their compensation for the two consecutive years preceding the act. The classification of postmasters was determined by the Postmaster General upon the basis of the commissions previously paid to them, and the exact amount of their salaries fixed within certain limitations provided by the act for each class. There was a further provision in the second section that the salary should be reviewed and readjusted by the Postmaster General once in two years, upon the basis upon which the salary was originally fixed; but that such change should not take effect until the first day of the quarter next following the order for the same. This section was amended by the act of June 12, 1866, c. 114, 14 Stat. 59, 60, by adding a proviso that when the quarterly returns of any postmaster showed that the salary allowed was

ten per cent less than it would have been on a basis of commissions, the Postmaster General should review and readjust under the provisions of the prior act.

It will be observed that these acts of 1864 and 1866 were both prospective in their operation. *United States* v. *McLean*, 95 U. S. 750. We must assume that when Verdier took office July 1, 1866, his salary was fixed by the Postmaster General under the act of 1864, this being the date at which the first biennial term fixed by the act of 1864 expired. It would seem that no readjustment could then be made until the lapse of two years, or until July, 1868, unless, upon satisfactory representation, it was deemed expedient by the Postmaster General. If a readjustment had been made under these acts, it would have operated prospectively only, and until April 30, 1869, when he ceased to serve as postmaster. Why a readjustment was not made does not appear. It may have been for the absence of quarterly returns, as there is no finding that such returns were made. It may have been by simple neglect of the Postmaster General to comply with the law; but there is no evidence of his refusal to do so, and in any event the government would not be liable for his neglect in that particular. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Sherman*, 98 U. S. 565. It was not until 1883 that the Postmaster General was authorized to readjust the compensation of postmasters and to make such readjustments retrospective.

By the act of March 3, 1883, c. 119, 22 Stat. 487, the Postmaster General was authorized and directed to readjust the salaries of postmasters, whose salaries had not theretofore been readjusted under the act of 1866, "who had made sworn returns of their receipts and business for readjustment of salary" to the department, or who had "made quarterly returns in conformity to the then existing laws and regulations, showing that the salary allowed was ten per centum less than it would have been upon the basis of commissions," such readjustment to be made in accordance with the act of 1866, and "to date from the beginning of the quarter succeeding that in which such sworn returns of receipts and business

or quarterly returns were made; provided, that every readjustment of salary under this act shall be upon a written application signed by the postmaster or late postmaster or legal representative entitled to such readjustment."

Pursuant to this statute application was made by the administrator of Verdier for a review and readjustment of his salary as postmaster, and on December 23, 1885, his salary was readjusted, and the sum of $2092.84 found to be due his estate.

On August 4, 1886, an act was passed by Congress, c. 903, 24 Stat. 256, 307, appropriating a sum of money to pay this and similar allowances. Verdier's account was finally audited March 4, 1887. In this statement he was charged with the judgment and interest thereon from July 5, 1870, to August 4, 1886 (the date of the appropriation), the total being the sum of $2296.77, and was credited with the amount of his readjusted salary and a balance of $596.07 found to be due him. This sum was subsequently paid, the receipt of petitioner's administrator taken for the amount, and the judgment against Verdier satisfied of record July 25, 1887. On September 28, 1888, this petition was filed to recover the difference between the original verdict and the amount which was deducted from his readjusted salary upon final settlement.

By the act of 1883 no readjustment could be made, except upon the application of the postmaster, and when that application was made in this case, the salary was for the first time readjusted. Until this time the debt was not liquidated — in fact it would be more accurate to say that it did not exist. The argument is made that, as the readjusted salary was earned prior to the verdict against Verdier of July 5, 1870, he ought not to be charged with interest upon the judgment against him for the sixteen years which elapsed from that time until August, 1886, when the act of Congress appropriating money for the payment of readjusted salaries was passed; or, which is nearly the same thing, that the government should be charged with interest upon his readjusted compensation from the time he left the office. It would certainly seem to be equitable that, if the government were indebted to Verdier at the time it obtained judgment against him, it should not charge

him with interest upon its judgment. But interest being a matter of purely statutory regulation, we are bound to give or withhold it as the statute directs. By the judgment of the District Court of South Carolina, Verdier became indebted to the government on January 25, 1871, in the sum of $1095.83, and as he did not pay the debt at the time, he was properly chargeable with interest. Rev. Stat. § 966.

Upon the other hand, the government did not become a debtor to Verdier until his claim was liquidated, and by Rev. Stat. § 1091, no interest can be allowed upon any claim against the government up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest. The theory upon which interest is claimed seems to be that the Postmaster General was in fault for not having readjusted Verdier's salary under the act of 1866, and that Verdier ought not to be prejudiced by such default. The whole difficulty in the case, however, arises from the fact that there were claims upon both sides. Did the case of the government stand alone, there could be no doubt whatever that Verdier's estate would be properly chargeable with interest. Upon the other hand, if his accounts had been settled and paid at the expiration of his term, and a claim were now made under the act of 1883, it would not be claimed that the government would be chargeable with interest. The equity of petitioner's claim, if there be any, arises from the fact that while interest was running against him on his judgment, the government was equitably his debtor. Were the case between private individuals perhaps interest would be chargeable to both parties; but we are unable to see how the fact that there were mutual claims can authorize us to disregard the plain letter of the statutes. There is really no greater hardship in denying the petitioner interest than there would have been if he had not been a judgment debtor of the government.

An inherent vice of petitioner's argument is in the assumption that he and the government stand upon an equality with respect to interest. The truth is that in its dealings with individuals public policy demands that the government

should occupy an apparently favored position. It may sue, but, except by its own consent, cannot be sued. In the matter of costs it recovers but does not pay, and the liability of the individual would not be affected by the fact he had a judgment against the government which did not carry costs. So the statute of limitations may be pleaded by the government, but not against it; nor is it affected by the laches of its officers. *United States* v. *Barker*, 2 Wheat. 395; *The Antelope*, 12 Wheat. 546; *United States* v. *McLemore*, 4 How. 286; *United States* v. *Boyd*, 5 How. 29; *United States* v. *Thompson*, 98 U. S. 486; *Simmons* v. *Ogle*, 105 U. S. 271; *United States* v. *Kirkpatrick*, 9 Wheat. 720; *United States* v. *Nicholl*, 12 Wheat. 505; *Gaussen* v. *United States*, 97 U. S. 584. Under the bankruptcy law, it was a preferred creditor, and its claims were paid even before the wages of operatives, clerks or house servants. Rev. Stat. § 5101. In short, the equities which arise as between individuals have but a limited application as between the government and a citizen.

Nor is it strictly true to say that the government was indebted to Verdier at the date of its judgment against him. He had performed services for which an indebtedness was subsequently voluntarily created by the government; but until the readjustment was made the law imposed no obligation upon the government to pay him an increased salary. Verdier could not have availed himself of it as a set off or counter claim to his own debt to the government, and in fact it never became a debt until the claim was liquidated under the act of 1883. As was said by this court in *United States* v. *McLean*, 95 U. S. 750, 753: "The law imposes no obligation upon the government to pay an increased salary unless a readjustment has preceded it. And by the act of 1866 the Postmaster General is not to readjust an existing salary unless the quarterly returns made show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster General to make a readjustment immediately on the receipt of the returns, still his readjust-

ment was an executive act made necessary by the law in order to perfect any liability of the government. If the executive officer failed to do his duty, he might have been constrained by a mandamus. But the courts cannot perform executive duties or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive officer of certain duties he has failed to perform. The right asserted by the claimant rests upon a condition unfulfilled." In that case, as stated by Mr. Justice Miller in *McLean* v. *Vilas*, 124 U. S. 86, 87, this court held that the Court of Claims could not "perform the duty of readjusting the salary under the acts which conferred that power on the Postmaster General, and that there was no legal liability against the United States for the amount claimed by him until that officer had readjusted the salary in accordance with those acts of Congress"; and in *McLean* v. *Vilas* it was held that the statute did not contemplate a readjustment oftener than once in two years as a legal duty or obligation on the part of the Postmaster General.

Verdier's claim for interest in this case is based upon the assumption that the Postmaster General neglected his duty in failing to readjust his salary. We have shown that if he had performed his statutory duty his action would have been prospective only, and would have covered but comparatively a short period of Verdier's services; but however this may be, the government is not chargeable for his neglect in that particular.

It results that the judgment of the court below must be reversed, and the case remanded with direction to dismiss the petition.

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

BROWN v. UNITED STATES.

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

No. 381. Submitted October 23, 1896. — Decided November 16, 1896.

Evidence of the reputation of a man for truth and veracity in the neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood; and whether his neighbors are virtuous or immoral in their own lives. Such considerations may affect the weight, but do not touch the competency, of the evidence offered to impeach or to support his testimony.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dickinson for defendants in error.

No appearance for plaintiff in error.

MR. JUSTICE GRAY delivered the opinion of the court.

This was an indictment charging John Brown, in separate counts, with the murders by shooting of Thomas Whitehead and of Joseph Poorboy, on December 8, 1891, at the Cherokee Nation in the Indian Territory. Two successive convictions upon this indictment were set aside and new trials ordered, because of erroneous rulings and instructions of the court below, as stated in the opinions of this court, reported in 150 U. S. 93, and in 159 U. S. 100.

At the third trial, the government introduced evidence tending to show that the defendant, being nineteen years of age, and one Hampton, being seventeen years old, participated in the killing of Whitehead and Poorboy in a shooting affray about nine or ten o'clock at night on December 8, 1891; that the defendant and Whitehead were white men, and Poorboy and Hampton were Cherokee Indians; and that Hampton had since been killed in resisting arrest. The defendant was ac-

quitted by the jury of the murder of Poorboy; but was again convicted and sentenced upon the count for the killing of Whitehead, and sued out this writ of error.

At this trial, Sam Manus, being called as a witness for the government, testified that on the night of the killing the defendant and Hampton came into his house, and said they had killed Whitehead and his comrade, and taken their fire-arms and three silver dollars, all they had, from Whitehead's pocket, and showed the witness the arms and money. Manus further testified that he had himself been convicted and sentenced to the penitentiary for twelve months for resisting an officer.

Witnesses called by the defendant testified that the reputation of Sam Manus for truth and veracity was bad among the people of the neighborhood where he lived. Other witnesses, called in rebuttal, testified that his reputation for truth and veracity was good.

The court instructed the jury that if "the parties or either one of them was robbed of property or money after being killed, that becomes a potential fact in the case to show that there was a wilful purpose upon the part of those who may have done the killing"; and that "if these parties were killed for the purpose of robbery, the very fact of the robbery shows a state of general malevolence, a general wickedness of purpose and a general design to do wrong, that is of a doubly criminal character in showing the existence of this element of the crime of murder." The defendant excepted to these instructions.

The court further instructed the jury as follows: "One of the principal witnesses in this case is Mr. Sam Manus. He comes before you and swears to inculpatory statements made by the defendant as to the robbery. He swears to you as to the statement of the defendant that he got three dollars in silver. He swears to you in reference to a statement made by the defendant as to taking the fire-arms of these men who were killed. That shows a robbery, if true. Efforts have been made and brought to bear here to break down his evidence, to destroy his evidence before you, by impeaching his general character for truth. It is necessary in the interest of

truth, and in the interest of justice, and in the interest of the enforcement of the law in this jurisdiction, that I should give you an admonition, and the one I am now about to give you. That is a proper way to attack a witness. It is a proper way to destroy his evidence. But it must amount to proof of a certain character. It must show a certain condition. It is a method that is easily resorted to; that is often resorted to. I cite these conditions, because I have a right to, on account of their notoriety, on account of its being common knowledge before you, and before this court, that under the law I can take judicial notice of. I say it is a method easily resorted to, often resorted to in this jurisdiction, and resorted to as often when it is based upon fraud, upon perjury, and upon subornation of perjury. It is a method of attack that lets in personal spite, neighborhood grievances, personal animosity, personal bickering, and the personal feelings of people. It opens wide the door for the admission of all these things that if properly considered go to cloud the judgment of men; but in many of these cases, unfortunately, they are the very seeds from which spring the judgment of the witness as to the general character of the witness who comes before you. Now, that is not the source of general character. Animosity, the feeling of hatred, nor of neighborhood bickering, that may produce a feeling of animosity against a man, is not the source from which impeachment by proof of general bad character is to come. It must come to you as the opinion of the people in the neighborhood where the man is known, and that opinion must be founded upon a state that is dispassionate, must grow out of the dispassionate judgment of men, who are honest men, and good men, and able and competent to make up a judgment of that kind. It is not the judgment of the bad people, the criminal element, the man of crime, that is to fasten upon a man and blacken his name; that is not the state of case that would show you that he has general bad character. That is not the condition that must come to you when the attack is made to be effective; but it must come to you as an honest reflection of the opinion of the people generally in the neighborhood where the man lives and is known."

The defendant, at the time of the delivery of the charge, and before the jury retired, as appears by the bill of exceptions allowed by the presiding judge, alleged exceptions "to all the remarks of the court in reference to the impeachment of the witness Sam Manus," and "to that part of the charge in regard to the evidence of Sam Manus"; and thereby distinctly and sufficiently excepted to the instruction just quoted.

There was conflicting testimony in the case as to what took place in the affray when Whitehead and Poorboy were killed; and the government much relied on subsequent admissions by the defendant, as testified to by Sam Manus. His character for truth and veracity was therefore an important element to be considered by the jury who were to decide the guilt or innocence of the accused.

The jury were indeed instructed, in terms of themselves unobjectionable, that the general character of a person must come to the jury "as the opinion of the people in the neighborhood where the man is known"; and again, in equivalent phrase, that it must come to them "as an honest reflection of the opinion of the people generally in the neighborhood where the person lives and is known."

Those general statements, however, were materially qualified by the intervening definition that "that opinion must be founded upon a state that is dispassionate, must grow out of the dispassionate judgment of men, who are honest men, and good men, and able and competent to make up a judgment of that kind"; and "not the judgment of bad people, the criminal element, the man of crime."

The jury were thus plainly told, not only that reputation could not grow out of the opinion of criminal or bad men; but that it could only grow out of the dispassionate judgment of men who were honest and good, and competent to form such a judgment. And this, as appears throughout the instruction upon the subject, was declared to be a necessary condition of the admissibility of the impeaching testimony.

The instruction given was too narrow and restrictive. Evidence of the reputation of a man for truth and veracity in the

neighborhood of his home is equally competent to affect his credibility as a witness, whether it is founded upon dispassionate judgment, or upon warm admiration for constant truthfulness, or natural indignation at habitual falsehood; and whether his neighbors are virtuous or immoral in their own lives. Such considerations may affect the weight, but do not touch the competency, of the evidence offered to impeach or to support his testimony.

The instruction in question is pervaded by an error analogous to that for which the judgment was reversed in *Smith* v. *United States*, 161 U. S. 85.

As the error in this respect requires the verdict to be set aside, it would be superfluous to pass upon the many other questions of law presented by the bill of exceptions, and by the assignments of error, some of which would require grave consideration, were it necessary to decide them in the form in which they are presented by this record.

Judgment reversed, and case remanded, with directions to set aside the verdict and to order a new trial.

Mr. Justice Brewer (with whom concurred Mr. Justice Brown and Mr. Justice Peckham) dissenting.

I dissent: First. Because after three juries, thirty-six jurors, have agreed in finding a defendant guilty of the crime charged, and such finding has each time been approved by the trial judge, the judgment based upon the last verdict ought not to be disturbed unless it is manifest that the verdict is against the truth of the case, or that the court grossly and prejudicially erred on the trial.

Second. Because the testimony in this case discloses an outrageous crime, showing that this defendant in connection with another party, that other party already convicted of one murder and a fugitive from justice, in the night time called from their slumbers two officers of the law and shot them down without provocation. Justice and the protection of society unite in saying that it is high time such a crime was punished.

Third. Because no sufficient exception was taken. The

entire charge of the court fills about thirty-seven closely printed pages of the record. If reprinted here it would make nearly seventy-five pages of this volume. With the exception of two or three short instructions at the close, it does not consist of separate instructions, but is one continuous charge. This charge was excepted to, as appears from the record, in this way: "Defendant, John Brown, excepts to those parts of the charge of the court to the jury at the time of the delivery thereof, as follows, to wit, first, to that part of the charge relating to what the court says as to evidence that 'cannot be bullied or bribed,' as to the 'fruits of the crime, the taking of the money,' etc.; second, as to the definition and illustrations of 'wilfully'" and so on through a series of twenty-five or thirty specifications, covering therewith the entire charge. The seventeenth is as follows: "Defendant excepts to all the remarks of the court in reference to the impeachment of the witness, Sam Manus"; and again, "also excepts to that part of the charge in regard to the evidence of Sam Manus." And in this way only was objection made or exception taken to the charge, or any part of it. Now, there is about a page referring to the testimony of Sam Manus. On this page are stated certain rules of law, which it is conceded are correct, and it is only a portion of the language used in reference to the testimony of Sam Manus that the court considers objectionable. I have always understood that the purpose of an objection and exception was to call the attention of the trial court to the particular words or phrases complained of in order that it might have an opportunity to consider, and if need be correct the alleged error. The decision in this case seems to entirely ignore this purpose and to make the noting of an objection and exception simply a request to the appellate court to search through the several pages of a charge for any sentence or sentences which its critical eye may disapprove of. For all practical purposes a single exception might just as well have been taken to the entire charge.

Fourth. Because this part of the charge is as a whole unobjectionable. The testimony referred to was admitted, and therefore held to be competent. The rule of law in reference to impeachment was correctly stated, and the objectionable

matter was prefaced by a declaration of the court that it gives a matter of admonition. That admonition was just and sound. Reputation is the general judgment of the community in respect to the witness whose reputation is challenged, and is not made up by the flippant talk of a few outlaws.

For these reasons I dissent.

MR. JUSTICE BROWN and MR. JUSTICE PECKHAM concur in this dissent.

PRAIRIE STATE BANK *v.* UNITED STATES.

UNITED STATES *v.* HITCHCOCK.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 10, 16. Argued October 13, 14, 1896. — Decided November 30, 1896.

S. contracted with the United States, in 1888, to erect a custom-house at Galveston. H. was his surety on a bond to the United States for the faithful performance of that contract. The contract gave the government a right to retain a part of the price until the work should be finished. In consideration of advances made, and to be made, by a bank, S. gave it in 1890, written authority to receive from the United States the final contract payment so reserved. The Treasury declined to recognize this authority, but consented, on the request of the contractor, to forward, when due, a check for the final payment to the representative of the bank. Later S. defaulted in the performance of his contract, and H., as surety, without knowledge of what had taken place between the bank, the contractor and the Treasury, assumed performance of the contract obligations, and completed the work, disbursing, in so doing, without reimbursement, an amount in excess of the reserved final payment. The bank and H., each by a separate action, sought to recover that reserved sum from the government. The cases being heard together it is *Held*, that, a claim against the government not being transferable, the rights of the parties are equitable only, and the equity, if any, of the bank in the reserved fund, being acquired in 1890, was subordinate to the equity of H. acquired in 1888.

THE real contestants in the controversy below were the Prairie State National Bank and Charles A. Hitchcock, who respectively claimed the right to receive from the government

a balance in its hands of $11,850. This balance arose by the retention from time to time of ten per cent upon the estimated value of work done under a contract entered into on May 10, 1888, by the government with Charles Sundberg & Company, wherein they agreed for the consideration of $118,590 to erect a custom-house at Galveston, Texas. The right of the government to retain the reserved sums was founded upon the following provision in the contract:

"Payments to be made in the following manner, viz.: ninety per cent (nine tenths) of the value of the work executed to the satisfaction of the party of the first part will be paid from time to time as the work progresses in monthly payments, (the said value to be ascertained by the party of the first part), and ten per cent (one tenth) thereof will be retained until the completion of the entire work and the approval and the acceptance of the same by the party of the first part, which amount shall be forfeited by said party of the second part in the event of the nonfulfillment of this contract, subject, however, to the discretion of the Secretary of the Treasury; it being expressly stipulated and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for all damages sustained by reason of any breach of this contract."

While the respective claims were pending before the Comptroller of the Treasury, and at his request, the Secretary of the Treasury transmitted the same to the Court of Claims under § 1063, Rev. Stat.

The bank bases its claim to the fund upon the following state of facts: On February 3, 1890, in consideration of advances made and to be made by the Prairie Bank, Sundberg & Company gave to one Van Zandt, a representative of the bank, an order or power of attorney, authorizing him to receive from the United States the final payment under the contract. The Acting Secretary of the Treasury declined to recognize this power of attorney, but expressed a willingness, on request of the contractors, to forward, when it became due, the check for the final payment to the address of Van Zandt. Being informed by the latter that this arrangement would

Statement of the Case.

be satisfactory to the contractor and himself, the Assistant Secretary of the Treasury gave direction to the disbursing agent of the building to send the final check, drawn to the order of the contractor, to the address of Van Zandt. Between February and May, 1890, upon the faith of the lien upon the final payment alleged to have been acquired by this arrangement, the bank advanced to Sundberg & Company about six thousand dollars, but, although it was claimed by the bank that the amount of the advances in question were, in large part, actually used in the performance of the contract of Sundberg & Company, the Court of Claims failed to find such to be the fact. It is true that the court, in one of its findings, gives "a full and accurate statement of the checking, deposit and loan accounts between the bank and Sundberg & Company from January 24, 1890, to August 15, 1890," but to whom the checks were made payable or for what purpose they were issued does not appear.

Hitchcock's claim to the fund was asserted upon the ground that in May, 1890, Sundberg & Company defaulted in the performance of their contract, and that thereupon he, as surety, without any knowledge of the alleged rights of the bank, assumed the completion of the contract with the consent of the contractors, and that he had disbursed therein about fifteen thousand dollars in excess of the current payments from the government. The bond which Hitchcock executed as surety was made pursuant to the following provision contained in the contract between Sundberg & Company and the government:

"It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of thirty thousand dollars ($30,000), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said party of the second part."

The Court of Claims held that Hitchcock was entitled to the fund, 25 C. Cl. 185, and entered judgment accordingly. The Prairie Bank thereupon appealed, and a cross appeal was

taken by the United States in order that it might be protected from a double liability, in the event this court should hold that the Prairie Bank was entitled to any part of the fund.

Mr. Howard Henderson and *Mr. A. B. Browne* for Prairie State Bank. *Mr. A. T. Britton* was on their brief.

Mr. George A. King for Hitchcock. *Mr. Rufus H. Thayer* was on his brief.

Mr. Assistant Attorney General Dodge for the United States.

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

The question to be determined is which of the two contestants possesses a superior right to the fund. It is self-evident that, considering the agreements between Sundberg & Company and the bank as an intended transfer *pro tanto* of the rights of the latter to the results of the contract with the United States, such transfer would be void under § 3477, Rev. Stat. This position was not controverted in the discussion at bar, but it was asserted that as the bank had advanced money to complete the building and thus to enable Sundberg & Company to perform their contract obligations with the government, therefore the bank had an equitable lien upon the ten per cent retained by the government paramount to any lien in favor of Hitchcock, whose lien, it was contended, only arose from the date of his advances made to execute the contract upon Sundberg's default.

Thus the respective contentions are as follows: The Prairie Bank asserts an equitable lien in its favor, which it claims originated in February, 1890, and is therefore paramount to Hitchcock's lien, which it is asserted arose only at the date of his advances. The claim of Hitchcock, on the other hand, is that his equity arose at the time he entered into the contract of suretyship, and therefore his right is prior in date and paramount to that of the bank.

Opinion of the Court.

In considering these conflicting claims, it must be recognized at the outset that the terms of the original contract made by the United States with Sundberg were in nowise affected or changed by the agreements subsequently made between Sundberg and the Prairie Bank. Not to so consider would be admitting the application of section 3477 on the one hand, and then immediately proceeding to deny its effect on the other. We shall, therefore, in examining the rights of the parties proceed upon the hypothesis that the contract made by the United States remained in full force and effect, and that the rights, if any, of both parties to this controversy were subject to its terms.

That Hitchcock, as surety on the original contract, was entitled to assert the equitable doctrine of subrogation is elementary. That doctrine is derived from the civil law, and its requirements are, as stated in *Ætna Life Insurance Company* v. *Middleport*, 124 U. S. 534: "1, that the person seeking its benefits must have paid a debt due to a third party before he can be substituted to that party's rights; and, 2, that in doing this he must not act as a mere volunteer, but on compulsion, to save himself from loss by reason of a superior lien or claim on the part of the person to whom he pays the debt, as in cases of sureties, prior mortgagees, etc. The right is never accorded in equity to one who is a mere volunteer in paying a debt of one person to another." See authorities reviewed at pages 548 *et seq.*

As said by Chancellor Johnson in *Gadsden* v. *Brown*, Speer's Eq. So. Car. 37, 41 (quoted and referred to approvingly in the opinion in *Insurance Co.* v. *Middleport*, just referred to), "The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound; and, as far as I have been able to learn its history, it never has been so applied. If one with the perfect knowledge of the facts will part with his money, or bind himself by his contract in a sufficient consideration, any rule of

law which would restore him his money or absolve him from his contract would subvert the rules of social order. It has been directed in its application exclusively to the relief of those that were already bound who could not but choose to abide the penalty."

Under the principles thus governing subrogation, it is clear whilst Hitchcock was entitled to subrogation, the bank was not. The former in making his payments discharged an obligation due by Sundberg for the performance of which he, Hitchcock, was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to Sundberg on the faith of a presumed agreement and of supposed rights acquired thereunder. The sole question, therefore, is whether the equitable lien, which the bank claims it has, without reference to the question of its subrogation, is paramount to the right of subrogation which unquestionably exists in favor of Hitchcock. In other words, the rights of the parties depend upon whether Hitchcock's subrogation must be considered as arising from and relating back to the date of the original contract, or as taking its origin solely from the date of the advance by him.

A great deal of confusion has arisen in the case by treating Hitchcock as subrogated merely "in the rights of Sundberg & Co." in the fund, which, in effect, was saying that he was subrogated to no rights whatever. Hitchcock's right of subrogation, when it became capable of enforcement, was a right to resort to the securities and remedies which the creditor (the United States) was capable of asserting against its debtor Sundberg & Company, had the security not satisfied the obligation of the contractors, and one of such remedies was the right based upon the original contract to appropriate the ten per cent retained in its hands. If the United States had been compelled to complete the work, its right to forfeit the ten per cent and apply the accumulations in reduction of the damage sustained remained. The right of Hitchcock to subrogation, therefore, would clearly entitle him when, as surety, he fulfilled the obligation of Sundberg & Company, to the government, to be substituted to the rights which the United

States might have asserted against the fund. It would hardly be claimed that if the sureties had failed to avail themselves of the privilege of completing the work, they would not be entitled to a credit of the ten per cent reserved in reduction of the excess of cost to the government in completing the work beyond the sum actually paid to the contractor, irrespective of the source from which the contractor had obtained the material and labor which went into the building.

That a stipulation in a building contract for the retention, until the completion of the work, of a certain portion of the consideration, is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed; that it raises an equity in the surety in the fund to be created; and that a disregard of such stipulation by the voluntary act of the creditor operates to release the sureties, is amply sustained by authority. Thus in *Calvert* v. *London Dock Co.*, 2 Keen, 638, (1838,) where a contractor had undertaken to perform certain work, and it was agreed that three fourths of the work, as finished, should be paid for every two months, and the remaining one fourth upon the completion of the whole work, it was held that the sureties for the due performance of the contract were released from their liability by reason of payments exceeding three fourths of the work done having been made to the contractor without the consent of the sureties before the completion of the whole work. To the argument that the extra advances really went into the work and so enured to the benefit of the sureties, Lord Langdale, Master of the Rolls, answered as follows (p. 644):

"The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety — and the answer has always been, that the surety himself was the proper judge of that — and that no arrangement, different from that contained in his

contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

"In this case, the company were to pay for three fourths of the work done every two months; the remaining one fourth was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete work, if he did not; and thus it materially tended to protect the sureties.

"What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one fourth of the value of the work done, became creditors to a large amount, without any security; and, under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship."

In *General Steam Navigation Co.* v. *Rolt*, 6 C. B. (N. S.) 550, (1859,) upon a second appeal of the case, the Exchequer Chamber held that a plea by a surety to an action to recover from him the excess of cost in completing a ship after the contractor had made default, and also a stipulated sum by way of damages for delay, to the effect that the owner, without the consent of the surety, had allowed the builder to anticipate a greater portion of the last two instalments specified in the contract, and thus materially and prejudicially alter the surety's position, was a *prima facie* answer to the action, and that the onus lay upon the plaintiffs to prove the allegations of their reply that the advances were made with the knowledge and assent and at the request of the surety. It was argued on behalf of the plaintiffs, among other contentions, that under the circumstances in the case there was nothing to show that the defendant could be prejudiced in

his capacity of surety by any of the advances made by the plaintiffs, and therefore he was not discharged from his liability of surety. The appellate court declined to hear counsel for the plaintiffs. In announcing the opinion of the court affirming the judgment below, Pollock, C. B., said, (p. 604):

"Now, certainly, *prima facie*, the withdrawal of a fund which is a security for the thing in respect of the not doing of which he is now called upon to pay damages, is a prejudice to the surety. He is not in the same situation with regard to his principal in which he ought to be placed; he is deprived of the security of the fund out of which the company might in the first instance have indemnified themselves. With regard to the point that there was constructive notice, that has very properly been abandoned by Mr. Welsby. It is clearly not tenable; *prima facie*, the surety was prejudiced by the existing state of things. Whether there could have been any proof to shew that, notwithstanding the appearance of prejudice, in reality none was or could be sustained, it is not at all necessary to inquire. It is, however, exceedingly difficult to conceive any state of things in which it must not to a considerable extent be a prejudice to a surety to have a fund withdrawn which would be in reality the security to the company with whom he is contracting, and to the surety who guarantees."

Polak v. *Everett*, 1 Q. B. D. 669, was decided by the Court of Appeal in 1876. Brandt, at page 629 of his Treatise on Suretyship, thus succinctly states the facts and ruling in the case:

"A agreed to redeem certain shares for 6000*l* within twelve months, and B became his surety. A at the same time transferred to the creditor certain book accounts, amounting to 8000*l*, with the understanding that they should be collected, and one half the amount collected should go as payment on the 6000*l*. Afterwards the creditors, for an equivalent in shares and cash, released to A their interest in the book accounts, held, this discharged B altogether from his obligation, even though the book accounts would only have

paid 4000*l* of the 6000*l*, if they had all been collected. This was put upon the ground that the contract for which the surety became responsible had been changed, and he was thereby wholly discharged, the same as if time had been given, or any other material alteration in the original contract had been made."

The three judges of the Queen's Bench agreed upon the proposition that it was an established principle of equity that where time was given by a creditor to the principal debtor without the assent of the surety, there was thereby a violation of rights which the surety acquired when he entered into the suretyship, and that no inquiry could be made into the question of whether the act of the creditor was for the benefit or to the prejudice of the surety. Lord Blackburn thought the same principle should govern in the case before the court where the "equitable right" which the surety acquired when he entered into the suretyship to have the book debts appropriated to reduce the principal debt, had been taken away from him by the act of the creditor in releasing the book debts to the person collecting them. He also (p. 676) called attention to the fact that there was a distinction made in equity between those rights of a surety, which he acquired at the time when he entered into the suretyship and those subsequently acquired, such as the benefit of new securities which might be received by the creditors subsequent to the making of the original contract, and he remarked that the question whether a dealing by the creditor with such new securities would operate to discharge the surety was quite a different question from that before the court.

Mellor, J., said (p. 676) that the question was one of contract, "and the surety is entitled not to be affected by anything done by the creditor, who has no right to consider whether it might be to the advantage of the surety or not. The surety is entitled to remain in the position in which he was at the time when the contract was entered into."

Quain, J., said (p. 677):

"I agree with my brother Mellor, that it is a thoroughly sound and safe principle that, where the act is voluntary and

deliberate, the creditor, altering the contract and rendering it impossible that it should be carried out in its original form, should suffer. This is a sound doctrine, which ought not to be impeached and cannot be impeached, because it is established by authority."

The judgment of the Queen's Bench was affirmed by the Court of Appeal (Jessel, M. R.; Kelly, C. B.; Mellish, L. J., and Denman, J.) without opinion other than the statement that "the court had no doubt that the view taken by the Queen's Bench Division was correct, and affirmed the judgment for the same reasons."

Holme v. *Brunskill*, 3 Q. B. D. 495, (1877,) substantially reiterated the principle decided in the earlier cases. Cotton, L. J., with whom concurred Lord Justice Thesiger, said (p. 505):

"The true rule, in my opinion, is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged."

The rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement with reference to which he entered into his contract of suretyship and to exact strict compliance with its stipulations. Thus, in the case of *Miller* v. *Stewart*, 9 Wheat. 680, Mr. Justice Story, in delivering the opinion of the court, said (p. 702):

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal."

In *Reese* v. *United States*, 9 Wall. 13, Mr. Justice Field, delivering the opinion of the court, said (p. 21):

"It is true, the rights and liabilities of sureties on a recognizance are in many respects different from those of sureties on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal, and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

And the soundness of these opinions was recognized in *Cross* v. *Allen*, 141 U. S. 528, 537, it being held that in the case there before the court the rights of the surety were not altered by certain transactions of which complaint was made, but remained as before.

Finney v. *Condon*, 86 Illinois, 78, (1877,) was a dispute over

a building contract. It was held that where, under the terms of a building contract, payments were to be made semi-monthly, according to the estimates of an architect, of a certain proportion of the value of the work done, the surety was bound by the estimates and could not defeat a recovery of damages sustained by reason of the contractor abandoning the completion of the erection of the dwelling houses provided for in the contract, upon the plea that payments in excess of the amount stipulated in the contract were made by the owner. The doctrine, however, enunciated in *Calvert* v. *London Dock Co.* and *Steam Navigation Co.* v. *Rolt, supra*, was approved by the court in the opinion delivered by Mr. Justice Scott, who said (pp. 80, 81):

"The point relied on most confidently in the defence is, that the sureties for the performance of the contract are released from all liability thereon, on account of payment exceeding eighty-five per cent of the work done having been made to the contractor without their consent before the completion of the work. The law upon this subject seems to be, the reserved per cent to be withheld until the completion of the work to be done is as much for the indemnity of him who may be a guarantor of the performance of the contract as for him for whom it is to be performed. And there is great justness in the rule adopted. Equitably, therefore, the sureties in such cases are entitled to have the sum agreed upon held as a fund out of which they may be indemnified, and if the principal releases it without their consent it discharges them from their undertaking. The principle is, the withdrawal of the fund agreed upon as security for the performance of the contract without his consent is a prejudice to the surety or guarantor. Sureties and guarantors are not to be made liable beyond the express terms of their engagements. They have the right to prescribe the terms and conditions on which they will assume responsibility, and neither of the principals can change those terms without the consent of the sureties, even with a view to avoid ultimate liability."

Applying the principles, which are so clearly settled by the foregoing authorities, to the case at bar, it is manifest that if

Counsel for Plaintiff in Error.

the transaction in February, 1890, by which the Prairie Bank acquired its alleged lien on the fund possessed the effect contended for by the bank, it would necessarily operate to alter and impair rights acquired by the surety under the original contract.

Sundberg & Company could not transfer to the bank any greater rights in the fund than they themselves possessed. Their rights were subordinate to those of the United States and the sureties. Depending, therefore, solely upon rights claimed to have been derived in February, 1890, by express contract with Sundberg & Company, it necessarily results that the equity, if any, acquired by the Prairie Bank in the ten per cent fund then in existence and thereafter to arise was subordinate to the equity which had, in May, 1888, arisen in favor of the surety Hitchcock. It follows that the Court of Claims did not err in holding that Hitchcock was entitled to the fund, and its judgment is therefore affirmed.

Judgment affirmed.

DRAPER *v.* UNITED STATES.

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

No. 496. Submitted October 23, 1896. — Decided November 30, 1896.

When the enabling act, admitting a State into the Union, contains no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than Indians or against Indians, the state courts are vested with jurisdiction to try and punish such crimes. *United States* v. *McBratney*, 104 U. S. 621, to this point affirmed and followed.

The provision in the enabling act of Montana that the "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" does not affect the application of this general rule to the State of Montana.

THE case is stated in the opinion.

Mr. J. W. Strevell, for plaintiff in error, submitted on his brief. *Mr. S. A. Balliet* and *Mr. Lewis Penwell* were on the brief.

Opinion of the Court.

Mr. Assistant Attorney General Dickinson for defendants in error.

Mr. Justice White delivered the opinion of the court.

The plaintiff in error was indicted, tried, convicted and sentenced to death for the crime of murder, alleged to have been committed on the Crow Indian reservation. He moved to arrest the judgment on the ground that the court had no jurisdiction to try an offence committed on the Crow reservation by other than an Indian, as such crime was exclusively cognizable by the proper court of the State of Montana. The refusal to arrest the judgment on account of this asserted want of jurisdiction is one of the errors pressed upon our attention, and our opinion on the subject will render it unnecessary to consider the other assignments.

The indictment does not state, nor does the record affirmatively show, that the accused and the deceased were negroes, but that fact is conceded both by counsel for the prisoner and the government, and upon such concession, the case as to jurisdiction was determined below, and is here presented for consideration. Irrespective, however, of the admission of counsel as to the race to which the accused and the deceased belonged, the question of jurisdiction arises on the record, since if, as matter of law, the reservation was not within the sole and exclusive jurisdiction of the United States, as the indictment fails to charge that the crime was committed by an Indian, it necessarily follows that if the court had jurisdiction only to punish such a crime the want of jurisdiction appears upon the face of the record. It is clear that if the accused was an Indian the court below had jurisdiction under the act of March 3, 1885, which, among other things, authorizes the punishment of any Indian committing the offence of murder within the boundaries of any State of the United States and within the limits of any Indian reservation, according to the laws and before the tribunals of the United States. *United States* v. *Kagama*, 118 U. S. 375. The assertion of jurisdiction in the courts of the United States over the crime of mur-

der perpetrated by one not an Indian against one not an Indian is based on the fact that the offence was committed on an Indian reservation. The contention as to want of jurisdiction rests upon the proposition that the Indian reservation being within the State, the courts of the State had alone cognizance of crimes therein done by other than Indians. To determine these conflicting contentions requires a brief examination of the legislation organizing the Territory of Montana and which provided for the admission of that State into the Union.

The Territory of Montana was organized by the act of May 26, 1864, c. 95, 13 Stat. 85. Subsequently, in 1868, the Crow Indian reservation was created, 15 Stat. 649, the land of which it was composed being wholly situated within the geographical boundaries of the Territory of Montana. The treaty creating this reservation contained no stipulation restricting the power of the United States to include the land, embraced within the reservation, in any State or Territory then existing or which might thereafter be created. The law to enable Montana and other States to be admitted into the Union was passed February 22, 1889, 25 Stat. 676, c. 180. This act embraced the usual provisions for a convention to frame a constitution, for the adoption of an ordinance directed to contain certain specified agreements, and provided that, upon the compliance with the ordained requirements, and the proclamation of the President so announcing, the State should be admitted on an equal footing with the original States. The question then is, has the State of Montana jurisdiction over offences committed within its geographical boundaries by persons not Indians or against Indians, or did the enabling act deprive the courts of the State of such jurisdiction of all offences committed on the Crow Indian reservation, thereby divesting the State *pro tanto* of equal authority and jurisdiction over its citizens, usually enjoyed by the other States of the Union?

In *United States* v. *McBratney*, 104 U. S. 621, this court held that where a State was admitted into the Union, and the enabling act contained no exclusion of jurisdiction as to crimes committed on an Indian reservation by others than

Indians or against Indians, the state courts were vested with jurisdiction to try and punish such crimes. The court there said:

"The act of March 3, 1875," c. 139 (the enabling act, which provided for the admission of the State of Colorado), "necessarily repeals the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith. *The Cherokee Tobacco*, 11 Wall. 616. Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *The Kansas Indians*, 5 Wall. 737; *United States* v. *Ward*, Wool. 17. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the treaty with the Ute Indians and in the act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States. The courts of the United States have, therefore, no jurisdiction to punish crimes within that reservation, unless so far as may be necessary to carry out such provisions of the treaty with the Ute Indians as remain in force. But that treaty contains no stipulation for the punishment of offences committed by white men against white men."

United States v. *McBratney* is therefore decisive of the question now before us, unless the enabling act of the State of Montana contained provisions taking that State out of the general rule and depriving its courts of the jurisdiction to them belonging and resulting from the very nature of the equality conferred on the State by virtue of its admission into the Union. Such exception is sought here to be evolved from certain provisions of the enabling act of Montana which were ratified by an ordinance of the convention which framed the constitution of that State. The provision relied on is as follows:

"Second. That the people inhabiting the said proposed State of Montana do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State of Montana shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the said State of Montana on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein or in the ordinances herein provided for shall preclude the said State of Montana from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States, or from any person, a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation, but said last-named lands shall be exempt from taxation by said State of Montana so long and to such extent as such act of Congress may prescribe."

The words in the foregoing provisions upon which the argument is based are the following: "And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." This language has been considered in several cases in the courts of the United States with somewhat contradictory results. *United States* v. *Ewing*, 47 Fed. Rep. 809; *United States* v. *Partello*, 48 Fed. Rep. 670; *Truscott* v. *Hurlbut Land & Cattle Co.*, 73 Fed. Rep. 60.

As equality of statehood is the rule, the words relied on here to create an exception cannot be construed as doing so, if, by any reasonable meaning, they can be otherwise treated.

Opinion of the Court.

The mere reservation of jurisdiction and control by the United States of "Indian lands" does not of necessity signify a retention of jurisdiction in the United States to punish all offences committed on such lands by others than Indians or against Indians. It is argued that as the first portion of the section in which the language relied on is found, disclaims all right and title of the State to "the unappropriated public lands lying within the boundaries thereof and of all lands lying within said limits, owned or held by an Indian or Indian tribes, and until the title thereof shall be extinguished by the United States, the same shall be and remain subject to the disposition of the United States," therefore the subsequent words "and said lands shall remain under the absolute jurisdiction and control of the United States," are rendered purely tautological and meaningless, unless they signify something more than the reservation of authority of the United States over the lands themselves and the title thereto. This argument overlooks not only the particular action of Congress as to the Crow reservation, but also the state of the general law of the United States, as to Indian reservations, at the time of the admission of Montana into the Union.

On April 11, 1882, c. 74, 22 Stat. 42, Congress confirmed an agreement submitted by the Crow Indians for the sale of a portion of their reservation, and for the survey and division in severalty of the agricultural lands remaining in the reservation as thus reduced. The act, however, provided that the title to be acquired by the allottees was not to be subject to alienation, lease or incumbrance, either by voluntary conveyance of the grantee or his heirs, or by the judgment, order or decree of any court, but should remain inalienable and be not subject to taxation for the period of twenty-five years, and until such time thereafter as the President might see fit to remove the restriction.

The policy thus applied to the Crow reservation subsequently became the general method adopted by Congress to deal with Indian reservations. In February, 1887, by a general law, Congress provided "for the allotment of lands in severalty to Indians on the various reservations, and to extend the protec-

tion of the laws of the United States and the Territories over the Indians, and for other purposes." Act of February 8, 1887, c. 119, 24 Stat. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in section 6, "that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." But the act at the same time put limitations and restrictions upon the power of the Indians to sell, encumber or deal with the lands thus to be allotted. Moreover, by section 4 of the act of 1887, Indians not residing on a reservation, or for whose tribe no reservation had been provided, were empowered to enter a designated quantity of unappropriated public land and to have patents therefor, the right, however, of such Indian to sell or encumber being regulated by provisions like those controlling allotments in severalty of lands comprised within a reservation. From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the State.

It is also equally clear that the reservation of jurisdiction and control over the Indian lands was relevant to and is explicable by the provisions of section 4 of the act of 1887, which allowed non-reservation Indians to enter on and take patents for a certain designated quantity of public land. In-

deed, if the meaning of the words which reserved jurisdiction and control over Indian lands contended for by the defendant in error were true, then the State of Montana would not only be deprived of authority to punish offences committed by her own citizens upon Indian reservations, but would also have like want of authority for all offences committed by her own citizens upon such portion of the public domain, within her borders, as may have been appropriated and patented to an Indian under the terms of the act of 1887. The conclusion to which the contention leads is an efficient demonstration of its fallacy. It follows that a proper appreciation of the legislation as to Indians existing at the time of the passage of the enabling act by which the State of Montana was admitted into the Union adequately explains the use of the words relied upon and demonstrates that in reserving to the United States jurisdiction and control over Indian lands it was not intended to deprive that State of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians, and that a consideration of the whole subject fully answers the argument that the language used in the enabling act becomes meaningless unless it be construed as depriving the State of authority to it belonging in virtue of its existence as an equal member of the Union. Of course the construction of the enabling act here given is confined exclusively to the issue before us, and therefore involves in no way any of the questions fully reserved in *United States* v. *McBratney*, and which are also intended to be fully reserved here.

Our conclusion is that the Circuit Court of the United States for the District of Montana had no jurisdiction of the indictment, but, "according to the practice heretofore adopted in like cases, should deliver up the prisoner to the authorities of the State of Montana to be dealt with according to law." *United States* v. *McBratney*, *supra*, and authorities there cited.

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

WILSON *v.* KIESEL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 139. Argued and submitted November 3, 1896. — Decided November 30, 1896.

The complaint in this case sought to compel a number of stockholders in a corporation severally to pay their respective alleged unpaid subscriptions to the capital stock of a corporation, the amounts to be applied in satisfaction of a judgment in plaintiff's favor. Among the stockholders so proceeded against were K., C. and A. As to them the allegations were that each subscribed for fifty shares of the corporation, of the par value of one hundred dollars each; and that each was liable for five thousand dollars, for which recovery was sought. *Held*, that the amount involved for each subscription did not reach the amount necessary to give this court jurisdiction; that the subscriptions could not be united for that purpose; and that even if they could, there having been a cross bill in the case, the judgment upon which must affect rights of parties not before the court, the court could not take jurisdiction.

MOTION to dismiss.

The case is stated in the opinion.

Mr. Abbot R. Heywood for the motion submitted on his brief.

Mr. Ogden Hiles opposing.

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

Wilson recovered judgment against the Ogden Power Company, a corporation organized under the laws of the Territory of Utah, for $22,405.16, on which an execution was issued and returned wholly unsatisfied, whereupon he filed a bill in the Fourth Judicial District Court for the Territory of Utah, County of Weber, against the company; and against Kiesel, Anderson and Carnahan, and many others, to compel them severally to pay their respective unpaid subscriptions to the capital stock of the corporation to be applied in satisfaction of the judgment. Defendants Kiesel, Carnahan and Anderson were charged with having each subscribed for fifty shares

of the par value of one hundred dollars each and with being each liable for five thousand dollars. They answered denying that there was anything due from them to the corporation, and alleging that each of them had paid in full and at par value the amount of the stock subscribed by him; and averring, among other things, that plaintiff was also a subscriber and had paid no part of his subscription; and that Wilson had long before sold and assigned the said judgment and now had no interest therein; and by way of cross complaint alleged that said judgment was entered by unauthorized consent and was fraudulent and void for various reasons set forth; that it had been sold and transferred to third parties; and that if the action of Wilson against the company had been tried, no greater sum than two thousand dollars would have been found due; to which cross complaint plaintiff filed an answer.

The record discloses that some twenty-two of the other defendants filed their several answers to the complaint, but does not contain those answers. The cause was referred to a special master to take testimony and report his findings thereon, and he subsequently filed a report containing twenty-one findings of fact, embracing a finding that defendants Kiesel, Carnahan and Anderson had paid their subscriptions to the capital stock in full, and to these the master added twenty-nine further findings, making fifty in all. As a conclusion of law the master recommended that the court find that plaintiff was entitled to a judgment for the sum of $16,500.52; that some thirty-two named defendants, not including Kiesel, Carnahan and Anderson, should be, respectively, ordered to pay their unpaid subscriptions in the amounts stated; and that said amounts should be applied in payment of the judgment and costs. A decree was thereupon rendered in favor of plaintiff, April 29, 1893, making the findings and conclusions of the master the findings and conclusions of the District Court, and awarding judgment against each of some thirty defendants for amounts stated severally and separately as to each, and in favor of some seven defendants under a stipulation that they had paid their

several subscriptions, and also in favor of defendants Kiesel, Carnahan and Anderson. Plaintiff moved for a new trial as to Kiesel, Carnahan and Anderson, which was denied, and he appealed to the Supreme Court of the Territory from the judgment in favor of Kiesel, Carnahan and Anderson and from the order overruling the motion for a new trial. The record does not contain the appeal of the other defendants from the judgment which had been rendered in favor of plaintiff and against them, but it appears from the opinion of the Supreme Court of the Territory that they did so appeal, and that all the contesting defendants were before that court.

On January 29, 1894, the judgment of the District Court on plaintiff's appeal was affirmed with costs. On the same day the opinion of the Supreme Court of the Territory was filed in the case, a copy of which was transmitted in accordance with our rule, is referred to by counsel for appellant as part of the record, and as such may serve to supply certain marked deficiencies otherwise existing therein. From this opinion it appears that plaintiff appealed from the judgment in favor of Kiesel, Carnahan and Anderson, and that twenty-four other defendants appealed from the judgment against them. The Supreme Court, after rehearsing the facts in the case, stated the question on plaintiff's appeal to be whether Kiesel, Carnahan and Anderson had paid their subscriptions to the capital stock of the company as contended on their behalf; and that the questions raised on the appeal of the other defendants were whether plaintiff while a delinquent subscriber himself could maintain this action in equity against other delinquent subscribers; whether the judgment at law in Wilson's favor was fraudulent and void; and whether if the judgment was valid plaintiff could maintain an action on it as the real party in interest. The Supreme Court held that a delinquent subscriber could maintain the action but must contribute *pari passu* with the other subscribers to the payment of the amount due him; that the judgment was not conclusive on the subscribers, ought to have been reduced by a very large amount, and would have to be reversed in order to afford the subscribers the opportunity to test the validity of

Wilson's claim against the corporation; and that Wilson was not the real party in interest at the beginning of the action and could not maintain it in his own name, which latter conclusion called for the affirmance of the judgment in favor of Kiesel, Carnahan and Anderson, and the absolute reversal of the judgment against the other defendants and the remanding of the cause to the court below with directions to dismiss the action, it being, therefore, unnecessary to pass on the question as to whether or not Kiesel, Carnahan and Anderson had paid their subscriptions to the capital stock of the company.

While the judgment of affirmance appears in the record, the judgment of reversal with directions does not. From the judgment of affirmance, the plaintiff appealed to this court and gave bond running to Kiesel, Carnahan and Anderson, or either of them, and citation was issued to Kiesel, Carnahan and Anderson only.

It is evident from the foregoing statement that this appeal must be dismissed. The complaint alleged that Kiesel, Carnahan and Anderson each subscribed to fifty shares of the capital stock of the Ogden Power Company of the par value of one hundred dollars each, and that each was liable for five thousand dollars for which recovery was sought. This did not reach the jurisdictional amount. *Chapman* v. *Handley*, 151 U. S. 443.

It is true that these defendants contended that the amount due from each on their several subscriptions had been paid by a conveyance of land which was owned by them jointly, but the matter in dispute was the liability of each for five thousand dollars, and the fact that their several subscriptions may have been paid with joint property would not make the question of the liability of each a question of the liability of all, and they did not seek a recovery over. But it is said that the matter in dispute far exceeded the jurisdictional limit, because Kiesel, Carnahan and Anderson had filed a cross complaint seeking to set aside and cancel Wilson's judgment against the Ogden Power Company, which was a judgment for $22,405.16. This contention, however, only demonstrates that the appeal must be dismissed for want of proper parties,

Counsel for Plaintiffs in Error.

as the other defendants were directly and vitally interested in the disposition of the cross complaint and necessary parties to the appeal. Not having been made such, and there being no summons and severance, or the equivalent, the appeal cannot be sustained. *Davis* v. *Mercantile Trust Co.*, 152 U. S. 590; *Hardee* v. *Wilson*, 146 U. S. 179.

Indeed this objection is fatal in any view, for while this record is manifestly inadequate and insufficient, it does appear and is conceded that the other defendants were before the Supreme Court of the Territory on their own appeal as well as Kiesel, Carnahan and Anderson on Wilson's appeal, and that the case was disposed of as to all of them on a ground common to all. We cannot be required to consider such a case by piecemeal, and if we were to take jurisdiction and determine the questions which have been argued at the bar, we should, in fact, be disposing of matters affecting parties not before us and who have been afforded no opportunity to be heard.

Appeal dismissed.

FOWLER *v.* LAMSON.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 83. Argued and submitted November 9, 1896. — Decided November 30, 1896.

The printed record in this case is so fragmentary in its nature as to leave no foundation for the court to even guess that there was a Federal question in the case, or that it was decided by the state court against the right set up here by the plaintiffs in error; and, under the well settled rule that where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a Federal question was raised in the state court before entry of final judgment in the case, this court is without jurisdiction, it must be dismissed.

THE case is stated in the opinion.

Mr. E. F. Thompson for plaintiffs in error. *Mr. G. W. Delamater*, *Mr. Frank H. Clark* and *Mr. William H. Wilkins* were on his brief.

Mr. L. H. Bisbee and *Mr. D. M. Kirton* for defendants in error submitted on their brief.

Mr. Justice Peckham delivered the opinion of the court.

The printed record which is before this court in this case is so fragmentary in its nature as to leave no foundation for us to even guess that there was a Federal question in the case or that it was decided by the state court against the right now set up by plaintiffs in error.

The record opens with an assignment of errors which it is alleged were made by the Supreme Court of Illinois, and fourteen grounds of error are set forth, many of them setting up that such court, by the judgment in suit, erred in the decision of several Federal questions. Then follows the writ of error. Then comes what is termed a decree in the case of *George Fowler* v. *The Cherokee Brilliant Coal and Mining Company and others*, in the Superior Court of Cook County, Illinois, which decree, after reciting the fact of a hearing and a reference to a master in chancery and his report thereon, proceeds to make certain findings of fact, and to give extracts from the constitution and statutes of Kansas, which, briefly stated, are as follows:

(1.) The incorporation of the coal and mining company under the statutes of Kansas.

(2.) An extract from the constitution and statutes of Kansas providing for a double liability of stockholders of an insolvent corporation.

(3.) An extract from the statutes of Kansas providing for the dissolution of corporations and for a recovery against the stockholders therein for debts due from the company.

(4.) An extract from the statutes of limitation of Kansas relating to absconding or concealed debtors.

(5.) Findings of indebtedness from the coal and mining company to the Fowlers, plaintiffs in error; the giving of a note and mortgage for such indebtedness, and default in the payment thereof and a dissolution of the company.

(6.) The recovery of judgment in Illinois in favor of the

plaintiffs in error herein on account of the debt due them from the corporation; the issue and return of execution upon such judgment wholly unsatisfied.

(7.) The ownership of stock in the company by the Lamsons.

Upon these findings the decree directs a recovery by the plaintiffs herein against the defendants Lamsons, stockholders in the dissolved and insolvent corporation, of the amount of the Illinois judgment against the corporation which had been obtained by plaintiffs herein.

This decree is followed in the record by an order made by the appellate court in Illinois reversing the decree of the court below. Then follows an assignment of errors committed by the court in ordering such reversal, after which the opinion of Judge Wilken of the Supreme Court of Illinois is printed, which affirms the judgment of the appellate court. In that opinion no Federal question is discussed or decided. The point actually decided by the Supreme Court of Illinois was, as shown by that opinion, that the constitution and statutes of Kansas in relation to the liability of stockholders in an insolvent corporation provide a special remedy for enforcing that liability, and that such remedy only could be pursued, and that the courts of Illinois would not enforce a statutory liability under a Kansas statute providing a special remedy against stockholders. Following this opinion is a decree of affirmance by the Supreme Court of Illinois; after which comes a petition for a writ of error from this court and an allowance thereof. This completes the record.

It will be seen that there are no pleadings in the record; no evidence is returned; no exceptions to any decision of the court are to be found; no request to the court to find upon any Federal question; no refusal of the court to find and no finding upon any such question. Thus there is an entire absence in this whole record of any fact showing that the Supreme Court of Illinois or either of the lower courts decided any Federal question whatever. The assignment of errors alleged to have been made by the Illinois Supreme Court is unavailable for the purpose of showing any Federal question decided, where the record itself does not show that

any such question was passed upon by the state court. *Missouri Pacific Railway* v. *Fitzgerald*, 160 U. S. 556, 575.

Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appear in the record that a Federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction. *Simmerman* v. *Nebraska*, 116 U. S. 54.

It has also been frequently decided that, to give this court jurisdiction on writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Eustis* v. *Bolles*, 150 U. S. 361; *California Powder Works* v. *Davis*, 151 U. S. 389, 393; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 576.

Nothing of the kind appears from this record, and the writ of error must, therefore, be

Dismissed.

LALONE v. UNITED STATES.

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

No. 4. Submitted October 13, 1896. — Decided November 30, 1896.

The rule that in all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff, the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory extends to cases of alleged fraudulent representations, on the faith of which an officer of the government has done an official act upon which rights of the party making the representations may be founded; and in this case the evidence on the part of the plaintiff, when read in connection with that which was given on the part of the defendants, falls far short of the requirements of the rule.

THE case is stated in the opinion.

Mr. A. T. Britton and *Mr. A. B. Browne* for appellants.

Mr. Solicitor General for appellees.

Mr. Justice Peckham delivered the opinion of the court.

This is a suit in equity, brought by the United States to recover back certain moneys which had theretofore been paid the appellant, Joseph Lalone, upon the granting of his application for a pension, and to enjoin the defendant, the First National Bank of Beaver Dam, Wisconsin, from paying out certain moneys deposited therein by the appellant, Margaret Lalone, the wife of Joseph, and which moneys were alleged to be part of those paid to Joseph, and to enjoin the conveyance of certain real estate, the legal title to which was vested in the defendant, Margaret Lalone, and which plaintiff alleged to have been purchased by her with a portion of such moneys, and to vest the title to such moneys and real estate in the United States.

The ground upon which a recovery of the moneys was sought was that the pension had been obtained through the fraudulent acts and representations of the individual defendants. The bill alleged that the defendant, Joseph Lalone, filed with the pension bureau, on the 19th of May, 1880, a claim for a pension on account of partial paralysis due to disease and sickness contracted while serving in the army during 1865; that after the consideration of such claim for a period of eight years, and until April 21, 1888, the application was allowed, and more than $5000 were paid to the applicant as arrearages of pension, and the sum of $30 per month thereafter was allowed. The bill then alleged that the partial paralysis which Lalone claimed he was suffering from and which he said resulted from the disease and sickness contracted while in such army service was not the result of any such cause, and that Lalone's allegation to that effect was false and fraudulent, and intended to deceive the officers charged with the duty of examining and allowing such claim, and that it did so deceive them; that claimant's disability

was caused by and resulted from an accident suffered by him long subsequent to his discharge from the army; that Lalone had turned the pension moneys received from the government over to his wife, Margaret Lalone, who had deposited $5000 thereof in her name in the First National Bank of Beaver Dam, Wisconsin, and had thereafter withdrawn all but about $1500 thereof, and with it had purchased 120 acres of land in Dodge County, Wisconsin, subject to an existing mortgage of $1300; that Margaret Lalone had knowledge of and was a party to the fraud alleged. The bill asked for a decree giving the United States the residue of the fund in the bank and a conveyance of the realty and for an injunction *pendente lite*. Upon the filing of the bill an injunction was issued. The individual defendants each answered under oath denying all the charges of fraud made by the bill. The bank admitted its possession of $1500 deposited by Margaret Lalone.

On the testimony submitted, which consisted of the depositions of many witnesses, the Circuit Court rendered a final decree in favor of the United States against the individual defendants for a recovery of the amount of money received by them from such pension fund with interest; the decree also provided that the bank should pay the $1500 on deposit with it into the United States Treasury; it also ordered the sale of the realty, and that the proceeds of the sale should be applied to the payment of the money decree against the Lalones, with execution for any deficiency.

The case is now before us for review. In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on such finding. The rule obtains in cases of alleged fraudulent representations made to

an officer of the government upon the faith of which the officer has issued a patent or done any other official act upon which the rights of the party making the misrepresentations may be founded. This principle is exemplified in *United States* v. *Iron Silver Mining Co.*, 128 U. S. 673, and cases cited, and is not confined to cases of patents for lands.

Examining the record in this case and after perusing the whole evidence contained therein, and having in mind the rule above stated, we are entirely convinced that the evidence on the part of the plaintiff when read in connection with that which was given on the part of the defendants, falls far short of the requirements of the rule.

There are some facts which are established by uncontradicted evidence in the case. Joseph Lalone, one of the defendants and the individual to whom the pension was granted, was, at the time of his enlistment, a young man of about thirty-two years of age, of French extraction, and living in the State of Wisconsin. In 1864 he enlisted as a private in one of the Wisconsin regiments. He was famed at that time among his townsmen for his physical strength and perfect health. As many of the witnesses expressed it, he was one of the healthiest men they ever saw. He was with his regiment in the Army of Virginia, and during the winter and spring of 1865 he contracted a disease and was in the hospital at Alexandria in Virginia, suffering from what was thought to be dumb ague, or fever and ague, as stated by some of the witnesses. He came back to his home in Wisconsin, after his discharge in August, 1865, badly shattered in health, sickly in appearance, and to such an extent as scarcely to be recognized by some of his former friends. His complexion and color were bad. He seemed to have no strength in his legs, walked in a trembling way, and seemed unable to do any hard work. (There is some difference of opinion among the witnesses as to the extent of his sickness when he came from the army.) Some time in the spring or early summer of 1866 or 1867 he suffered from a stroke of paralysis, resulting in the almost complete loss of the use of one side of his body, and affecting his speech and to some extent his mind. From that time

until the time of the trial of this case he has suffered without intermission and with scarcely any improvement. In making his application for a pension in 1880 he claimed that this paralysis was the result of his experience in the army and of his exposure incident to army life and of the disease he there contracted. So far the evidence is substantially uncontradicted. There is, however, a conflict in regard to the immediate cause of the paralysis. Two witnesses upon the part of the government, who were boys at the time of the alleged occurrence, testified that they saw the defendant thrown from his wagon while driving along the road, and it is claimed that immediately or soon thereafter the paralysis appeared. It is claimed that the evidence on the part of the government shows that before this accident he had exhibited no signs of any paralysis, and that he had been fairly capable from the time of his return from the army up to the time of the accident to attend to the work on his farm like any other man of his age. Other witnesses for the government testified to the general speech of people at that time that Lalone had been thrown from his wagon and had received severe injuries, resulting in paralysis, from which he never recovered. On the other hand, the individual defendants denied the occurrence of any such alleged accident, contradicted the evidence of the government's witnesses as to its happening, and gave evidence tending to show that soon after his return from the army Lalone suffered a slight paralytic stroke, and that he was unable to do the ordinary work of the farm from the time of his return, and that in the spring of 1866 he sustained the last stroke, from the effects of which he never recovered, and was then suffering.

Upon a careful perusal of the evidence we think it clearly appears that Lalone was not able to work on his farm from the time of his return as he had been accustomed to work before his departure for the army. Many years have elapsed since those events, and it is not strange that witnesses differ somewhat as to Lalone's condition when he returned, or as to the first appearance of the paralysis with which he is unquestionably afflicted, and under which he has suffered and been

almost helpless for nearly thirty years. Whether it was the direct result of his army life and the disease there contracted, or the direct and immediate result of the alleged accident, seems to be the chief subject of conflict in the evidence of the witnesses.

It is unnecessary and it would serve no good purpose for us on this occasion to go into an extended and minute review of the evidence given on both sides of this case. It has been read with great care, and the most that can be said is that after a careful perusal of all of it there are some circumstances shown which might raise a doubt as to whether the last stroke of paralysis did not occur immediately or soon after the alleged accident. We are not entirely satisfied from the evidence that the accident in truth occurred in the manner and to the extent as testified to by the witnesses who spoke in regard to it, and who were quite young boys at the time they alleged that it happened, which was almost thirty years before the time they testified. But even if we were satisfied from the evidence that the accident took place as described by these witnesses, we should still feel that the case on the part of the government had not been made out with that clearness which is requisite in order to base a finding of fraud. It is not and cannot be disputed that Lalone went to the army a healthy man and came back very greatly altered and to all appearance a very sick man. It is uncontradicted that while in the army he suffered from some very grave and enervating fever, and that he was treated for it in the hospital at Alexandria. The medical witnesses called on the part of the government themselves admit that paralysis might supervene more readily in the case of one who had materially suffered from some disease and who had not recovered from its effects, such as fever and ague, than it might in the case of a healthy man, or, as one of them said, "just to the extent that his vital forces were depressed by the disease under which he suffered he would be just that much less able to withstand sickness or injury, and that, therefore, an injury, which might not have resulted with a perfectly well person in such injury to the brain as to cause paralysis might be followed

with such result more readily in the case of a man who had suffered from a previous illness and was still laboring under its depressing effects." In the latter case, while the blow or accident might be the direct, immediate cause of the paralysis, yet the prior physical condition of the subject caused by ill-health and exposure in the army and the sickness which he endured while in the hospital in Virginia from which he was then suffering, might fairly be regarded as a concurring cause of such paralysis. It could not be said to be a fraud, at any rate, under such a state of facts for the defendant to claim that his paralysis was caused by his sickness in the army.

It may be somewhat doubtful as to what was the immediate cause of the paralysis from which the defendant suffered and from which he is now suffering and probably will suffer to the end. That he is almost completely helpless and has been all these years is not doubted. The trial court in the opinion delivered by it only went so far as to say that on the whole it was satisfied that the government had a preponderance of evidence that the pension was obtained fraudulently and that the money paid on it should be recovered back. This mere preponderance, as we have seen, is not sufficient in such a case. The decree in favor of the government must, therefore, be

Reversed, and the case remanded to the Circuit Court with directions to dismiss the bill.

OLD JORDAN MINING AND MILLING CO. *v.* SOCIÉTÉ ANONYME DES MINES.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 71. Argued October 27, 1896. — Decided November 30, 1896.

The only error urged in the court below, or noticed in its opinion, and which, consequently, can be considered here, goes to the insufficiency of the proof of the contract set up in the complaint, in which this court finds no error.

Statement of the Case.

THIS was an action originally brought in the District Court for the Third Judicial District of the Territory of Utah by the Société Anonyme des Mines de Lexington, a French corporation, against the Old Jordan Mining and Milling Company, to recover one half the expense of certain repairs made to a canal or water ditch owned by them in common.

The complaint alleged that, since the month of March, 1883, these parties had continuously been tenants in common, owning an equal undivided interest in a certain canal, known sometimes as the "Galena," sometimes as the "Old Telegraph Canal," and sometimes the "Old Jordan Canal," together with the right of way and adjacent lands; that, between the 22d of October, 1883, and November 5, 1883, they entered into a contract in writing, in which it was agreed that they would make repairs, etc., and that each should pay one half of the expense thereof; that in the year 1884 the plaintiff made certain repairs of the value of $993.93; in 1885, of the value of $4025; in 1886, and until June, 1887, $4826.95, and, in 1887, from June 30 to December 31, $500, aggregating $10,345.88, for its share of which a statement or bill of items was furnished to the defendant; that the said defendant, on the 31st of December, 1884, paid to plaintiff $496.96, its half of the amount expended in 1884, but failed to pay its half of the other expenses incurred as aforesaid, leaving a balance due of $4675.98, for which judgment was demanded.

An answer was filed specifically denying the several averments of the complaint; and subsequently an amendment was made alleging that from the 1st of January, 1885, plaintiff had appropriated to its own use, without defendant's consent, all the water flowing through said ditch or canal, and that the reasonable value of that portion of the said water owned by defendant was $10 per day. The answer also made other allegations not necessary to be considered as the case was presented to this court.

In support of the contract alleged in the complaint plaintiff put in evidence the following letter, written by its manager to the manager of the defendant under date of October 24, 1883:

Statement of the Case.

"DEAR SIR: During my present stay in this city, for the purpose of investigating and inspecting our different pieces of property in this Territory, my attention was particularly called to the bad state of the Jordan water ditch, which your and our companies own jointly. Considering that it is for our mutual interest to see that this property should be kept in proper shape, I beg you in the name of your company, if you do not judge that it would be advisable, while I am here, to have an understanding regarding this matter. I suggest that the necessary repairs should be done at once, and that hereafter the ditch should be kept in good condition, both companies paying their share of the incurred expenses.

"Will you please be kind enough to give this matter your prompt attention and favor us with an immediate reply, as I shall remain here only until the 15th of November."

To this letter the defendant's manager made the following reply:

"CLEVELAND, O., Oct. 30th, 1883.

"Mons. Eng. Renevey, l'administrateur délégué de Société des Mines de Lexington:

"Your letter of 24th inst., in regard to the necessity of entering into some arrangement for repairing and preserving the Jordan water canal, owned by your company and the one I represent, is rec'd. I agree with you that it is for our mutual interest that this property should be kept in good order, and I shall be pleased to join you in a reasonable arrangement for the purpose of protecting the property from decay, and I am very glad to find a gentleman willing to coöperate in a business way for the protection of our mutual interests. Your suggestion that the needed repairs should be done at once, and that each company pay its share of expense, and also for care for the future, is right, and I will direct Mr. Van Deusen, our engineer, to coöperate with you or any one you may delegate to examine the property and report what repairs are necessary, and the cost of the same. He is a very trustworthy and capable man, and I think you will find it for our mutual advantage to act under his judgment and let him

make the repairs. As neither of us are using the water at present, I would think it best to expend only so much as is necessary to prevent loss, and when we are ready to use the water, then we make permanent improvements. If you do not have time to go into details before you leave, will you please leave the matter in the hands of some one who will coöperate with me and Mr. Van Deusen — unless you are willing to have him do it, and each company pay one half the expense.

"I make this suggestion because I think Mr. Van Deusen can do the work satisfactory to both.

"Regretting that my absence from Salt Lake prevents me from a personal consultation with you, I am."

Other correspondence and evidence were introduced, which are fully set forth in the opinion of the court.

The case was tried before a jury, and a verdict rendered in favor of the plaintiff for the sum of $6028.76, upon which a remittitur was filed of $12.35, and judgment thereupon entered in the sum of $6016.41.

Upon appeal to the Supreme Court of the Territory this judgment was affirmed. 9 Utah, 483. Whereupon defendant sued out a writ of error from this court.

Mr. L. T. Michener for plaintiff in error. *Mr. C. W. Bennett* and *Mr. W. W. Dudley* were on his brief.

Mr. Jeremiah M. Wilson for defendant in error.

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

1. As the only error urged in the court below, or noticed in its opinion, turns upon the alleged insufficiency of the proof of the contract set up in the complaint, we shall confine our consideration of the case to that point, notwithstanding that other errors are assigned in this court, and, to some extent, noticed in the brief of the plaintiff in error. We have repeatedly held that the failure to present and insist upon errors

assigned in the court below constitutes an abandonment, or waiver, of all the errors so assigned, not vital to the question of jurisdiction, or the foundation of the right; and this court can only be called upon to consider such assignments as are pressed upon the attention, or noticed in the opinion of the court below. If the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here. *Montana Railway Co.* v. *Warren*, 137 U. S. 348, 351; *San Pedro &c. Co.* v. *United States*, 146 U. S. 120, 136.

2. From a perusal of the correspondence, set forth in the statement of facts, it will appear that plaintiff's introductory letter contained the following propositions: (1) that the company should come to an understanding with regard to the keeping of the ditch "in proper shape"; (2) that the necessary repairs should be done at once; (3) that thereafter the ditch should be kept in good condition; (4) that both companies should pay their share of expenses.

In its reply, the defendant agreed: (1) that it was for their mutual interest that the property should be kept in good order, and that it would be pleased to join the plaintiff in any reasonable arrangement for the purpose of protecting it from decay; (2) that it approved of plaintiff's suggestion that the needed repairs should be done at once; that each company should pay its share of expenses, and also for its care in the future; (3) that it would direct Mr. Van Deusen, its engineer, to coöperate with the plaintiff, or any one that plaintiff's manager might delegate, to examine the property and report what repairs were necessary, and the cost of the same; (4) that, as neither party was using the water at present, the writer thought it best to expend only so much as would prevent loss, and that when they were ready to use the water, they would make permanent improvements; that plaintiff should leave the matter in the hands of some one who would coöperate with the writer of the letter and Mr. Van Deusen, unless plaintiff were willing to have Mr. Van Deusen do it, and each pay one half the expense.

Conceding, for the purposes of the case, that this corre-

spondence standing alone did not contain a completed understanding for the repair of the property — at least beyond such repairs as were immediately necessary — it evidently was of such a character as to lead the plaintiff to believe that any arrangement it might make with Van Deusen, the engineer, for such repairs as were necessary to prevent loss to the property would be respected by the company.

Upon the receipt of defendant's answer, plaintiff proceeded to make certain repairs, and on September 24, 1884, addressed a letter to Van Deusen, stating that the expenses upon the canal for the eight months immediately preceding amounted to $643.85, giving the items, and requesting him to remit one half the amount. There was also evidence tending to show that the repairs had been made after a visit to the canal by Van Deusen and Lavagnino, an agent of the plaintiff company, when Van Deusen asked the latter to report to him what he thought would be necessary to be done, and that they agreed upon the work; that after receiving the letter of September 24, 1884, Van Deusen said that Mr. Holden, the manager of the company, would be there pretty soon; that he was acting under Holden's instructions; and that it would be best to wait until he came. On December 14, 1884, plaintiff wrote to Holden, the manager of the company, stating that the total expenditure for the year had been $993.93, and that the officers of his company desired to ask his coöperation "towards making next spring substantial repairs on the canal, so as to bring it up to usefulness"; and also "toward making all titles about the canal clear, and to proceed against trespassers." On December 31, defendant paid one half of the bill for that year, but made no comments upon the propositions contained in the plaintiff's letter.

There was also evidence tending to show that in the spring of 1885 Mr. Lavagnino examined the canal with Mr. Van Deusen in order to ascertain what repairs were absolutely necessary and urgent. As Mr. Lavagnino says: "We made an estimate. He told me that he would send the estimate to his company, and I would send the same estimate to my company. . . . These estimates were made because we

were waiting for Mr. Holden. Mr. Van Deusen said that according to the instructions he had last year, he would have no objection, but that I remembered what Mr. Holden said last year, that he paid the bill, and that he didn't care to take any responsibility, but he would let Mr. Holden do it himself. . . . He was telling me all the time that he would be here very soon. This conversation was in the latter part of March, 1885."

On August 27, 1885, Lavagnino addressed Holden a note calling his attention to the canal, stating that in the spring he had Van Deusen with him along the canal to see what repairs were indispensable, in order to risk a little water in it, and to prevent a total ruin of it; that the expenses run at about $2000; and saying that he would be able to present him a statement, and hoped that he would approve the same in behalf of the defendant. He also expressed the wish that he would like to have Mr. Holden inspect the canal to satisfy himself that he had done the most needed things for its protection, and to get his opinion "about the probable expenses for keeping up the canal to even its present low condition, and to define in a sure way how far you think it right for the Old Jordan company to stand the French company by."

On September 1 he sent him a statement of what he had paid during the last six months, amounting to $2204.23, and asking for its proper contribution from the Old Jordan company.

Here, at least, was a distinct and unequivocal notice that repairs had been made, and that the plaintiff looked to defendant for a proportion of the cost. In view of their previous correspondence defendant could have had no doubt that such repairs were made upon the faith of the letters that had passed between them, and, if it did not intend to be bound, it was its duty to repudiate the bill at once, and give notice that the repairs were unauthorized. Instead of this, however, Mr. Holden on September 2 promptly acknowledged the receipt of the statement; said that the owners were expected early in the month, and desired them to examine the canal with him and decide the matter, both for the present and for future expenditures; and suggesting that, as tenants

in common, it was best for them "to agree upon some line of policy by which either party should be allowed to expend money on the property and thus bind the other to payments."

On November 19, he wrote to him again, desiring him to make a complete statement of the expenditures made during the last year, which had been necessary for the protection of the canal, and send them to him at Cleveland. He said that the owners had been opposed to spending any more money than was absolutely necessary for the protection of the canal; that when the Jordan company was ready to use it they would make improvements and repairs, and that he was quite certain the company would be disposed to do whatever was equitable.

On February 10, 1886, Lavagnino addressed a letter to Mr. Holden at Cleveland, enclosing a statement of the total expenditures upon the canal during 1885, which amounted to $4025, stating that most of these expenditures had been necessary for the protection of the canal, and that the expenditures were either evidently indispensable, or were considered as necessary by Mr. Van Deusen and himself.

To this Mr. Holden replied on February 16, stating that he was pleased with the fair and candid statement made with regard to the expenditures; that he would submit them to the board for consideration, and felt sure they would be acted upon in an equitable manner. The letter further stated that the board did not desire to spend any more money than was absolutely necessary to protect the canal and save larger expenditures in the future; that if they were using the water, or contemplated its immediate use, they would have no hesitation in joining in any judicious expenditure; that "it was the hope of the management of our company that you would be willing to make such expenditures upon the canal as in your judgment would seem to be best, and that you should report the same to us from time to time, and that when we should be ready to use the water, that we should expend for the benefit of the canal a like amount, or, in case we should find it at that time in such good repair that it were not necessary to expend as much money as you had expended,

that we should then pay to you the half of these expenditures made by you, as indicated in your different letters up to the 10th inst., less, of course, at any time, the amounts which we should expend upon the canal."

The next letter was not written until July 30, 1887, and in this Mr. Lavagnino states that the expenditures upon the canal property during the year 1886 and the first half of 1887 had been $4826.95; that in his opinion the work had been necessary for the protection of the canal property, and that whatever value there was in it at present was "mainly due to the perseverant attention bestowed upon it during the last four years," and that he was willing to settle by arbitration any difference between them. He also gave a list of all the expenses put upon the canal as common property, which amounted to $10,745.88, and asked him to settle for his share of the expenses.

A further letter was written on February 6, 1888, stating that the expenses for the last half of 1887 had been $500.

A reply was made to this letter by Mr. Van Deusen on February 11, 1888, acknowledging the receipt of the statement of February 6, 1888, and asking him to forward him a completed statement of his account against the Old Jordan company, that he might report the same to the owners, and demanded that the statements show how and where each item of expense was applied, that they might be assured that such application was made for the protection of the property only.

To this Mr. Lavagnino replied, under date of February 14, sending copies of statements rendered to Mr. Holden, promising to give any further details required, and requesting a settlement of the account within ten days.

This letter completed the correspondence. In this connection the court charged the jury as follows: "If you believe from a preponderance of the evidence that the contract was made as alleged, as I have stated it to you, and that the plaintiff made the repairs during the time specified, and that the repairs were necessary to the preservation and protection of the property, and that the defendant has been requested to pay and has refused, then you should find for the plaintiff the

amount of such one half of expenditures." It further charged that if the defendant were liable under the contract it was liable only for the reasonable and necessary expenditures to preserve and protect the property, and that such expenditures must have been made for the benefit of the common interest of both parties to preserve and protect them.

We see no reason to doubt that the case was properly submitted to the jury. In determining whether there was a binding contract between the parties arising from the letter of the plaintiff of October 24, 1883, and the answer of the defendant thereto, the jury were at liberty to consider, in connection with those letters, the subsequent correspondence and the conduct of the parties in respect to the common property, and the interpretation put upon them by the parties themselves. Not only was the canal visited and examined by the agents of both parties acting in concert, but, from the beginning to the end of the correspondence there was no refusal to cooperate on the part of defendant, no disavowal of an agreement between them, nor any expression of dissent as to the propriety of what had been done toward the preservation of the property. It is true that the defendant was not making use of the canal, but its preservation from ruin was an object of as much importance to one party as to the other. The conduct and letters of the defendant were such as to justify the plaintiff in believing that the repairs that it was making to the canal were assented to and approved by it, and it was, at least, a question for the jury to say whether the plaintiff was not justified in believing that the defendant would pay its proportion of them, and whether the two first letters were not treated by both as embodying the arrangement between them.

We see no error in the record of which the defendant is entitled to complain, and the judgment of the court below is therefore

Affirmed.

Mr. Justice Peckham was not present at the argument, and took no part in this decision of this case.

WABASH WESTERN RAILWAY *v.* BROW.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 235. Submitted November 6, 1896. — Decided November 30, 1896.

The filing by the defendant in an action in a state court of a petition for its removal to the proper Circuit Court of the United States does not prevent the defendant, after the case is removed, from moving in the Federal court to dismiss it for want of jurisdiction of the person of the defendant in the state court or in the Federal court.

Joseph Brow commenced suit in the Circuit Court of Wayne County, Michigan, against the Wabash Western Railway to recover the sum of twenty thousand dollars for personal injuries, caused, as he alleged, by defendant's negligence, by the service, September 24, 1892, of a declaration and notice to appear and plead within twenty days, on Fred J. Hill, as agent of the company, which declaration and notice were subsequently filed in that court. On the 7th of October defendant filed its petition and bond for removal in that court, and an order accepting said bond and removing the cause to the Circuit Court of the United States for the Eastern District of Michigan, and directing the transmission of a transcript of record, was entered.

The petition alleged that the matter and amount in dispute exceeded, exclusive of interest and costs, the sum or value of two thousand dollars, and that the controversy was between citizens of different States; that petitioner was at the time of the commencement of the suit and still was "a corporation created and existing under the laws of the State of Missouri, having its principal business office at the city of St. Louis in said State, and a citizen of the said State of Missouri, and a resident of said State, and that the plaintiff, Joseph Brow, was then and still is a citizen of the State of Michigan, and a resident of the county of Wayne in said State."

The record having been filed in the Circuit Court of the

United States for the Eastern District of Michigan, a motion to set aside the declaration and rule to plead was made in the cause in these words and figures: "And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause, and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause, and to dismiss the same for want of jurisdiction of the person of the defendant in the state court from which this cause was removed, and in this court." The affidavit was to the effect that Hill, on September 24, 1892, was the freight agent of "the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit"; and that on the day aforesaid the Wabash Western Railway "did not own, operate or control any railroad in the State of Michigan, or have any officers or agent of any description therein, and did no business and had no property and no place of business in said State; and that on said day deponent was not a ticket or station agent of the said defendant, nor an officer or agent of the defendant of any description."

The motion was denied by the Circuit Court, with leave to defendant to plead within ten days, and defendant excepted. Thereafterwards defendant filed a plea in said cause as follows: "And the said defendant appearing and pleading under protest and excepting to the refusal of the court to grant its motion to dismiss, by Alfred Russell, its attorney, comes and demands a trial of the matters set forth in the declaration of the said plaintiff."

The cause was subsequently tried and resulted in a judgment in favor of Brow for $2500 and costs. The bill of exceptions sets forth that, when the case came on for trial, "the defendant company protested in open court against being forced to go to trial and for cause of protest showed to the court that the defendant was a corporation organized in the State of Missouri, and that at the time of the commence-

ment of this suit, the defendant had no agent, business, property, officer or servant in the State of Michigan, and had not been served and had not appeared." The court overruled the protest and defendant duly excepted. An instruction embracing the same point was also asked by defendant and refused, and an exception taken.

A writ of error was allowed from the Circuit Court of Appeals for the Sixth Circuit and the cause heard by that court. Among the errors assigned were the refusal of the Circuit Court to grant the motion to set aside the service of declaration and rule to plead and to dismiss the cause; the compelling of defendant to go to trial against its protest, the court having no jurisdiction over its person; and the refusal of the instruction presenting the same point. The opinion is reported in 31 U. S. App. 192, and fully discusses the objection to the jurisdiction of the state court over defendant's person, ruling that the filing of a petition for removal to the Circuit Court effected a general appearance, and that it was too late after such removal had been perfected for it in the Circuit Court to attempt to plead that that court had no personal jurisdiction over the company by virtue of the process issued. The case was also considered upon the merits and the judgment was affirmed. Thereupon application was made by plaintiff in error to this court to issue a writ of *certiorari* to the Circuit Court of Appeals, which was granted, and the record having been sent up, the cause was submitted on briefs.

Mr. Alfred Russell for plaintiff in error.

Mr. Edwin F. Conely for defendant in error.

The plaintiff in error did not allege in its petition of removal that it was unable to obtain justice in the state court, neither does the petition refer in any manner to the service on the defendant made in the state court; but it prays for the removal of the cause on the merits of the controversy, in which the matter in dispute exceeds the sum of two thousand dollars, and for no other reasons whatever.

As it did not file in the state court a special appearance or

a motion for the purpose of attacking the service made there, there was nothing in the record removed which could be reviewed or revived in the Federal court except the petition of removal, which with the declaration, comprised the entire record. Nor can it be inferred that it was the intention of the railway to attack the service after removal in the face of the petition, which refers only to a controversy on the merits which exceed the sum of two thousand dollars. This petition for removal as the case now stands could not be held an appearance in the state court for the purposes of attacking the service in that court on a motion made after a removal to the Federal court.

The following cases are cited in support of the position that there is a conflict among the different circuits upon the question of allowing service in the state court to be attacked after removal to the Federal court, counsel claiming that the majority of these circuits sustain his position : *Parrott* v. *Alabama Gold Life Ins. Co.*, 5 Fed. Rep. 391 ; *Blair* v. *Turtle*, 5 Fed. Rep. 394; *Small* v. *Montgomery*, 17 Fed. Rep. 865 ; *Hendrickson* v. *Chicago, Rock Island &c. Railway*, 22 Fed. Rep. 569 ; *Miner* v. *Markham*, 28 Fed. Rep. 387 ; *Golden* v. *Morning News*, 42 Fed. Rep. 112 ; *Clews* v. *Woodstock Iron Co.*, 44 Fed. Rep. 31 ; *Reifsnider* v. *Amer. Pub. Co.*, 45 Fed. Rep. 433 ; *Forrest* v. *Union Pacific Railway*, 47 Fed. Rep. 1 ; *O'Donnell* v. *Atchison, Topeka &c. Railway*, 49 Fed. Rep. 689 ; *McGillin* v. *Claflin*, 52 Fed. Rep. 657.

In all these cases there was either a motion or special appearance by defendant for the purpose of setting aside the service in the state court which formed part of the record removed, and many of these cases would seem to allow defendant to revive or renew such motion or special appearance, as being part of the record removed, the cause proceeding under the act of 1887 on the record removed only. The decisions, however, do not contemplate the taking up of any proceedings in the Federal court not contained in the record removed, and none of these cases can be compared with the present one, where the record consists of the petition for removal only, the contents of which we have referred to.

Opinion of the Court.

We therefore contend that there is no conflict in the different circuits on the questions raised by the facts and record in the case at bar.

There also seems to be some misunderstanding as to the ruling of the Supreme Court on these questions, counsel contending that this court should by its decision settle such questions.

We cannot overlook or ignore the decision in *Bushnell* v. *Kennedy*, 9 Wall. 387, where, among other things, Chief Justice Chase has given a final opinion for this court on the question of jurisdiction of the person of a defendant who, after praying for Federal jurisdiction, and bringing a cause in which he is interested into a Federal court, of his own election and by his own act refused to proceed on the merits, and attacked the service in the state court, thereby attempting to deprive a plaintiff of the jurisdiction of both courts. The learned Chief Justice concludes his opinion in that case by holding that the petition for the removal of the controversy between the parties in the state court constitutes an appearance on the merits in the Federal court.

In that case the question was fully discussed, and the decision has since been considered as the final judgment of this court in cases like the present one. See also *Sweeny* v. *Coffin*, 1 Dillon, 73; *Sayles* v. *Northwestern Ins. Co.*, 2 Curtis, 212; *Tallman* v. *Baltimore & Ohio Railroad*, 45 Fed. Rep. 156; *New York Const. Co.* v. *Simon*, 53 Fed. Rep. 1.

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

This was not a proceeding *in rem* or *quasi in rem*, but a personal action brought in the Circuit Court of Wayne County, Michigan, against a corporation which was neither incorporated nor did business, nor had any agent or property, within the State of Michigan; and service of declaration and rule to plead was made on an individual who was not, in any respect, an officer or agent of the corporation. The state court, therefore, acquired no jurisdiction over the person of

the defendant by the service. Did the application for removal amount to such an appearance as conceded jurisdiction over the person?

We have already decided that when in a petition for removal it is expressed that the defendant appears specially and for the sole purpose of presenting the petition, the application cannot be treated as submitting the defendant to the jurisdiction of the state court for any other purpose. *Goldey* v. *Morning News*, 156 U. S. 518.

The question "how far a petition for removal, in general terms, without specifying and restricting the purpose of the defendant's appearance in the state court, might be considered, like a general appearance, as a waiver of any objection to the jurisdiction of the court over the person of the defendant," was not required to be determined, and was, therefore, reserved; but we think that the line of reasoning in that case and in the preceding case of *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, compels the same conclusion on the question as presented in the case before us.

In *Goldey* v. *Morning News*, Mr. Justice Gray, speaking for the court, observed: "The theory that a defendant, by filing in the state court a petition for removal into the Circuit Court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit, of the existing act of Congress regulating removals from a court of a State into the Circuit Court of the United States. The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and cannot be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal. . . . Although the suit must be actually pending in the state court before it can be removed, its removal into the Circuit Court of the United States does not admit

that it was rightfully pending in the state court, or that the defendant could have been compelled to answer therein; but enables the defendant to avail himself, in the Circuit Court of the United States, of any and every defence, duly and seasonably reserved and pleaded, to the action, 'in the same manner as if it had been originally commenced in said Circuit Court.'" 156 U. S. 523, 525.

In *Martin* v. *Baltimore & Ohio Railroad*, referring to the provision of the act of Congress of 1887, defining the time of filing a petition for removal in the state court, it was said: "This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court 'to answer or plead to the declaration or complaint.' These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, 'to oppose or answer' the declaration or complaint which the defendant is summoned to meet. Stephen on Pleading, (1st. Am. ed.,) 60, 62, 63, 70, 71, 239; Lawes on Pleading, 36. The Judiciary Act of September 24, 1789, c. 20, § 12, required a petition for removal of a case from a state court into the Circuit Court of the United States to be filed by the defendant 'at the time of entering his appearance in such state court.' 1 Stat. 79. The recent acts of Congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earlier statutes. *Pullman Car Co.* v. *Speck*, 113 U. S. 84; *Smith* v. *Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk* v. *Henarie*, 142 U. S. 459, 467; *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, 449. Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal

should be filed in the state court as soon as the defendant was required to make any defence whatever in that court, so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States." 151 U. S. 686, 687.

Want of jurisdiction over the person is one of these defences, and, to use language of Judge Drummond in *Atchison* v. *Morris*, 11 Fed. Rep. 582, we regard it as not open to doubt that "the party has a right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party, who has the right to remove a cause, is foreclosed as to any question which the Federal court can be called upon, under the law, to decide."

An appearance which waives the objection of jurisdiction over the person is a voluntary appearance, and this may be effected in many ways, and sometimes may result from the act of the defendant even when not in fact intended. But the right of the defendant to a removal is a statutory one, and he is obliged to pursue the course pointed out, and when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held thereby to have voluntarily waived any other right he possesses. An acknowledged right cannot be forfeited by pursuit of the means the law affords of asserting that right. *Bank* v. *Slocomb*, 14 Pet. 60, 65. The statute does not require the removing party to raise the question of jurisdiction over his person in the state court before removing the cause, or to reserve that question in respect of a court which is to lose any power to deal with it; and to decide that the presentation of the petition and bond is a waiver of the objection would be to place a limitation upon the jurisdiction of the Circuit Court, which is wholly inconsistent with the act.

Moreover the petition does not invoke the aid of the court touching relief only grantable in the exercise of jurisdiction of the person. The statute imposes the duty on the state court, on the filing of the petition and bond, "to accept such

petition and bond and proceed no further in such suit," and, if the cause be removable, an order of the state court denying the application is ineffectual, for the petitioner may, notwithstanding, file a copy of the record in the Circuit Court and that court must proceed in the cause.

In this aspect the conclusion is impossible that the party submits to the jurisdiction of the state court by availing himself of a right to which he is entitled under the act of Congress, and which the state court is by that act required to recognize.

It is conceded that if defendant had stated that it appeared specially for the purpose of making the application, that would have been sufficient; and yet when the purpose for which the applicant comes into the state court is the single purpose of removing the cause, and what he does has no relation to anything else, it is not apparent why he should be called on to repeat that this is his sole purpose; and when removal is had before any step is taken in the case, as the statute provides that "the cause shall then proceed in the same manner as if it had been originally commenced in said Circuit Court," it seems to us that it cannot be successfully denied that every question is open for determination in the Circuit Court, as we have, indeed, already decided.

The Circuit Court of Appeals held that a petition to remove, without more, was tantamount to a general appearance, but that this result could be avoided by a special appearance accompanying, or made part of, the petition, which would not be waived by or be inconsistent with the general appearance because the application was analogous to an objection to jurisdiction over the subject-matter. We do not concur in this view. By the exercise of the right of removal, the petitioner refuses to permit the state court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort. This may be said to challenge the jurisdiction of the state court, in the sense of declining to submit to it, and not necessarily otherwise.

We are of opinion that the filing of a petition for removal does not amount to a general appearance, but to a special appearance only.

Section twelve of the Judiciary Act of September 24, 1789, c. 20, required the petition for removal to be filed by the defendant "at the time of entering his appearance in such state court," (1 Stat. 79,) and those words were omitted in the act of 1887, though probably the omission is of no special significance. Some cases are referred to, however, which were decided under that section, and have not been followed under the present statute. *Pollard* v. *Dwight*, 4 Cranch, 421; *Bushnell* v. *Kennedy*, 9 Wall. 387; *Sayles* v. *Northwestern Insurance Co.*, 2 Curtis, 212. These were all cases of attachment and of jurisdiction asserted in the state courts through the levy of the writs. The last two cited were satisfactorily disposed of in *Goldey* v. *Morning News*.

In *Pollard* v. *Dwight*, it appears that the objection that the Circuit Court had no jurisdiction, "the plaintiffs being citizens of Massachusetts and Connecticut, and the defendants citizens of Virginia, not found in the district of Connecticut," was not raised in the Circuit Court, but for the first time in the assignment of errors after judgment in that court, and it was accordingly held that, "by appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the non-service of process."

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed and the cause remanded to that court with directions to grant a new trial, sustain the motion to set aside the service of the declaration and rule to plead, and dismiss the action.

Mr. Justice Brewer and Mr. Justice Peckham dissented.

NATIONAL ACCIDENT SOCIETY *v.* SPIRO.

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

No. 460. Submitted April 27, 1896. — Decided November 30, 1896.

A defendant, by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, does not thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons.

THE case is stated in the opinion.

Mr. H. D. McBurney for plaintiff in error.

Mr. Henry H. Ingersoll for defendant in error.

THE CHIEF JUSTICE: This is a certificate from the Circuit Court of Appeals for the Sixth Circuit, propounding, after a preliminary statement, the following question:

"Does a defendant by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons?"

For the reasons given and on the authorities cited in the case of *Wabash Western Railway* v. *Brow*, *ante*, 271, the question must be answered in the negative.

Certificate accordingly.

MR. JUSTICE BREWER and MR. JUSTICE PECKHAM dissented.

UNITED STATES *v.* DELANEY.

APPEAL FROM THE COURT OF CLAIMS.

No. 493. Submitted November 3, 1896. — Decided November 30, 1896.

Doing that which it is necessary to do, in order that a newly created land office may be in a proper and fit condition at the time appointed for opening it for public business, is a part of the official duties of the person who is appointed its register and receiver.

The claimant having entered on the performance of such duties at a new office in Oklahoma on the 18th of July, 1890, and having been engaged in performing them, in the manner described by the court in its opinion, from thence to the 1st of September following, when the office was opened for the transaction of public business, is entitled to compensation as register and receiver during that period.

THE case is stated in the opinion.

Mr. Assistant Attorney General Dodge and *Mr. Assistant Attorney Gorman* for appellants.

Mr. W. W. Dudley, *Mr. L. T. Michener*, *Mr. John C. Chaney* and *Mr. J. R. Garrison* for appellee.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is an appeal from the Court of Claims. It involves simply the question as to the right of the appellee to compensation as register and receiver of the land office at the city of Oklahoma, in the Territory of Oklahoma, from the 18th of July to the 1st of September, 1890.

It appears from the findings of fact by the Court of Claims that the land office at Oklahoma city was first established by an executive order of the President on the 6th of June, 1890. The appellee, John C. Delaney, was duly appointed and commissioned as receiver of public moneys at Oklahoma city on the 23d of June, 1890, and on the 7th of July, 1890, he qualified by taking the oath of office and giving the bond required by law. On the 10th of July, 1890, the claimant was verbally directed by the Commissioner of the General Land Office to

go to Oklahoma as speedily as possible, and make the necessary preparations to open the office at that place. He left his residence in Harrisburg, Pennsylvania, on the 15th and arrived at Oklahoma city on the 18th of July, 1890. The land district at Oklahoma city was taken from parts of the two districts of Guthrie and Kingfisher, and on the 18th of July, 1890, the Commissioner of the General Land Office wrote to appellee at Oklahoma city, stating to him that the officers at Guthrie and Kingfisher had been directed to turn over to him all the plats and records of every description relating to the lands forming his district, and asking him to at once confer with those officers upon the subject. The letter also contained the following: "As soon as the records are received, you will proceed to give notice by publication, as an advertisement, at regular advertising rates, in the newspaper having the largest circulation in your district, once a week for four weeks, of the precise date when your office will be open for the transaction of public business, when the officers at Guthrie and Kingfisher will cease transacting business relating to the lands transferred." Between the 18th day of July (the date of the arrival of the appellee at Oklahoma city) and the 1st day of September, 1890 (the date on which the office was formally opened for the transfer of land and the receipt of money), the appellee was engaged in attending to business pertaining to his office, which had necessarily to be transacted before the date of the formal opening of the office in accordance with the published notice.

Upon this subject the Court of Claims found: "The nature of the services performed by claimant after his arrival and before the 1st of September is as follows: Conferring with the officers of other districts in the Territory from which his district was formed to determine what date to open the office; preparing and issuing thirty days' notice of the day fixed for opening the office; overseeing and superintending the preparation of rooms for the office; getting estimates for the manufacture of cases for the office; superintending the constructing of fixtures and having them put into the office; giving information and receiving instructions from the inspec-

tor; attending to the transfer of the records from the other offices of the Territory to that of the Oklahoma office. During said time there was a continuous arrival of letters from different parts of the district as well as letters from the department, which required the attention of claimant up to the 1st of September, 1890."

The land office of which the claimant was receiver was in fact opened for the transaction of business the 1st day of September, 1890, pursuant to the published notice to that effect, thirty days prior to that time, and the claimant insists that he commenced his services as receiver upon his arrival at Oklahoma on the 18th day of July, 1890, while the defendant, the appellant, urges that his term of office commenced when the office was opened for the entry and sale of land, September 1, 1890, and from that time it has allowed him compensation.

The written communication to the claimant from the Commissioner of the General Land Office, dated Washington, July 18, 1890, enclosed to the claimant the notice of the establishment of the office at Oklahoma city, and the letter in general terms defines certain services which were necessary to be performed before the opening of the office for the entry and sale of lands; and in pursuance of that letter the claimant commenced the performance of those services preliminary to the opening of the office. The character of the service has already been stated.

Section 2243, Revised Statutes, provides that "the compensation of registers and receivers, both for salary and commissions, shall commence and be calculated from the time they respectively enter upon the discharge of their duties." The sole question in this case, therefore, is when did the claimant, within the meaning of the above section, "enter on the discharge of his duties"? The claimant had been duly appointed on the 23d of June, 1890. On July 7, 1890, he had qualified by taking the oath of office and giving the bond required by law. The office was newly established and was taken from parts of two other land offices. Pursuant to the directions of the Commissioner of the General Land Office the claimant had left his home in Pennsylvania on the 15th day of July, 1890, and arrived at

Oklahoma city on the 18th of the same month. He at once entered upon the performance of the duties which it was essential should be performed, which pertained to the establishment of and the transaction of business at the new office, which were official in their nature and solely connected with the discharge of the duties of the office to which claimant had been appointed. What is the reason that he had not then, within the meaning of the statute, entered upon the discharge of the duties of his office? It is said that receiving applications and making entries in the public records of the office in regard to the transfer of public land within the district and receiving the moneys of applicants for the purchase of such lands comprise the duties of a register and receiver of a land office at each land district established by law. These are undoubtedly the main duties of an already established land office. Here, however, the office had been but just established by order of the President. The location of chambers in which the business was to be done was part of the duty of the appointee. It was his official duty to see to their being properly furnished and prepared for the transaction of the public business. He had to see or to correspond with the officials of the two land offices from which the one in question had but just been taken. That correspondence was not personal; it was official and it was necessarily connected with the performance of his duties as register and receiver for the newly made district. All of the services performed by the claimant, as found by the Court of Claims and above set forth, were wholly official in their nature, connected solely with the performance of the claimant's duties as an officer, and to our minds were just as much official as would be the entry of an application in the books of the land office or the receipt of money in payment for any portion of the public lands within the district. Doing that which it is necessary to do in order that a newly created land office may be in a proper and fit condition at the time appointed for opening it for the transaction of public business is, as it seems to us, a part of the official duties of the person who is appointed to the office. While it is true that he cannot earn commissions until money

has been paid for lands transferred, and that no transfer can be made until after the formal opening of the office for the entry of applications, that fact can have no legitimate bearing upon the question as to when the register and receiver enters upon the discharge of the duties of his office in a newly created land district. It is said that the salary and commissions of a register and receiver commence at the same time, which is the time when they, respectively, enter upon the discharge of their duties, and that as commissions cannot be earned until work is done upon which commissions can be charged, which is not until after the formal opening of the office, it follows that the salary cannot commence until that time. The argument is not sound. The right to both salary and commissions, it is true, commences when the registers and receivers, respectively, enter upon the discharge of their duties, but a register may enter upon the discharge of his duties under such circumstances as the claimant did in this case before the time arrives for the formal and official opening of the land office to the public, and before the receipt of any moneys upon which commissions might be earned. Otherwise if the salary could not commence to run until the receipt of such moneys, the office might have been formally opened for the transaction of public business and the register have been in attendance thereat for a long time before any moneys were received in payment for any part of the public land, and so he would be without a right to compensation by salary during the time succeeding the opening of his office and up to the time of the receipt of such moneys.

It is unnecessary to enlarge upon the question, as it seems quite plain to us that upon the facts found by the Court of Claims the services performed by claimant after the creation of the new land district and before the formal opening of the land office were official services, and that as early as the 18th of July, 1890, he had entered upon the discharge of the duties of his office, and was in the continuous performance of such duties until after the 1st of September, 1890.

The judgment of the Court of Claims was right, and it is

Affirmed.

McKEE v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 131. Argued November 3, 1896. — Decided November 30, 1896.

The last clause of section 4 of the act of March 2, 1891, c. 496, 26 Stat. 822, entitled "An act to credit and pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August 5, 1861," does not refer to or cover the cases of those owners who are mentioned in the first clause of the same section.

Brewer v. *Blougher*, 14 Pet. 178, affirmed to the point that it is the duty of the court, in construing a statute, to ascertain the meaning of the legislature from the words used in it, and from the subject-matter to which it relates, and to restrain its meaning within narrower limits than its words import, if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it.

THE case is stated in the opinion.

Mr. W. S. Monteith for appellants. *Mr. Leroy F. Youmans* was on his brief.

Mr. Assistant Attorney General Dodge for appellees. *Mr. Assistant Attorney Gorman* was on his brief.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The appellants herein have brought this appeal for the purpose of obtaining a review of a judgment of the Court of Claims dismissing their petition. No opinion was delivered by that court in this case, but it was decided upon the authority of the case of *Sams* v. *United States*, 27 C. Cl. 266, which involved the construction of the same statute that is before us in this case.

It appears by the finding of the court that one Henry McKee was the owner of certain lands, which are therein described, in the town of Beaufort, in the parish of St. Helena, South Carolina, and that while he was such owner the land was sold for the payment of the direct tax provided for in section 9, and the following sections of the act approved

August 5, 1861, c. 45, entitled "An act to provide increased revenue from imports, to pay the interest on the public debt, and for other purposes." 12 Stat. 292. The property was bid in by the United States and was thereafter resold by the government. The direct tax on the property so sold amounted in all to $91.52, and upon the resale of such property there was received into the Treasury of the United States, in excess of the direct tax, the sum of $5003.41. Henry McKee, the legal owner of the property at the time of its sale, died some time thereafter, leaving a will, and the claimants are the beneficiaries thereunder, being his widow and children. These same claimants have heretofore obtained judgment in the Court of Claims against the government for the sum of $5680.60 on account of the same real estate above described. That judgment was obtained, and the claim in this case is founded upon the act approved March 2, 1891, 26 Stat. 822, entitled "An act to credit and pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August 5, 1861." The act is set forth in full in the margin.[1]

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[1] An act to credit and pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August fifth, eighteen hundred and sixty-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be the duty of the Secretary of the Treasury to credit to each State and Territory of the United States and the District of Columbia a sum equal to all collections by set off or otherwise made from said States and Territories and the District of Columbia or from any of the citizens or inhabitants thereof or other persons under the act of Congress approved August fifth, eighteen hundred and sixty-one, and the amendatory acts thereto.

SEC. 2. That all moneys still due to the United States on the quota of direct tax apportioned by section eight of the act of Congress approved August fifth, eighteen hundred and sixty-one, are hereby remitted and relinquished.

SEC. 3. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary to reimburse each State, Territory and the District of Columbia for all money found due to them under the provisions of this act; and the Treasurer of the United States is hereby directed to pay the same to the Governors of the States and Territories and to the Commissioners of the District of Colum-

The judgment which the claimants have already obtained in the Court of Claims was rendered under the first clause in section 4 of the act. The claim now before the court rests upon the last clause of section 4, which reads as follows: "*And provided further*, That any sum or sums of money received into the Treasury of the United States from the sale of lands bid in for taxes in any State under the laws described

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bia, but no money shall be paid to any State or Territory until the legislature thereof shall have accepted, by resolution, the sum herein appropriated, and the trusts imposed, in full satisfaction of all claims against the United States on account of the levy and collection of said tax, and shall have authorized the Governor to receive said money for the use and purposes aforesaid: *Provided*, That where the sums, or any part thereof, credited to any State, Territory or the District of Columbia, have been collected by the United States from the citizens or inhabitants thereof, or any other person, either directly or by sale of property, such sums shall be held in trust by such State, Territory or the District of Columbia for the benefit of those persons or inhabitants from whom they were collected, or their legal representatives: *And provided further*, That no part of the money collected from individuals and to be held in trust as aforesaid shall be retained by the United States as a set off against any indebtedness alleged to exist against the State, Territory or District of Columbia in which such tax was collected: *And provided further*, That no part of the money hereby appropriated shall be paid out by the Governor of any State or Territory or any other person to any attorney or agent under any contract for services now existing or heretofore made between the representative of any State or Territory and any attorney or agent. All claims under the trust hereby created shall be filed with the Governor of such State or Territory and the Commissioners of the District of Columbia, respectively, within six years next after the passage of this act; and all claims not so filed shall be forever barred, and the money attributable thereto shall belong to such State, Territory or the District of Columbia, respectively, as the case may be.

SEC. 4. That it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor, and furnish satisfactory evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner, or is the heir at law or devisee of the legal owner of such lands as were sold in the parishes of Saint Helena and Saint Luke's in the State of South Carolina, under the said acts of Congress, the value of said lands in the manner following, to wit: To the owners of the lots in the town of Beaufort, one half of the value assessed thereon for taxation by the United States direct tax commissioners for South Carolina; to the owners of lands which were rated for taxation by the State of South Carolina as being usually cultivated, five dollars per acre for each acre thereof returned on the proper tax book; to the owners of all other lands,

in the first section of this act in excess of the tax assessed thereon shall be paid to the owners of the land so bid in and resold, or to their legal heirs or representatives." We think this proviso does not apply to the owners of lands described in the first clause of the section.

A perusal of the entire act shows that its purpose was to pay back to the States or to individual citizens of States

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one dollar per acre for each acre thereof returned on said tax book: *Provided*, That in all cases where such owners, or persons claiming under them, have redeemed or purchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased; and any sum or sums held or to be held by the said State of South Carolina in trust for any such owner under section three of this act shall be deducted from the sum due to such owner under the provisions of this section: *And provided further*, That in all cases where said owners have heretofore received from the United States the surplus proceeds arising from the sale of their lands, such sums shall be deducted from the sum which they are entitled to receive under this act. That in all cases where persons, while serving in the Army or Navy or Marine Corps of the United States, or who had been honorably discharged from said service, purchased any of said lands under section eleven of the act of Congress approved June seventh, eighteen hundred and sixty-two, and such lands afterwards reverted to the United States, it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor, or to their heirs at law, devisees or grantees, in good faith and for valuable consideration, whatever sum was so paid to the United States in such case. That before paying any money to such persons the Secretary of the Treasury shall require the person or persons entitled to receive the same to execute a release of all claims and demands of every kind and description whatever against the United States arising out of the execution of said acts, and also a release of all right, title and interest in and to the said lands. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of five hundred thousand dollars, or so much thereof as may be necessary to pay for said lots and lands, which sum shall include all moneys in the Treasury derived in any manner from the enforcement of said acts in said parishes, and not otherwise appropriated. That section one thousand and sixty-three of the Revised Statutes is hereby made applicable to claims arising under this act without limitation as to the amount involved in such claim: *And provided further*, That any sum or sums of money received into the Treasury of the United States from the sale of lands bid in for taxes in any State under the laws described in the first section of this act in excess of the tax assessed thereon shall be paid to the owners of the land so bid in and resold, or to their legal heirs or representatives.

Approved, March 2, 1891.

the amounts of money received from them in the course of the execution of the direct tax act of 1861 and the acts amendatory thereof. The first section of the act provides for the crediting by the Secretary of the Treasury to each State, etc., a sum equal to all collections by set off or otherwise made from said States or from any of the citizens or inhabitants thereof or other persons, under the act of Congress therein mentioned. Provision is thus made for the amount that had been collected by the United States.

The second section provides for the remission and relinquishment of all moneys still due to the United States under the direct tax apportioned by section 8 of the above-mentioned act of Congress. The third section appropriates moneys for the purpose of reimbursing each State for all money found due under the provisions of the act, and various conditions are therein imposed relative to the payment of such moneys. By the first clause of the fourth section special provision is made for the payment to the legal owners or their heirs of such lands as were sold in the parishes of St. Helena and St. Luke's in the State of South Carolina under this direct tax act. Those owners or their representatives were to be paid for their lands which had been sold, and the value thereof was to be ascertained in the manner provided by the fourth section. Full and special provision was thus made in the clauses preceeding the last clause of section 4 for the owners of lands which had been sold under the direct tax act in the parishes of St. Helena and St. Luke's in the State of South Carolina. The reimbursement of the owners in those particular parishes for their lands which had been sold was to be after the standard which was provided for in the clauses quoted.

There were, however, cases where lands had been sold under this direct tax act in other parishes of the State of South Carolina and in other States. There was added to the act of 1891 the last clause of section 4, which would cover all such cases, and we are of opinion that this last clause does not refer to or cover the cases of those owners who are mentioned in the first clause of the same section. Otherwise this curious result might, and in this particular case would, follow. The owners of the

land at the time of its sale would recover under the first clause a greater amount than the government actually received upon its resale of the land pursuant to the provisions of the direct tax act. That result would be accomplished by the rule provided in the first clause for arriving at the sum to be paid by the government without reference to the amount actually received by it. But in addition to that and under the provisions of the last clause as construed by plaintiffs in error, the owners would be entitled to recover all the moneys received into the Treasury of the United States upon the sale of such lands for taxes, under the direct tax act, in excess of the taxes assessed thereon. In this case these claimants have already obtained judgment against the government for $5680.60, and all that the government has received upon the sale of the property (above the taxes on such land, which were $91.52) is $5003.41. By that judgment, therefore, the government must pay nearly six hundred dollars more than it ever received on account of the land, and in addition to that, if the claimants' interpretation of the statute be the correct one, the government must pay five thousand dollars more to the owners of the same lands. We cannot think that this was the intention of Congress. To give back as much as it has received over and above the original tax would seem to be dealing with a good deal of liberality with the owners. The fact is well known as a matter of contemporaneous history, and it was so stated by counsel on the argument, that upon the sale of lands which the United States had bid in by virtue of the provisions of the direct tax act of 1861, and which were sold thereafter under the provisions of section 11 of the act of June 7, 1862, c. 98, entitled "An act for the collection of direct taxes in insurrectionary districts within the United States, and for other purposes," 12 Stat. 422, the amounts of such sales were frequently and generally very much less than the real value of the property sold. This was no fault of the government, however, and resulted in no benefit to it. By the rule adopted in the first clause of section 4 of the act of 1891 for ascertaining the amount which was to be paid the former owners of the property that had been sold, the sum which the United States

would have to pay to those legal owners might and probably would be much in excess of the sums which the government had actually received, so that in numerous cases there would be a pure gratuity on the part of the government to those owners. The language would have to be very plain to call for such a construction of the last proviso in section 4 as would give in addition to a gratuity a still further sum amounting to the surplus received by the government over and above the amount of the tax levied upon the property sold. The fact that there were lands sold in other parishes than those named, in the State of South Carolina, and also lands lying in other States, furnishes a rational and proper foundation for the last proviso in section 4 of the act of 1891, without construing it to involve these owners who had already been specially provided for. There is full opportunity thus given for the application of the clause in question to other landowners without including within its benefits the owners of those lands who had already been particularly mentioned and provided for by other clauses in the same section. It is true that if the language used in that last clause be given its widest and broadest application it would include all owners of real estate which had been sold in any portion of the country under the provisions of the direct tax act. But we think a perusal of the whole act prevents our giving this unlimited construction, because to do so would conflict with what we think was the intention of Congress, gathered from the provisions of the whole act. Under such circumstances it is not only the right but it is the plain duty of the court to limit by a proper construction the otherwise boundless application of the general language used in the statute. As was said by Mr. Chief Justice Taney: "It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject-matter to which it relates; and to restrain its operation within narrower limits than its words import if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it." *Brewer* v. *Blougher*, 14 Pet. 178, at 198; *Petri* v. *Commercial National Bank of Chicago*, 142 U. S. 644, 650.

Counsel for Parties.

It is true that, in the first case cited, the court refused to limit the application of the statute as contended for by one of the parties to the controversy, but such refusal was based on the view of the statute taken by the court, which was that the intention of the legislature was not so plainly within the contention of counsel as to permit of the limitation in that case. The rule for the construction of a statute and of the duty of the court was given as above stated.

In this case we think the intention of Congress was plain, and that the general language of the last clause of section 4 should not be held to include the class of owners of lands mentioned in the first clause of the same section, for whose case special provision was therein made. We think that the construction given by the Court of Claims to the statute of 1891, as set forth in its opinion in *Sams* v. *United States*, 27 C. Cl., *supra*, was correct, and its judgment in this case should, therefore, be

Affirmed.

GLOVER *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 140. Argued November 3, 1896. — Decided November 30, 1896.

A mortgage creditor, who was such at the time of the sale of real estate in South Carolina for non-payment of taxes to the United States under the tax acts of 1861, is not the legal owner contemplated by Congress in the act of March 3, 1891, c. 496, as entitled to receive the amount appropriated by that act in reimbursement of a part of the taxes collected; but the court, by this decision, must not be understood as expressing an opinion upon what construction might be justified under other facts and circumstances, and for other purposes.

THE case is stated in the opinion.

Mr. James Lowndes for appellants.

Mr. W. S. Monteith for interested parties.

Mr. Assistant Attorney Gorman and *Mr. Assistant Attorney General Dodge* for appellees submitted on their brief.

Opinion of the Court.

MR. JUSTICE WHITE delivered the opinion of the court.

In 1861 Benjamin R. Bythewood was the owner of a lot in the town of Beaufort and a plantation in the county of the same name, both situated in Saint Helena Parish, State of South Carolina. On the occupation of Port Royal by the national troops in November, 1861, Bythewood left Saint Helena Island, as did all the white population of that island. Thereafter the property of Bythewood was assessed for taxes by the United States under the direct tax act of 1861, (12 Stat. 294,) and was sold in enforcement thereof. A portion of the plantation was subsequently redeemed.

Congress provided, by the act of March 2, 1891, c. 496, 26 Stat. 822, for refunding the direct tax collected under the act of 1861, and also for payment, under certain conditions, of a stipulated amount to the owners of property in Saint Helena Parish, which had been sold to collect such direct tax. This controversy arises from a claim made, under said act, by the representatives of Mrs. Verdier, that as their ancestor was a creditor secured by mortgage on the property of Bythewood at the date when it was sold under the act of 1861, they are therefore entitled to be paid the sum stipulated in the act of Congress, because as the representatives of such mortgage creditor they were the legal owners of the property within the meaning of the refunding law of 1891. The full text of the act of 1891, upon which the issue depends, is set out in the margin of the opinion in *McKee* v. *United States*, *ante*, 287.

By the fourth section of the act it is made "the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor and furnish evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner or the heirs at law or devisee of the legal owner of such lands as were sold in the parish of Saint Helena and Saint Luke's in the State of South Carolina under the said acts of Congress, the value of said land in the manner following, to wit. . . ."

The question which therefore arises is this: is one who was a mortgage creditor at the time of the sale of the property, to

enforce the direct tax, the legal owner contemplated by Congress when it enacted the law of 1891?

Construing the words "legal owner" in a strictly literal and purely technical sense, it is clear that under the law of South Carolina a mortgage creditor was not such legal owner. Without considering whether a mortgage creditor under the common law might be technically held to be the legal owner within the meaning of the act of 1891, it is plain that the statute law of South Carolina made the position of a mortgagee merely that of a creditor with security. The law from which this resulted was passed in 1791, 5 Stat. S. C. 169, and therein it was provided:

"No mortgagee shall be entitled to maintain any possessory action for the real estate mortgaged, even after the time alloted for the payment of the money secured by the mortgage is elapsed; but the mortgagor shall be still deemed the owner of the land and the mortgagee as owner of the money lent, or due, and shall be entitled to recover satisfaction for the same out of the land . . . Provided always, that nothing herein contained shall extend to any suit or action now pending, or when the mortgagor shall be out of possession, . . ."

As late as 1890 the Supreme Court of South Carolina construed this statute in *Hardin* v. *Hardin*, 34 S. C. 77, 80, and it was there held that it was well settled, by many decisions, that in South Carolina a mortgage of real estate is not a conveyance of any estate whatever, but is simply a contract whereby the mortgagee obtains a lien on the property mortgaged as a security for the payment of the debt, and that the mortgagor still remains, even after the condition is broken, the owner of the land.

Nor did the mere fact that Bythewood left Saint Helena Island, on the arrival of the Federal forces, convert Mrs. Verdier's title, which was one of mere security, into that of a legal owner. It is not found that she herself in fact took any possession of the property mortgaged to secure her debt.

As said in *Norwich* v. *Hubbard*, 22 Connecticut, 587, 594:

"A mortgagee, out of possession, is not the proprietor of

the mortgaged premises, and, in common parlance, is never spoken of as such, nor is he so recognized in a legal sense. To be sure, he is said to have the legal title, and as against the mortgagor, and for the purpose of enforcing his rights, as mortgagee, he has such title. He can convey no beneficial interest in the land mortgaged, as separate and distinct from the debt; and he has no such interest in it as can be levied upon, and taken in execution, by his creditors."

Even the common law right of a mortgagee not in possession to be considered the legal owner is so in a restricted sense, as is shown by *Great Falls Co.* v. *Worster*, 15 N. H. 412, 434, where the court said:

"A mortgagee not in possession is not entitled to be treated as owner, except in a suit, or some other proceeding, to enforce his rights as mortgagee. Until entry, he has no right to exercise any acts as owner. He cannot claim the rents and profits. He cannot convey the land by deed, without transferring the debt. But he may assign the debt, and thereby assign and transfer the charge upon the land. He has no right to commit waste or destroy the property when in possession, until he has foreclosed."

Whilst it is hence clear that a strict and technical construction of the words "legal owner" would be conclusive against the claim which the mortgage creditors here assert, the language of the act of 1891 should not be measured and interpreted by this narrow rule. The context of that act makes it manifest that the word "legal," prefixed to the word "owner," was not intended to give it a purely artificial meaning. This is shown by the fact that in other places in the section where the word "owner" is found the same idea is conveyed by the use of that word without the prefix "legal." In interpreting the act, therefore, we must be guided not by any mere technicality, but must read its provisions by the light of the cardinal rule, commanding that the words must be apprehended, not in a forced and purely technical way, but in their general acceptation, and that the law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby. *Maillard* v. *Lawrence*, 16 How. 251; *Smythe* v. *Fiske*, 23 Wall. 374.

Following these canons of construction, it cannot be denied that the general acceptation of the word "owner" is distinct and different — indeed, is the very opposite of the word "creditor," whether secured by mortgage or not. And that this meaning is the sense in which it was used in the law in question is demonstrated by the fact that nowhere therein is provision made for the classification and ascertainment of the rights of creditors for determining whether such rights had been duly preserved by proper registry or had been discharged by payment or barred by the statute of limitations. Indeed, there is one requirement of the act which excludes the implication that the word "owner" was intended to refer to a creditor. The payment to the owner, the fourth section commands, "shall be made by the Secretary of the Treasury to such persons as shall . . . furnish satisfactory evidence that such applicant was at the time of the sales, hereinafter mentioned, the legal owner." Now, whilst the time of the sale was an absolutely certain criterion by which to determine ownership *vel non*, it is an impossible test by which to ascertain the existence or non-existence of a creditor at the time the law was enacted. The mere fact that a creditor held security at a given time does not exclude the possibility of the debt having been paid subsequent to the sale, or of its having perished by limitation, or having been extinguished in some other lawful way. To hold that the payment must be made, therefore, to one who was a creditor *at the time of the sale* would imply that Congress intended to make a payment to one who might not be a creditor at the time of the payment, although he may have been such creditor when the sale was made.

A consideration of the purpose meant to be accomplished by the act of 1891 fortifies the foregoing conclusions. That it was avowedly intended to repay the tax which had been levied under the act of 1861 is beyond question. The provision as to payment to the owners of a certain sum for land sold under that act was clearly a result and consequence of the general purpose contemplated by Congress in passing the refunding law. It follows that the aim proposed by the act of 1891 was the return of the tax assessed under the act of

1861 and the repayment, in certain cases, to the owners of a named sum for lands which were assessed and sold under that act. Now, if it be clear that under the act of 1861 the owner and not the mortgage creditor out of possession was liable for assessment, it becomes equally clear that a mortgage creditor who was not assessable under the act of 1861 was not within the scope of the relief intended to be accomplished by the act of 1891. The act of 1861, in section 8 and subsequent sections, provided for a tax which was to be assessed and laid within the United States "on the value of lands and lots of ground, their improvement and dwelling houses." It contemplated an assessment against the owner of the property and not the creditor, since there was a personal liability entailed on the owner for the tax. Thus, by section 35, the collector was authorized upon default in the payment of the tax to distrain upon goods and chattels. Can it be contended that one who was a creditor with a mortgage security on the property of his debtor was liable to assessment for this tax, and hence to have his goods and chattels distrained for its payment? If it cannot be, then it follows that the mortgage creditor could not be assessed under the act of 1861. But if he was not assessable under that law, and the act of 1891 contemplates only the owners who could be so assessed, the deduction is irresistible that the mortgage creditor was not embraced in the word "owner" as used in the act of 1891. Nor is the claim here asserted by the mortgage creditor that he is within the term "owner," as used in the act of 1891, fortified by a reference to decisions construing that word in statutes regulating the enforcement of the right of eminent domain. Some courts, considering that word strictly in such statutes, have held it not to embrace a mortgagee. *Farnsworth* v. *Boston*, 126 Mass. 1; *Norwich* v. *Hubbard*, *supra*. Other courts, however, have held from a consideration of the context of the statutes which they were interpreting, and the evident purpose intended thereby to be subserved, that mortgagees were embraced. Even if *arguendo* it be conceded that the latter construction is a correct one, and that where the law seeks to divest all

and every title to land or estate and substitute the price therefor, that the word "owner" should receive a broad and liberal construction so as to embrace every right in and to the land, such concession would not affect or control the proper interpretation to be given to the word "owner" in the act under consideration. In conferring the gratuity provided by the act of 1891, Congress in no way manifested its purpose to make a *restitutio in integrum*, to create a fund which would take the place of the property and be the representative of its entire value, at the date of the sale, or of all the interests then resting upon or entering into the land. The act does not provide for ascertaining the value of the land at the time of the sale and for a return of the amount thereof, but simply fixes an arbitrary sum to be paid to the one who was the owner at the time of the sale. And that this sum was not considered by Congress as the whole value of the property, at the date of the sale, is demonstrated by the fact that, as to the lots in Beaufort, the amount to be paid was fixed at one half the valuation placed on them, by the United States, when they were assessed under the direct tax law. We cannot adopt a theory of construction which substantially asserts that the half is equal to the whole. To enforce, then, against the money given by Congress to the owner, the rights of the mortgage creditor on the theory that it represents the entire value of the property would be indulging in an untrue hypothesis to justify not only a repudiation of the express words of the law, but also a refusal to execute its manifest intent. Doubtless both the rights of the owner and those of the mortgage creditor were operated on by the tax sale. But the taxing law gave to either a right of redemption. If years after the sale and when the right to redeem had lapsed, Congress chose to give to the owner a proportion of the value of the property to compensate for his loss, we can see no equitable consideration supporting the claim that the money should be, by judicial construction, taken from the owner, in order to bestow it on the mortgage creditor. To so construe would substitute the judicial for the legislative mind.

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This case is also unlike that of a factor who, by reason of advances upon goods in his physical possession, has acquired a quasi ownership in such goods, and who, to the extent of such advances, is entitled as special owner to sell the goods in his possession. *United States* v. *Villalonga*, 23 Wall. 35. Of course the construction which we give to the term "legal owner" or "owners" in the act of 1891, is limited to the precise question arising on this record, which is simply whether a mortgagee can properly be said to be embraced within the terms of the act of 1891 giving a particular sum to the legal owner or owners for lands sold by the government under the direct tax act of 1861. In determining, therefore, as we do, that the mortgage creditor is not embraced in the provisions of the act, we are not to be understood as expressing an opinion upon what construction might be justified under other facts and circumstances and for other purposes.

The judgment of the Court of Claims, disallowing the claim of the plaintiffs, having construed the act of 1891 in accordance with the foregoing views, was right, and is therefore

Affirmed.

COUGHRAN *v.* BIGELOW.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

No. 53. Argued and submitted May 7, 1896. — Decided November 30, 1896.

The granting, by a trial court, of a nonsuit for want of sufficient evidence to warrant a verdict for the plaintiff is no infringement of the constitutional right of trial by jury.

A surety on a bond, conditioned for the faithful performance by the principal obligor of his agreement to convey land to the obligee on a day named on receiving the agreed price, is released from his liability if the vendee fails to perform the precedent act of payment at the time provided in the contract, and if the vendor, having then a right to rescind and declare a forfeiture in consequence, waives that right.

Eugene W. Coughran and Nathan H. Cottrell filed their amended complaint in the district court of the first judicial district of the Territory of Utah on December 15, 1891,

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against Henry C. Bigelow and H. P. Henderson, showing that on April 26, 1890, E. A. Reed and H. H. Henderson, as principals, and the defendants as sureties, executed and delivered to the plaintiffs a bond conditioned for the performance of a contract on the part of the said principals to convey to the plaintiffs an interest in certain lands situate in Weber County, in the said Territory; alleging that the said principals had failed to perform the contract, and seeking, on account of such alleged breach of the condition of the bond, to recover the amount of the penalty thereof from the defendants.

The bond was as follows:

"Know all men by these presents that we, E. A. Reed and H. H. Henderson, principals, and H. Bigelow and H. P. Henderson, as sureties, all of the county of Weber, Territory of Utah, are held and firmly bound unto Eugene W. Coughran and Nathan H. Cottrell, of Sioux Falls, South Dakota, in the sum of five thousand dollars, lawful money of the United States, to be paid to the said Eugene W. Coughran and Nathan H. Cottrell, their executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, we and each of ourselves, executors and administrators jointly and severally firmly by these presents.

"Sealed with our seals, and dated this 26th day of April, A.D. 1890.

"The condition of the above obligation is such that the above-bounden E. A. Reed and H. H. Henderson, on or before the first day of October next, or in case of their death before that time, if the heirs of the said E. A. Reed and H. H. Henderson, within three months after their decease, shall and do upon the reasonable request of the said Eugene W. Coughran and Nathan H. Cottrell, their heirs or assigns, make, execute and deliver, or cause so to be made, a good and sufficient warranty deed, in fee simple, free from all incumbrance and with the usual covenants of warranty, of the following-described premises, to wit: An undivided one tenth of section fifteen (15), in township six (6), north of range one (1) west, Salt Lake meridian, Weber County, Utah Territory, except a part of the

southwest quarter section of said section 15, described as follows: Beginning at the southeast corner of said southwest quarter section, and running thence west 20 rods; thence north 30 rods; thence west 20 rods; thence north 40 rods; thence east 40 rods; thence south 70 rods to the place of beginning; provided the said Eugene W. Coughran and Nathan H. Cottrell comply with their part of the contract this day made and delivered to them by the said E. A. Reed and H. H. Henderson, and a copy of which is hereto attached, then the above obligation to be void; else to remain in full force and virtue.

"H. H. Henderson.
"E. A. Reed.
"H. C. Bigelow.
"H. P. Henderson.

"Signed in presence of —
"Geo. H. Burgitt."

Attached to the bond was the instrument following:

"Ogden, *April* 26, 1890.

"Received of Eugene W. Coughran and Nathan H. Cottrell thirty-three hundred and thirty-three dollars as part purchase price of an undivided one tenth part of the following-described lands, viz.: Section fifteen (15), in township six (6), north of range one (1) west, Salt Lake meridian, Weber County, Utah Territory, except a part of the southwest quarter section of said said section fifteen, described as follows: Beginning at the southeast corner of said southwest quarter section, and running thence west twenty rods, thence north thirty rods, thence west twenty rods, thence north forty rods, thence east forty rods, thence south seventy rods, to the place of beginning.

"The full purchase price being ten thousand dollars, to be paid as follows: $3334 on October 1, 1890, and $3333 on April 1, 1891, with interest at eight per cent per annum on deferred payment from October 1, 1890. But in case said land is sold before October 1, 1890, then the last two payments are to bear interest from April 1, 1890, to the date of sale. And in case any payments are not made as above

provided the amount paid herein is forfeited, and this receipt is from that time void and inoperative, and when the payment [*sic*] are made as above provided the land to be conveyed to said Eugene W. Coughran and Nathan H. Cottrell, or their assigns, with good title free from incumbrances.

"H. H. Henderson.
"E. A. Reed.
"Millie G. Reed.

"Signed in presence of —
"Geo. H. Burgitt."

The plaintiffs alleged that they made the first and second payments provided for in the contract in accordance with the terms thereof; that on or about November 1, 1890, upon the request of the plaintiffs, E. A. Reed and H. H. Henderson tendered them a deed for the said interest in the lands; that thereupon they examined the title to the property, found the same to be defective and, because of the defects therein, refused to accept the deed; and that as to these transactions between the parties to the contract the defendants had due notice. It was alleged that Reed and H. H. Henderson had never been able, and were not able at the time the complaint was filed to convey a fee simple and unincumbered title to the one tenth interest in the lands described in the bond and contract; that for a long time prior to April 12, 1890, the property was owned in fee simple by the Union Pacific Railway Company, which company, by deed of that date, conveyed all of the east half and the north half of the northwest quarter of said section fifteen to one James Taylor; that in and by that deed the company reserved to itself "the exclusive right to prospect for coal and other minerals within and underlying said land, and mine and remove the same if found," and also "the right of way over and across said lands, and space necessary for the conduct of said business thereon, without charge or liability therefor"; that the title of Reed and H. H. Henderson to the said interest was obtained by deed to them from Taylor, dated October 17, 1890, which deed was made subject to the said mining rights reserved to

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the company; that the lands were situated in a mining district, and that the said reservation rendered the title to the lands doubtful and unmarketable, and greatly diminished their probable value; that, furthermore, the property was subject to a mortgage. The plaintiffs allege that they had performed all the conditions of the contract upon their part, except to pay the sum of $3333 on April 1, 1891, and that neither Reed and H. H. Henderson, nor the defendants, had ever tendered to them any other or different title than the alleged defective one aforesaid, or had ever refunded to them the amount of the first two payments. They asked for judgment in the sum of $5000.

The defendants, on January 8, 1892, filed separate answers, wherein they denied that the said second payment made by the plaintiffs was made in accordance with the provisions of the contract, or that the title to the property was defective, or that the refusal of the plaintiffs to accept the deed tendered to them by Reed and H. H. Henderson was on account of any defect in the title, or that the lands were mineral lands, or that a reservation of mineral rights therein would be an incumbrance upon the title thereto. Further answering, they alleged that shortly before the execution of the said bond the plaintiffs had entered into negotiations with Reed and H. H. Henderson for the purchase of the said interest in the lands; that at that time Reed and H. H. Henderson held the said interest under executory contracts for the conveyance thereof to them; that Reed and H. H. Henderson fully informed the plaintiffs of the character of their title; that the said contract was then entered into, and the plaintiffs, in receiving the same, required some guarantee that Reed and H. H. Henderson would perfect their rights under the said executory contracts by April 1, 1891, that being the agreed time, as alleged, at which the plaintiffs would be entitled to a conveyance from Reed and H. H. Henderson; that thereupon it was agreed and understood that the defendants, as sureties, would execute a bond in the sum of $5000, with Reed and H. H. Henderson as principals, guaranteeing that on or before April 1, 1891, Reed and H. H. Henderson should execute and deliver a deed

as stipulated in the contract, provided that the plaintiffs should perform all the conditions of the contract upon their part; that the bond was prepared and attached to the contract, and was signed by Reed and H. H. Henderson and by the defendants; that by inadvertence in the preparation of the bond the time therein stated for the delivery of the deed was October 1, 1890, instead of April 1, 1891; that, therefore, the bond was not in accordance with the agreement and understanding of the parties thereto.

The case came on for trial in the said court November 29, 1892, before the court and a jury. Thereupon the plaintiffs introduced evidence tending to show, among other things, that the said lands were, on November 1, 1890, subject to a mortgage for the sum of $9000, recorded July 2, 1889; that on October 17, 1890, the defendants placed in the custody of the Ogden State Bank a deed bearing that date, whereby Reed and H. H. Henderson conveyed to the plaintiffs the said interest in the said lands, subject to one tenth of the said mortgage; two notes, unsigned, dated October 17, 1890, payable to Reed and H. H. Henderson on April 1, 1890, for the aggregate amount of $2433, being the amount of the last payment under the said contract, less $900, or one tenth of the amount of the said mortgage; and an unexecuted mortgage of the interest in the lands described in the contract, in favor of Reed and H. H. Henderson; that the bank was instructed to deliver the deed to the plaintiffs when they should have executed the notes and the last-mentioned mortgage, and should have returned them to the bank to be delivered by it to Reed and H. H. Henderson; that subsequently to October 8, 1890, and not later than the 12th of that month the bank received the sum of $3334 from the plaintiffs, with instructions to pay the same to Reed and H. H. Henderson, and did pay the same to them some time within the month following. It was further shown that Reed and H. H. Henderson derived their title to the property from James Taylor, by deed dated October 17, 1890; that Taylor's title was obtained from the said railway company; and that the deed from the company to Taylor as well as the deed of Taylor to Reed and H. H. Henderson contained the reservation of mineral rights as set out in the complaint.

Opinion of the Court.

After all the evidence on behalf of the plaintiffs had been introduced, the defendants moved for a nonsuit. The motion was granted, and judgment was entered in favor of the defendants. The plaintiffs then appealed to the Supreme Court of the Territory of Utah, where the judgment of the said District Court was affirmed. *Coughran* v. *Bigelow*, 9 Utah, 260. Thereupon they sued out a writ of error from this court.

Mr. C. W. Bennett for plaintiffs in error submitted on his brief.

Mr. Arthur Brown for defendants in error.

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

The ruling of the Supreme Court of the Territory of Utah in affirming the action of the trial court ordering a nonsuit of plaintiffs is assigned as error. It was held by this court in *Elmore* v. *Grymes*, (1 Pet. 469,) that a Circuit Court of the United States had no authority to order a peremptory nonsuit against the will of the plaintiff. This case has been followed in repeated decisions. *Crane* v. *Morris*, 6 Pet. 598; *Castle* v. *Bullard*, 23 How. 172.

The foundation for those rulings was not in the constitutional right of a trial by jury, for it has long been the doctrine of this court that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the *onus* of proof is imposed, and that, if the evidence be not sufficient to warrant a recovery, it is the duty of the court to instruct the jury accordingly, and, if the jury disregard such instruction, to set aside the verdict. *Parks* v. *Ross*, 11 How. 362; *Schuchardt* v. *Allens*, 1 Wall. 359; *Pleasants* v. *Fant*, 22 Wall. 116, 120. And, in the case of *Oscanyon* v. *Arms Co.*, 103 U. S. 264, it was said by Mr. Justice Field, in delivering the opinion of the court, that

the difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant is "rather a matter of form than of substance."

That the cases above cited, which held that the Circuit Court of the United States had no authority to order peremptory nonsuits, were based, not upon a constitutional right of a plaintiff to have the verdict of a jury, even if his evidence was insufficient to sustain his case, but upon the absence of authority, whether statutory or by a rule promulgated by this court, is shown by the recent case of *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S. 24, 38, where it was held that, since the act of Congress of June 1, 1872, c. 255, § 5, 17 Stat. 197, reënacted in § 914 of the Revised Statutes, courts of the United States are required to conform, as near as may be, in questions of "practice, pleadings and forms and modes of proceeding" to those existing in the courts of the State within which the trial is had, and a judgment of the Circuit Court of the United States for the Eastern District of Pennsylvania, ordering a peremptory nonsuit, in pursuance of a state statute, was upheld. It is the clear implication of this case that granting a nonsuit for want of sufficient evidence is not an infringement of the constitutional right of trial by jury.

As there was a statute of the Territory of Utah authorizing courts to enter judgments of peremptory nonsuit, there was no error in the trial court in granting the motion for a nonsuit in the present case, nor in the judgment of the Supreme Court affirming such ruling; if, indeed, upon the entire evidence adduced by the plaintiffs enough did not appear to sustain a verdict.

We are thus brought to the question whether the trial court was mistaken in its view of the plaintiffs' evidence.

The facts of the case are somewhat peculiar. The suit is against sureties on a bond, conditioned for the performance by the principals of the terms of a contract for the sale of land to the parties plaintiff. The chief difficulty arises from the fact that there is a discrepancy between the terms of the contract, as they appear in the written instrument itself, and as they are described or narrated in the bond.

Opinion of the Court.

The contract is clear and unambiguous. It is dated April 26, 1890. After acknowledging receipt of thirty-three hundred and thirty-three dollars as part purchase price of an undivided one tenth part of a certain tract of land, describing it, it proceeds as follows: "The full purchase price being ten thousand dollars, to be paid as follows, $3334 on October 1, 1890, and $3333 on April 1, 1891, with interest at eight per cent per annum on deferred payment from October 1, 1890. But in case said land is sold before October 1, 1890, then the last two payments are to bear interest from April 1, 1890, to the date of sale. And in case any payments are not made as above provided, the amount paid herein is forfeited, and this receipt is from that time void and inoperative, and when the payments are made as above provided the land to be conveyed to said Eugene W. Coughran and Nathan H. Cottrell, or their assigns, with good title free from incumbrances."

The obvious meaning of these provisions is that if the sum of $3334 is paid on October 1, 1890, and the sum of $3333 is paid on April 1, 1891, with interest from October 1, 1890, then it shall be the duty of the vendors to convey the property to the vendees or their assigns with a good title free from incumbrances; but that if said deferred payments are not made, as provided for, then the amount previously paid shall be forfeited and the contract become void.

The bond, bearing even date with the contract, contains the following language: "The condition of the above obligation is such that the above bounden E. A. Reed and H. H. Henderson, on or before the first day of October next, or in the case of their death before that time, if the heirs of the said E. A. Reed and H. H. Henderson, within three months after their decease, shall and do upon the reasonable request of the said Eugene W. Coughran and Nathan H. Cottrell, their heirs or assigns, make, execute and deliver, or cause so to be made, a good and sufficient warranty deed, in fee simple, free from all incumbrance, and with the usual covenants of warranty, of the following-described premises, . . . provided the said Eugene W. Coughran and Nathan H. Cottrell comply with their part of the contract this day made and delivered to them

by the said E. A. Reed and H. H. Henderson, and a copy of which is hereto attached, then the above obligation to be void; else to remain in full force and virtue."

It will be observed that, by the terms of the contract, the deed of conveyance was not to be made until the purchase money had been paid in full, but the recital in the bond calls for the making and delivery of the deed on or before the first day of October, 1890.

The solution of the difficulty thus created will be found by reading the bond in the light of the contract, to secure the performance of which was the purpose of the bond. That contract provided, indeed, that the vendors should execute and deliver a proper deed, but also provided that the title should not pass until the deferred payments were made. To construe the bond as compelling a conveyance before such payments were made would deprive the vendors of the security given them by retaining the title and also of their stipulated right to forfeit the cash payment and rescind the sale, if the payments were not made as provided in the contract.

The obligatory portion of the bond was expressly made dependent on the proviso that Coughran and Cottrell should comply with their portion of the contract that day made and a copy of which was attached, one of the terms of which was that the sum of $3334 should be paid on October 1, 1890. This payment was not so made on that day. The acceptance by the vendors of the payment subsequently made, on or about October 12, was, of course, a waiver by them of their right to rescind and declare a forfeiture, but such waiver did not bind the sureties, who were relieved from liability by the failure of the vendees to perform the precedent act of payment at the time provided in the contract. *Bank of Columbia* v. *Hagner*, 1 Pet. 455; *Kelsey* v. *Crowther*, 162 U. S. 404.

The contention on the part of the plaintiffs in error that the alleged inability of the vendors to make a conveyance of the character called for by the contract relieved them from the duty of payment, is only true so far as they might choose to make such inability the ground of a right to rescind. They could not elect to abide by and enforce the contract, except

upon performance or tender of payment on their part. *Telfener* v. *Russ*, 162 U. S. 171; *Kelsey* v. *Crowther*, 162 U. S. 404. These were the views that prevailed in the Supreme Court of the Territory, and its judgment is accordingly

Affirmed.

CAKE *v.* MOHUN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 123. Argued November 2, 1896. — Decided November 30, 1896.

After the death of the receiver, this case was properly revived in the name of his executrix.

While, as a general rule, a receiver has no authority, as such, to continue and carry on the business of which he is appointed receiver, there is a discretion on the part of the court to permit this to be done when the interests of the parties seem to require it; and in such case his power to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the office.

A purchaser of property at a receiver's sale who, under order of court, in order to get possession of the property gives an undertaking, with surety, conditioned for the payment to the receiver of such amounts as should be found due him on account of expenditures or indebtedness as well as compensation, thereby becomes liable for such expenditures and indebtedness.

In determining what allowances shall be made to a receiver and to his counsel this court gives great consideration to the concurring views of the auditor or master and the courts below; and it is not disposed to disturb the allowance in this case, although, if the question were an original one it might have fixed the receiver's compensation at a less amount.

This was an appeal taken by Horace M. Cake and the administrators of William B. Moses, surety upon a certain undertaking of his to pay Francis B. Mohun, appellee's intestate, such sums as the court should find to be due the latter as receiver of the furniture, equipments and other personal property of the hotel known as La Normandie, in the city of Washington.

The original bill was filed April 23, 1891, by the appellant Cake to foreclose a chattel mortgage or deed of trust executed

by one Woodbury to William B. Moses and John C. Heald, to secure an indebtedness of $75,000 to Cake, and covering the furniture and other personal property in the hotel, a part of which property was also subject to a prior mortgage or deed of trust to secure the payment of the rent of the hotel. As it was manifestly for the interest of all parties that the hotel should not be closed, shortly after the bill was filed, and on May 5, 1891, Francis B. Mohun was appointed receiver, with instructions to take possession of the property, "and to carry on and manage the business of keeping said hotel in substantially the same manner in which it has heretofore been carried on," provided that he gave a bond in the sum of $15,000, conditioned for the faithful performance of his duties as such receiver.

Upon his appointment, Mohun at once took possession of the hotel and personal property as receiver, and carried on the business until December 4, 1891, when he was directed to surrender the property to the appellant Cake, who became the purchaser under a decree of foreclosure, subject to the prior mortgage, as well as the unexpired term of the lease, which was sold by the marshal on an execution against Woodbury. Before taking possession, however, Cake was required to file an undertaking, with surety, conditioned for the prompt payment to the receiver of such amounts as should be found to be due him on account of his expenditures or indebtedness, as well as of his compensation; and also conditioned that a decree might be pronounced against such surety, as well as against the principal obligor, for the payment of such amounts. This undertaking was executed by Cake, with William B. Moses as surety, and was filed December 4, 1891. The undertaking having proved satisfactory to the court, possession was surrendered, and the cause referred, by order of the court, to an auditor, with directions to state the account of the receiver, and directing that all questions as to the payment of expenses incurred by him in the performance of his duties or as to the settlement of his unpaid obligations be reserved until the coming in of the auditor's report. Before the accounts were stated, Moses, the surety upon the undertaking, died intestate,

and the administrators of his estate were brought in and made parties to the cause.

The auditor proceeded to take proof under the reference and stated an account, showing an aggregate sum to be paid to the receiver of $8332.53. This sum was made up as follows:

Indebtedness of the receiver incurred in the conduct of the business	$5038 74
Allowance for compensation for his services	2793 79
Allowance to his counsel	500 00
Total	$8332 53

Exceptions were filed to this report by the appellant Cake, by the administrators of Moses as surety upon the undertaking, and by Mohun, the receiver. Upon the hearing of these exceptions, they were all overruled, the report ratified and approved, and a final decree passed for the payment to the receiver of the above amount. All parties appealed from this decree to the Court of Appeals, which affirmed the decree of the Supreme Court of the District, reducing the amount by a small credit of $7.59 to $8324.94. *Cake* v. *Woodbury*, 3 App. Cas. D. C. 60. Before this decree was entered, Mohun having died, his executrix, Martha V. Mohun, was substituted in his place. From this decree of the Court of Appeals, Cake and the administrators of Moses, his surety, appealed to this court.

Mr. W. L. Cole for Moses, appellant.

I. The receiver was an officer of the court, discharging duties imposed upon him by its orders. Upon his death his powers and duties could not devolve upon his personal representative.

II. A receiver has no power to contract debts so as to make them a charge on the trust fund without express authority from the court. *Lehigh Coal & Nav. Co.* v. *N. J. Central Railroad*, 35 N. J. Eq. 426; *Brown* v. *Hazlehurst*, 54 Maryland, 26; High on Receivers, §§ 175, 188; *Addison* v. *Lewis*, 75 Virginia, 701; *Cowdrey* v. *Galveston, Houston &c. Railroad*,

1 Woods, 331; *S. C.* 93 U. S. 352; *Tripp* v. *Boardman*, 49 Iowa, 410; *Davis* v. *Gray*, 16 Wall. 203, 218.

A party dealing with a receiver must take notice of his want of authority. *Tripp* v. *Boardman*, 49 Iowa, 410; *Kennedy* v. *St. Paul & Pacific Railroad*, 5 Dillon, 519.

He cannot make a contract that will bind his successor. *Lehigh Coal & Navigation Co.* v. *Central Railroad*, 35 N. J. Eq. 426; *Cowdrey* v. *Railroad Co.*, 1 Woods, 331.

Debts contracted without previous authority of the court are subordinate to the secured indebtedness. *Union Trust Company* v. *Illinois Midland Company*, 117 U. S. 434.

III. After the appointment of the receiver the complainant in the bill was no more responsible for the conduct and management of the property than any other party to the suit. He was in no way liable for the acts of the receiver or the debts incurred by him.

"A receiver is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hand is *in custodia legis*. He has only such power and authority as are given him by the court, and must not exceed the prescribed limits." *Davis* v. *Gray*, 16 Wall. 218.

IV. The amount allowed the receiver for compensation is excessive. A discussion of the proper compensation to be allowed receivers will be found in the following cases: *Farmers' Loan & Trust Co.* v. *Central Railroad*, 2 McCrary, 181; *Woven Tape Skirt Co.*, 85 N. Y. 506; *Stretch* v. *Gowdey*, 3 Tenn. Ch. 565.

Mr. J. J. Darlington for appellee.

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

1. The first error assigned is to the allowance by the court below of a revival of the case in the name of the executrix of Francis B. Mohun. As the original decree in favor of Mohun was passed March 10, 1893, and as the order making the executrix a party was made by the Court of Appeals January

4, 1894, it would appear that Mohun died after the case had been carried to the Court of Appeals and before it was finally decided. It will scarcely be claimed that a judgment in his favor lapsed by his death, and that no one could be authorized to make it available or collect it. As no one had been appointed to succeed him, and the receivership had, in fact, terminated by the sale of the property and the installation of the purchaser, it would seem that, from the necessities of the case, the right to collect this judgment must have passed to the personal representatives of Mohun. Beyond this, however, one third of the decree was for his own services, and to that extent, at least, his executrix was entitled to represent him, and was properly made a party. While his powers and duties as receiver would not devolve upon his personal representatives, a judgment entered in his favor for his own compensation, and for an indebtedness, for which he had assumed an individual liability, would pass to such representatives, and might be enforced by them. It is impossible that the court should be called upon to appoint a successor for that purpose. That the receiver had in fact assumed a personal liability for the bills contracted by him in the conduct of his business is evident from the very fact that he made claim for the same against the plaintiff Cake and his surety Moses under their undertaking of December 4, 1891. The question whether a receiver has assumed such personal liability or not is one to be determined from the facts and circumstances of the case. *Ryan* v. *Rand*, 20 Abb. N. C. 313; *People* v. *Universal Life Ins. Co.*, 37 N. Y. Sup. Ct. (30 Hun), 142; *Ferrin* v. *Myrick*, 41 N. Y. 315; *Rogers* v. *Wendell*, 61 N. Y. Sup. Ct. (54 Hun), 540; *Schmittler* v. *Simon*, 114 N. Y. 176. See also *Cowdrey* v. *Galveston, Houston &c. Railroad*, 93 U. S. 352, 355.

2. That the receiver exceeded his authority in incurring the indebtedness mentioned in the auditor's report. Admitting to its fullest extent the general proposition laid down by this court in *Cowdrey* v. *Galveston, Houston &c. Railroad*, 93 U. S. 352, that a receiver has no authority, as such, to continue and carry on the business of which he is appointed

receiver, there is a discretion on the part of the court to permit this to be done temporarily when the interests of the parties seem to require it. Under such circumstances, the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the receivership. *Barton* v. *Barbour*, 104 U. S. 126, 135; *Thompson* v. *Phenix Insurance Co.*, 136 U. S. 287, 293.

In the case under consideration the receiver was expressly authorized by the court "to carry on and manage the business of keeping said hotel in substantially the same manner as it has heretofore been carried on"; and by a subsequent order, was authorized to borrow, not to exceed $8000, for the purpose of paying the rent and other necessary and urgent debts incurred, or to be incurred, on account of the running expenses of the hotel. In view of the fact that the closing of the hotel, even temporarily, would have soon become known to its patrons, and would probably have been attended by a serious loss to the good-will of the business, we think the court did not exceed its authority in directing the receiver to keep it open during the pendency of the suit.

Beyond this, however, appellants are in no condition to make this objection, since in their undertaking of December 4, 1891, they agreed to pay the receiver such sums of money as the court should thereafter find to be due him on account of his indebtedness or expenditures as receiver, or on account of his compensation as such receiver.

3. The assignment that it was error to find that Cake, the plaintiff in the suit, was personally liable for the expenditures and indebtedness of the receiver, is fully met by the above-mentioned undertaking which Cake was obliged to give before taking possession of the property. Had he refused to give this undertaking, it would have been perfectly competent for the court to have required enough of the purchase money to be paid in cash to discharge the expenses of the receivership, and to compensate the receiver. It is true that Cake might not have been personally liable in the absence of this undertaking, but, as he chose to assume this responsibility in order

to obtain immediate possession of the property, and to avoid the payment of any part of the purchase money into court, he is in no condition to set up this defence.

4. The only assignment that strikes us as entitled to any weight is that wherein complaint is made of the amount allowed to the receiver for his compensation, which was itemized by the auditor as follows:

Allowance of ten per cent on the receipts of the business	$2510 81
Allowance of five per cent on the amount received from trustees and paid to George J. Seufferle	31 05
Allowance of five per cent on disbursements of indebtedness	251 93
Total	$2793 79
Counsel fee	500 00

In view of the fact that the receiver had never been in the hotel business; that he employed a manager at $125, and part of the time at $150 a month, and required of him a bond for the faithful performance of his duties; that he was not prevented from giving his usual attention to his private business, and ordinarily spent only his evenings at the hotel, we are bound to say that, if it had been an original question, we should have fixed his compensation at a considerably less amount.

Upon the other hand, however, as it appears that the hotel was kept open during the summer months at a very considerable loss; that the receiver was obliged to raise money to pay the rent and meet a deficiency each month; that the position was attended with considerable anxiety; that he retained it apparently against his own inclinations and in compliance with the wishes of the parties in interest; that proprietors of other large hotels in Washington testified that $5000 a year was a fair compensation, and there was no evidence to the contrary; that the auditor, upon full consideration of all the facts of the case, made the allowance; that it was subsequently approved by the learned judge of the Supreme Court

of the District, and, upon appeal, by the three justices of the Court of Appeals, we are not disposed to disturb it. Great consideration will be paid to the concurring views of the auditor or master and the courts respecting a mere question of amount. High on Receivers, §§ 781 to 786.

It has been said in a number of cases that an allowance of five per cent upon the receipts and disbursements of the business was a fair compensation to receivers, *Stretch* v. *Gowdey*, 3 Tenn. Ch. 565; but in view of the facts above stated and the further fact that no compensation was allowed him for the custody and responsibility of the large amount of personal property that came into his possession, we are not prepared to say that the allowance was so excessive as to justify us in reducing it.

The reasons given by the auditor for the allowance of $500 counsel fee are full and satisfactory. "The record shows that the receiver was frequently called into court either to answer the call of other parties in the cause or to ask instructions or authority from the court to meet emergencies arising in the business. It is evident that wise and capable advice was needed to protect him in the proper discharge of his duties, both as affecting himself and his responsibility, and as affecting the property entrusted to his charge. In view of what is disclosed in the record and proceedings, I consider the sum so allowed to be reasonable and fair." High on Receivers, § 805.

This disposes of all the errors assigned, and, upon the whole, we think the judgment of the court should be

Affirmed.

CITIZENS' BANK *v.* CANNON.

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

No. 58. Argued and submitted October 21, 1896. — Decided November 30, 1896.

Jurisdiction cannot be conferred on a Circuit Court of the United States, by joining in one bill against distinct defendants claims, no one of which reaches the jurisdictional amount.

In proceedings under a bill to enjoin the collection of taxes for a series of years, where the proof only shows the amount of the assessment for one year, which is below the jurisdictional amount, it cannot be assumed, in order to confer jurisdiction, that the assessment for each of the other years was for a like amount.

Although, as a general rule, an appeal will not lie in a matter of costs alone, where an appeal is taken on other grounds as well, and not on the sole ground that costs were wrongfully awarded, this court can determine whether a Circuit Court, dismissing a suit for want of jurisdiction, can give a decree for costs, including a fee to the defendants' counsel in the nature of a penalty; and it decides that the decree in this case was erroneous in that particular.

When a Circuit Court dismisses a bill for want of jurisdiction it is without power to decree the payment of costs and penalties.

In March, 1893, the Citizens' Bank of Louisiana, a banking corporation created by the legislature of Louisiana, filed a bill of complaint in the Circuit Court of the United States for the Western District of Louisiana, against several defendants who were sheriffs respectively of a number of parishes in that district, seeking to enjoin the defendants from enforcing the payment of taxes alleged to be due from the bank on lands owned by it in the several parishes.

The main allegation of the bill was that the bank was by the terms of its charter exempt from taxation of every kind on its capital and property, and that certain specific and subsequent statutes of the State of Louisiana, by virtue of whose provisions the defendants were proposing to enforce the payment of taxes, would, if carried into effect, operate to impair the contract between the bank and the State, contrary to the tenth section of the first article of the Constitution of the

United States. The taxes, which it was alleged it was the purpose of the defendants to assess and collect, were for state and parish taxation for the years 1889, 1890, 1891 and 1892.

Restraining orders were issued against the several defendants. Afterwards, in May, 1893, an amended bill of complaint was filed by the bank against the same defendants, alleging that, since the granting of the restraining orders and pending the disposition of the case, certain named assessors of the said several parishes were proceeding to list for assessment and taxation for the year 1893 the property of the bank situated in the said parishes, and praying that the said assessors might be subpœnaed to appear and answer said original and amended bill, and to abide the decrees of the court. Restraining orders were likewise issued under this amended bill.

On July 17, 1893, the defendants filed a general demurrer to both bills, and, on the same day, filed a plea to said bills, alleging that the taxes levied on the property of the complainant did not in any one of the parishes named in the bill amount to the sum of two thousand dollars, and because such taxes so levied were payable to and levied for the State, the respective parish, and the levee board of the levee district in which such parish was situated; and alleging that the assessors and tax collectors of each of said parishes could not be joined for the purpose of giving the Circuit Court jurisdiction. The defendants also filed an answer, setting up various matters on which they contended that the bank's exemption from taxation was no longer operative.

The demurrer was, after argument, overruled. Replications to the plea and answer were filed. The complainant put in evidence the original charter of the bank and several acts of the legislature amendatory thereof; the revenue act of the legislature for the year 1890, and extracts from the assessment rolls of the several parishes named in the original and amended bill, showing the property owned by the bank and the amount of taxes assessed thereon. The defendants put in evidence certificates from the respective parishes, showing the property owned by the bank and the amount of taxes assessed thereon.

Opinion of the Court.

On November 22, 1893, after argument, the court entered a decree, sustaining the plea to the jurisdiction and dismissing the bill at complainant's costs. The decree further ordered that a fee should be allowed the solicitor of the defendants, amounting to ten per cent of the taxes sought to be enjoined in the bill, viz., the sum of three hundred and seventeen $\frac{44}{100}$ dollars, to be paid by complainant as part of the costs in the case. From this decree an appeal was prayed and allowed to this court. A certificate was duly signed by the judge of the Circuit Court, setting forth that the question decided was solely that raised by the plea to the jurisdiction of the court, and directing that copies of the bill, the exhibits showing the taxes involved and the property on which the taxes were levied, and the valuation of said property, and of the plea and decree, should be attached to the certificate.

Mr. William A. Maury for appellant. *Mr. Charles J. Boatner* was on the brief.

Mr. M. J. Cunningham, Attorney General of the State of Louisiana, *Mr. A. H. Leonard* and *Mr. Alexander Porter Morse*, for defendants, submitted on their brief.

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

The first assignment of error questions the correctness of the decree of the court in sustaining the plea to the jurisdiction and dismissing the bill.

The bill alleged that the defendants were about to assess and collect state and parish taxes for the years 1889, 1890, 1891 and 1892, and the amended bill alleged a similar purpose as to taxes for 1893. Neither bill contained a specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of two thousand dollars.

This must be understood to mean that the aggregate amount of the taxes for the several parishes exceeded two thousand

dollars, and the theory of that part of the bill evidently was that the amount involved, in order to confer jurisdiction on the Circuit Court, could be reached by adding together the taxes for the several parishes. But, for reasons given in the recent cases of *Walter* v. *Northeastern Railroad*, 147 U. S. 370, and *Northern Pacific Railroad* v. *Walker*, 148 U. S. 391, jurisdiction cannot be conferred on the Circuit Court by joining in one bill against distinct defendants claims no one of which reached the jurisdictional amount. It is now contended that, as it appears in the extract from the assessment roll for the year 1892, that the tax for that year assessed and in the hands of John S. Young, sheriff for the parish of Caddo, for collection, amounted to upwards of nine hundred dollars, it can be assumed that the taxes for the years 1889, 1890 and 1891 were for similar amounts, and thus, in the case of that parish at least, that jurisdiction was shown. But, as the facts showing jurisdiction do not affirmatively appear in the bill, and as, for some reason that does not appear, the proof was restricted to the year 1892, we do not think the defect is supplied by such a conjecture.

It is further argued that jurisdiction may be seen in the averment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds two thousand dollars for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future.

It is, however, suggested that as the allegations of the bill and the evidence adduced to sustain the plea leave it uncertain whether, if the facts were made fully to appear, jurisdiction might not be maintainable, this court should reverse the decree in order to afford an opportunity to the complainant to make it appear, by competent evidence, what were the amounts of the taxes assessed and levied for the whole four

years, and also for the year 1893 covered by the amended bill; and reference is made to *Northern Pacific Railroad* v. *Walker*, 148 U. S. 392, a case somewhat similar to the present, where such a course, it is said, was followed. We do not feel warranted to reverse the decree of the court below on such a view, but as we are constrained to reverse the decree, for reasons presently to be stated, we shall leave it to the court below to exercise its own discretion in the matter of further proceedings of the kind suggested.

Error is assigned to the action of the court decreeing that the complainant should pay the costs, including a fee of upwards of three hundred dollars to the defendants' counsel.

As a general rule, an appeal will not lie in a matter of costs alone. But such appeals have been sustained in particular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In *Trustees* v. *Greenough*, 105 U. S. 527, this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only, is untenable. However, in the present case, the appeal was not taken from the decree on the sole ground that costs were wrongfully awarded, and, as the entire decree is before us, it is competent for us to consider whether, when a Circuit Court dismisses a suit for want of jurisdiction, it can give a decree for costs, including a fee in the nature of a penalty, to the defendants' counsel.

The revenue law of Louisiana, act 106 of 1890, section 56, provides that the attorney at law who represents the tax collector in injunction proceedings shall, in case of a successful defence, receive a compensation of ten per cent on the amount of taxes and penalties collected as the result of the proceedings, which shall be paid to the said attorney by the party against whom the judgment is rendered, and shall be collected by the tax collector as costs at the same time that the taxes and other penalties are collected. It would seem that the court below applied the provisions of that statute in the present instance.

Without considering or deciding whether it would be the duty of a Federal court to follow the state statute in assessing costs, and particularly in making a payment to an attorney at

law of a fee proportionate to the amount recovered a part of the decree, we are of opinion that this decree was erroneous in the particular complained of. Having dismissed the bill for want of jurisdiction, the court was without power to decree the payment of costs and penalties.

The Mayor v. *Cooper*, 6 Wall. 247, 250, was a case where the Circuit Court of the United States had held that it had no jurisdiction of a case, removed to it from a state court, and had sustained a motion to remand for that reason, yet proceeded to give a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This court said: "The court held that it had no jurisdiction whatever of the case, and yet gave a judgment for the costs of the motion, and ordered that an execution should issue to collect them. This was clearly erroneous. If there were no jurisdiction, there was no power to do anything but to strike the case from the docket. In that view of the subject the matter was as much *coram non judice* as anything else could be, and the award of costs and execution were consequently void. Such was the necessary result of the conclusions of the court."

In *Inglee* v. *Coolidge*, 2 Wheat. 363, it was said by the Chief Justice that this court does not give costs where a cause is dismissed for want of jurisdiction.

In *Hornthall* v. *The Collector*, 9 Wall. 560, 566, where the Circuit Court of the United States for the district of Mississippi had dismissed a bill for want of jurisdiction and had awarded costs to the respondents, this court reversed the decree for that reason, and remanded the cause, with directions to dismiss the bill of complaint but without costs. *Blacklock* v. *Small*, 96 U. S. 105.

The decree of the court below is reversed and the cause remanded with directions to proceed in conformity with this opinion.

CAROTHERS v. MAYER.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 144. Submitted November 4, 1896. — Decided November 30, 1896.

In an action of ejectment in a state court by a plaintiff claiming real estate under a patent from the United States for a mining claim, a ruling by the state court that the statute of limitations did not begin to run against the claim until the patent had been issued presents no Federal question.

So, too, a ruling that matters alleged as an estoppel having taken place before the time when plaintiffs made their application for a patent, and notice of such application having been given, all adverse claimants were given an opportunity to contest the applicant's right to a patent, and that, the patent having been issued, it was too late to base a defence upon facts existing prior thereto, presents no Federal question.

This was an action of ejectment originally brought by the defendants in error, Isaac Mayer and Andrew J. Wilson, in the District Court of the Sixth Judicial District of Montana, in and for the county of Meagher, to recover possession of five lots in the townsite of Neihart. The complaint alleged a seisin in fee on July 22, 1887, and upon the trial plaintiffs introduced in support thereof a patent of the United States for the Keegan lode mining claim, bearing date July 27, 1887, and running to the plaintiffs.

Defendants averred no privity of title under such mining claim or patent, but set up, *first*, an adverse and exclusive possession of the premises since June 1, 1882; and, *second*, an equitable defence of estoppel arising from the following state of facts, namely: That in April, 1882, when about fifteen or twenty people were living in that vicinity, a meeting of citizens was held for the purpose of laying out a townsite, the Keegan being then a located mining claim; that at such meeting it was agreed that the surface ground should be devoted to townsite uses; that each citizen should be entitled to enter with the recorder not to exceed two of the lots as laid off, and that each citizen entering lots should fence them; that thereupon at such meeting the said mining claim owners,

among others the predecessor in interest of plaintiffs, he being at that time the claimant of the Keegan lode, agreed that the surface ground should belong to the town, and gave the same to the citizens for townsite purposes; that such premises were so laid off for town purposes, and the lots were entered in the manner agreed at the meeting with the knowledge and consent of plaintiffs' predecessor in interest.

A general demurrer to this answer having been overruled, plaintiffs replied by a denial of the defences therein set up.

Upon the trial defendants offered to prove an exclusive continuous possession of the premises from 1882 down to the commencement of the action, which offer was rejected by the court, under objection from the plaintiffs that the statute of limitations could not begin to run until the patent for the Keegan mining claim was issued, July 27, 1887, to which ruling the defendants excepted. After making proof in support of the equitable defences so pleaded, the trial court refused all instructions asked by the defendants thereunder, and directed the jury to return a verdict for the plaintiffs.

On appeal the judgment upon such verdict was affirmed by the Supreme Court of Montana, 14 Montana, 274, whereupon defendant sued out this writ, and assigned as error, first, the ruling of the court in excluding evidence of the adverse possession of the defendants and their predecessors in interest prior to the issuance of the patent; and, second, to the action of the court in directing the jury to return a verdict for the plaintiffs.

Mr. E. W. Toole and *Mr. William Wallace, Jr.*, for plaintiff in error.

Mr. A. T. Britton and *Mr. A. B. Browne* for defendants in error.

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

Upon the facts above stated, the Supreme Court held, first, that the statute of limitations did not begin to run against the

mining claim until the patent had been issued, following in this particular *King* v. *Thomas*, 6 Montana, 409; and, second, that the matters alleged as an estoppel having taken place before the time the plaintiffs made their application for a patent, and notice of such application having been given, that all adverse claimants were given an opportunity of contesting the applicant's right to a patent, and that the patent having been issued, it was too late to base a defence upon facts existing prior thereto, citing in support of its position a prior ruling of the court in *Talbott* v. *King*, 6 Montana, 76.

Neither of these defences presents a Federal question. Defendants asserted no right under a Federal statute; made no claim under any Federal patent; claimed solely under a statute of limitations, which the highest court of the State declared did not protect them, and certain matters of alleged estoppel *in pais*, which the court held to constitute no defence.

The writ of error must, therefore, be

Dismissed.

CENTRAL RAILROAD AND BANKING COMPANY *v.* WRIGHT.

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

No. 300. Argued October 22, 1896. — Decided November 30, 1896.

Section eighteen of the act of the legislature of Georgia of December 14, 1835, providing that no municipal or other corporation shall have power to tax the stock of the Central Railroad and Banking Company of Georgia, but may tax any property, real or personal, of said company within the jurisdiction of said corporation in the ratio of taxation of like property, when construed in connection with other legislation on that subject, permits municipal corporations to tax such property within their respective jurisdictions in the ratio of taxation of like property.

While, in the absence of any words showing a different intent, an exemption of the stock or capital stock of a corporation may imply, and carry with it, an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts,

which will never presume a purpose to exempt any property from its just share of the public burdens, will construe any doubts which may arise as to the proper interpretation of the charter against the exemption.

This was an intervening petition filed by William A. Wright, Comptroller General of the State of Georgia, praying that the receivers of the Central Railroad and Banking Company, appointed in a suit for the foreclosure of a mortgage to the Farmers' Loan and Trust Company, be required to pay him certain taxes said to be due by the corporation for the year 1891, upon its property in different counties and cities upon the line of its road in the State of Georgia, which taxes were claimed to be a lien upon the property of the road.

The taxes were assessed in pursuance of certain acts of the General Assembly, passed in 1889 and 1890, authorizing counties and cities to tax railroad property. The taxes were levied upon the *railroad and appurtenances* of that portion of the Central Railroad between Savannah and Macon, and included no other property of the company. The defendants claim the taxes to be invalid, upon the ground that the railroad and its appurtenances over that part of the line from Savannah to Macon were subject only to a taxation of one half of one per cent upon the net annual income of the road, and that the acts of 1889 and 1890, in so far as they authorized the taxation of its property by counties and other municipalities, impaired the obligation of the original contract of the State contained in its charter, and were, therefore, void.

The Circuit Court was of opinion that the taxes were properly levied, and made a decree for their payment by the receivers, and from that decree the corporation and its receivers appealed to this court.

Mr. A. R. Lawton for appellants. *Mr. Henry C. Cunningham* and *Mr. Samuel B. Adams* were on his brief.

Mr. J. M. Terrell for appellee.

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

Opinion of the Court.

This case raises the question, frequently presented to this court, of the power of a State to impose upon a corporation a tax not provided for or contemplated, nor yet expressly forbidden, in its original charter.

The defendant corporation was chartered in 1833, Laws of Georgia of 1833, 246, under the name of the Central Railroad and Canal Company, "for the purpose of opening a canal or railroad communication from the city of Savannah to the interior of the State." The seventh section declared that "the said canal or railway, and the appurtenances of the same, shall not be subjected to be taxed higher than an half per cent upon its annual net income." On December 14, 1835, the General Assembly passed an amendatory act, Laws of 1835, 217, under which the road was constructed, changing the name to the Central Railroad and Banking Company, and giving it certain banking powers and privileges. The eighteenth section of this act provided that "the said railroad, and the appurtenances of the same shall not be subjected to be taxed higher than one half of one per centum upon its annual net income, and no municipal or other corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation in the ratio of taxation of like property."

No other act affecting the question at issue was passed until 1889, when the General Assembly provided a general system of taxation of railroad property in each of the counties of the State through which the railroads ran, and required the various companies to make annual returns to the Comptroller General, under the oath of the president or chief executive officer, and enacted that they should be subjected to taxation in every county through which their roads might pass. Other sections of the act provided how the amounts should be assessed and paid, and the manner of issuing execution in the event they were not paid.

By another act, approved December 24, 1890, railroad companies were subjected to taxation upon their property located in the different towns and cities of the State.

By reason of the fact that all of the property and effects of

the Central Railroad and Banking Company were in the hands of receivers, appointed by the Circuit Court of the United States, under certain bills filed to foreclose a mortgage to the Farmers' Loan and Trust Company, the Comptroller General was unable to collect such taxes by the ordinary process of levy and sale, and therefore filed his petition against such receivers, praying that they might be required to pay him the taxes. Under the acts of 1889 and 1890 the corporation made the returns required, and paid such taxes as were assessed upon those parts of its property which were admitted to be subject to taxation, but contended that, as to its original line between Savannah and Macon, it could not be taxed, either by the State or by its municipalities, at a greater rate than one half of one per cent upon its net annual income.

In section eighteen of the act of 1835, above cited, there is an express prohibition against the municipal taxation of the "stock" of the company, and an express permission to tax any "property" of the company within the jurisdiction of the corporation. The real question is whether these two clauses can be reconciled, and each given its proper effect. The position of the railway company in this connection is that the railroad and its appurtenances may not be taxed either by the State or by municipalities or counties, at a greater rate than one half of one per cent upon its net annual income; that this amount having been paid, the power to tax the railroad and its appurtenances has been exhausted; that the permission given the municipalities to tax the property of the company applies only to such property as is not included in the term "railroad and appurtenances," and must have been intended to include such property as the corporation, by virtue of its banking powers, could purchase or might receive in satisfaction of debts. It is further contended that the prohibition of the taxation of the stock applies equally to the property represented by the stock.

In support of this contention we are cited to certain decisions holding that a tax upon the "property" of a railway company is within the prohibition of a tax upon the "stock" of the company; in other words, that a tax upon the property

is a tax upon the stock. In examining these cases, however, it will be found that the words "stock" or "capital stock" were used in the sense of the capital, the plant, or the property of the company, and not, as in this statute, in the sense of stock or shares of stock, as distinguished from the property of the company. Thus in *Rome Railroad* v. *The Mayor &c.*, 14 Georgia, 275, there was an attempt made to levy a tax upon the property of the Rome Railroad Company within the corporate limits of the city of Rome. There was a provision in the charter that the "stock" of the company should "not be liable to any tax, duty or imposition whatever, unless such, and no more, as is now in the banks of this State." The tax was held to be invalid. As it appeared in this case that a certain part of the stock of the company, which was on deposit in the bank, was expressly permitted to be taxed, it was apparent that the word "stock" was used in the sense of property, and that the money of the company on deposit in the banks was intended to be distinguished from its other property.

So, also in *State* v. *Hood*, 15 Rich. (Law) 177, a charter of a railroad company exempting the "stock" of a railroad company from taxation was held also to exempt its "gross income," as the income was only an accessory of the stock, which was an aggregate of the property and effects of the corporation.

Indeed, the general tenor of the authorities is to the effect that where there is a general exemption of the stock or capital stock of a corporation, without other explanatory words, the exemption applies equally to the property of the corporation represented by its shares of stock. *Gordon* v. *Baltimore*, 5 Gill, 231; *Baltimore* v. *Baltimore & Ohio Railroad*, 6 Gill, 288; *State* v. *Cumberland &c. Railroad*, 40 Maryland, 22; *Connersville* v. *Bank of Indiana*, 16 Indiana, 105; *New Haven* v. *City Bank*, 31 Connecticut, 106; *Hannibal & St. Joseph Railroad* v. *Shacklett*, 30 Missouri, 550. And, in the *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665, it was held by this court that, in view of the eighteenth section of the act of 1835, the State itself could not tax the property of the Central Railroad and Banking Company between

Savannah and Macon beyond one half of one per cent upon its annual net income, notwithstanding that, in 1872, it had become consolidated with the Macon and Western Railroad Company, whose charter did not possess such immunity from taxation.

The only embarrassment in the case arises from a decision of the Supreme Court of Georgia in the case of the *Ordinary of Bibb County* v. *Central Railroad & Banking Co.*, 40 Georgia, 646. It appeared in this case that the ordinary of Bibb County endeavored to levy a tax upon the property of railroad companies having their *termini* in Macon, and it was submitted to the judge of the Macon circuit to decide whether, under its charter, the company could be taxed for county purposes, or was liable for any other tax than one half of one per cent upon its annual net income. The judge held that so much of the property, as was necessary and proper for sustaining the railroads, was exempt from the county tax, but that such of its real estate as was not improved and in use was subject to be taxed until it was improved and used for railroad purposes. Both parties appealed to the Supreme Court of the State.

The head-note of the case in that court indicates the ruling of the court to have been that all the property of the company that was necessary and proper for laying, building and sustaining the railroad constituted a part of its capital stock, and was not liable to be taxed in any other manner than was specified in its charter; but that any other property owned by the company, which was not necessary for that purpose, might be taxed by the county or other corporation in the ratio of taxation of like property. The statement of the head-note, however, is not borne out by an examination of the opinions. The court, which then consisted of three members, was unanimous in reversing the judgment of the court below, but each gave a different reason for his opinion. Mr. Justice Warner, who delivered the first opinion, held that the stock of the company consisted of its capital invested in such property as was necessary and proper for conducting its business, and was not liable to be taxed in any other manner than was specified in the charter, either by the State or by the county corporation; but

that any other property owned by it which was not necessary and proper for railroad purposes, might be taxed in the ratio of taxation of like property. Mr. Justice McCay concurred upon the ground that under the laws of Georgia, as they then existed, no county tax could be collected upon any property not taxed by the State; that although the State had expressly reserved the right to authorize municipal and other corporations to tax for local purposes the property of the company, it had not by any law been as yet conferred on the counties. Chief Justice Brown, on the other hand, held that although the State had relinquished her right of taxation beyond a percentage upon the income, the company had expressly agreed that a municipal or other corporation might tax any property of the company within its jurisdiction; that such property was not limited to such as the company might have purchased in payment of debts, and the like, which was not appurtenant to the road, but that the municipal corporation, through which the road ran, might tax any of its property, real or personal, in the ratio of taxation imposed on any other like property. But, he was further of opinion, that that power had not been exercised as to any part of the property of the company not subject to a state tax; that the county was only authorized to levy a percentage on the state tax, and that as the State was not authorized to levy a tax upon the road and its appurtenances, and none such had been levied, there was no state tax upon which the county could assess a percentage.

If the opinion of Mr. Justice Warner had been the opinion of the court, it would have been difficult to avoid the conclusion that this was a construction of the charter which would have been binding upon the Federal court, as it held, in effect, that the law taxing the property of the railroad impaired the obligation of the contract contained in the charter. But his opinion was not the opinion of the court, but of only one of its three members. The opinion of the court was, simply, that the action of the court below should be reversed for reasons in which no two of its members concurred.

As our attention has not been called to any later case in

the Supreme Court of the State of Georgia which gives a different construction to the charter of this road, we consider ourselves at liberty to deal with the question presented in this case as an original one to which the Supreme Court of the State has not given an answer.

In this aspect, we can have no doubt whatever of the power of municipalities to do exactly what the charter authorized them to do, namely, to tax any property, real or personal, of the company within the jurisdiction of the corporation in the ratio of taxation of like property. While, as above stated, the word "stock" has sometimes been held to include the property of the corporation represented by its stock, this is true only when the context does not require a different construction. The distinction was clearly stated by Chief Justice Waite in *Railroad Companies* v. *Gaines*, 97 U. S. 697, in which the charter of a railroad company provided that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, machinery and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer." It was insisted by the road that the term "capital stock" must be held to signify the property purchased therewith and represented thereby, and that it necessarily followed that the perpetual exemption of the stock from taxation extended to such property, and that full effect might be given to the charter by exempting for a limited period such property as was purchased or constructed with money, not constituting a part of the fund subscribed by the corporators, but borrowed pursuant to the power which the charter conferred upon the company. In delivering the opinion of the court, Mr. Chief Justice Waite said that there were undoubtedly many cases to be found in this and other courts where it had been held that an exemption of the capital stock from taxation was equivalent to an exemption of the property into which the capital had been converted. But in all these cases the question had turned upon the effect to be given to the term "capital" or "capital stock," as used in the par-

ticular charter under consideration, and that when the property had been exempted by reason of the exemption of the capital, it had been because, taking the whole charter together, it was apparent that the legislature so intended. "Thus the capital stock of a bank usually consists of money paid in to be used in banking, and an exemption of such capital stock from taxation must almost necessarily mean an exemption of the securities into which the money had been converted in the regular course of a banking business. And, in general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which, in the legitimate operations of the corporation, comes to represent the capital." It was held, however, that in that particular case it could not have been understood that the property was to represent the capital for the purposes of taxation, and that such property was taxable under the original charter at the expiration of twenty years from the completion of the road.

The same construction was given to a similar provision of the charter of the Cairo and Fulton Railroad Company in *Railroad Company* v. *Loftin*, 98 U. S. 559. So in *Bank* v. *Tennessee*, 104 U. S. 493, where a bank was required to "pay to the State an annual tax of one half of one per cent upon each share of capital stock, in lieu of all other taxes," and was also allowed to "purchase and hold a lot of ground" for its place of business, and hold such real property as might be conveyed to it to secure its debts, it was held that the immunity from taxation extended only to so much of the building as was required by the actual wants of the bank to carry on its business. See, also, *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, and *Tennessee* v. *Whitworth*, 117 U. S. 129.

From a review of these cases, it is evident that while in the absence of any words showing a different intent, an exemption of the stock or capital stock of a corporation may imply, and carry with it, an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts, which will never presume a purpose to exempt any property from its just share of

the public burdens, will construe any doubts which may arise as to the proper interpretation of the charter against the exemption.

In the eighteenth section of the charter under consideration there are three clauses which cover the question of taxation. First, the railroad and its appurtenances shall not be subject to be taxed higher than one half of one per centum upon its annual net income; second, no municipal or other corporation shall have the power to tax the stock of said corporation; third, but such municipal or other corporation may tax any property, real or personal, of the said company within the jurisdiction of said corporation in the ratio of taxation of like property. The first clause was obviously intended as a limit upon state taxation; the second, as a prohibition upon the powers of municipalities to tax the shares of stock held by its citizens; the third, as an express permission to tax any property of the company within its jurisdiction for local purposes. If, as insisted by the defendants, this permission were limited to the taxation of property, belonging to the company, other than the railroad and its appurtenances, the clause would be meaningless, since the first clause, limiting taxation to a percentage upon the income, applies only to the railroad and its appurtenances, and leaves to the State itself, as well as to its municipalities, the power to tax property received by the corporation in satisfaction of debts, or otherwise, for purposes disconnected with the business operations of the railroad. Full effect can be given to these three clauses only by sustaining the right of the municipalities to tax any property of the company within their jurisdiction. Indeed, the argument made here was the very one made in connection with the somewhat similar clause in *Railroad Companies* v. *Gaines*, 97 U. S. 697, and held to be unsound.

In the State of Georgia there seems to have been, prior to the act of 1889, some efforts made to subject the property of this road to municipal taxation, which were ineffectual by reason of the legislature failing to provide the proper machinery for the assessment and collection of such taxes; and, as late as 1883, it was held that its system of taxation virtually

excluded counties and municipal corporations from levying a tax upon it for county or municipal purposes by making no provision for the assessment and collection of such taxes. *Houston County* v. *Central Railroad &c. Co.*, 72 Georgia, 211. This defect seems to have been supplied by the acts of 1889 and 1890, and we see no reason why the system of taxation provided by these acts is not valid and consistent with the charter.

We regard it as quite immaterial that when the act of 1835 was passed, a county was not a municipal corporation, or indeed a corporation at all. The power given by the eighteenth section not only extends to municipal but to other corporations, by which was evidently intended other corporations with power to tax for local purposes. If, for instance, cities were reorganized under the names of boroughs or taxing districts, the power of taxation, so far as this section is concerned, would pass to the same corporation under its new name, if the legislature so directed; and the fact that no corporations existed in 1835 under the names of boroughs or taxing districts, would not affect the question. The essential thing reserved was the power to tax for local purposes by whatever corporation then existed, or should thereafter be called into being, for municipal purposes. The legislature could not then foresee what corporations might thereafter be established for municipal purposes, and it would be frittering away its whole object to limit it to corporations then existing.

The decree of the court below was clearly right, and it is, therefore,

Affirmed.

GONZALES *v.* FRENCH.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 84. Argued and submitted April 27, 28, 1896. — Decided November 30, 1896.

As the claim of the plaintiff in error, claiming under an alleged preëmption, was passed upon by the proper officers of the land department, originally and on appeal, and as the result of the contest was the granting of a patent to the contestant, in order to maintain her title she must show either that the land department erred in the construction of the law applicable to the case, or that fraud was practised upon its officers, or that they themselves were chargeable with fraudulent practices, which she has failed to do.

The claim of the plaintiff in error to a right of preëmption is fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office.

Emma J. Gonzales, in October, 1891, filed a bill of complaint in the District Court of the Fourth Judicial District of the Territory of Arizona, against E. W. French, probate judge of the county of Yavapai and Territory of Arizona, and former trustee of the inhabitants of the town of Flagstaff, of the county of Coconino, and J. E. Jones, probate judge of said county of Coconino, and the successor as trustee of the inhabitants of the said town of Flagstaff, and therein alleged that she was the equitable owner of a certain tract of land containing 120 acres, and forming part of section 16, T. 21 N., R. 7 E. of the Gila and Salt River meridian. The facts, as alleged by her, were substantially these: Prior to the survey of said township, Thomas F. McMillan, Frank Christie and Conrad Farriner, who were citizens of the United States, over the age of twenty-one years, and qualified preëmptors, while prospecting for a home upon the public lands of the United States subject to preëmption, or that might so become when the same should be surveyed, settled on this land, intending to claim the same as preëmptors, and were on said land at the date of survey in 1878; that they had built dwelling

Statement of the Case.

houses thereon and reduced portions of it to cultivation prior to such survey; that they continued to improve and claim the same until in June, 1883, when the plaintiff bought from the said occupants all their improvements and took possession thereof; that she afterwards, and while living on the land she now claims, built a dwelling house thereon and made other improvements, prior to April 2, 1885, of the value of $3000; that, on said date, she made formal application to the register and receiver of the United States Land Office at Prescott, Arizona, to be allowed to file a preëmption declaratory statement for the land, and to enter the same, tendering to said officers the proper price therefor, said application being made before any adverse claimant was known, but her application was rejected on the ground that the land was reserved for schools; that on February 3, 1889, Congress passed an act for the relief of the inhabitants of Flagstaff, Arizona, the tract involved in this suit being embraced in the half section mentioned in said act, by which it was provided that the probate judge of Yavapai County might enter the south half of section sixteen, township twenty-one north, range seven east, in trust for the occupants and inhabitants of Flagstaff. The bill further alleged that the tracts settled on at the date of the survey were excepted by section 2275 of the Revised Statutes of the United States from the reservation of the sixteenth and thirty-sixth sections in each township for school purposes, but that, if not so excepted, the land claimed by her was released from any such reservation by said act of February 13, 1889, and became subject to her settlement claim; that the said French, probate judge, had been permitted, on January 17, 1889, to make townsite declaratory statement for the benefit of the inhabitants of Flagstaff for said half section; that she, the plaintiff, contested the right of the said French to make townsite entry, and prosecuted her protest by successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior, but that a patent of the United States was issued to said French on said entry for said land; that at the time she purchased said improvements and settled on the land, the town of Flagstaff was unorganized

and unknown, and none of the inhabitants were then settled on said land or claiming any part of it; and that on the organization of Coconino County the land in suit became a part thereof, and the defendant Jones became probate judge of the new county and the successor to French in the trust. The plaintiff asked a decree declaring that the settlement and occupancy of said land, at the date of survey, by qualified preëmptors, excluded the same from the reservation for school purposes; that, by reason of defendant's purchase of the improvements and her own occupancy and improvements, a right of entry attached thereto in her; that the refusal of the local officers to allow her filing in 1885 was unlawful; that the act of February 13, 1889, did not take away any of her rights, but, if anything, released any claim the Territory of Arizona might have to the land, and that, under the townsite laws referred to in said act, her rights as a settler were and are superior to those of the inhabitants of Flagstaff, as to the particular part of the section covered by her claim; and that the said patentee, as trustee for the said inhabitants, in so far as the land claimed by the plaintiff is embraced in said patent, should be decreed to be the trustee of the plaintiff, and be required to deliver a deed for the same to the plaintiff.

The defendant demurred to the complaint on the general ground that it failed to state facts sufficient to constitute a cause of action. This demurrer was sustained by the District Court. The plaintiff elected to stand on her complaint, and a final decree was entered dismissing the bill. The plaintiff thereupon appealed to the Supreme Court of the Territory, where the judgment below was affirmed, from which decree an appeal was taken and allowed to this court.

Mr. S. D. Luckett for appellant. *Mr. Henry N. Copp* was on his brief.

Mr. Edward M. Doe for appellees submitted on his brief.

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

Section 1946 of the Revised Statutes enacted that sections numbered sixteen and thirty-six in each township of the Territories of New Mexico, Utah, Colorado, Dakota, *Arizona*, Idaho, Montana and Wyoming should be reserved for the purpose of being applied to schools in the several Territories named, and in the States and Territories thereafter to be erected out of the same. Section 2275 is as follows: "Where settlements with a view to preëmption have been made before the survey of the lands in the field, which are found to have been made on section sixteen or thirty-six, those sections shall be subject to the preëmption claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by preemptors. . . ."

In 1878 a survey in the field was made of the township in which the lands in dispute were situated, which survey, together with a plat of the same, was approved February 3, 1879. At the time of the survey McMillan and Farriner were residing on and cultivating lands constituting a portion of section sixteen, and in 1883 Emma J. Gonzales, the plaintiff in error, purchased from said occupants their improvements, took possession of the land, and erected additional improvements thereon.

February 13, 1889, 25 Stat. 668, c. 150, Congress enacted the following law:

"A bill for the relief of the occupants of the town of Flagstaff, county of Yavapai, Territory of Arizona.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the probate judge of Yavapai County, Territory of Arizona, be, and he is hereby, authorized to enter, in trust for the occupants and inhabitants of Flagstaff for townsite purposes, the south half of section sixteen, township twenty-one north, range seven east, Gila and Salt River meridian, in the Territory of Arizona, subject to the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and

eighty-eight and twenty-three hundred and eighty-nine of chapter eight of the Revised Statutes of the United States relating to townsites.

"SEC. 2. That upon the passage of this act the Territory of Arizona, through its proper officers, shall be, and hereby is, authorized to select as indemnity to said land, and in full satisfaction thereof and for the purpose stated in section nineteen hundred and forty-six, one half section of public lands at any office in said Territory, said selections to be made according to legal subdivisions."

On January 17, 1889, E. W. French, as probate judge of said county, in trust for the inhabitants of the town of Flagstaff, filed a declaratory statement for the entry of said south half of said section sixteen, and on July 29, 1889, the plaintiff in error appeared before the local land officers and filed a protest against the allowance of said entry by the said probate judge. At the hearing before said local land officers the land was awarded to the said probate judge in trust for the inhabitants of Flagstaff, and the plaintiff appealed successively to the Commissioner of the General Land Office and to the Secretary of the Interior, by both of whom her right of entry was denied; the land was awarded to said probate judge, and subsequently a patent was issued to him in trust for the occupants and inhabitants of the said town of Flagstaff.

As the claim of the plaintiff in error to the land in question was passed upon by the proper local officers of the land department, and subsequently, upon appeal, by the Commissioner of the General Land Office, and, upon a further appeal, by the Secretary of the Interior, and as the result of the contest was the granting of a patent to the probate judge of the county of Yavapai as trustee of the inhabitants of the town of Flagstaff, the plaintiff, to maintain her bill, must aver and prove either that the land department erred in the construction of the law applicable to the case, or that fraud was practised upon its officers, or that they themselves were chargeable with fraudulent practices. *Johnson* v. *Towsley*, 13 Wall. 72; *Moore* v. *Robbins*, 96 U. S. 530; *Steel* v. *Smelting Co.*, 106 U. S. 447.

Opinion of the Court.

Recognizing this well-settled rule, the plaintiff contends that the land department and the Supreme Court of Arizona erred in failing to find, as matter of law, that the conceded settlement of McMillan and Farriner on the land in question, prior to the survey in the field, and their occupancy of the same with the intention of claiming said land under the preëmption law, excluded said land from the reservation for school purposes. In other words, the contention is that mere settlement and cultivation upon any portion of sections sixteen and thirty-six before the same shall be surveyed exclude such portion from the school grant, and *Sherman* v. *Buick*, 93 U. S. 209, and *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 167, are cited to that effect.

But those were cases decided under the act of March 3, 1853, c. 145, 10 Stat. 244, under which the right of the State of California to school lands arose, and it was held that, by the express terms of the seventh section of that act, where there was either a dwelling house or the cultivation of any portion of the land, on which some one was residing and was asserting claim to it, the title of the State did not vest, but the alternative right to other land as indemnity did.

The language of the seventh section of that act, "Where any settlement, by the erection of a dwelling house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections before the same shall be surveyed, . . . other land shall be selected by the authorities of the State in lieu thereof," is widely different from that of section 2275; "Where settlements, with a view to preëmption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen and thirty-six, those sections shall be subject to the preëmption claim of such settler, and . . . other lands of like quantity are appropriated in lieu of such as may be patented by preëmptors." And Mr. Justice Miller, in delivering the opinion of the court in *Mining Co.* v. *Consolidated Mining Co.*, 102 U. S. 175, was careful to say that "the qualifying incidents," prescribed in the act of 1853, "are not the same required under the general preëmption law," but

are intended "to convey the idea of a settlement and a settler according to the terms of the statute under consideration."

The claim of the plaintiff in error, therefore, to a right of preëmption was fatally defective because her vendors and predecessors in title had failed to make or file an actual entry in the proper land office. As they did not choose to assert their rights by filing a declaratory statement, or by making an entry as preëmptioners, their mere possession did not prevent the rights of the Territory from attaching to the school sections when the survey was made. Nor did the plaintiff in error lawfully succeed to any possessory rights they may have had, as against the United States, because such rights were merely personal to the settler, and, under § 2263, Rev. Stat., were not assignable to the plaintiff in error. She did not herself, after taking possession, comply with the requisitions of the law.

Section 2265, Revised Statutes, provides that "every claimant under the preëmption law for land not yet proclaimed for sale is required to make known his claim in writing to the register of the proper land office within three months from the time of the settlement, giving the designation of the tract and the time of settlement; otherwise his claim shall be forfeited and the tract awarded to the next settler, in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law"; and section 2266 provides that "in regard to settlements which are authorized upon unsurveyed lands, the preëmption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such preëmption settlement"; and section 2267 provides that "all claimants of preëmption rights, under the two preceding sections, shall, when no shorter time is prescribed by law, make the proper proof and payment for the lands claimed within thirty months after the date prescribed therein, respectively, for filing their declaratory notice, has expired."

The bill discloses that the plaintiff in error first appeared in the land office and proposed to file her declaratory state-

ment on April 2, 1885, more than six years after the filing of the plat.

The register and receiver were, therefore, warranted in rejecting the claim of the plaintiff in error. And, at any rate, as she did not appeal from their decision to the Commissioner of the General Land Office, she must be deemed to have acquiesced therein, and is concluded thereby so long as it remains unreversed. *Wilcox* v. *Jackson*, 13 Pet. 498, 511.

The plaintiff in error took no further steps until July 20, 1889, when, as already stated, she ineffectually opposed the claim of the probate judge in making his entry under the provisions of the act of February 13, 1889. The present bill was not filed until October 2, 1891, and in the meantime, as appears by one of the pleas, the truth of which was admitted by demurrer, the probate judge had, as trustee under the act, conveyed many and large portions of the lands in controversy to numerous inhabitants of the town of Flagstaff.

The Supreme Court of the Territory held that the land in question was never divested of its character as school land until the entry by the probate judge under the act of 1889, and accordingly sustained the action of the trial court in dismissing the plaintiff's complaint, and in this we see no error.

Whatever might have been the possessory rights of the plaintiff in error as against other claimants under the ordinary land laws, such rights could not avail against the right of Congress to confer said lands upon other parties. *Frisbie* v. *Whitney*, 9 Wall. 187; *Yosemite Valley case*, 15 Wall. 77; *Shepley* v. *Cowan*, 91 U. S. 330. We cannot accede to the argument on behalf of the plaintiff in error that the legal effect of the act of February 13, 1889, was to leave the land described therein open to controversy between townsite settlers and persons who might have settled on the lands but had not complied with the requisites of the preëmption laws.

As was said in *Shepley* v. *Cowan*, *supra*, "In those cases, *Frisbie* v. *Whitney* and the *Yosemite Valley case*, the court decided that a party, by mere settlement upon the public lands, with an intention to obtain a title to the same under the preëmption laws, did not thereby acquire such a vested

interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light houses, custom houses and other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon Congress by the Constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested right in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a patent of the United States. Until such payment and entry, the acts of Congress gave to the settler only a privilege of preëmption in case the lands were offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others."

In *Buxton* v. *Traver*, 130 U. S. 232, this language was used: "A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified time after the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement, . . . and performs certain other acts prescribed by law, he acquires for the first time a right of preëmption to the land. . . . If those steps are from any cause not taken, the proffer of the government has not been accepted, and a title in the occupant is not even initiated."

Proper effect would not be given, as we think, to the act of February 13, 1889, by subjecting the patentee and his

grantees to the claims of persons who have no vested rights under the preëmption laws. Such claims would, in the present case, oust the townsite settlers from large portions of the grant, and defeat the manifest purpose of Congress.

The judgment of the Supreme Court of the Territory of Arizona is

Affirmed.

McCLELLAN *v.* CHIPMAN.

ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

TRADERS' BANK *v.* CHIPMAN.

ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Nos. 35, 36. Argued April 28, 29, 1896. — Decided November 30, 1896.

The provisions of §§ 96 and 98 of c. 157 of the Public Statutes of Massachusetts, invalidating preferences made by insolvent debtors and assignments or transfers made in contemplation of insolvency, do not conflict with the provisions contained in Rev. Stat. §§ 5136 and 5137, relating to national banks and to mortgages of real estate made to them in good faith by way of security for debts previously contracted, and are valid when applied to claims of such banks against insolvent debtors.

National Bank v. *Commonwealth*, 9 Wall. 353, affirmed to the point that it is only when a state law incapacitates a national bank from discharging its duties to the government that it becomes unconstitutional: and *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, affirmed to the point that national banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States: and the two distinct propositions held to be harmonious.

The Traders' National Bank, a corporation organized under the banking laws of the United States, carried on its business in the city of Boston. The firm of Dudley Hall & Company, composed of Dudley Hall and Dudley C. Hall, were likewise engaged in business in Boston, and were customers of the bank, having a deposit account therein. By an understanding between the bank and the firm, made to induce the latter

to keep its deposit account with the former, the firm was to be considered as entitled to a line of discount on its paper to the extent of $20,000. On the 16th of October, 1890, the partnership then being in the enjoyment of its full agreed line of discount, borrowed from the bank an additional sum of $12,500, which was evidenced by a note of Dudley C. Hall at one month, endorsed by the firm and secured by the pledge of certain shares of the Ætna Mining Company and by two notes of that company, amounting to about $2500. When this note matured, on the 16th of November, 1890, a new demand note in an equal amount was given in renewal thereof and was secured by the same collaterals. On the 17th of December, 1890, payment of this note was demanded, and the debtor being unable to meet it a new note at two months was given, the sum thereof was passed to the credit of the firm, and the old note was debited, cancelled and surrendered. This new note was drawn like the preceding one by Hall and endorsed by the firm, and was secured, not only by the same collaterals, but also by a conveyance of two pieces of land made by Dudley C. Hall to A. D. McClellan, a director of the bank, he giving to Hall a writing, in which it was declared that the conveyance was made for the sole purpose of securing the note held by the bank, and that on its payment the land would be retransferred. In March, 1891, the firm suspended payment, and the members thereof were adjudged to be insolvent under the insolvency laws of the State of Massachusetts, and made to their assignees an assignment of all their property, as required by the statutes of the State. In May the assignees brought a writ of entry against McClellan to recover the two pieces of land.

Sections 96 and 98 of chapter 157 of the Public Statutes of the State of Massachusetts, relied on by the assignees to sustain their action to recover the land, are as follows:

"Sec. 96. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, with a view to give a preference to a creditor or person who has a claim against him, or is under any liability for him, procures any part of his property to be

attached, sequestered or seized on execution, or makes any payment, pledge, assignment, transfer or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer or conveyance, or to be benefited thereby, having reasonable cause to believe such person is insolvent or in contemplation of insolvency, and that such payment, pledge, assignment or conveyance is made in fraud of the laws relating to insolvency, the same shall be void; and the assignees may recover the property or the value of it from the person so receiving it or so to be benefited."

"SEC. 98. If a person, being insolvent or in contemplation of insolvency, within six months before the filing of the petition by or against him, makes a sale, assignment, transfer or other conveyance of any description of any part of his property to a person who then has reasonable cause to believe him to be insolvent or in contemplation of insolvency, and that such sale, assignment, transfer or other conveyance is made with a view to prevent the property from coming to his assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way to impair, hinder, impede or delay the operation and effect of, or to evade any of said provisions, the sale, assignment, transfer or conveyance thereof shall be void, and the assignee may recover the property or the value thereof as assets of the insolvent. And if such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief."

The action was tried before a jury and there was a verdict in favor of the surviving assignee, and exceptions were filed and allowed. Whilst these exceptions were pending before the Supreme Judicial Court, the Traders' Bank filed its bill in equity against the surviving assignee of the estate of Dudley C. Hall and Dudley Hall and A. D. McClellan, setting up its right under the conveyance made to McClellan, the bringing of the writ of entry and the fact that the bank had not been made party defendant therein. The bill charged

that the complainant, as a national bank, was entitled to take the conveyance of the real estate to secure the debt of Hall, and that the provisions of the statutes of Massachusetts which were relied on by the assignees were in conflict with sections 5136, 5137, Revised Statutes of the United States. The bill prayed that the assignee and McClellan be permanently enjoined from proceeding under the writ of entry and the exceptions filed therein, and McClellan be ordered to apply the proceeds of the property to the payment of the note and loan secured thereby. After due pleading the issues tendered were reported by the presiding justice for the consideration of the full court upon certain questions of law reserved, and the full court affirmed the verdict of the jury and judgment thereon in the writ of entry case and dismissed the bill in equity.

So far as concerned the Federal question, the court held that there was no conflict between sections 5136, 5137 of the Revised Statutes of the United States, and sections 96 and 98 of chapter 157 of the Public Statutes of Massachusetts. Both cases were brought here by writ of error.

Mr. Almon A. Strout and *Mr. William H. Coolidge* for plaintiffs in error. *Mr. H. J. Jaquith* was on their brief.

The provisions of sections 96 and 98 of the Massachusetts statute are inconsistent with the letter and spirit of sections 5136 and 5137 of the Revised Statutes of the United States, and tend to impair the operations of a national bank organized thereunder in taking security for its debts, whereby it is enabled to preserve its assets and ensure its stability and efficiency in carrying out the purposes for which it was organized, thereby rendering effectual the end for which these statutes were enacted.

The decisions of the English courts are not in point, owing to the difference of the structure of the two systems of government, and this question, in the precise form in which it is now presented, has never been directly adjudicated in the courts of the United States. But we claim that the principle

involved has been decided in favor of the contention of the plaintiff in error.

In considering the question as to whether there is such inconsistency and conflict as we claim exists, the purposes for which the banking act was passed, and for which national banks were created, are not to be limited by occasional dicta of the courts, but are to be found by considering the objects to be subserved by them.

"National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283. See also *Waite* v. *Dowley*, 94 U. S. 527; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Gulf, Colorado & Santa Fé Railway* v. *Hefley*, 158 U. S. 98.

In the case at bar the statute of Massachusetts is not in the nature of a police regulation, nor is it a statute prescribing certain forms to be observed in executing the conveyance and making public record thereof. It is rather a statute which goes to the validity of the conveyance made in accordance with the provisions of the statute of the United States, because it is alleged such conveyance was made in violation of certain conditions which the legislature of Massachusetts had declared should render it void if they were disregarded.

At the time of the passage of the national banking act, the finances of the country were in a deplorable condition. There was no uniformity, and so great was the distrust of state banks that in many instances bills which were used in one State were not current in another. Nor could the United States avail themselves of these institutions to carry on the

fiscal operations of the government, and the result was that commerce was impeded, the operations of the national government crippled, and it became absolutely necessary that Congress should establish not only a "stable," but a "uniform," system of currency applicable alike to every State in the Union.

With this end in view, the national banking act was so constructed as to afford security to currency issued by the several banking associations, and it was intended that they should have credit for stability and permanency, not only by depositing the bonds of the United States, but by taking security whenever necessary for the protection of their property and assets. Hence it was that Congress was not satisfied with legislating in a general way upon the manner of doing business by national banking associations, but legislation was had covering the specific question in controversy, and by section 5136 it is declared "That the banking association shall have power. . . . Third, to make contracts. . . . Seventh, All such incidental powers as shall be necessary to carry on the business of banking . . . by loaning money on personal security." And section 5137 provides "That a national banking association may purchase, hold and convey real estate for the following purposes and no other. . . . Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts contracted in the course of its dealings."

The act further points out the qualifications and disabilities attending such holding, for it says: "But no such association shall hold the possession of any real estate under mortgage or title of possession of any real estate purchased to secure any debt due it for a longer period than five years." This qualification, which was intended to prevent speculation in land, or the accumulation of large amounts of real estate to be held for an indefinite period, is the only restriction which Congress placed upon the power of the national bank to take conveyances of real estate by way of mortgage for the security of debts previously contracted. "*Expressio unius est exclusio alterius.*"

Argument for Plaintiff in Error.

There can be no doubt that, under the provisions of the statute of the United States, the Traders' National Bank could hold this real estate conveyed to one of its directors in trust and mortgage to secure a debt previously contracted in good faith, and even for a debt contracted contemporaneously with the conveyance. This conveyance was valid security for the debt of the bank, unless it is rendered invalid by the laws of the State of Massachusetts. *National Bank* v. *Whitney*, 103 U. S. 99, 102; *National Bank* v. *Matthews*, 98 U. S. 621.

Considering the purposes for which banking associations are organized, and for which the provisions of the national banking act were enacted by Congress, do the provisions of the insolvent law of Massachusetts render void this conveyance and other like conveyances at the will of the assignee appointed by state courts, and under authority of state statutes, by attaching to it conditions which provide that such conveyance shall be void if at any time within six months the bank has reasonable cause to believe that the mortgagor is insolvent or in contemplation of insolvency? In other words, if the bank has reasonable cause to believe that a state of affairs exists which makes it the duty of the bank to take additional security for an existing debt in order to preserve its own assets, and thereby its usefulness in carrying out the purposes of its organization, does such knowledge, at the election of the assignee, who may affirm or repudiate the conveyance, render its efforts to obtain the security provided by the statute without avail? We respectfully contend that such a statute tends to impair the usefulness of national banks, and is in conflict with both the letter and spirit of the act of Congress.

The conveyance to the plaintiff in error was not void at the time it was made, but under the construction given to the state laws of insolvency was only voidable. If the conveyance had been rendered void by the force of the statute, no title would have passed to the purchaser; otherwise if it was voidable at the election of the assignee. If the title passed, then the lien of the United States attached, and the statute of the State of Massachusetts would be inoperative to defeat that lien, because of the insolvency of the grantor.

The knowledge of the bank and the subsequent election of the assignee to proceed under the state statute for the recovery of the property certainly would operate as an impairment of the operation of the statute of the United States creating a national bank.

We further respectfully contend that where, as in the present case, Congress has legislated fully upon a specific subject-matter, such legislation is exclusive of any legislation upon the same subject-matter by the several States. Turning to the statute of the United States, it is difficult to conceive how Congress could have used language to more fully convey its will in relation to a power of national banks to take securities for past debts by a conveyance of land, either directly or in mortgage.

It provides: (1) The kind of security to be taken; (2) The kind of debt for which security may be taken; namely, a debt previously contracted; (3) The nature of the conveyance to be made: that it shall be by way of mortgage security, or in satisfaction of the debt itself; (4) The conditions and restrictions to be applied to the conveyance — that it shall be mortgaged in good faith, or conveyed in satisfaction of debts previously contracted in the course of its dealings; (5) The length of time for which the real estate can be held: that it shall not be for a longer period than five years.

It is clear that if Congress had intended to make these provisions for the taking and holding of real estate subject to any other conditions, its intention would have been apparent in additional provisions of the law.

We do not contend that Congress did not contemplate that the conveyance should be made in accordance with the provisions of the common law, and should conform to the requirements of the statutes of the several States, so far as the form of conveyance was concerned, and the measures to be taken to give it publicity; that is to say, it left it still open to the courts to say who could have priority of security where there was no notice or record of the mortgage made, and like questions. But that goes simply to the form, not to the spirit, of the act and the power of making a conveyance in the

manner prescribed by Congress. There is a wide difference between the two, and that difference is effectual in favor of the contention of the plaintiff in error.

We call attention with confidence to the case of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275. In that case sections 5236 and 5242 of the Revised Statutes of the United States provided for the manner of the distribution of the assets of a national bank by the comptroller of the currency ratably among the creditors; but the State of New York, legislating upon the same subject-matter, provided by state statute for a different method of distribution, and instead of its being distributed ratably among the creditors, it provided for the preferential distribution under the law in certain cases. The court holds that there is a conflict between the spirit and letter of the two statutes, and that therefore the state statute must yield to the provisions of the paramount law.

And, after a full citation of authorities and an exhaustive opinion, the court comes to the conclusion that the statutes of the State of New York conflict in letter and spirit with the statute of the United States, and therefore must yield.

Now, it will be remembered that in section 5136 the language of the statutes may in some sense be called "general"; that is, it enables national banks "to make contracts," "to sue and be sued," "to complain and defend in any court of law and equity as fully as natural persons," "to elect or appoint directors," "to regulate the manner in which its stock shall be transferred," and other general matters relating to the powers of the bank; but when it comes to defining the kind of security that may be taken, the language ceases to be general and becomes specific, and, as has been shown above, every condition necessary to a valid conveyance is prescribed by the terms of the act itself. In this regard it is well said by Mr. Justice Field in *Cook County Bank* v. *United States*, 107 U. S. 445, that "everything essential to the formation of the banks, the issue, security and redemption of their notes, and the winding up of the institutions, and the distribution of their assets, are fully provided for."

We respectfully submit to the court that in the case at bar

the provisions of the state law are much more antagonistic to the provisions of the statute of the United States, both in letter and spirit, than they were in the case of *Davis* v. *Elmira Savings Bank*. It might have been argued, and was argued, with equal force in that case, that the provisions of the statute of the United States were general in their character, and that the statute of the United States in making the distribution must have regard to the provisions of the state statute which gave savings banks, in certain cases, a preference. But the court held otherwise, and declared that there was a conflict in spirit, as well as in letter, between the two acts. How much more in the present case is there such conflict? As has been shown above, the provisions of the statute of the United States were not merely general but were specific in relation to security in land which a national bank might take and hold. The provisions of the state statute, if it is operative, forbid such holding in the cases pointed out in the insolvent law.

Mr. William B. French for defendants in error.

Mr. S. J. Elder filed a brief for defendant in error in No. 36.

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

Although these two cases were brought here by separate writs of error, they depend on the same facts and involve the same legal question, and were passed upon by the court below in one opinion. 159 Mass. 363. We shall, therefore, consider them together.

The only Federal question for our consideration is whether there was conflict between the statutes of the United States and the provisions of the general law of the State of Massachusetts referred to and heretofore fully set out. Two propositions have been long since settled by the decisions of this court:

First. National banks "are subject to the laws of the State, and are governed in their daily course of business far more by

the laws of the State than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank* v. *Commonwealth*, 9 Wall. 362.

Second. "National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283.

These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States. The provisions of the statutes of the United States upon which the plaintiffs in error rely are as follows:

"A national banking association may purchase, hold and convey real estate for the following purposes, and for no others:

* * * * *

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of

debts previously contracted in the course of its dealings." Rev. Stat. § 5137.

The argument is that as this statute permits national banks to take real estate for given purposes, therefore the Massachusetts law which forbids a transfer of property, with a view to a preference, in case of insolvency, where the transferee has reasonable cause to believe that the transferrer is insolvent or in contemplation of insolvency, in no way controls the contracts or dealings of a national bank. But this position denies the general rule just referred to, and amounts to asserting that in every case where a national bank is empowered to make a contract, such contract is not subject to the state law. In the case in hand there is no express conflict between the grant of power by the United States to the bank to take real estate for previous debts, and the provisions of the Massachusetts law, which, although allowing as a general rule the taking of real estate, as a security for an antecedent debt, provides that it cannot be done under particular and exceptional circumstances. Nor is there anything in the statutes of the State of Massachusetts, here considered, which in any way impairs the efficiency of national banks or frustrates the purpose for which they were created. No function of such banks is destroyed or hampered by allowing the banks to exercise the power to take real estate, provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected, one of which limitations arises from the provisions of the state law which in case of insolvency seeks to forbid preferences between creditors. Of course, in the broadest sense, any limitation by a State on the making of contracts is a restraint upon the power of a national bank within the State to make such contracts; but the question which we determine is whether it is such a regulation as violates the act of Congress. As well might it be contended that any contract made by a national bank, within a State in violation of the state laws on the subject of minority or coverture, was valid because such state laws were in conflict with the act of Congress or impaired the power of the bank to perform its functions. Indeed, reduced to its last analysis, the

position here assumed by the plaintiff in error amounts to the assertion that national banks in virtue of the act of Congress are entirely removed, as to all their contracts, from any and every control by the state law. The argument that the concession of a right on the part of a State to forbid the taking of real estate by a national bank for an antecedent debt, under any circumstance, implies the existence of a power in the State to forbid such taking in all cases, begs the question, and amounts simply to a restatement of the proposition already answered. As long since settled in the cases already referred to, the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States.

It is said that section 98 of the Massachusetts statute is in conflict with the statutes of the United States in so far as it provides that, "If such sale, assignment, transfer or conveyance is not made in the usual and ordinary course of business of the debtor, that fact shall be *prima facie* evidence of such cause of belief," that is, the belief on the part of the creditor of the insolvency of the debtor by whom the transaction was made. The reasoning is that as the United States law allows the taking by a bank of real estate for an antecedent debt, and the state statute makes such taking of real estate *prima facie* evidence of a reasonable belief on the part of the bank of the insolvency of the debtor from whom the real estate is so taken, therefore the state law violates the national bank law, since it attributes to the doing of the act which the national bank law authorizes, a presumption which virtually annuls the contract, unless proof be made to the contrary. But this view gives to the words "ordinary course of business" in the state statute a strained and unreasonable con-

struction. The state statute does not provide that the mere fact that a security is taken for an antecedent debt renders the contract one not in the actual course of the debtor's business, thereby engendering the presumption of knowledge on the part of the creditor, but affixes such presumption only to cases where the particular nature of the dealings between the parties is such as to make the contract not one in the actual course of business, from which fact the statutory presumption arises. However, this objection does not arise on the record before us, since the Supreme Court of Massachusetts held that the effect of the charge of the trial court was substantially to instruct the jury that before the plaintiff in the entry suit could recover he must satisfy the jury by a preponderance of evidence that Hall at the time of the conveyance was insolvent.

The claim that the security vested in the bank by the conveyance of the land is taken away from it in violation of the United States law, because, under the Massachusetts law, a contract by a debtor giving a fraudulent preference to one creditor over another, is voidable and not void, is without merit. This contention concedes that if the state law rendered the transaction void there would be a valid exercise of state authority. But the power to do the greater necessarily carries with it the right to do the lesser. Nor is there anything in the opinion of this court in *Davis* v. *Elmira Savings Bank*, *supra*, which supports the argument of the plaintiff in error. There, the conflict between the state and the Federal law was found to be express and irreconcilable, bringing that case, therefore, under the exception to the general rule. The opinion carefully confined the ruling there made to such a case, so as to render it inapplicable in a case like the one now before it. It said:

"It is certain that, in so far as not repugnant to acts of Congress, the contracts and dealings of national banks are left subject to the state law, and upon this undoubted premise, which nothing in this opinion gainsays."

And the whole opinion was qualified by this language:

"Nothing, of course, in this opinion is intended to deny the

operation of general and undiscriminating state laws on the contracts of national banks, so long as such laws do not conflict with the letter or the object and purposes of Congressional legislation."

Finding no conflict between the special power conferred by Congress upon national banks to take real estate for certain purposes, and the general and undiscriminating law of the State of Massachusetts subjecting the taking of real estate to certain restrictions, in order to prevent preferences in case of insolvency, we conclude that the judgments of the Supreme Court of the State of Massachusetts were right, and they are, therefore, in both cases,

Affirmed.

EDGINGTON *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA.

No. 336. Submitted November 2, 1896. — Decided November 30, 1896.

Section 5438 of the Revised Statutes (codified from the act of March 2, 1863, c. 67, 12 Stat. 696) is wider in its scope than section 4746, (codified from the act of March 3, 1873, c. 234, 17 Stat. 575,) and its provisions were not repealed by the latter act.

On the trial of a person accused of the commission of crime, he may, without offering himself as a witness, call witnesses to show that his character was such as to make it unlikely that he would be guilty of the crime charged; and such evidence is proper for the consideration of the jury in determining whether there is a reasonable doubt of the guilt of the accused.

At the March term, 1895, in the District Court of the United States for the Southern District of Iowa, Avington A. Edgington was tried and found guilty of the crime of making a false deposition on April 13, 1894, in aid of a fraudulent pension claim on behalf of his mother, Jennie M. Edgington, claiming to be the widow of Francis M. Edgington.

The indictment was based on section 5438 of the Revised Statutes of the United States, and it was claimed on behalf of

the defendant that that section had been repealed by the subsequent enactment of section 4746 of the Revised Statutes, and was no longer in force at the time the indictment was found. The motion to direct a verdict of not guilty for that reason was overruled, to which action of the court an exception was taken. Exceptions were also taken to the action of the court in excluding testimony as to the defendant's general reputation for truth and veracity, and to the instruction to the jury upon the testimony as to the good character of the defendant.

On April 30, 1895, judgment was pronounced against the defendant that he pay a fine of fifteen hundred dollars and the costs, and that he stand committed to jail until said fine and costs should be paid. A writ of error was prayed for and allowed.

Mr. Smith McPherson, *Mr. A. H. Garland* and *Mr. R. C. Garland* for plaintiff in error.

Mr. Assistant Attorney General Whitney for defendants in error.

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

Section 5438 of the Revised Statutes makes it penal to make or cause to be made, for the purpose of obtaining or aiding to obtain payment or approval of any claim against the United States, any false deposition, knowing the same to contain any fraudulent or fictitious statement; and such offence is made punishable by imprisonment at hard labor for not less than one nor more than five years, or by fine of not less than one thousand nor more than five thousand dollars. The statute which was carried into this section of the Revised Statutes was enacted March 2, 1863. 12 Stat. 696, c. 67.

Section 4746 is based on a statute passed March 3, 1873, c. 234, § 33, 17 Stat. 566, 575, and provides a penalty of a fine not exceeding five hundred dollars, or of imprisonment for

a term not exceeding three years, or of both, for every person who knowingly or wilfully in anywise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions.

We are unable to accept the contention that the latter section is to be deemed a repeal of the former. Undoubtedly there is some ground that is common to both. Thus the procuring or causing to be made a false deposition or affidavit in promoting a fraudulent pension claim is made an offence by both statutes. But the earlier statute is wider in its scope, because not restricted to fraudulent pension claims, nor to merely procuring a false affidavit to be made. We think the offence charged in the present indictment, of making a false deposition in aid of a fraudulent pension claim, is properly within section 5438, and not within section 4746, which is in terms applicable only to the offence of procuring another person to commit the offence.

We are constrained to sustain the assignments which complain of the exclusion of testimony offered to show defendant's general reputation for truth and veracity. It is not necessary to cite authorities to show that, in criminal prosecutions, the accused will be allowed to call witnesses to show that his character was such as would make it unlikely that he would be guilty of the particular crime with which he is charged. And as here the defendant was charged with a species of the *crimen falsi*, the rejected evidence was material and competent. This, indeed, is conceded in the brief for the government; but it is argued that, as the learned judge, in overruling the offer of the evidence, observed that the testimony might "become proper later on," he was merely passing on the order of proof, his discretion in respect to which is not reversible. It is possible, as suggested, that the judge thought that such evidence should not be offered until it appeared that the defendant had himself testified. But this would show a misconception of the reason why the evidence was competent. It was not intended to give weight to the defendant's personal

testimony in the case, but to establish a general character inconsistent with guilt of the crime with which he stood charged; and the evidence was admissible whether or not the defendant himself testified. When testimony, competent and material, has been offered and erroneously rejected, the error is not cured by a conjecture that if offered at a subsequent period in the trial the evidence might have been admitted. It should also be observed that when a subsequent offer to the same effect was made the judge rejected it without qualification.

There was likewise error in that portion of the charge in which the judge instructed the jury as to the effect that they should give to the testimony showing the defendant's good character.

It is proper to give the judge's own language:

"Some testimony has been given you touching the good character of the defendant. When a man is charged with crime the courts of the United States permit this question of good character to be introduced to go to the jury. The theory, as I view it, is a wise one. If a man, in the community where he lives, by his incoming and outgoing among his neighbors, has built up in the years of his life, be they comparatively few or many, a character among them for good morals, which includes the uprightness and excellency of our general citizenship, it is right that the jury should know that fact. It is of value to them in conflicting cases in determining points in the case; and yet, gentlemen, I have to say to you that evidence of good character is no defence against crime actually proven. If the defendant in this case is proven guilty of crime charged, any good character borne by him in his community is no defence; it must not change your verdict; for the experience of mankind, of all of us, teaches us that men reputed to be of good moral character in a community unfortunately sometimes we find they are sadly different from that which they are reputed to be, and that they are committers of crime; yet the good character goes to the jury with special force wherever the commission of the crime is doubtful. If your mind hesitates on any

point as to the guilt of this defendant, then you have the right and should consider the testimony given as to his good character, and it becomes, as I have suggested, or may be of great importance in the minds of the jury in the matters of doubt."

To this portion of the charge the defendant's counsel took exception in the following terms: "We except to that part of the charge in stating the effect of good character, the defendant claiming that it should not be of force only in doubtful cases, but should be considered by the jury in connection with all of the evidence as to whether or not on all the evidence there is a reasonable doubt."

Some criticism is offered to the exception as made to the whole paragraph, and thus coming within cited cases, to the effect that exceptions are not well taken to an entire charge, or to large portions of a charge, if the instructions complained of are, as to some of them, sound. There is a reasonable rule that if the entire charge is excepted to, or a series of propositions contained in it is excepted to in gross, the exception cannot be sustained if there were a distinct proposition or instruction given that was sound. Waiving the question as to how far this rule is justly applicable to the case of a charge in a criminal case, we are of opinion that, in the present instance, the criticism is not well founded. The paragraph of the charge excepted to does not contain instructions on separate and distinct propositions, some of which are sound and others not so. The subject treated of in the paragraph is the single one of the proper effect to be given by the jury to the evidence of the defendant's good character. A fair understanding of the meaning of the instruction cannot be reached without reading and weighing the entire paragraph. There would have been more room for just criticism had the defendant taken exception to sentences or phrases detached from their connection.

If formally correct, was the exception in question substantially well taken? Was the charge, in the particular complained of, a correct exposition of the law?

It is impossible, we think, to read the charge without per-

ceiving that the leading thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. He stated that such evidence "is of value in conflicting cases," and that if the mind of the jury "hesitates on any point as to the guilt of the defendant, then you have the right and should consider the testimony given as to his good character."

Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Jupitz v. *The People*, 34 Illinois, 516, was a case where the defendant was indicted for having received goods knowing them to have been stolen, and his counsel requested the trial judge to instruct the jury that the evidence of the good character of the defendant for honesty should have great weight in determining as to his guilt or innocence. This was qualified by the court by the addition of these words: "If the jury believe there is any doubt of his guilt." This was held to be error, and the Supreme Court of Illinois used the following language:

"The instruction as asked may be objectionable on account of the epithet great, but as that was not the ground of the qualification, but on the ground, as is inferable, that the court did not consider evidence of good character of any weight except in a doubtful case. The more modern decisions in criminal cases go to the extent that in all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. . . . We can hardly imagine a case where evidence of a good character was a more important element of defence than this, and in the lan-

guage of the instruction was entitled to great weight. Proof of uniform good character should raise a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the possession of stolen goods. It is not proof of innocence, although it may be sufficient to raise a doubt of guilt. The court seemed to think it was entitled to no weight, unless, taking the language used in its most favorable aspect, there was doubt of his guilt. A strong *prima facie* case was made out by the prosecution, but it was not conclusive. If the court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised which would have resulted in his acquittal."

Similar conclusions were reached in *Commonwealth* v. *Leonard*, 140 Mass. 470; *Heine* v. *Commonwealth*, 91 Penn. St. 145; *Remsen* v. *The People*, 43 N. Y. 6; *People* v. *Garbutt*, 17 Michigan, 29; Wharton on Crim. Law, vol. 1, § 636.

We find no errors disclosed by the other assignments.

The judgment of the court below is reversed and the cause remanded with directions to set aside the verdict and award a new trial.

Mr. Justice Brewer concurred in the judgment.

Mr. Justice Brown dissented.

NOBLE *v.* MITCHELL.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 101. Submitted October 29, 1896. — Decided November 30, 1896.

The construction by the Supreme Court of Alabama of §§ 1205, 1206 and 1207 of the code of that State, regulating the subject of fire and marine insurance within the State by companies not incorporated therein, is, under the circumstances presented by this case, binding on this court.

The decision below upon the question whether there was adequate proof that the policy in controversy in this case was issued by a foreign corporation is not subject to review here on writ of error.

THE case is stated in the opinion.

Mr. John M. Chilton and *Mr. A. A. Wiley* for plaintiffs in error.

Mr. Charles Wilkinson for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

Article II of Chapter V, Title 12, of the Code of Alabama, regulates the subject of fire and marine insurance within the State by companies not incorporated therein. It is required by section 1199 that such companies shall pay annually into the treasury the sum of one hundred dollars. Section 1200 directs that each of such corporations must file with the state auditor a certified copy of its charter and a statement setting forth certain items in relation to its business condition on the 31st day of December next preceding; and, by section 1201, such corporations are required to possess a cash capital of at least one hundred and fifty thousand dollars, and are obliged to file a written instrument consenting to service of process upon any agent of such company within the State. Upon compliance with all the requirements of the article, the auditor, if satisfied that the affairs of such company are in sound condition, is required to issue to it a license to transact the business of insurance within the State until the 15th day of January next ensuing.

Sections 1205, 1206 and 1207 of the same article read as follows:

"SEC. 1205. Any person who solicits insurance on behalf of an insurance company, not incorporated by the laws of this State, or who, other than for himself, takes or transmits an application for insurance, a premium of insurance or a policy of insurance to or from such company, or in any way gives notice that he will receive or transmit the same, or receives or delivers a policy of insurance of such company, or who in-

spects any risk, or makes or forwards a diagram of any building, or does any other thing in the making of a contract of insurance, for or with such company, other than for himself, or examines into, adjusts or aids in examining into or adjusting any loss for such company, whether such acts are done at the instance of such company, or any broker, or other person, shall be held to be the agent of the company for which the act is done, and such company held to be doing business in this State.

"SEC. 1206. Any person acting as agent of any foreign insurance company which has not received the license from the auditor above provided for, or shall so act after its expiration, is liable personally to the holder of any policy of insurance in respect to which he so acted as agent for any loss covered by it; and shall forfeit, for each offence, the sum of five hundred dollars, to be sued for in the Circuit Court where the delinquency occurs, by the solicitor, in the name of the State and paid into the state treasury, less twenty-five per cent retained by the solicitor for his services.

"SEC. 1207. The term 'insurance company,' as used in this article, includes every company, corporation, association or partnership organized for the purpose of transacting the business of insurance."

The action below was originally instituted in a Circuit Court of Alabama by Mitchell, a citizen of Alabama, to recover from the defendants, a firm of insurance agents, doing business in the city of Montgomery, the amount of a loss under a policy of insurance covering a stock of merchandise owned by the plaintiff, which policy was procured by the defendants from a corporation known as the Fairmount Insurance Association of Philadelphia, Pennsylvania. The corporation in question was not incorporated under the laws of Alabama, and at the time of the issue of the policy had not been licensed to do an insurance business within that State. From a verdict and judgment against them the defendants prosecuted error. The Supreme Court of the State affirmed the judgment. 100 Alabama, 519.

The highest court of the State having affirmed the validity

of the state statute and enforced its provisions against the plaintiff in error, despite his objection duly made that such statute was repugnant to the Constitution of the United States, a writ of error was allowed, and the cause is here for review.

In *Hooper* v. *California*, 155 U. S. 648, this court held that a statute of the State of California which made it a misdemeanor for a person, in that State, to procure insurance for a resident in the State from an insurance company not incorporated under its laws, and which company had not filed the bond required by the laws of the State, was not a regulation of commerce, and did not conflict with the Constitution of the United States. The doctrine of earlier decisions of this court with reference to contracts of insurance, namely, that the business of insurance is not commerce, and that a contract of insurance is not, in the constitutional sense of the words, an instrumentality of commerce, was reiterated and held applicable to a marine policy. This court said (p. 655):

"The State of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And, as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company, and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the State which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject

always, of course, to the paramount authority of the Constitution of the United States."

It inevitably results from this ruling that the State of Alabama, in virtue of the power possessed by it of excluding foreign fire insurance corporations from its jurisdiction, could lawfully punish or regulate, by the imposition of civil liability, or otherwise, the doing of acts within the territory of the State calculated to neutralize and make ineffective the statute which prescribed conditions upon which alone the right existed in a foreign insurance corporation to do business within the State.

It is conceded that in so far as the Alabama law forbids foreign insurance corporations from doing business within the State in violation of the state law, such law does not conflict with the Constitution of the United States; but the claim is made that since the statute not only regulates foreign corporations, but declares that the term "insurance company" embraces every company, corporation, association or partnership organized for the purpose of transacting an insurance business, therefore it violates section 2, article IV, of the Constitution, guaranteeing that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The fact that foreign corporations are not "citizens," within the meaning of the Constitution, it is said was the reason of the ruling in *Hooper* v. *California*, hence that case does not apply to a state law which includes within its inhibitions those who are citizens. We need not, however, express any opinion as to the correctness of this asserted distinction, since, even if it be well founded, it has no relevancy to the question before us. The action below was predicated upon the fact that the business of insurance alleged on had been done by a foreign corporation. The Supreme Court of Alabama in interpreting the statute held that the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. It said:

"It is contended, however, by section 1207 of the code, *supra*, these provisions of the law are made to include 'associations'

and 'partnerships' as well as 'corporations' and in this respect discriminates against citizens of another State who may compose such 'partnerships,' and in this respect is violative of the constitutional provision which declares that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' We construe section 1207 as amendatory of the sections to which it refers, so as to substitute the words 'corporation, association or partnership' for the words 'insurance company.' Thus construed, section 1205, *supra*, would read as follows: 'Any person who solicits insurance on behalf of a corporation, association or partnership not incorporated by the laws of this State,' etc., and section 1206, *supra*, would read: 'Any person acting as agent of any foreign corporation, association or partnership which has,' etc.

"By holding that section 1207 is amendatory of the other sections referred to in the manner declared, sections 1205 and 1206 are separable in their provisions, and, so far as they are made to apply to and are enforced against 'foreign corporations,' they do not contravene any provision of the state constitution or the Constitution of the United States. 8 Wall. *supra; Baldwin* v. *Franks*, 120 U. S. 678; *S. & N. R. R. Co.* v. *Morris*, 65 Alabama, 193; *McCreary* v. *The State*, 73 Alabama, 480; *Powell* v. *The State*, 69 Alabama, 10; *Vines* v. *The State*, 67 Alabama, 73. The construction of the statute is one of difficulty, and the one given to it is not altogether satisfactory, but we are of opinion the language used in section 1207, considered in connection with other sections to which it refers, admits of the interpretation given to it, and when the statute is attacked upon constitutional grounds it is our duty to avoid such a construction, if it can be done consistently, as will defeat the entire legislation of the State upon questions embraced in these statutes relating to insurance companies."

This construction of the Alabama statute, although made by the Supreme Court of that State, it is urged is erroneous, and we are invited to disregard it; but manifestly the interpretation of a statute of the State of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us. *Dibble* v. *Bellingham Bay Land Co.*, 163

U. S. 63, 73; *Union Bank* v. *Louisville, New Albany &c. Railway*, 163 U. S. 325, 331.

Reading, then, into the Alabama statute the construction given thereto by the court of last resort of that State, the argument of the plaintiff in error amounts to this, that, although it is admitted that the law of the State of Alabama regulating the doing of insurance business by foreign corporations is not in conflict with the Constitution of the United States, nevertheless we should hold that it does violate that Constitution, because of another and separate law of Alabama, which it is asserted would be unconstitutional if it were before us for consideration. Of course, to state this proposition is to answer it.

It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower* v. *Richards*, 151 U. S. 658; *In re Buchanan*, 158 U. S. 31.

Affirmed.

Mr. Justice Harlan dissented.

UNITED STATES *v.* ELLIOTT.

APPEAL FROM THE COURT OF CLAIMS.

No. 37. Argued October 19, 1896. — Decided November 30, 1896.

A tract of land in South Carolina was sold in 1863 under the direct tax acts for non-payment of the direct tax to the United States, and was bid in by the United States. It was then subdivided into two lots, A and B. Lot A, the most valuable, was resold at public auction to E who had a life estate in it, and it was conveyed to him. Lot B was also resold, but the present controversy relates only to Lot A. This lot was purchased by a person who had been a tenant for life of the whole tract before the tax sale. After the purchase and during his lifetime it was seized under execution and sold as his property. No part of the property has come

Statement of the Case.

into the possession of the remaindermen, claimants in this action, nor have they repurchased or redeemed any part of it from the United States, nor has any purchase been made on their account. Under the act of March 2, 1891, c. 496, 26 Stat. 822, they brought this suit in the Court of Claims to assert their claim as owners in fee simple in remainder, and to recover one half of the assessed value of the tract. *Held*, that as they were admittedly owners, as they themselves neither purchased nor redeemed the land, and as they are not held by any necessary intendment of law to have been represented by the actual purchaser, they are entitled to the benefit of the remedial statute of 1891.

The facts of the case, as found by the Court of Claims, were as follows:

On March 13, 1863, block 91, in the town of Beaufort, South Carolina, was sold by the United States direct tax commissioner for South Carolina, under the direct tax acts, act of August 5, 1861, c. 45, § 8, 12 Stat. 292, 294; act of June 7, 1862, c. 98, 12 Stat. 422, to satisfy a tax, with penalty and interest, of $127.42 assessed against it, and was bid in by the United States. Said block was assessed for taxation by the said commissioner at $10,000. Subsequently it was divided into two lots, viz., lot A, containing buildings, and measuring on the north line 103 feet; and lot B, measuring on the north line 207½ feet.

Lot A was resold November 1, 1866, at public auction, to T. R. S. Elliott for $200, and conveyed to him. Lot B was resold at public auction to Thomas M. S. Rhett for $225. At the time of the said sale for taxes the titles in lots A and B, save so much thereof as lies west of a line drawn parallel to the west line of lot A 103 feet west therefrom, were vested in T. R. S. Elliott as tenant for life, with remainder in fee in Alfred, William, Phœbe, Ann C., James C., Arthur H., Isabella R., Seignley C., Montrose and Apsley H. Elliott, children of the said T. R. S. Elliott. The said Apsley H. Elliott died in the year 1867, and the other mentioned children are his heirs at law. The said Thomas R. S. Elliott died in 1876. The surviving children, who are the claimants, were of tender years during the late civil war. The value of that part of block 91 owned by the claimants is twenty-nine thirtieths of the whole value of said block.

Argument for Appellants.

Thomas R. S. Elliott, the tenant for life, adhered to the cause of the rebellion, and on the occupation of Port Royal by the Union troops in November, 1861, left St. Helena Island, with all the population of those islands, and remained away until after the close of the war. During the entire period of his absence St. Helena Island and the adjacent islands were occupied by United States troops and had been entirely abandoned by the original inhabitants. After the purchase, in November, 1866, by T. R. S. Elliott, the property was seized under execution and sold as his property. Subsequently the purchaser of the property at sheriff's sale handed to the widow of T. R. S. Elliott the value of her dower in the property. No part of the property has come into the possession or ownership of the claimants, or any one of them, through the said T. R. S. Elliott. The claimants have not repurchased or redeemed any part of said property from the United States, nor has any purchase been made or intended to be on their account.

On this state of facts the Court of Claims found that the claimants were entitled to recover, and on May 8, 1893, entered judgment in their favor for the sum of four thousand one hundred and eighty-five $\frac{98}{100}$ dollars. From this judgment an appeal was taken and allowed to this court.

Mr. Assistant Attorney Gorman and *Mr. Assistant Attorney General Dodge* for appellants.

If a tenant for life neglects or refuses to pay the taxes, a receiver may be appointed to take so much of the rent as is necessary for that purpose and to discharge that obligation. *Cairns* v. *Chabert*, 3 Edw. Ch. 312.

It is thoroughly settled that a tenant for life cannot purchase at a tax sale, nor acquire an interest adverse to the reversioner or remainderman by obtaining an assignment of the tax title. *Phelan* v. *Boylan*, 25 Wisconsin, 679; *Varney* v. *Stevens*, 22 Maine, 331; *Prettyman* v. *Walston*, 34 Illinois, 175–191; *Olleman* v. *Kelgore*, 52 Iowa, 38; *Patrick* v. *Sherwood*, 4 Blatchford, 112; *Arnold* v. *Smith*, 3 Bush, 163;

Stovall v. *Austin*, 16 Lea (Tenn.), 700; *Stewart* v. *Matheny*, 66 Mississippi, 21.

It is entirely unnecessary, however, to multiply authorities on the subject. As was said by Judge Cooley and approvingly quoted by this court in *Lamborn* v. *County Commissioners*, *supra*, "the principle is universal, and is so entirely reasonable as scarcely to need the support of authorities"; or, as was said by the Court of Claims in *Chaplin* v. *United States*, 29 C. Cl. 231, "the authorities are abundant and are all one way."

Of course there can be no question but that the term "owner" as used in the act applies to the life tenant. Under the decisions of the Court of Claims the term is held to embrace all persons who have any estate in the property. *Rodgers's case*, 21 C. Cl. 130; *Elliott's case*, 20 C. Cl. 328; *Cuthbert's case*, 20 C. Cl. 172.

It is apparent, then, that when this life tenant, Thomas R. S. Elliott, repurchased the real estate in question from the United States, it was a purchase for the benefit of the respondents, the remaindermen. It follows that the property having been purchased from the United States "by the owner or those under whom he claims," the respondents are by the terms of the first proviso of section 4 of the act of March 2, 1891, expressly inhibited from recovery, and that the judgment rendered in their favor was erroneous.

Mr. James Lowndes for appellees.

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

The act of February 6, 1863, c. 21, 12 Stat. 640, provided for the collection of direct taxes in insurrectionary districts within the United States, by subjecting lands, on which such taxes had been assessed and remained unpaid, to public sale to the highest bidder for a sum not less than the taxes, penalty and costs, and ten per centum per annum on said tax. The act contained a provision that the tax commissioners should be authorized to bid in such lands for the United States at a

sum not exceeding two thirds of the assessed value thereof, unless some person should bid a larger sum. It also gave a right of redemption to minors, non-resident aliens, loyal citizens beyond seas, guardians or trustees of persons under legal disabilities at any time within two years of such sale.

The land of the claimants was sold on March 3, 1863, and bid in by the United States for the sum of eleven hundred dollars. Subsequently, November 1, 1866, the United States sold at public auction that portion of its land described as lot A to T. R. S. Elliott for two hundred dollars, and the same was conveyed to him. Said Elliott died in 1876. During his lifetime the land was seized under execution as his property and sold, and never afterwards came into his possession or that of the claimants.

The act of March 2, 1891, c. 496, 26 Stat. 822, provided for the return to the owners of lands bid in for taxes and subsequently resold of any excess received by the United States beyond the amount of the tax assessed thereon, and also for a certain rate of compensation to the owners of property sold for direct taxes. The fourth section of that act contained the following:

"That it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor and furnish satisfactory evidence that such applicant was at the time of the sales hereinafter mentioned the legal owner, or is the heir at law or devisee of the legal owner of such lands as were sold in the parishes of St. Helena and St. Luke in the State of South Carolina, under the said acts of Congress, the value of said lands, in the manner following, to wit: To the owners of the lots in the town of Beaufort, one half of the value assessed thereon for taxation by the United States direct tax commissioners for South Carolina; to the owners of lands which were rated for taxation by the State of South Carolina as being usually cultivated, five dollars per acre for each acre thereof returned on the proper tax book; to the owners of all other lands, one dollar per acre for each acre thereof returned on said tax book: *Provided*, That in all cases where such owners, or persons claiming under them, have redeemed or

purchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased; and any sum or sums held or to be held by the said State of South Carolina in trust for any such owner under section three of this act shall be deducted from the sum due to such owner under the provisions of this section: *And provided, further*, That in all cases where said owners have heretofore received from the United States the surplus proceeds arising from the sale of their lands, such sums shall be deducted from the sum which they are entitled to receive under this act."

This suit was brought by the appellees in the Court of Claims to assert their claim as the owners in fee simple in remainder of block 91, composed of lots A and B, to $\frac{29}{30}$ths of one half of the value assessed for taxation on said block by the United States direct tax commissioners for South Carolina. The Court of Claims found, among other findings, that the claimants had not repurchased or redeemed any part of lot A from the United States; nor had any purchase been made, intended to be on their account; and rendered judgment for the claimants in the sum of $4709.22, being $\frac{29}{30}$ths of one half of the assessed value of block 91, less the taxes assessed thereon under the direct tax acts. From so much of this judgment as relates to one half of the assessed value of lot A the United States appealed to this court. There is no controversy as to so much of the judgment as relates to lot B.

The United States do not claim that the appellees, as remaindermen in fee, are not owners, within the meaning of the statute; but they contend that the claimants are within the exclusion of the proviso that in all cases where such owners, or persons claiming under them, have redeemed or repurchased said lands, or any part thereof, from the United States, they shall not receive compensation for such part so redeemed or purchased.

As already stated, the Court of Claims found, as a fact, that the claimants had not redeemed or repurchased any part of lot A, nor had any purchase thereof been made on their account. But this finding is alleged by the United States to

have been based on an erroneous view of the law, that the claimants must be deemed to have repurchased lot A because T. R. S. Elliott, the life tenant, had purchased said lot A at the public sale made by the government in 1866.

The theory of the government is that the life tenant was so far a trustee or representative of the remaindermen that, when he purchased at the public sale in 1866, he acted as well for those in remainder as for himself. To sustain this view the counsel for the United States point to the numerous cases in which it has been held that a tenant for life cannot purchase for himself at a tax sale or acquire an interest adverse to the reversioner or remainderman by obtaining an assignment of the tax title.

Unquestionably, those cases do declare that, as it is the duty of the life tenant to pay the taxes, he cannot, by buying the property at a tax sale or by buying from a purchaser at such sale, take advantage of his own wrong and set up a title so acquired against the remaindermen.

But does the principle of such decisions apply to a case like the present?

That principle is that one whose duty it is to keep the taxes paid cannot, as against those who had a right to rely on his performance of such duty, successfully assert a title originating in his dereliction of duty. In all the cases cited the question was between the life tenant and the remaindermen. In the present case the doctrine is invoked, not in protection of the remaindermen, but to their detriment. The argument is that, because the remaindermen might, by proceeding in equity, have had it declared that the title purchased by the life tenant at the public sale enured to their benefit, it therefore follows that they must be regarded to have been purchasers at said sale, and be now precluded from the benefits of the act of 1891.

An important circumstance is that T. R. S. Elliott did not buy the property at the tax sale in 1863; nor did he buy from an agent or go-between who bought at that sale; nor did he redeem the land under the provisions of the tax law. He bought at the public sale in 1866, the time for redemption

having long expired, when the United States gave a fee simple title, free from encumbrances, to the purchaser. If any one else than the former life tenant had purchased at that sale, it is indisputable that the present claimants would have had a right to recover the money coming to them as owners under the act of 1891. T. R. S. Elliott was under no obligations to bid, and we are unable to see that his doing so changed the relations between the United States and the appellees. If the creditors of T. R. S. Elliott, instead of awaiting his action in possessing himself of the title of the United States to the property, and then seizing it in execution, had themselves bought at the sale, the substantial facts would have been just what they now are. It was found as a fact, by the Court of Claims, that in buying at the auction sale T. R. S. Elliott did not act for or on account of the remaindermen, and we do not feel constrained to extend a doctrine devised for the protection of *cestuis que trustent* so as to operate to their injury.

As, then, the appellees were admittedly owners; as they themselves neither purchased nor redeemed the land; and as they are not held by any necessary intendment of law to have been represented by the actual purchaser, it follows that they are entitled to the benefit of the remedial statute of 1891, and the decree of the Court of Claims to that effect is accordingly

Affirmed.

STONE *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 113. Argued November 4, 1896. — Decided November 30, 1896.

The findings of the Court of Claims in an action at law determine all matters of fact, like the verdict of a jury; and when the finding does not disclose the testimony, but only describes its character, and, without questioning its competency, simply declares its insufficiency, this court is not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings.

Opinion of the Court.

On April 16, 1891, appellant, under authority of the act of March 3, 1891, c. 538, 26 Stat. 851, filed his petition in the Court of Claims to recover the sum of $12,375 for certain property, to wit, two geldings, of the value of $500 each, and ninety-one head of horses, of the value of $125 each, alleged to have been taken or destroyed by the Cheyenne and Arapahoe Indians on November 17, 1867. A traverse having been filed the case was submitted to the court upon the evidence. Certain findings of fact were made, the second of which is as follows:

"The depredation was committed on the 17th November, 1867, near the town of Fort Collins, in Larimer County, Colorado, by the defendant Indians. The claimant never presented this claim to the Department of the Interior nor to Congress nor to any officer or agent of the government until his petition in this case was filed in this court on the 16th April, 1891. It is supported only by the testimony of the claimant himself and one witness. Since the claimant testified he has filed his own *ex parte* affidavit, stating that the witness above referred to 'is the only person with whom I am acquainted who is familiar with the theft complained of,' and that of thirteen persons who followed the Indians at the time they took his horses he does not know the whereabouts of any except the witness produced, and that he had used every endeavor to discover the other witnesses, but can secure no information except that they are dead. The court is not satisfied by this evidence as to the extent of the depredation or the value of the property."

Upon this finding judgment was entered in favor of the defendants, 29 C. Cl. 111, from which judgment the claimant appealed to this court.

Mr. Charles A. Keigwin and *Mr. J. M. Wilson* for appellant. *Mr. W. B. Matthews* was on their brief.

Mr. Assistant Attorney General Howry for appellees.

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

The findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury. Act of March 3, 1887, c. 359, §§ 2, 7, 24 Stat. 505; act of March 3, 1891, c. 538, §§ 1, 4, 26 Stat. 851, 852; *Desmare* v. *United States*, 93 U. S. 605, 610; *McClure* v. *United States*, 116 U. S. 145.

That court finds that the claimant, upon whom rests the burden of proof, has not proved the extent of the depredation or the value of the property, and there being thus a case of a failure of proof judgment properly went against the party upon whom the burden rested. Counsel for appellant contend that the Court of Claims has attempted to create a rule of evidence as to the number of witnesses required in different classes of cases. Beyond the language of this finding they call our attention to the opinion in which, after a reference to the peculiar circumstances of this case, the court observes: "The court has no reason in this particular case, other than the lapse of time and the inaction of the claimant, to discredit the witnesses or suspect the claim." We cannot so interpret the finding or the opinion. We do not understand that either lays down any arbitrary rule of evidence, as, for instance, that a claim ten years old must be proved by at least two witnesses, one twenty years old by three witnesses, and so on. Such action would be legislative rather than judicial. The court simply refers, and properly, to the age of the claim, the failure to present it for such a length of time and the meagreness of the testimony now offered to substantiate it, and then finds that such testimony, as to two essential facts in the claimant's case, to wit, the extent of the depredation and the amount of the loss, is not sufficient. It is true the court does not find that the witnesses have sworn falsely, but that is not essential even when that is its belief. To say that the testimony is not satisfactory is more polite and less offensive, and at the same time equally sufficient. More than that, it is the very language of the statute, sec. 4: "But the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court." We do not mean to intimate that the court in this

case believed that the witnesses committed perjury. On the contrary it may well be that it simply found the testimony so confused, so lacking in distinctness and precision, as to suggest a weakening of the memory through lapse of time, and, therefore, not the satisfactory proof required of these essential facts.

We are not at liberty to refer to the opinion for the purpose of eking out, controlling or modifying the scope of the findings. *British Queen Mining Co.* v. *Baker Silver Mining Co.*, 139 U. S. 222; *Lehnen* v. *Dickson*, 148 U. S. 71; *Saltonstall* v. *Birtwell*, 150 U. S. 417. Neither is this a case like *United States* v. *Clark*, 96 U. S. 37, in which in one finding was stated the testimony, and in another the conclusion as to the ultimate fact, in which case the court held that it might consider the sufficiency of such testimony to establish that principal fact, for here the finding does not disclose the testimony, but only describes its character, and, without questioning its competency, simply declares its insufficiency.

The judgment is

Affirmed.

NORTHERN PACIFIC RAILROAD COMPANY *v.* COLBURN.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 70. Argued October 27, 1896. — Decided November 30, 1896.

The Supreme Court of the State of Montana having decided adversely to the plaintiff in error a claim of title to land under an act of Congress, a Federal question was thereby raised.

No preëmption or homestead claim attaches to a tract of public land until an entry in the local land office; and the ruling by the state court that occupation and cultivation by the claimant created a claim exempting the occupied land from passing to the railroad company under its land grant, is a decision on a matter of law open to review in this court.

The facts found below were not of themselves sufficient to disturb the title of the railroad company under the grant from Congress.

On April 23, 1892, defendant in error, as plaintiff, filed in the district court of the county of Gallatin, Montana, his com-

plaint against the railroad company to recover a sum of money paid as the contract price of a tract of land conveyed by it to him. The contract was alleged to have been made on January 16, 1886, by the company, with Nathan Frost, who, in the same year, transferred his interest to John R. Foster, who, in 1888, in like manner conveyed to the plaintiff. Payments by the terms of the contract were to be made and were made on January 16 of the years 1886, 1887, 1888, 1889, 1890 and 1891. The complaint further alleged that the railroad company did not have and could not convey any title to the land; that in January, 1891, in certain proceedings in contest, the Secretary of the Interior decided that the land did not pass under the land grant to the railroad company, but was subject to entry and patent under the general land laws of the United States; and that during that year a patent was issued to the plaintiff.

The railroad company answered, setting up the act of Congress of July 2, 1864, c. 217, 13 Stat. 365, making to it a land grant of twenty alternate sections per mile on each side of its road in the Territories of the United States; the filing on February 21, 1872, in the office of the Commissioner of the General Land Office, of its map of general route, as provided in section six of the act; the like filing on July 6, 1882, of its line of definite location; the construction of its road; that this land was not mineral; was free from preëmption and other claims; was in an odd-numbered section within forty miles of its line of general route and twenty miles of its road as definitely located and constructed, and situated within the Territory of Montana; and alleged that thereby it acquired full title. It set forth in terms the contract of January 16, 1886, with Nathan Frost, the various transfers by which, on January 15, 1888, the plaintiff obtained title thereto, admitted the payments, and alleged an execution and delivery to the plaintiff of a deed, in conformity to the terms of the contract; and further, that his possession had never been disturbed or his title assailed or impaired. It admitted that at the time of the filing of the map of definite location one Horace F. Kelly claimed to be occupying and cultivating the land, but denied that he had made any entry or filing in the local land office.

It alleged that in 1888, Foster, plaintiff's immediate grantor, contested the right of the railroad company to this land, that a contest thereon was had in the land office and finally on appeal before the Secretary of the Interior, who held that Kelly's cultivation and occupation created a claim which he could have perfected under the public land laws, and therefore excepted the land from the scope of the company's grant. It denied that a patent had been issued to the plaintiff, or to any one else, and alleged that prior to plaintiff's purchase of the contract from Foster he knew of the claim that the land was not within the scope of the company's land grant and was not its property.

To this answer a demurrer was filed by the plaintiff which was sustained by the circuit court, and a judgment rendered for the plaintiff. Thereupon the case was taken to the Supreme Court of the State, which affirmed the judgment, 13 Montana, 476, and the railroad company sued out this writ of error.

Mr. C. W. Bunn for plaintiff in error.

Mr. W. B. Matthews submitted for defendant in error.

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

A motion is made to dismiss for lack of a Federal question. The contention is that the defendant disclosed in its answer a decision of the land department; that it is bound by its own pleadings; and that having pleaded this decision of the land department, that decision is final and conclusive until set aside in a direct proceeding instituted for that purpose. This motion must be overruled. The answer of the company alleged the Congressional land grant, and the facts and circumstances which under that grant created, as claimed, a title in it to the land. It is true it also set up certain proceedings in the land department, but that was by way of answer to the allegations in the complaint of a decision by that department claimed by the plaintiff to be controlling, and disclosed

in detail the facts upon which that decision was based and the terms of the decision itself in order to show that such decision was ineffective to disturb the title which it took by virtue of the land grant and the proceedings had thereunder. If the company had relied upon this decision as its defence against the action, and the court had decided in favor of its validity, a different conclusion might be reached. The judgment of the Supreme Court of the State was adverse to the claim of title made by the company. It denied to it the right which it asserted under the act of Congress, and a Federal question is, therefore, presented.

On the merits of the case it may be observed that the burden of the decision of the Supreme Court of the State is that because the land department had decided adversely to the claim of the railroad company and because no direct proceedings had been had to set aside that decision, it was conclusive against the company. In this we think the learned court erred. The facts set up in the answer in reference to the land grant, the filing of the map of the line of general route and also that of definite location, the situation of the land, and its freedom from record claims, were such as to *prima facie* vest a title in the company. It is true it is also disclosed by the answer that one Kelly was in occupation, or at least cultivating the land at the time of the filing of the map of definite location, and the decision of the land department as to that fact undoubtedly concludes both parties. And if it be true, as matter of law, that mere occupation or cultivation of the premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, excludes the tract from the operation of the land grant, the decision of the Supreme Court of Montana was right. But frequent decisions of this court have been to the effect that no preëmption or homestead claim attaches to a tract until an entry in the local land office. Thus, in the case of *Kansas Pacific Railroad* v. *Dunmeyer*, 113 U. S. 629, 644, Mr. Justice Miller, speaking for the court, said:

"Of all the words in the English language, this word

'attached' was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation."

This language was quoted and the decision reaffirmed in *Hastings & Dakota Railroad* v. *Whitney*, 132 U. S. 357; *Whitney* v. *Taylor*, 158 U. S. 85. In *Lansdale* v. *Daniels*, 100 U. S. 113, 116, it was ruled that "such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preëmptor, the rule being that his settlement alone is not sufficient for that purpose." See also *Maddox* v. *Burnham*, 156 U. S. 544. Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts.

In this connection it may be borne in mind that the act of Congress operated to pass the fee of the land to the company, and this independently of the issue of a patent. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 6; *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241. While it is alleged in the complaint that a patent had been issued to the plaintiff, this fact is denied in the answer, so that the case is presented of a mere decision of the Secretary of the Interior that the plaintiff was entitled to a patent and not that of a patent already issued.

Though a patent had been issued it would not follow that that is conclusive in even an action at law, and that in all cases some direct proceeding to set aside the patent is necessary. *Burfenning* v. *Chicago, St. Paul &c. Railway*, 163 U. S. 321, and cases cited in the opinion.

There are other questions in this case, such as the significance of an "expired filing," the omission in the Northern Pacific land grant of the word "attached" in respect to preëmption claims which seems to have been deemed by this court significant in the construction of the Union Pacific and other land grants, the question whether, after the filing of the map of general route on February 21, 1872, any rights of preëmption or homestead could be acquired in this land, and also whether, as plaintiff had not been disturbed in his possession and made his payments with notice of all the facts, he must not be held to have made such payments voluntarily or only under a mistake of law, and so be precluded from recovering. But as none of these matters were considered by the Supreme Court of the State, and are not noticed by counsel for defendant in error, we deem it unwise to make any observations thereon, leaving them for consideration in the future progress of the case.

For the reasons above indicated, because the decision of the land department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, the judgment is

Reversed and the case remanded to the Supreme Court of the State for further proceedings not inconsistent with this opinion.

ACERS *v.* UNITED STATES.

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

No. 393. Submitted October 22, 1896. — Decided November 30, 1896.

The exceptions to this charge are taken in the careless way which prevails in the Western District of Arkansas.

In a trial for assault with intent to kill, a charge which distinguishes between the assault and the intent to kill, and charges specifically that each must be proved, that the intent can only be found from the circumstances of the transaction, pointing out things which tend to disclose the real intent, is not objectionable.

Opinion of the Court.

There is no error in defining a deadly weapon to be "a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing by which death can be easily and readily produced, the law recognizes it as a deadly weapon."

With reference to the matter of justifying injury done in self-defence by reason of the presence of danger, a charge which says that it must be a present danger, "of great injury to the person injured, that would maim him, or that would be permanent in its character, or that might produce death," is not an incorrect statement.

The same may be said of the instructions in reference to self-defence based on an apparent danger.

THE case is stated in the opinion.

Mr. A. H. Garland and *Mr. R. C. Garland* for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiff in error was convicted in the District Court for the Western District of Arkansas of an assault with intent to kill, and sentenced to the penitentiary for the term of two years and six months. The undisputed facts were these: Defendant and one Joseph M. Owens had some dispute about business affairs, and while returning together to the house where they were both stopping, defendant picked up a stone about three inches wide, nine inches long and an inch and a half or two inches thick, and with it struck Owens on the side of the head, fracturing the skull. The defence was that there was no intent to kill; that defendant acted in self-defence; that, believing Owens was about to draw a pistol, he picked up the stone and pushed him down; and the disputed matters were whether Owens had a pistol, and if so, whether he attempted to draw it, or made any motions suggestive of such a purpose. The verdict of the jury was adverse to the contentions of the defendant.

The only questions presented for our consideration arise on the charge of the court, and may be grouped under four heads: First, as to the evidences of intent; second, as to what constitutes a deadly weapon; third, as to real danger; and, fourth, as to apparent danger. It may be premised that the exceptions to this charge are taken in the careless way which prevails in the Western District of Arkansas; but passing this and considering the charge as properly excepted to we find in it no substantial error.

First. With reference to the charge as to the matter of intent, counsel for plaintiff in error challenge a single sentence, as follows: "But you need not go to a thing of that kind, because the law says you may take the act itself as done, and from it you may find that it was wilfully done." But this sentence is to be taken, not by itself alone, but in connection with many others, in order to determine what the court instructed as to the evidences of intent. It distinguished between the assault and the intent to kill, and charged specifically that each must be proved, that the intent could only be found from the circumstances of the transaction, and, after suggesting that the declarations made by a party at the time of an assault would tend to show the intent with which it was committed, added the sentence which counsel have quoted. Nowhere, not even in the sentence quoted, was it said that the assault of itself necessarily proved the intent, but all through the charge in this respect was the constant declaration that the intent was to be deduced from all the circumstances of the case, the court pointing out many things which tended to disclose the real intent of a party, summing up the matter with these observations: "That is the way you find intent, then, bearing in mind that he is held to have intended whatever consequences might have followed from the act as wilfully done by him with the deadly weapon. You, in other words, to find intent, take the circumstances; you take the character of the act done, the manner in which it was executed, the weapon used in executing it, the part of the body upon which it was executed, the very result produced by that act upon that vital part of the body known as the

head. These are all circumstances that it is your duty to take into consideration to find whether the party intended to kill him or not." There is nothing objectionable in this.

Second. With respect to a deadly weapon, the court defined it as "a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon." We see nothing in this definition to which any reasonable exception can be taken. Nor do we find anything in the subsequent language of the court which in any manner qualifies this definition, or can be construed as an instruction to the jury that as matter of law the stone actually used was a deadly weapon. It is true reference was made to the manner in which the stone was used and the part of the body upon which the blow was struck as considerations to aid the jury in determining whether it was properly to be considered a deadly weapon. We have so little doubt that when one uses a stone of such size and strikes a blow on the skull so severe as to fracture it, a jury ought to find that the stone was a deadly weapon, that if the court had expressed a definite opinion to that effect we should have been reluctant on that account alone to have disturbed the judgment. But the court did not so express itself, and in calling attention to the manner of its use and the part of the body upon which the blow was struck it only properly called the attention of the jury to circumstances fairly to be considered in determining the character of the weapon. *United States* v. *Small*, 2 Curtis, 241, 243; *Commonwealth* v. *Duncan*, 91 Kentucky, 592; *State* v. *Davis*, 14 Nevada, 407, 413; *People* v. *Irving*, 95 N. Y. 541, 546; *Hunt* v. *State*, 6 Tex. App. 663; *Melton* v. *State*, 30 Tex. App. 273; *Jenkins* v. *State*, 30 Tex. App. 379.

Third. With reference to the matter of self-defence by reason of the presence of a real danger, the court charged that it could not be a past danger, or a danger of a future injury, but a present danger and a danger of "great injury to the

person injured that would maim him, or that would be permanent in its character, or that might produce death." In this we think nothing was stated incorrectly, and that there was a fair definition of what is necessary to constitute self-defence by reason of the existence of a real danger.

Neither, fourthly, do we find anything to condemn in the instructions in reference to self-defence based on an apparent danger. Several approved authorities are quoted from in which the doctrine is correctly stated that it is not sufficient that the defendant claims that he believed he was in danger, but that it is essential that there were reasonable grounds for such belief, and then the rule was summed up in this way:

"Now, these cases are along the same line, and they are without limit, going to show that, as far as this proposition of apparent danger is concerned, to rest upon a foundation upon which a conclusion that is reasonable can be erected there must be some overt act being done by the party which from its character, from its nature, would give a reasonable man, situated as was the defendant, the ground to believe — reasonable ground to believe — that there was danger to his life or of deadly violence to his person, and unless that condition existed then there is no ground upon which this proposition can stand; there is nothing to which the doctrine of apparent danger could apply."

Counsel criticise the use of the words "deadly violence," as though the court meant thereby to limit the defence to such cases as showed an intention on the part of the person assaulted to take the life of the defendant, but obviously that is not a fair construction of the language, not only because danger to life is expressly named, but also because in other parts of the charge it had indicated that what was meant by those words was simply great violence. This is obvious from this language, found a little preceding the quotation: "'When from the nature of the attack.' You look at the act being done, and you from that draw an inference as to whether there was reasonable ground to believe that there was a design upon the part of Owens in this case to destroy the life of the defendant Acers or to commit any great violence upon his person at the

time he was struck by the rock. 'When from the nature of the attack.' That implies not that he can act upon a state of case where there is a bare conception of fear, but that there must exist that which is either really or apparently an act of violence, and from that the inference may reasonably be drawn that there was deadly danger hanging over Acers, in this case, at that time."

These are all the matters complained of. We see no error in the rulings of the court, and, therefore, the judgment is

Affirmed.

MR. JUSTICE SHIRAS dissented.

ATLANTIC AND PACIFIC RAILROAD COMPANY *v.* LAIRD.

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

No. 64. Submitted October 27, 1896. — Decided November 30, 1896.

The complaint in this case charged that the Atchison, Topeka and Santa Fé Company and the plaintiff in error, corporations of the State of Massachusetts, were, at the time of the injury complained of, jointly operating a railroad; that the defendant was travelling upon it with a first class ticket; and that by reason of negligence of the defendants an accident took place which caused the injuries to the plaintiff for which recovery was sought. The answers denied joint negligence, or joint operation of the road, and admitted that the plaintiff in error was operating it at the time. A trial resulted in a verdict in favor of the Atchison Company and against the plaintiff in error. On the trial the complaint was amended by substituting "second class" for "first class" ticket, and that the charters were by acts of Congress, and to the complaint so amended the statute of limitations was pleaded. A judgment on the verdict was set aside and an amended complaint was filed in which the plaintiff in error was charged to have done the negligent acts complained of, and recovery was sought against it. A second trial resulted in a verdict against the company. *Held*,

(1) That the action was *ex delicto;* that the defendants might have been sued either separately or jointly; that recovery might have been had, if proof warranted against a single party; and that the amend-

ment, dismissing one of two joint tort feasors, and alleging that the injury complained of was occasioned solely by the remaining defendant, did not introduce a new cause of action;

(2) That the amendment stating that the plaintiff was travelling upon a second class ticket instead of a first class ticket, and that the plaintiff in error was chartered by an act of Congress instead of by a statute of Massachusetts, as originally averred, did not state a new cause of action.

The action below was originally brought in a state court in California against the plaintiff in error and the Atchison, Topeka and Santa Fé Railroad Company to recover damages for personal injuries sustained on November 3, 1890, by the derailment of a train of cars upon which the plaintiff was a passenger. It was alleged in the complaint that each of defendants was a corporation of the State of Massachusetts; that they jointly owned and operated a described line of railroad; that plaintiff was a passenger on one of the trains coming westward on said line of railroad, holding and travelling upon a first class ticket entitling her to travel between named stations, and the liability of the defendants was claimed to arise by reason of alleged negligence, both in the construction of the road and in the management of the train. Upon the several applications of the defendants, the cause was transferred to the Circuit Court of the United States for the Southern District of California. In that court answers were filed denying that the defendants were jointly guilty of the negligence complained of or that they jointly operated the line of railroad described in the complaint, but admitting that the defendant, the Atlantic and Pacific Railroad Company, was operating the road. The cause was tried for the first time in November, 1892, and resulted in a verdict for plaintiff against the Atlantic and Pacific Railroad Company, and in favor of the Atchison Company. On the trial the plaintiff was allowed to amend her complaint by alleging that the ticket upon which she was travelling was a "second class" ticket instead of, as alleged in the original complaint, a "first class" ticket. To the cause of action stated in the complaint as thus amended the defendants pleaded a statute of limitations of two years. Judgment was entered on the verdict,

but this judgment was subsequently set aside, with leave to the plaintiff to amend her complaint. On February 7, 1893, a second amended complaint was filed, in which the Atlantic and Pacific Railroad Company was charged to have owned and operated the line of railroad in question, and to have done the negligent acts averred in the original complaint. An attack upon this pleading was made in the trial court by motion to strike from the files, by demurrer, by motion for judgment upon the pleadings, and by special requests for directions to the jury upon the second trial of the case. The ground of all such attacks was that the pleading set up a new cause of action, against which the statute of limitations had run at the time of the filing of such pleading. The cause was tried for the second time in April, 1893, and a verdict was again rendered against the Atlantic and Pacific Railroad Company. A judgment upon such verdict was subsequently affirmed by the Circuit Court of Appeals. 15 U. S. App. 248. By writ of error such judgment of affirmance was brought to this court for review.

Mr. A. T. Britton, *Mr. A. B. Browne* and *Mr. C. N. Sterry* for plaintiff in error.

Mr. George H. Smith, *Mr. Frank H. Short* and *Mr. Edwin A. Meserve* for defendant in error.

Mr. Justice White delivered the opinion of the court.

It is not controverted that under section 339 of the Code of Civil Procedure of California a cause of action of the character of that set forth in the various complaints filed on behalf of plaintiff was required to be instituted within two years after the cause of action accrued.

The question to be determined, therefore, is whether the trial court erred in holding that the amendments effected by the second amended complaint did not set up a new cause of action; for, if the second amended complaint stated a distinct and independent cause of action, the bar of the statute

should have been allowed to prevail. *Union Pacific Railway Company* v. *Wiley*, 158 U. S. 285.

The contention of the plaintiff in error that there was a departure resulting from the amended petition is based upon two propositions: 1, that the parties defendant in the original complaint were sued jointly *ex quasi contractu*, and were liable only upon proof of a joint contract, whilst the amended petition proceeded upon a contract made only by one and a different person than those originally sued; and, 2, because certain averments in the petition as to the place of incorporation of plaintiff in error and as to the character of ticket upon which the plaintiff travelled changed the cause of action.

We will discuss these two contentions separately.

1. *Was the action stated in the original complaint one against the defendants as distinct and separate corporations, or against them as a single entity or artificial being, and what was the nature of the cause of action?*

It is urged by the plaintiff in error that as the complaint, after alleging that the defendants jointly owned and operated the line of road in question and jointly committed the alleged negligent acts, charged that they together "were a common carrier of passengers on said road," that such allegation must be construed as an averment that the defendants were a single company, and that it cannot be assumed that one or the other, by itself, had capacity to violate any duty of a common carrier of passengers, or that either had power to sue or be sued separately and alone from the other.

This construction of the complaint is obviously a forced and unnatural one. In the caption of the complaint the two defendants were designated as distinct corporations and several defendants, while in separate paragraphs each defendant was alleged to be a corporation, duly incorporated under the laws of the State of Massachusetts, and having its principal place of business outside of the State of California. Soon after the filing of the complaint each defendant presented its separate application for removal of the cause to the Federal court. In that of the Atchison, Topeka and Santa Fé road it was averred that it was a corporation organized, existing

and doing business under and by virtue of the laws of the State of Kansas. The Atlantic and Pacific Company averred in its application that it was a corporation duly created, organized and existing under an act of Congress, which, it was expressly alleged, authorized it to construct and operate, as a common carrier of passengers and freight, certain described lines of railroad, including the line of railroad upon which plaintiff received her injury. The answer filed on behalf of the defendants was "joint and several," and it was therein admitted that the defendant, the Atlantic and Pacific Company, plaintiff in error here, was operating the line of railroad in question. The case presented by the complaint, giving to the language employed the reasonable inferences which it should receive, was one where each of two corporations was proceeded against as a common carrier of passengers, exercising their respective corporate powers concurrently, the two corporations acting together, just as several individuals might have done.

Looking then to the averments of the complaint, we find it stated that the defendants, as common carriers, jointly owned and operated a described line of railroad; that on November 3, 1890, the plaintiff was a passenger on a train of cars then being run by the defendants, which train was derailed and thrown from the track and the plaintiff injured. Was this an action *ex quasi contractu* as now claimed?

Before proceeding to answer this question, we observe that it seems manifest, from the attacks originally made upon the amended complaint, that this claim is an afterthought. The motion to strike from the files, demurrer, answer and motion for judgment upon the pleadings proceeded upon the assumption that the cause of action stated in both complaints was subject to a limitation of two years, whereas it did not appear upon the face of the complaint, but that the agreement, if any, made by the alleged contract was entered into in the State of California, in which event the statutory limitation for commencing the action would have been four years. The fact that a written contract was executed in Ohio, which it is claimed was established on the

trial, was not at any time specially set up as a defence to the amended complaint.

It is clear that the original complaint is not susceptible of the construction now attempted to be given to it. Though it is alleged that the plaintiff was the holder of and travelling upon a certain ticket, no undertaking or promise by the defendants was averred, nor is there any allegation of the breach of any undertaking or promise. The reference to the ticket joined with the allegation immediately preceding it, that the plaintiff was a passenger on the described line of railroad, was evidently introduced by the pleader to show the existence of the relation of passenger and carrier between the plaintiff and the defendants. Because of such relation the duty to exercise due care in the carriage of the passenger was imposed upon the defendants, and from the recital of the negligent acts committed arose the implication of the failure of the defendants to perform that legal duty. As said by Martin, B., in *Legge* v. *Tucker*, 1 H. & N. 500, 501:

"In the case of carriers, the custom of the realm imposes on them a duty to carry safely, and a breach of that duty is a breach of the law, for which an action lies founded on the common law, and which does not require a contract to support it."

Legge v. *Tucker* was in form an action on the case for the negligence of a livery stable keeper in the care and custody of a horse. It was held that the foundation of the action was a contract, and that whatever way the declaration was framed it was an action of assumpsit. The line which distinguishes the case at bar from an action *ex quasi contractu* is thus expressed in the remarks of Watson, B., who said (p. 502):

"The action is clearly founded on contract. Formerly, in actions against carriers, the custom of the realm was set out in the declaration. Here a contract is stated by way of inducement, and the true question is, whether, if that were struck out, any ground of action would remain. *Williamson* v. *Allison*, 2 East. 452. There is no duty independently of the contract, and therefore it is an action of assumpsit."

The doctrine is very clearly expressed in *Kelly* v. *Metro-*

politan Railway Company, (1895) 1 Q. B. 944, where the Court of Appeals held that an action brought by a railway passenger against a company for personal injuries caused by the negligence of the servants of the company, while he was travelling on their line, was an action founded upon tort. In reading the judgment of the court, A. L. Smith, L. J., said (p. 947):

"The distinction is this — if the cause of complaint be for an act of omission or nonfeasance which, without proof of a contract to do what has been left undone, would not give rise to any cause of action (because no duty apart from contract to do what is complained of exists) then the action is founded upon contract and not upon tort. If, on the other hand, the relation of the plaintiff and the defendants be such that a duty arises from that relationship irrespective of contract, to take due care, and the defendants are negligent, then the action is one of tort."

So, in the case at bar, there was a duty shown, independently of contract; and the trial court, looking at the allegations of a complaint which had not been demurred to, solely for the purpose of determining the propriety of an amendment, was manifestly justified in holding that the right to recover was not founded upon the breach of a contract, but upon the neglect of a common law duty. The action therefore was *ex delicto*, and the defendants, being joint tort feasors, might have been sued either separately or jointly at the election of the injured party, and if, upon the trial, the proof warranted, a recovery might have been had against a single defendant. *Sessions* v. *Johnson*, 95 U. S. 347.

The right of recovery against one of several joint tort feasors thus existing is in principle analogous to the rule declared by Chitty at page 386 of his work on pleading, to the effect that in torts the plaintiff may prove a part of the charge if the averment be divisible and there be enough proof to support his case. This is illustrated at page 392, where Chitty says:

"In an action *ex delicto*, upon proof of part only of the injury charged, or of one of several injuries laid in the same count, the plaintiff will be entitled to recover *pro tanto*, pro-

vided the part which is proved afford *per se* a sufficient cause of action, for torts are, generally speaking, divisible."

As, therefore, in an action against joint tort feasors recovery may be had against one, it follows that allegations alleging a joint relationship and the doing of negligent acts jointly are divisible, and that a recovery may be had where the proof establishes the connection of but one of the defendants with the acts averred. The case also comes within the principle of the rule alluded to by Chitty, Ib. 393, that "a general averment, including several particulars, may be considered *reddendo singula singulis*." He instances the case of a declaration for a false return to a *fi. fa.* against the goods of A and B, wherein it was alleged that A and B had goods within the bailiwick, and it was held to be sufficient to prove that either of them had, the averment being severable.

But even though the action was founded upon a contract, under the rules of practice in California a recovery might have been had against either defendant. Thus, in *Shain* v. *Forbes*, 82 California, 577, which was an action against two defendants to recover compensation for professional services alleged to have been rendered for them jointly by an attorney at law, pending the action one of the defendants died. It was argued that the testimony of a certain witness, not being admissible against the representatives of the deceased defendant, was not competent for any purpose, because the action was joint, and that no several judgment could be rendered against the surviving defendant. To this argument the Supreme Court answered:

"It is true that the rule contended for existed at common law, but from the earliest time it has been changed by statute in this State. The code provides: 'Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate right of the parties on each side, as between themselves.' Id. § 578. And this was but a reënactment of section 145 of the old practice act. Under this provision it has been held that where two persons are sued jointly upon a joint contract,

judgment may be rendered in favor of the plaintiff against one of the defendants, and in favor of one of the defendants against the plaintiff. *Rowe* v. *Chandler*, 1 Cal. 168; *Lewis* v. *Clarkin*, 18 Cal. 399; *People* v. *Frisbie*, Id. 402. . . . In our opinion a several judgment might have been rendered against McPherson."

It results that if the nature of the action was not changed, the amendment merely dismissing one of two joint tort feasors and alleging that the injury complained of was occasioned solely by the remaining defendant did not introduce a new cause of action.

2. *Did the amendments stating that the plaintiff was travelling upon a "second class" ticket instead of, as stated in the original complaint, a "first class" ticket, and that the Atlantic and Pacific Company was chartered by an act of Congress instead of by the laws of Massachusetts, as averred in the original complaint, state a new cause of action?*

The changes made clearly were not of the essence of the cause of action, and could in nowise have injuriously prejudiced the Atlantic and Pacific Company. Amendments of this character were plainly allowable. The Code of California, section 471, virtually forbids amendments only where the allegation of the claim or defence would be changed in its general scope and meaning. Illustrations of the construction given to these provisions are found in several cases. *Smullen* v. *Phillips*, 92 California, 408, was an action of slander, and the words charged to have been spoken were, "He is a thief." The proof introduced at the trial was that the words uttered were, "That thieving ——, he stole $2500 from me, and I can prove it." An amendment of the complaint was at once allowed over the objection of the defendant that the statute of limitations barred the cause of action as thus amended. The Supreme Court of California held that the scandalous words alleged in the original complaint were not qualified or altered in their sense or meaning by those proven to have been used by the defendant, that the cause of action remained the same, and that the amendment simply obviated a variance between the allegations and the proof.

In *Redington* v. *Cornwell*, 90 California, 49, it was held that as the original complaint declared on two notes, alleging that they were given "for value received," and were assigned by indorsement, and also alleged facts from which an equitable assignment would result, an amended complaint which omitted the allegation of indorsement and alleged that the debt was for money loaned and for a balance due on account, set up substantially the same cause of action, the averment as to value received being equivalent to the more specific allegations of the items of money loaned and due on account.

In *Bogart* v. *Crosby*, 91 California, 278, the complaint in an action against a firm of real estate agents to recover money deposited on a verbal contract of sale which had been rescinded was amended by making the owners of the land defendants, and alleging that defendants were an association of two or more persons doing business under a common name. A second amended complaint was filed, alleging that only the agents constituted the association, and both amendments charged all the defendants with having received the deposit from plaintiff and to his use.

The court said (p. 281):

"It is claimed by appellants that the cause of action stated in the last amended complaint is, as against appellants, essentially different from that alleged in the first amended complaint, and that, as it was not filed within two years after the cause of action accrued, the same is barred by the provision of subdivision 1 of section 339 of the Code of Civil Procedure. We do not agree with appellants in this contention; the difference between the first and second amended complaint is not so marked that the latter can be deemed the statement of an entirely new and different cause of action against the appellants. In both amended complaints the appellants are charged with having received from plaintiff, and to his use, the money sued for, and with a refusal to pay it to plaintiff when demanded."

As we hold that the dismissal of the Atchison Company did not operate to change the cause of action against the other corporation, and that the allegations of the second

amended complaint substantially counted upon the same wrong charged in the original complaint, to wit, a neglect of duty causing injury to plaintiff while travelling as a passenger, upon a ticket, in a train of cars over a described line of railroad, and between specified stations, it results that the judgment of the Circuit Court of Appeals was right, and it is

Affirmed.

MISSOURI PACIFIC RAILWAY COMPANY *v.* NEBRASKA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 1. Argued March 4, 1896. — Decided November 30, 1896.

The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.

A statute of a State, by which, as construed by the Supreme Court of the State, a board of transportation is authorized to require a railroad corporation, which has permitted the erection of two elevators by private persons on its right of way at a station, to grant upon like terms and conditions a location upon that right of way to other private persons in the neighborhood, for the purpose of erecting thereon a third elevator, in which to store their grain from time to time, is a taking of private property of the railroad corporation for a private use, in violation of the Fourteenth Article of Amendment of the Constitution of the United States.

This was a writ of error to review a judgment of the Supreme Court of the State of Nebraska, awarding a writ of mandamus to compel the Missouri Pacific Railway Company, a corporation of Nebraska, to comply with an order of the Nebraska State Board of Transportation, which directed the company to grant to John W. Hollenbeck and others the right and privilege of erecting an elevator upon the grounds of the railway company at its station at Elmwood.

By the constitution of Nebraska of 1875, art. 11, sec. 4, "Railways heretofore constructed or that may hereafter be

constructed in this State are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State." And by sec. 7, "The legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

The State Board of Transportation was created by the statute of Nebraska of March 31, 1887, c. 60, entitled "An act to regulate railroads, prevent unjust discrimination," etc., which took effect July 1, 1887, and was very similar to the act of Congress of February 4, 1887, c. 104, regulating interstate commerce (24 Stat. 379), except in applying only to commerce within the State. The material provisions of the Nebraska statute are copied in the margin.[1]

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[1] SEC. 1. The provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property by railroad, under a common control, management or arrangement for a continuous carriage or shipment from any point in the State of Nebraska to any other point in said State. The term "railroad," as used in this act, shall include the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage. All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivery, storage or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

SEC. 2. If any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater compensation for any service rendered or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and

Statement of the Case.

On October 9, 1889, there was presented to the Nebraska State Board of Transportation a complaint in these terms:

"The petition and complaint of John W. Hollenbeck, Cyrelius Lemasters, John W. Miller, John Hayes, Charles Hall and others, trading under the name of the Elmwood Farmers' Alliance Number 365, of Elmwood, Cass County, Nebraska, respectfully represents:

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conditions, such common carriers shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. It shall be unlawful for any common carrier subject to the provisions of this act to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such contracting lines; but this shall not be construed as requiring any such common carrier to give the use of its track or terminal facilities to another carrier engaged in like business.

SEC. 17. Said board shall have the general supervision of all railroads operated by steam in the State, and shall inquire into any neglect of duty, or violation of any of the laws of this State, by railroad corporations doing business in this State, or by any officer, agent or employé of any railroad corporation doing business in this State; and shall from time to time carefully examine and inspect the condition of each railroad in this State, and its equipments and manner of the conduct and management of the same, with reference to the public safety, interest and conveniences. It shall carefully investigate any complaint made in writing, and under oath, concerning any lack of facilities or accommodations furnished by any railroad corporation doing business in this State, for the comfort, convenience and accommodation of individuals and the public; or any unjust discrimination against either any person, firm or corporation, or locality, either in rates, facilities furnished, or otherwise; and whenever, in the judgment of said board, any repairs are necessary upon any portion of the road, or upon any stations, depots, station-houses or warehouses, or upon any of the rolling stock of any railroad doing business in this State, or additions to, or any changes in its rolling stock, stations, depots, station-houses or warehouses are necessary in order to secure the safety, comfort, accommodation and convenience of the public and individuals, or any change in the mode of conducting its business or operating its road is reasonable and expedient

"First. That the petitioners and complainants are now and have for many years been extensive raisers of corn, wheat, oats and other cereals, and that large quantities of said cereals

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in order to promote the security and accommodation of the public, or in order to prevent unjust discriminations against either persons or places, it shall make a finding of the facts, and an order requiring said railroad corporation to make such repairs, improvements or additions to its rolling stock, road, stations, depots or warehouses, or to make such changes, either in the manner of conducting its business or in the manner of operating its road, as such board shall deem proper, reasonable and expedient; and said finding shall be entered in a record kept for that purpose, and said board shall cause a copy of the same to be served on said railroad corporation by any sheriff or constable in this State, in the same manner as a summons is required to be served, and shall also transmit to the person, firm or corporation interested, a copy of the same. Said railroad corporation shall, within ten days after being served with a copy of said finding and order, show cause, if any it has, why it should not comply with said order, by filing with said board an answer, verified in the same manner as pleadings of fact in the district court are required to be verified. If no answer shall be filed as aforesaid, then such finding and order shall be final and conclusive as against said railroad corporation. Upon the filing of any answer as provided for in this section, the said board shall set a day, not exceeding thirty days from the date of the filing of such answer, for the hearing of the matter, and shall notify said railroad company, or any other person or persons or corporations interested, of the time so fixed, and the place of hearing the same; and shall carefully and fully investigate the matter, and for that purpose may subpœna witnesses, and compel their attendance, and the productions of any books or papers, in the same manner as the courts of law of this State may do. After a full investigation of the matter, said board shall again make a finding of the facts, and make such an order as it may deem just in the premises. If said railroad shall refuse or neglect to comply with such order, the board shall order the attorney general, or the county attorney of the proper county, to institute a suit to compel such railroad company to comply with such order; and it shall be the duty of the attorney general, or the county attorney of the proper county, at the request of the board, or any person interested in any such order or finding, to apply to the Supreme Court, or to the district court of any county through or into which its line of road may run, in the name of the State and on the relation of said board, for a writ of mandamus to compel such railroad company to comply with such order; and upon the hearing of any such cause such finding and order shall be, as against such railroad company, *prima facie* evidence of the reasonableness of such order, and of the necessity of such repairs, changes, additions or improvements, or other matters in such order required to be done or omitted. Nebraska Laws of 1887, pp. 541, 542, 555, 558; Compiled Statutes of 1895, pp. 779, 780, 785, 786.

have been marketed in seasons past, and that large quantities are now ready for the markets; that the several farms and leaseholds of the petitioners are situated near Elmwood, in Cass County, Nebraska.

"Second. That the Missouri Pacific Railway Company is a common carrier, engaged in the transportation of passengers and property by railroad under a common control, management or arrangement for a continuous carriage or shipment through Elmwood aforesaid.

"Third. That the said defendant railroad company is the owner of the right of way and depot grounds bordering the main and side tracks of the defendant company, upon which are located the station-houses and other shipping facilities connected with the transportation originating at or destined to Elmwood station aforesaid; that the complainants aforesaid did make a written application to the general manager of the defendant company for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farm and leaseholds of complainants aforesaid, as well as the products of other neighboring farms; that the application aforesaid was refused by the general manager of the defendant company aforesaid.

"Fourth. That the elevators now located on the right of way of the defendants aforesaid at Elmwood station aforesaid are during certain seasons of the year wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain.

"Fifth. That the refusal of the defendant railroad company to lease a location for an elevator as aforesaid is in contravention of the provisions of an act of the legislature entitled 'An act to regulate railroads, prevent unjust discrimination,' etc., approved March 31, 1887, in that —

"(*a.*) The said refusal is an unjust discrimination.

"(*b.*) The said Missouri Pacific Railway Company, by the refusal aforesaid, is subjecting the complainants aforesaid to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities.

"(*c.*) The said Missouri Pacific Railway Company, by the refusal aforesaid, is giving an undue and unreasonable preference and advantage to Adams and Gilbert, and Eells Brothers, owners of the elevators located at Elmwood, on the right of way of the defendant, by permission of the said Missouri Pacific Railway Company.

"Wherefore the petitioners pray that the defendants may be required to answer the charges herein, and that after due hearing and investigation an order be made, commanding the defendants to cease and desist from said violations of the act of the legislature entitled 'An act to regulate railroads,' etc., and for such other and further relief as the board of transportation may deem necessary in the premises."

On the same day, the board of transportation issued an order to the railway company to show cause why the prayer of the complaint should not be granted; and on October 19, 1889, the railway company filed an answer, admitting its ownership of the right of way and depot grounds at Elmwood, described in the complaint, and its refusal to allow the petitioners to erect an elevator on the side track there, and that there were two elevators now upon that track; and alleging that those two elevators were sufficient to transact the business at Elmwood, and that there was no room there for another elevator, without purchasing an additional right of way and extending its track, and that this was the only reason for the refusal; and denying all the other allegations of the complaint.

On December 13, 1889, the board of transportation, after a hearing, at which evidence and arguments were submitted on behalf of both parties, made the following findings and order:

"This case and complaint having been heard by the board upon the pleadings, evidence and argument of counsel, the board finds as follows:

"First. That the defendant has all its side tracks within the limits of its right of way and depot grounds at the said station of Elmwood.

"Second. That there are only two elevators at said station

of Elmwood, having the combined capacity of ten thousand bushels, and that said elevators are insufficient to handle the grain shipped at said station, and that the owners and operators thereof have entered into a combination, and do combine and fix the prices of grain, and prevent competition in the purchase price thereof, and that there are not sufficient facilities for the handling and shipping of grain at said station.

"Third. That it is necessary for the convenience of the public, patrons and shippers of grain of said railroad company, that another elevator be erected and operated at said station.

"Fourth. That the defendant has permitted two elevators to be erected upon its grounds at said station, and that the same are now being operated, and that the said defendant has refused to grant the same privilege to the complainant.

"Fifth. That an elevator is necessary for the shipment of grain by railroad, and that, by reason of the side track being placed within the right of way and depot grounds, the plaintiff cannot ship grain without building its elevator upon the grounds of the defendant.

"Sixth. That there is room upon the grounds of the defendant at said station for another elevator without materially interfering with the operation of said railroad, and the building of the elevator by the plaintiffs upon said ground will not materially affect the defendant in the use of its grounds, or be an unreasonable burden to the defendant.

"Seventh. That granting of the right and privilege by the defendant to the elevators now standing upon its right of way and depot grounds at said station, and refusing to grant the same right and privilege to the complainant, is an unjust and unreasonable discrimination against the complainant, under the circumstances of this case.

"Eighth. That the said respondent has discriminated against the complainant, and that it has unlawfully made and given a preference and advantage to Adams and Gilbert, and to Eells Brothers, owners and operators of elevators at said station.

"It is therefore, by the Board of Transportation of the State of Nebraska, considered, adjudged and ordered that the respondent, the Missouri Pacific Railway Company, shall

cease and discontinue discriminating against the complainant, and grant to said complainant the same facilities and privileges as granted to the owners and operators of the elevators now established at said station; and that said respondent, within ten days after the service of this order, grant and give to the complainant, on like terms and conditions as granted to the said Adams and Gilbert, and Eells Brothers, the right and privilege of erecting an elevator upon its ground at said station, adjacent to said respondent's side track, at a convenient and suitable place thereon, to wit, at a point on the side track of said respondent near the east terminus of said side track, or some other suitable and convenient place on said side track, if the parties to this action can agree; and that said respondent grant to the said complainant all and equal facilities for the handling and shipping of grain at said station which it grants and gives to other shippers of grain at said station, and cease from all discrimination or preferences to and of said shippers and operators of elevators at said station of Elmwood aforesaid."

The railway company not having complied with that order, there was presented to the Supreme Court of the State of Nebraska, on January 7, 1890, a petition in the name of the State of Nebraska, at the relation of the board of transportation, and signed by the attorney general of the State, setting forth the proceedings and order of the board of transportation, and praying for a writ of mandamus to the railway company to compel them to comply with that order.

To this petition for a mandamus the railway company filed an answer, setting up the same defences as before the board of transportation, and relying upon the provisions of the Fourteenth Amendment of the Constitution of the United States, which prohibit any State to deprive any person of property without due process of law, or to deny to any person, within its jurisdiction, the equal protection of the laws.

Upon a hearing on this petition and answer, the Supreme Court of Nebraska, on May 13, 1890, "found the issues in favor of the relators," and adjudged that, unless the railway company within forty days complied with the order of the

board of transportation, a writ of mandamus should issue to compel a compliance with that order according to its terms. 29 Nebraska, 550. The railway company sued out this writ of error.

Mr. John F. Dillon for plaintiff in error. *Mr. Winslow S. Pierce* and *Mr. Harry Hubbard* were on his brief.

Mr. A. S. Churchill for defendant in error. *Mr. George H. Hastings* and *Mr. W. A. Dilworth* filed a brief for same.

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

The arguments in this case have taken a wider range than is required for its decision. The material facts, as assumed by the court below, are as follows:

The Missouri Pacific Railway Company, a corporation of the State of Nebraska, was the owner of the right of way and depot grounds, within which were its main and side tracks, its station-houses, and other shipping facilities, at Elmwood in that State; and had permitted two elevators to be erected and operated by private firms on the side track at that station.

John W. Hollenbeck and others, apparently not a corporation, but a voluntary association of persons owning farms and leaseholds in the neighborhood of Elmwood, upon which they raised corn, wheat, oats and other cereals, large quantities of which were ready for market, made an application in writing to the railway company to grant them "a location on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of" the applicants, "as well as the products of other neighboring farms." That application was refused by the railway company.

The applicants then made a complaint to the Board of Transportation of the State of Nebraska, alleging that the two elevators already built on the right of way of the rail-

way company at Elmwood station were "during certain seasons of the year wholly insufficient in affording a market for the cereals of the complainants and others desirous of marketing their grain"; and that the refusal of the railway company to grant to the complainants a location for an elevator was in violation of the Nebraska statute of 1887, c. 60, in that such refusal was an unjust discrimination, and that the railway company, by such refusal, was subjecting the complainants to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other localities, and was giving an undue and unreasonable preference and advantage to the owners and operators of the two elevators already built at that station.

The board of transportation, after notice to the railway company, and hearing evidence and arguments, found that the two existing elevators were insufficient to handle the grain shipped at Elmwood station, and the owners and operators of those elevators had entered into a combination to fix the prices of grain and to prevent competition in the price thereof, and there were not sufficient facilities for the handling and shipping of grain at that station; that it was necessary for the convenience of the public that another elevator should be erected and operated there; that, by reason of the side track being placed within the right of way and depot grounds, the complainants could not ship grain without building their elevator upon the grounds of the railway company; that there was room upon those grounds for another elevator without materially interfering with the operation of the railroad, and the building of an elevator thereon by the complainants would not materially affect the railway company in the use of its grounds, or be an unreasonable burden to it; and that the granting by the railway company of the right and privilege to the owners of the two elevators now standing, and refusing to grant the like right and privilege to the complainants, was an unjust and unreasonable discrimination against the complainants, and unlawfully gave a preference and advantage to the owners of the two existing elevators.

The board of transportation thereupon ordered that the railway company, within ten days, grant to the complainants, on like terms and conditions as granted to the owners of the two existing elevators, the right and privilege of erecting an elevator upon its grounds, and adjacent to its track, at a point specified in the order, or at some other suitable and convenient place if the parties could agree; and grant to the complainants all and equal facilities for the handling and shipping of grain at that station, which it granted to other shippers of grain there, and cease from all discrimination or preference to and of shippers and operators of elevators at that station.

The railway company not having complied with the order, the Supreme Court of the State, upon a petition in the name of the State, at the relation of the board of transportation, for a mandamus, and an answer thereto and hearing thereon, found the issues in favor of the relators, and adjudged that, unless the railway company, within forty days, complied with order of the board of transportation, a writ of mandamus should issue to compel compliance with that order according to its terms. In the opinion of the court, it was said: "The correctness of the findings of the board is not seriously questioned, but its power to make such findings and order is denied." 29 Nebraska, 556.

The statute of Nebraska of 1887, c. 60, §§ 1–3, prohibits, and declares to be unlawful, all unjust and unreasonable charges made by a railroad company for any services rendered in the transportation (which includes all instrumentalities of shipment or carriage) of passengers or property, or in connection therewith, or for the receiving, delivering, storage or handling of such property; the demanding or collecting, directly or indirectly, by a railroad company, from any person, of a greater compensation for such service, than it demands or collects from any other person for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is declared to be unjust discrimination; it is also made unlawful to give any preference or advantage to, or to subject to any prejudice or disadvantage, any particular person, company, firm, corporation or locality, or

any particular description of traffic, in any respect whatsoever; and railroad companies are required, according to their respective powers, to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such contracting lines.

By § 17, upon complaint in writing, concerning any lack of facilities or accommodations furnished by a railroad company, for the comfort, convenience and accommodation of individuals and the public, or concerning any unjust discrimination against any person, firm, corporation or locality, either in rates, facilities furnished, or otherwise, the board of transportation, whenever, in its judgment, any repairs of, or additions to, or changes in, any portion of the road, rolling stock, stations, depots, station-houses or warehouses of a railroad company, are necessary in order to secure the safety, comfort, accommodation and convenience of the public and individuals, or any change in the mode of conducting its business is reasonable and expedient in order to promote the security and accommodation of the public, or to prevent unjust discrimination against persons or places, is directed to order the railroad company to make such repairs, additions or changes.

The Supreme Court of Nebraska has construed this statute as authorizing the board of transportation to make the order questioned in this case, which required the railroad company to grant to the relators the right to erect an elevator upon its right of way at Elmwood station, on the same terms and conditions on which it had already granted to other persons rights to erect two elevators thereon. The construction so given to the statute by the highest court of the State must be accepted by this court in judging whether the statute conforms to the Constitution of the United States. *Chicago, Milwaukee & St. Paul Railway* v. *Minnesota*, 134 U. S. 418, 456; *Illinois Central Railroad* v. *Illinois*, 163 U. S. 142, 152.

A railroad corporation doubtless holds its station grounds, tracks and right of way as its private property, but for the

public use for which it was incorporated; and may, in its discretion, permit them to be occupied by other parties with structures convenient for the receipt and delivery of freight upon its railroad, so long as a free and safe passage is left for the carriage of freight and passengers. *Grand Trunk Railroad* v. *Richardson*, 91 U. S. 454. But how far the railroad company can be compelled to do so, against its will, is a wholly different question.

Upon the admitted facts of the case at bar, the railroad company had granted to two private firms the privilege of erecting elevators upon its right of way at Elmwood station; and had refused an application of other private persons, farmers in the neighborhood, for the privilege of erecting on that right of way a third elevator of sufficient capacity to store from time to time the grain produced upon their farms and upon those of their neighbors; and has been ordered by the board of transportation, and by the Supreme Court of the State, to grant to the applicants a location upon its right of way for the purpose of erecting thereon such an elevator, upon the like terms and conditions as in its grants to the owners of the two existing elevators.

The only particular alleged in the complaint, and the only one, therefore, presented for our consideration in this case, in which the railroad company is supposed to have made an unjust discrimination against the complainants, or to have subjected them to an undue and unreasonable prejudice and disadvantage, in respect to traffic facilities, over other locations, or to have given an undue and unreasonable preference to other persons, is the refusal of the railroad company to grant to the complainants a location upon its right of way for the purpose of erecting an elevator thereon, upon the terms and conditions upon which it had previously granted to other persons similar privileges to erect two other elevators.

The record does not show what were the terms and conditions of the contracts between the railroad company and the owners of those elevators; nor present any question as to the validity of those contracts.

Nor does it present any question as to the power of the

legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public; or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use, from time to time, of those tracks, for the purpose of shipping or receiving grain or other freight, as in *Rhodes* v. *Northern Pacific Railroad*, 34 Minnesota, 87, in *Chicago & Northwestern Railway* v. *People*, 56 Illinois, 365, and in *Hoyt* v. *Chicago, Burlington & Quincy Railroad*, 93 Illinois, 601.

Nor does this case show any such exercise of the legislative power to regulate the conduct of the business, or the rate of tolls, fees or charges, either of railroad corporations or of the proprietors of elevators, as has been upheld by this court in previous cases. *Munn* v. *Illinois*, 94 U. S. 113; *Chicago, Burlington & Quincy Railroad* v. *Illinois*, 94 U. S. 155; *Dow* v. *Beidelman*, 125 U. S. 680; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *Stoeser*, 153 U. S. 391; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 213, 214; *Louisville & Nashville Railroad* v. *Kentucky*, 161 U. S. 677, 696.

The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way.

The order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit. They do not appear to have been incorporated by the State for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only "for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store

from time to time the cereal products of the farms and leaseholds of complainants aforesaid, as well as the products of other neighboring farms."

To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 2. Pet. 627, 658; *Murray* v. *Hoboken Co.*, 18 How. 272, 276; *Loan Association* v. *Topeka*, 20 Wall. 655; *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Cole* v. *La Grange*, 113 U. S. 1; *Fallbrook District* v. *Bradley*, *ante*, 112, 158, 161; *State* v. *Chicago, Milwaukee & St. Paul Railway*, 36 Minnesota, 402.

Judgment reversed, and case remanded to the Supreme Court of the State of Nebraska, for further proceedings not inconsistent with this opinion.

WARNER *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

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

No. 47. Argued May 5, 1896. — Decided November 30, 1896.

The clause of the statute of frauds, which requires a memorandum in writing of "any agreement which is not to be performed within the space of one year from the making thereof," applies only to agreements which, according to the intention of the parties, as shown by the terms of their contract, cannot be fully performed within a year; and not to an agreement which may be fully performed within the year, although the time of performance is uncertain, and may probably extend, and may have been expected by the parties to extend, and does in fact extend, beyond the year.

An oral agreement between a railroad company and the owner of a mill, by which it is agreed that, if he will furnish the ties and grade the ground for a switch opposite his mill, the company will put down the iron rails and maintain the switch for his benefit for shipping purposes as long as he needs it, is not within the statute of frauds, as an agreement not to be performed within a year.

Packet Co. v. *Sickles*, 5 Wall. 580, doubted.

The provisions of the statute of frauds of the State of Texas concerning sales or leases of real estate do not include grants of easements.

This was an action brought May 9, 1892, by Warner against the Texas and Pacific Railway Company, a corporation created by the laws of the United States, upon a contract made in 1874, by which it was agreed between the parties that if the plaintiff would grade the ground for a switch, and put on the ties, at a certain point on the defendant's railroad, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was "not to be performed within one year from the making thereof," and because it was "a grant or conveyance by this defendant of an estate of inheritance, and for a term of more than one year, in lands."

Statement of the Case.

At the trial, the plaintiff, being called as witness in his own behalf, testified that prior to the year 1874 he had been engaged in the lumbering and milling business in Iowa and in Arkansas, and, in contemplation of breaking up and consolidating his business, came to Texas, and selected a point, afterwards known as Warner's Switch, as a suitable location, providing he could obtain transportation facilities; that he found at that point an abundance of fine pine timber, and, three miles back from the railroad, a stream, known as Big Sandy Creek, peculiarly adapted to floating logs, and lined for many miles above with pine timber; that in 1874 the defendant's agent, after conversing with him about his experience in the lumber business, the capacity of his mill, and the amount of lumber accessible from the proposed location, made an oral contract with him, by which it was agreed that if he would furnish the ties and grade the ground for the switch, the defendant would put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it; that the plaintiff immediately graded the ground for the switch, and got out and put down the ties, and the defendant put down the iron rails and established the switch; and that the plaintiff, on the faith of the continuance of transportation facilities at the switch, put up a large saw-mill, bought many thousand acres of land and timber rights and the water privileges of Big Sandy Creek, made a tram road three miles long from the switch to the creek, and otherwise expended large sums of money, and sawed and shipped large quantities of lumber, until the defendant, on May 19, 1887, while its road was operated by receivers, tore up the switch and ties, and destroyed his transportation facilities, leaving his lands and other property without any connection with the railroad. His testimony also tended to prove that he had thereby been injured to the amount of more than $50,000, for which the defendant was liable, if the contract sued on was not within the statute of frauds.

On cross-examination, the plaintiff testified that, when he made the contract, he expected to engage in the manufacture of lumber at this place for more than one year, and to stay

there, and to have a site for lumber there, as long as he lived; and that he told the defendant's agent, in the conversation between them at the time of making the contract, that there was lumber enough in sight on the railroad to run a mill for ten years, and by moving back to the creek there would be enough to run a mill for twenty years longer.

No other testimony being offered by either party, bearing upon the question whether the contract sued on was within the statute of frauds, the Circuit Court, against the plaintiff's objection and exception, ruled that the contract was within the statute, instructed the jury to find a verdict for the defendant, and rendered judgment thereon, which was affirmed by the Circuit Court of Appeals, upon the ground that the contract was within the statute of frauds, as one not to be performed within a year. 13 U. S. App. 236. The plaintiff sued out this writ of error.

Mr. Horace Chilton for plaintiff in error.

Mr. John F. Dillon for defendant in error. *Mr. Winslow S. Pierce* and *Mr. David D. Duncan* were on his brief.

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

The statute of frauds of the State of Texas, reënacting, in this particular, the English statute of 29 Car. II, c. 3, § 4, (1677) provides that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof," unless the "agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person by him thereunto lawfully authorized." Texas Stat. January 18, 1840; 1 Paschal's Digest, (4th ed.) art. 3875; Rev. Stat. of 1879, art. 2464; *Bason* v. *Hughart*, 2 Texas, 476, 480.

This case has been so fully and ably argued, and the construction of this clause of the statute of frauds has so seldom

come before this court, that it will be useful, before considering the particular contract now in question, to refer to some of the principal decisions upon the subject in the courts of England, and of the several States.

In the earliest reported case in England upon this clause of the statute, regard seems to have been had to the time of actual performance, in deciding that an oral agreement that if the plaintiff would procure a marriage between the defendant and a certain lady, the defendant would pay him fifty guineas, was not within the statute; Lord Holt saying: "Though the promise depends upon a contingent, the which may not happen in a long time, yet if the contingent happen within a year, the action shall be maintainable, and is not within the statute." *Francam* v. *Foster*, (1692) Skinner, 326; *S. C.* Holt, 25.

A year later, another case before Lord Holt presented the question whether the words "agreement not to be performed within one year" should be construed as meaning every agreement which *need* not be performed within the year, or as meaning only an agreement which *could* not be performed within the year, and thus, according as the one or the other construction should be adopted, including or excluding an agreement which might or might not be performed within the year, without regard to the time of actual performance. The latter was decided to be the true construction.

That was an action upon an oral agreement, by which the defendant promised, for one guinea paid, to pay the plaintiff so many at the day of his marriage; and the marriage did not happen within the year. The case was considered by all the judges. Lord Holt "was of opinion that it ought to have been in writing, because the design of the statute was, not to trust to the memory of witnesses for a longer time than one year." But the great majority of the judges were of opinion that the statute included those agreements only that were impossible to be performed within the year, and that the case was not within the statute, because the marriage might have happened within a year after the agreement; and laid down this rule: "Where the agreement is to be performed upon a

contingent, and it does not appear within the agreement, that it is to be performed after the year, then a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenor of the agreement, that it is to be performed after the year, there a note is necessary." *Peter* v. *Compton*, (1693) Skinner, 353; *S. C.* Holt, 326; *S. C.* cited by Lord Holt in *Smith* v. *Westall*, 1 Ld. Raym. 316, 317; *Anon.*, Comyns, 49, 50; Comberbach, 463.

Accordingly, about the same time, all the judges held that a promise to pay so much money upon the return of a certain ship, which ship happened not to return within two years after the promise made, was not within the statute, "for that by possibility the ship might have returned within a year; and although by accident it happened not to return so soon, yet, they said, that clause of the statute extends only to such promises where, by the express appointment of the party, the thing is not to be performed within a year." *Anon.*, 1 Salk. 280.

Again, in a case in the King's Bench in 1762, an agreement to leave money by will was held not to be within the statute, although uncertain as to the time of performance. Lord Mansfield said that the law was settled by the earlier cases. Mr. Justice Denison said: "The statute of frauds plainly means an agreement *not* to be performed within the space of a year, and expressly and specifically so agreed. A *contingency* is not within it; nor any case that depends upon contingency. It does not extend to cases where the thing only *may* be performed within the year; and the act cannot be extended further than the words of it." And Mr. Justice Wilmot said that the rule laid down in 1 Salk. 280, above quoted, was the true rule. *Fenton* v. *Emblers*, 3 Burrow. 1278; *S. C.* 1 W. Bl. 353.

It thus appears to have been the settled construction of this clause of the statute in England, before the Declaration of Independence, that an oral agreement which, according to the intention of the parties, as shown by the terms of the contract, might be fully performed within a year from the time it was made, was not within the statute, although the time of

its performance was uncertain, and might probably extend, and be expected by the parties to extend, and did in fact extend, beyond the year.

The several States of the Union, in reënacting this provision of the statute of frauds in its original words, must be taken to have adopted the known and settled construction which it had received by judicial decisions in England. *Tucker* v. *Oxley*, 5 Cranch, 34, 42; *Pennock* v. *Dialogue*, 2 Pet. 1, 18; *Macdonald* v. *Hovey*, 110 U. S. 619, 628. And the rule established in England by those decisions has ever since been generally recognized in England and America, although it may in a few instances have been warped or misapplied.

The decision in *Boydell* v. *Drummond*, (1809) 11 East, 142, which has been sometimes supposed to have modified the rule, was really in exact accordance with it. In that case, the declaration alleged that the Boydells had proposed to publish by subscription a series of large prints from some of the scenes of Shakespeare's plays, in eighteen numbers containing four plates each, at the price of three guineas a number, payable as each was issued, and one number, at least, to be annually published after the delivery of the first; and that the defendant became a subscriber for one set of prints, and accepted and paid for two numbers, but refused to accept or pay for the rest. The first prospectus issued by the publishers stated certain conditions, in substance as set out in the declaration, and others showing the magnitude of the undertaking, and that its completion would unavoidably take a considerable time. A second prospectus stated that one number at least should be published annually, and the proprietors were confident that they should be enabled to produce two numbers within the course of every year. The book in which the defendant subscribed his name had only, for its title, "Shakespeare subscribers, their signatures," without any reference to either prospectus. The contract was held to be within the statute of frauds, as one not to be performed within a year, because, as was demonstrated in concurring opinions of Lord Ellenborough and Justices Grose, Le Blanc and Bayley, the

contract, according to the understanding and contemplation of the parties, as manifested by the terms of the contract, was not to be fully performed (by the completion of the whole work) within the year; and consequently, a full completion within the year, even if physically possible, would not have been according to the terms or the intent of the contract, and could not have entitled the publishers to demand immediate payment of the whole subscription.

In *Wells* v. *Horton*, (1826) 4 Bing. 40; *S. C.* 12 J. B. Moore, 177, it was held to be settled by the earlier authorities that an agreement by which a debtor, in consideration of his creditor's agreeing to forbear to sue him during his lifetime, promised that his executor should pay the amount of the debt, was not within the statute; and Chief Justice Best said: "The present case is clearly distinguishable from *Boydell* v. *Drummond*, where upon the face of the agreement it appeared that the contract was not to be executed within a year."

In *Souch* v. *Strawbridge*, (1846) 2 C. B. 808, a contract to support a child, for a guinea a month, as long as the child's father should think proper, was held not to be within the statute, which, as Chief Justice Tindal said, "speaks of 'any agreement that is not to be performed within the space of one year from the making thereof'; pointing to contracts the complete performance of which is of necessity extended beyond the space of a year. That appears clearly from the case of *Boydell* v. *Drummond*, the rule to be extracted from which is, that, where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute; but that, where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply."

In *Murphy* v. *O'Sullivan*, (1866) 11 Irish Jurist (N. S.) 111, the Court of Exchequer Chamber in Ireland, in a series of careful opinions by Mr. Justice O'Hagan (afterwards Lord Chancellor of Ireland), Baron Fitzgerald, Chief Baron Pigot and Chief Justice Monahan, reviewing the English cases, held

that under the Irish statute of frauds of 7 Will. III, c. 12, (which followed in this respect the words of the English statute,) an agreement to maintain and clothe a man during his life was not required to be in writing.

In the recent case of *McGregor* v. *McGregor*, 21 Q. B. D. 424, (1888) the English Court of Appeal held that a lawful agreement made between husband and wife, in compromise of legal proceedings, by which they agreed to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and she agreeing to maintain herself and her children, and to indemnify him against any debts contracted by her, was not within the statute. Lord Esher, M. R., thought the true doctrine on the subject was that laid down by Chief Justice Tindal in the passage above quoted from *Souch* v. *Strawbridge*. Lord Justice Lindley said: "The provisions of the statute have been construed in a series of decisions from which we cannot depart. The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply." Lord Justice Bowen said: "There has been a decision which for 200 years has been accepted as the leading case on the subject. In *Peter* v. *Compton*, it was held that 'an agreement that is not to be performed within the space of a year from the making thereof' means, in the statute of frauds, an agreement which appears from its terms to be incapable of performance within the year." And each of the three judges took occasion to express approval of the decision in *Murphy* v. *O'Sullivan*, above cited, and to disapprove the opposing decision of Hawkins, J., in *Davey* v. *Shannon*, 4 Ex. D. 81.

The cases on this subject in the courts of the several States are generally in accord with the English cases above cited. They are so numerous, and have been so fully collected in Browne on the Statute of Frauds, (5th ed.) c. 13, that we shall refer to but few of them, other than those cited by counsel in the case at bar.

In *Peters* v. *Westborough*, 19 Pick. 364, an agreement to support a girl of twelve years old until she was eighteen was held not to be within the statute. Mr. Justice Wilde, in

delivering judgment, after quoting *Peter* v. *Compton*, *Fenton* v. *Emblers* and *Boydell* v. *Drummond*, above cited, said: "From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend upon any contingency. And this, we think, is the clear meaning of the statute. In the present case, the performance of the plaintiff's agreement with the child's father depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

In many other States, agreements to support a person for life have been held not to be within the statute. Browne on Statute of Frauds, § 276. The decision of the Supreme Court of Tennessee in *Deaton* v. *Tennessee Coal Co.*, 12 Heiskell, 650, cited by the defendant in error, is opposed to the weight of authority.

In *Roberts* v. *Rockbottom Co.*, 7 Met. 46, Chief Justice Shaw declared the settled rule to be that "when the contract may, by its terms, be fully performed within the year, it is not void by the statute of frauds, although in some contingencies it may extend beyond a year"; and stated the case then before the court as follows: "The contract between the plaintiff and the company was that they should employ him, and that he should serve them, upon the terms agreed on, five years, or so long as Leforest should continue their agent. This is a contract which might have been fully performed within the year. The legal effect is the same as if it were expressed as an agreement to serve the company so long as Leforest should continue to be their agent, not exceeding five years; though the latter expression shows a little more

clearly, that the contract might end within a year, if Leforest should quit the agency within that time."

In *Blanding* v. *Sargent*, 33 N. H. 239, the court stated the rule, as established by the authorities elsewhere, and therefore properly to be considered as adopted by the legislature of New Hampshire when reënacting the statute, to be that "the statute does not apply to any contract, unless by its express terms or by reasonable construction it is not to be performed, that is, incapable in any event of being performed, within one year from the time it is made"; and that "if by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary"; and therefore that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there, in consideration of a certain sum to be paid in five years, was not within the statute, because "if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed." The decisions in other States are to the same effect. Browne on Statute of Frauds, § 277.

In *Hinckley* v. *Southgate*, 11 Vermont, 428, cited by the defendant in error, the contract held to be within the statute of frauds was in express terms to carry on a mill for a year from a future day; and the suggestion in the opinion that if the time of performance depends upon a contingency, the test is whether the contingency will probably happen, or may reasonably be expected to happen, within the year, was not necessary to the decision of the case, and cannot stand with the other authorities. Browne on Statute of Frauds, § 279.

In *Linscott* v. *McIntire*, 15 Maine, 201, also cited by the defendant in error, an agreement to sell a farm at the best advantage, and to pay to the plaintiff any sum remaining after refunding the defendant's advances and paying him for his trouble, was held not to be within the statute of frauds;

Chief Justice Weston saying: "The sale did not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears that, in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases where, by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection that it depended on a contingency, which might not and did not happen, until after that time."

In *Herrin* v. *Butters*, 20 Maine, 119, likewise cited by the defendant in error, the contract held to be within the statute could not possibly have been performed within the year, for it was to clear eleven acres in three years, one acre to be seeded down the present spring, one acre the next spring, and one acre the spring following, and to receive in consideration thereof all the proceeds of the land, except the two acres first seeded down.

In *Broadwell* v. *Getman*, 2 Denio, 87, the Supreme Court of New York stated the rule thus: "Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be, carried into full execution until after the expiration of that time." The contract there sued on was an agreement made in January, 1841, by which the defendant agreed to clear a piece of woodland for the plaintiff, and to partly make a fence at one end of it, which the plaintiff was to complete, the whole to be done by the spring of 1842; and the defendant was to have for his compensation the wood and timber, except that used for the fence, and also the crop to be put in by him in the spring of 1842. The court well said: "As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed, was void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute."

In *Pitkin* v. *Long Island Railroad*, 2 Barb. Ch. 221, cited by the defendant in error, a bill in equity to compel a railroad

company to perform an agreement to maintain a permanent turnout track and stopping place for its freight trains and passenger cars in the neighborhood of the plaintiff's property, was dismissed by Chancellor Walworth upon several grounds, the last of which was that, as a mere executory agreement to continue to stop with its cars at that place, "as a permanent arrangement," the agreement was within the statute of frauds, because from its nature and terms it was not to be performed by the company within one year from the making thereof.

In *Kent* v. *Kent*, 62 N. Y. 560, an agreement by which a father, in consideration of his son's agreeing to work for him upon his farm, without specifying any time for the service, agreed that the value of the work should be paid out of his estate after his death, which did not in fact happen until twenty years after the son ceased work, was not within the statute. Judge Allen, delivering the judgment of the Court of Appeals, said: "The statute, as interpreted by courts, does not include agreements which may or may not be performed within one year from the making, but merely those which within their terms, and consistent with the rights of the parties, cannot be performed within that time. If the agreement may consistently with its terms be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute."

In *Saunders* v. *Kasterbine*, 6 B. Monroe, 17, cited by the defendant in error, the contract proved, as stated in the opinion of the court, was to execute a bill of sale of a slave when the purchaser had paid the price of $400, in monthly instalments of from $4 to $8 each, which would necessarily postpone performance, by either party, beyond the year.

In *Railway Co.* v. *Whitley*, 54 Arkansas, 199, a contract by which a railway company, in consideration of being permitted to build its road over a man's land, agreed to construct and maintain cattle guards on each side of the road, was held not to be within the statute, because it was contingent upon the continuance of the use of the land for a railroad, which might have ceased within a year. And a like decision was

made in *Sweet* v. *Desha Lumber Co.*, 56 Arkansas, 629, upon facts almost exactly like those in the case at bar.

The construction and application of this clause of the statute of frauds first came before this court at December term, 1866, in *Packet Co.* v. *Sickles*, 5 Wall. 580, which arose in the District of Columbia under the statute of 29 Car. II, c. 3, § 4, in force in the State of Maryland and in the District of Columbia. Alexander's British Statutes in Maryland, 509; *Ellicott* v. *Peterson*, 13 Maryland, 476, 487; Comp. Stat. D. C., c. 23, § 7.

That was an action upon an oral contract by which a steamboat company agreed to attach a patented contrivance, known as the Sickles cut-off, to one of its steamboats, and, if it should effect a saving in the consumption of fuel, to use it on that boat during the continuance of the patent, if the boat should last so long; and to pay to the plaintiffs weekly, for the use of the cut-off, three fourths of the value of the fuel saved, to be ascertained in a specified manner. At the date of the contract, the patent had twelve years to run. The court, in an opinion delivered by Mr. Justice Nelson, held the contract to be within the statute; and said: "The substance of the contract is that the defendants are to pay in money a certain proportion of the ascertained value of the fuel saved at stated intervals throughout the period of twelve years, if the boat to which the cut-off is attached should last so long." "It is a contract not to be performed within the year, subject to a defeasance by the happening of a certain event, which might or might not occur within that time." 5 Wall. 594–596. And reference was made to *Birch* v. *Liverpool*, 9 B. & C. 392, and *Dobson* v. *Collis*, 1 H. & N. 81, in each of which the agreement was for the hire of a thing, or of a person, for a term specified of more than a year, determinable by notice within the year, and therefore within the statute, because it was not to be performed within a year, although it was defeasible within that period.

In *Packet Co.* v. *Sickles*, it appears to have been assumed, almost without discussion, that the contract, according to its true construction, was not to be performed in less than twelve years, but was defeasible by an event which might or

might not happen within one year. It may well be doubted whether that view can be reconciled with the terms of the contract itself, or with the general current of the authorities. The contract, as stated in the fore part of the opinion, was to use and pay for the cut-off upon the boat "during the continuance of the said patent, if the said boat should last so long." 5 Wall. 581, 594; *S. C.* (Lawyer's Coöp. Pub. Co. ed.) bk. 18, pp. 552, 554. The terms "during the continuance of" and "last so long" would seem to be precisely equivalent; and the full performance of the contract to be limited alike by the life of the patent, and by the life of the boat. It is difficult to understand how the duration of the patent and the duration of the boat differed from one another in their relation to the performance or the determination of the contract; or how a contract to use an aid to navigation upon a boat, so long as she shall last, can be distinguished in principle from a contract to support a man, so long as he shall live, which has been often decided, and is generally admitted, not to be within the statute of frauds.

At October term, 1875, this court, speaking by Mr. Justice Miller, said: "The statute of frauds applies only to contracts which, by their terms, are not to be performed within a year, and does not apply because they may not be performed within that time. In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." And it was therefore held, in one case, that a contract by the owner of a valuable estate, employing lawyers to avoid a lease thereof and to recover the property, and promising to pay them a certain sum out of the proceeds of the land when recovered and sold, was not within the statute, because all this might have been done within a year; and in another case, that a contract, made early in November, 1869, to furnish all the stone required to build and complete a lock and dam which the contractor with the State had agreed to complete by September 1, 1871, was not within the statute, because the contractor, by pushing the work, might have fully completed it before November, 1870.

McPherson v. *Cox*, 96 U. S. 404, 416, 417; *Walker* v. *Johnson*, 96 U. S. 424, 427.

In Texas, where the contract now in question was made, and this action upon it was tried, the decisions of the Supreme Court of the State are in accord with the current of decisions elsewhere.

In *Thouvenin* v. *Lea*, 26 Texas, 612, the court said: "An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year." In that case, the owner of land orally agreed to sell it for a certain price, payable in five years; the purchaser agreed to go into possession and make improvements; and the seller agreed, if there was a failure to complete the contract, to pay for the improvements. The agreement to pay for the improvements was held not to be within the statute; the court saying: "There is nothing from which it can be inferred that the failure to complete the contract, (by reducing it to writing, for instance, as was stipulated should be done,) or its abandonment, might not occur within a year from the time it was consummated. The purchaser, it is true, was entitled by the agreement to a credit of five years for the payment of the purchase money, if the contract had been reduced to writing. But appellant might have sold to another, or the contract might have been abandoned by the purchaser, at any time; and upon this alone depended appellant's liability for the improvements." See also *Thomas* v. *Hammond*, 47 Texas, 42.

In the very recent case of *Weatherford &c. Railway* v. *Wood*, 88 Texas, 191, it was held that an oral agreement by a railroad company to issue to one Wood annually a pass over its road for himself and his family, and to stop its trains at his house, for ten years, was not within the statute. The court, after reviewing many of the authorities, said: "It seems to be well settled that where there is a contingency expressed upon the face of the contract, or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not

within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens." "If the contingency is beyond the control of the parties, and one that may, in the usual course of events, happen within the year, whereby the contract will be performed, the law will presume that the parties contemplated its happening, whether they mention it in the contract or not. The statute only applies to contracts '*not to be performed* within the space of one year from the making thereof.' If the contingency is such that its happening may bring the performance within a year, the contract is not within the terms of the statute; and this is true whether the parties at the time had in mind the happening of the contingency or not. The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute. Applying these principles to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and his family. He could not transfer it. In case of his death within the year, the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. If the agreement had been to give Wood a pass for life, it would, under the above authorities, not have been within the statute; and we can see no good reason for holding it to be within the statute because his right could not have extended beyond ten years. The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other." 88 Texas, 195, 196.

In the case at bar, the contract between the railroad company and the plaintiff, as testified to by the plaintiff himself, who was the only witness upon the point, was that if he would furnish the ties and grade the ground for the switch at

the place where he proposed to erect a saw-mill, the railroad company would "put down the iron rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it."

The parties may well have expected that the contract would continue in force for more than one year; it may have been very improbable that it would not do so; and it did in fact continue in force for a much longer time. But they made no stipulation which in terms, or by reasonable inference, required that result. The question is not what the probable, or expected, or actual performance of the contract was; but whether the contract, according to the reasonable interpretation of its terms, required that it should not be performed within the year. No definite term of time for the performance of the contract appears to have been mentioned or contemplated by the parties; nor was there any agreement as to the amount of lumber to be sawed or shipped by the plaintiff, or as to the time during which he should keep up his mill.

The contract of the railroad company was with, and for the benefit of, the plaintiff personally. The plaintiff's own testimony shows (although that is not essential) that he understood that the performance of the contract would end with his own life. The obligation of the railroad company to maintain the switch was in terms limited and restricted by the qualification "for the plaintiff's benefit for shipping purposes as long as he needed it"; and no contingency which should put an end to the performance of the contract, other than his not needing the switch for the purpose of his business, appears to have been in the mouth, or in the mind, of either party. If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed.

The complete performance of the contract depending upon a contingency which might happen within the year, the con-

tract is not within the statute of frauds as an "agreement which is not to be performed within the space of one year from the making thereof."

Nor is it within the other clause of the statute of frauds, relied on in the answer, which requires certain conveyances of real estate to be in writing. The suggestion made in the argument for the defendant in error, that the contract was, in substance, a grant of an easement in real estate, and as such within the statute, overlooks the difference between the English and the Texan statutes in this particular. The existing statutes of Texas, while they substantially follow the English statute of frauds, so far as to require a conveyance of any "estate of inheritance or freehold, or for a term of more than one year, in lands and tenements," as well as "any contract for the sale of real estate, or the lease thereof for a longer term than one year," to be in writing, omit to reënact the additional words of the English statute, in the clause concerning conveyances, "or any uncertain interest of, in, to or out of" lands or tenements, and, in the other clause, "or any interest in or concerning them." Stat. 29 Car. II, c. 3, §§ 1, 4; Texas Rev. Stat. of 1879, arts. 548, 2464; 1 Paschal's Digest, arts. 997, 3875; *James* v. *Fulcrod*, 5 Texas, 512, 516; *Stuart* v. *Baker*, 17 Texas, 417, 420; *Anderson* v. *Powers*, 59 Texas, 213.

Judgment reversed, and case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

CHAPMAN *v.* UNITED STATES.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 513. Submitted November 2, 1896. — Decided November 30, 1896.

This court has no jurisdiction to review, on writ of error, a judgment of the Court of Appeals of the District of Columbia in a criminal case, under § 8 of the act of February 9, 1893, c. 74, 27 Stat. 434.

CHAPMAN was indicted in the Supreme Court of the District of Columbia for an alleged violation of section 102 of the Revised Statutes, in refusing to answer certain questions propounded to him by a special committee of the Senate of the United States, appointed to investigate charges in connection with proposed legislation then pending in the Senate. To this indictment the defendant demurred on the ground, among others, that section 102 of the Revised Statutes was unconstitutional, and that, therefore, the court was without jurisdiction in the premises. This demurrer was overruled by the trial court and its judgment thereon affirmed by the Court of Appeals of the District. 5 D. C. App. 122. Defendant was thereupon tried and convicted, and motions for new trial and in arrest of judgment having been made and overruled (the question of the constitutionality of section 102 being raised throughout the proceedings), was sentenced to be imprisoned for one month in jail and to pay a fine of one hundred dollars, which judgment was affirmed on appeal. 24 Wash. Law Rep. 251.

A writ of error from this court was then allowed, 24 Wash. Law Rep. 297, which the United States moved to dismiss.

Mr. Solicitor General for the motion submitted on his brief.

Mr. George F. Edmunds, *Mr. Jeremiah M. Wilson* and *Mr. A. A. Hoehling, Jr.*, opposing, submitted on their brief.

I. After the plaintiff in error had been indicted, and before trial was had, he prayed leave of this court to file a petition for a writ of *habeas corpus*, 156 U. S. 211, 218. That application was denied.

Argument against the Motion.

In the case, *In re Belt*, 159 U. S. 95, 100, subsequently decided by this court, in the opinion of the Chief Justice, it is said: "We have heretofore decided that this court has no appellate jurisdiction over the judgments of the Supreme Court of the District of Columbia in criminal cases, or on *habeas corpus*, but whether or not the judgments of the Supreme Court of the District reviewable in the Court of Appeals may be ultimately reviewed in this court in such cases when the validity of a statute of, or an authority exercised under, the United States is drawn in question, we have as yet not been obliged to determine": citing, *In re Chapman, Petitioner*, 156 U. S. 211.

Prior to the passage of the act of the 9th of February, 1893, 27 Stat. 434, establishing the Court of Appeals of the District of Columbia, this court had held that it had no jurisdiction to review criminal cases from the Supreme Court of the District. *In re Heath*, 144 U. S. 92; *Cross* v. *United States*, 145 U. S. 571. In neither of these cases, however, was jurisdiction sought to be maintained by reason of the fact that there was drawn in question the validity of a statute of, or an authority exercised under, the United States.

Section 8, of said act of February 9, 1893, provides as follows: "Any final judgment or decree of the said Court of Appeals may be reëxamined and affirmed, reversed or modified, by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulation as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

In section 5 of the Judiciary Act of March 3, 1891, 26 Stat. 827, appeals and writs of error are provided for from the District Courts, or from the existing Circuit Courts of the United

States, to this court, in the following cases: "In cases of conviction of a capital or otherwise infamous crime; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States."

If, under the law of any State, a citizen thereof is convicted, and it is claimed that the law of such State, under which he is so convicted, is in contravention of the Constitution of the United States, he is entitled to a writ of error for the purpose of having his case reviewed in this court. Therefore, if the contention of the government in the present case is correct and well founded, namely, that no writ of error will lie to the Court of Appeals of the District of Columbia in a case such as the one at bar, then it must result that Congress has discriminated between the said citizens of the said District and the citizens of every State in the Union, because it has provided that every citizen of a State who has been indicted and convicted under a law of the United States which is claimed to be in contravention of the Constitution may have his case reviewed by this court, while a citizen of the District of Columbia (if this contention be correct), indicted and convicted under the same law, may not have his case so reviewed.

Prior to the passage of the act creating the Circuit Courts of Appeals, this court had no appellate jurisdiction in criminal cases arising in the Circuit Courts; but by that act, (enacted in 1891,) jurisdiction was conferred upon this court to review the decisions of said courts in all cases of conviction of a capital or otherwise infamous crime, in any case that involves the construction or application of the Constitution of the United States, and in any case in which the constitutionality of any law of the United States is drawn in question. The cases of *Heath*, of *Cross* and of *Schneider*, did not involve the question of the validity of any law of the United States, as above stated.

Argument against the Motion.

Following this Circuit Court of Appeals act, in 1893, the act creating the Court of Appeals of the District of Columbia was passed. The Court of Appeals occupies the same relation to the Supreme Court of the District of Columbia that the Supreme Court of a State occupies to the inferior courts of such State, and it is only reasonable to interpret this act creating the Court of Appeals for the District, so as to give the citizens of the District of Columbia the same rights as to writs of error in criminal cases that are given to the citizens of the States in like cases. As we have above seen, in all cases where the validity of an act of Congress is called in question, a review may be had of the decision of the court below, on writ of error, in this court, and we respectfully submit that, if the language of the statute in question is obscure, for the reasons we have stated it should receive a liberal construction in favor of the citizen.

It seems to us that it must be obvious that Congress did not intend to discriminate against persons accused and convicted of crime in the District of Columbia, which would necessarily result from the contention of the Solicitor General in this case, if sustained.

The importance in principle, in right and in the harmony required in respect of reviewing decisions of all courts established under the authority of the United States, justifies a critical examination and consideration of the various provisions of the statutes on the subject.

From the organization of the government until recently no decision of a United States court, either in the circuits or in the Territories, in a criminal case, could be reviewed on appeal or writ of error by this court.

The language of the law respecting District and Circuit Courts of the United States was literally confined to civil cases. The language of section 1909 of the Revised Statutes, claimed by the learned court below and by the Solicitor General to be the same as that of the District Court of Appeals act of 1893, is, that writs of error and appeals shall be allowed under the same regulations, etc., as from the Circuit Courts where the value of the property or the amount in controversy

exceeds one thousand dollars. Then comes the exception, as follows: "*Except* that a writ of error or appeal shall be allowed to the Supreme Court of the United States upon writs of *habeas corpus*." Section 1911 provides for writs of error, etc., from Washington Territory — "Where the value of property or the amount in controversy exceeds two thousand dollars; and such writs of error and appeals shall be allowed in all cases where the Constitution of the United States or a treaty thereof, or acts of Congress, are brought in question."

The act of Congress of March 3, 1885, 23 Stat. 443, prohibited any writ of error, etc., to the Supreme Court of the District, and to the Supreme Courts of the Territories, "unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars," and then follows the limitations: "That the preceding section shall not apply to any case in which is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

The plain effect of that act was to leave the law just as it was before, except in respect of the sum involved, with the addition of the new provision. As it regards the District of Columbia, that question of the validity of treaties and statutes, etc., might be reviewed without regard to the sum or value in dispute.

This was the state of the statute law, except in respect to capital cases, at the time of the passage of the act of March 3, 1891, establishing Circuit Courts of Appeals of the United States. That act radically changed the course of jurisprudence in the courts of the United States, in respect of criminal cases, by prescribing a review in this court in all cases of constitutional construction, or the validity of any law or treaty of the United States, etc., thus changing, in the interests of justice, and uniformity and supreme authority of decision, the practice of a century. Before that date the Supreme Court of the District of Columbia and the Circuit Courts of the United States stood on precisely the same ground in respect of the finality of their jurisdiction in criminal cases.

Argument against the Motion.

Then came the act of February 9, 1893, establishing the Court of Appeals of the District of Columbia and reducing the Supreme Court of the District to substantially the same relation to the new court as inferior courts in the States, and as the District Courts before the act of 1891 bore to the highest courts of the States, and to the Circuit Courts of the United States. By this act nothing could be taken from the Supreme Court of the District directly to this court, and it put the District Court of Appeals in precisely the same attitude as to the Supreme Court of the District that the Circuit Courts of the United States, before the act of 1891, held in respect to the District Courts of the United States.

Then section 8 of the act of 1893 provided for a review of the judgments of the District Courts of Appeals, "in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error, or upon judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia." Then, instead of providing as the principal territorial acts had provided, an *exception* relating to the same class of subjects, it provided in a distinct clause, and affirmatively, as follows: "And *also* in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

It is respectfully and confidently submitted that this language and the construction of the section differ essentially from the previous statute in respect of writs of error, etc., to the Supreme Court of the District of Columbia, and from the acts relating to all the Territories, except Washington. The Washington Act is constructed in the same manner as the section now under consideration, except that it does not contain the word "also."

The words "and also," used together, are those of almost immemorially precise and technical meaning. They are words of legal art, and import not a restriction or qualification of

matter previously stated, but *an affirmative and an additional independent proposition.* They are the literal translation of the words "*ac etiam*," used in ancient and in comparatively modern pleading as importing a distinct movement *and transition from what had been previously declared to a new and independent subject*, capable of standing, and intended to stand, by itself.

The grammatical construction, therefore, of this eighth section of the act of 1893 gives this court appellate jurisdiction in every case decided by the District Court of Appeals in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, without any reference or regard to the previous clause in the section defining and limiting the mere pecuniary jurisdiction of the courts of the District of Columbia — a jurisdiction wider, indeed, than any other court of the United States — and requiring that it should not be exercised in constitutional cases without the same power of review by this court that the act of 1891 had provided with respect of all Circuit Courts of the United States.

It is monstrous to suppose that Congress ever had any other purpose in view, and we repeat that it used the very language and construction of the section precisely adequate to that end.

It may be added that there cannot be a civil suit in which there is not "a sum or value" in dispute. And, therefore, it follows that when the statute declares that neither "sum or value" shall be the test in respect of questions of constitutional consideration, etc., there is nothing to which the authority to review can be applied other than to criminal cases in which such constitutional questions arise. If there had been no money limit to the first clause of the section, no one, we think, would question that the second clause gave appellate jurisdiction to this court in all cases in which constitutional questions, etc., arose. But the second clause stands precisely the same in respect to the first as it would have stood if the first had made no reference to pecuniary amounts, for as we have shown, the clause is *not* one of limitation or qualification, *but of addition and transition.*

Argument against the Motion.

This court has never yet decided, even in the case of the former statutes for the District of Columbia or the Territories, that it did not have appellate jurisdiction in criminal cases involving constitutional questions and the like. There is not even an intimation of the character in all the decided cases, excepting a remark of the late Mr. Justice Blatchford, in *Farnsworth* v. *Montana*, 129 U. S. 104, 111. That case showed that the pecuniary limit had not been reached, and it showed that no question of constitutional consideration existed in it. The learned justice, in deciding it, referred to *Watts* v. *Washington*, 91 U. S. 580, and said that the language of the court in that case was *obiter dictum*.

It is submitted, with the sincerest respect to the late justice, that in making that observation he was mistaken. This court in deciding the *Watts case*, through Chief Justice Waite, said, as the fundamental and only ground of the decision, that: "This court can only review the final judgment of the Supreme Court of the Territory of Washington in criminal cases when the Constitution or a statute or treaty of the United States is drawn in question.

"This is a criminal case; but the record does not present for our consideration any question of which we can take jurisdiction. It nowhere appears that the Constitution or any statute or treaty of the United States is in any manner drawn in question."

The foregoing is the whole of the decision. If, then, anything was *obiter* in the decision, it must have been the whole of it. That case was decided in 1875.

Kurtz v. *Moffatt*, 115 U. S. 487, decided in 1885, has no application to the present case. All that was held there was that the law did not provide for removing a *habeas corpus* proceeding from the state to the Circuit Court, and that a private citizen had no right to arrest a deserter from the army without warrant. It was a case depending entirely upon whether the statutes for removal of cases applied to *habeas corpus*, a *civil* procedure having no money value concerned in it.

In *Snow* v. *United States*, 118 U. S. 346, 348, decided in

1885, it was held, that the appellate jurisdiction of this court did not exist, because the validity of a statute of the United States, etc., was not drawn in question; and this upon the construction of § 702 of the Revised Statutes, to which we have already referred; and the court expressly said that Utah does not fall within the clause concerning constitutional questions, because the section is in terms limited to Washington alone.

In *In re Schneider*, 148 U. S. 157, decided in 1892, no question of the validity of a statute or of constitutional right was involved, and the application for a writ of error was denied, the court holding that the proceeding in *habeas corpus* below was a *civil* proceeding, and that the pecuniary clause in the statute did not apply.

All these decisions, and others of the same character, were made before the passage of the District Courts of Appeals act of 1893. It must be presumed that Congress was familiar with the course of these decisions when, in defining the jurisdiction of this court by the act of 1893, it reformed the language of former acts, and that it intended thereby to put its appellate jurisdiction over decisions and judgments of the highest court in the District of Columbia, with its almost illimitable jurisdiction, upon the same footing that Congress had provided by the act of 1891, in respect to all the Circuit Courts of the whole country.

II. The present case is one over which this court has jurisdiction, because there is a sum of money in dispute.

The statute under which the plaintiff in error was indicted, tried and convicted is one which provides, in section 1, that, upon conviction, the party shall be punished "by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment of not less than one month nor more than twelve months." There is, therefore, necessarily involved in this case a sum in dispute.

The language of the act, in substance, is, that if the validity of a statute is drawn in question in any case, the court shall have jurisdiction regardless of the amount in question; but in cases where the validity of a statute is not drawn in question, the amount in dispute must be not less than $5000.

Argument against the Motion.

Now, it is respectfully submitted that this is a case in which a money value is involved, because the statute is imperative that there shall be a judgment, in case of conviction, for at least $100, and it may be $1000, depending upon the decision of the court in view of the gravity of the offence. This question, so far as we have been able to find, has never been decided by this court.

In the case of *Farnsworth* v. *Montana*, 129 U. S. 104, the punishment inflicted was a fine of $50 and $17.50 costs. The statute under which that case was prosecuted provided that the case could not be reviewed in this court unless the matter in dispute amounted to $5000, and this court, in that case, said:

"The judgment of the Probate Court was imprisonment until the payment of the fine and costs, and, if the fine covered by the judgment of any one of the courts could be called a matter in dispute within the first section of the act of 1885, the pecuniary value involved did not exceed $5000, so that it is plain that the first section of the act of 1885 does not cover the case."

So it appears, in the above-named case, that it was decided solely upon the ground that the amount involved did not reach the statutory limit.

In the case of *Snow* v. *United States*, 118 U. S. 354, the plaintiff in error was convicted, in the Territory of Utah, on indictments found under section 3, of the act of March 22, 1882, for cohabiting with more than one woman, the judgment of the court being imprisonment for six months and a fine of $300. Section 1909 of the Revised Statutes of the United States provides, that writs of error and appeals from the final decisions of the Supreme Court of any one of eight named Territories, of which Utah was one, "shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy exceeds $1000."

In the opinion of the court, by Mr. Justice Blatchford, it is said: "In each of the present cases the pecuniary value

involved does not exceed $300, even if the fine could be called a 'matter in dispute,' within the statute."

It will be seen, therefore, that, in each of said cases, this court did not decide that the imposition of a fine could not be regarded as a matter in dispute capable of being valued in money, but merely decided that, in the cases presented, the amount of the fine did not equal the jurisdictional sum required by the statutes regulating the review upon writ of error. In the case at bar no such difficulty arises, as the statute provides for a review in this court of the cases enumerated "without regard to the sum or value of the matter in dispute."

There is one hundred dollars in amount and value in dispute in this case — just as much and more than it could be in an ordinary civil case, and in connection with it there is the question of the validity of the statute which the court below has said authorized it to exact that sum from the plaintiff in error. This brings the case literally within section 8 of the act of 1893, even upon the contention of the other side in respect of its meaning.

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

The appellate jurisdiction of this court rests on the acts of Congress, and the question is whether we have jurisdiction to review on writ of error a judgment of the Court of Appeals of the District of Columbia in a criminal case under section 8 of the act of February 9, 1893, c. 74, establishing that court. 27 Stat. 434. And the proper construction of that section is to be arrived at in the light of previous decisions in respect of similar statutory provisions conferring appellate jurisdiction.

Section 8 of the act of February 27, 1801, c. 15, entitled "An act concerning the District of Columbia," 2 Stat. 103, and creating a Circuit Court for the District, provided: "That any final judgment, order or decree in said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be reëxamined and

reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal, which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the Circuit Court of the United States."

In *United States* v. *More*, 3 Cranch, 159, 173 (decided in 1805), it was held that this court had no jurisdiction under that section over the judgments of the Circuit Court of the District in criminal cases, and Chief Justice Marshall said: "On examining the act, 'concerning the District of Columbia,' the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of one hundred dollars, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit."

The section, as thus construed, was carried forward in the subsequent legislation on the subject, which is referred to at length and considered in cases hereafter cited, and need not be again reviewed.

The act of March 3, 1885, c. 355, 23 Stat. 443, consists of two sections, reading:

"That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

"Sec. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

We have decided that this court has no jurisdiction to grant a writ of error to review the judgments of the Supreme Court of the District of Columbia in criminal cases either under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, *In re Heath*, 144 U. S. 92; or under the act of February 6, 1889, c. 113, 25 Stat. 655, *Cross* v. *United States*, 145 U. S. 571; or on *habeas corpus*, *Cross* v. *Burke*, 146 U. S. 82. And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3, 1885, applied to any criminal case; and *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, and *United States* v. *More*, 3 Cranch, 159, were cited with approval. *Cross* v. *United States*, 145 U. S. 574; *Cross* v. *Burke*, 146 U. S. 87.

In *Farnsworth* v. *Montana*, in which it was claimed that the validity of an authority exercised under the United States was drawn in question, it was held that the second section of the act did not extend to criminal cases, but that both sections applied to cases where there was a matter in dispute measurable by some sum or value in money. The view taken was that the second section contained an exception or limitation carved out of the first section, and that the words, that in the enumerated cases, "an appeal or writ of error may be brought without regard to the sum or value in dispute," clearly implied that in those cases also there must be a pecuniary matter in dispute measurable by some sum or value, though not restricted in amount.

In *United States* v. *Sanges*, referring to *Snow* v. *United States*, 118 U. S. 346, we said: "The question whether the provision of the act of March 3, 1885, c. 355, § 2, authorizing a writ of error from this court to the Supreme Court of any Territory in any case 'in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States,' extended to criminal cases, was then left open, but at October term, 1888, it was decided in the negative. *Farnsworth* v. *Montana*, 129 U. S. 104."

And in *Washington & Georgetown Railroad* v. *District of Columbia*, 146 U. S. 227, 231, it was said: "Both sections of the act of March 3, 1885, regulating appeals from the Supreme Court of the District of Columbia, apply to cases where there is a matter in dispute measurable by some sum or value in money. *Farnsworth* v. *Montana*, 129 U. S. 104, 112; *Cross* v. *Burke*, 146 U. S. 82. By that act no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars, except that where the case involves the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, jurisdiction may be maintained irrespective of the amount of the sum or value in dispute."

Watts v. *Washington Territory*, 91 U. S. 580, decided at October term, 1875, is cited as sustaining a different construction, but the point of decision there was that it nowhere appeared that the Constitution or any statute or treaty of the United States was in any manner drawn in question, and the broad language of the opinion was plainly *obiter*, as pointed out in *Farnsworth* v. *Montana*.

The eighth section of the act of February 9, 1893, establishing the Court of Appeals of the District of Columbia, is as follows:

"SEC. 8. That any final judgment or decree of the said Court of Appeals may be reëxamined and affirmed, reversed or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the Supreme Court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of

a treaty or statute of or an authority exercised under the United States."

We regard this section and the act of 1885 as the same in their meaning and legal effect. The act of 1885 prohibits appeals or writs of error unless the matter in dispute exceeds the sum of $5000, and provides that the restriction shall not apply to certain enumerated cases, "but that in all such cases an appeal or writ of error shall be brought without regard to the sum or value in dispute."

The act of 1893 allows appeals or writs of error whenever the matter in dispute exceeds the sum of $5000, and also in cases "without regard to the sum or value of the matter in dispute," wherein the validity of any patent or copyright or of a treaty or statute of or an authority exercised under the United States is drawn in question, being the same cases mentioned in the second section of the act of 1885. We think as that section clearly applied to cases where there was a pecuniary matter in dispute, measurable by some sum or value, as has been repeatedly decided, the last clause of section eight of the act of 1893 must receive the same construction. The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases. The suggestion that because the punishment for conviction by the statute under which plaintiff in error was indicted, tried and convicted embraced a fine, there was therefore a sum of money in dispute, was disposed of by Chief Justice Marshall in *United States* v. *More*, *supra*. We repeat the language of the Chief Justice: "In criminal cases, the question is of the guilt or innocence of the accused. And although he may be fined upwards of one hundred dollars, yet that is, in the eye of the law, a punishment for the offence committed, and not the particular object of the suit."

It is contended that the words "and also" as used in the section under consideration are words "of legal art," of "almost immemorially precise and technical meaning," and import,

not a restriction of matter previously stated, but a transition from what had been previously declared to a new and independent subject intended to stand by itself.

We do not care to go into the struggle between the courts of King's Bench and Common Pleas on the question of the jurisdiction of the former over civil actions, which led to the curious device of the *ac etiam*, more particularly to avoid the effect of 13 Car. II, 2 Stat. c. 2. It was invented in order to couple with a cause of action over which the Court of King's Bench had jurisdiction, another cause of action, over which, without being joined with the first, the court would not have had jurisdiction. 2 Sellon's Pract. Appendix, 625, 630; Burges on Insolvency, 135, 149.

We are unable to conclude that Congress, which might easily have conferred jurisdiction in plain and explicit language, resorted to this ancient contrivance to effect it.

The argument is pressed that as by section five of the judiciary act of 1891, cases of conviction of capital or otherwise infamous crimes; cases involving the construction or application of the Constitution of the United States; or cases in which the constitutionality of any law of the United States is drawn in question, can be brought to this court directly from the District and Circuit Courts of the United States, therefore this section should be construed as giving the same right of review in the District of Columbia.

But we think the section too plain to admit of this. No mention of the courts of the District of Columbia is made in the act of March 3, 1891, and there is nothing in the eighth section to justify its expansion so as to embrace the provisions of that act. *In re Heath, Petitioner*, 144 U. S. 92, 96.

The writ of error was granted by the Court of Appeals in this case with reluctance, as appears from the opinion of Chief Justice Alvey, in passing upon the application therefor, given in the record, and out of deference to the supposed intimation in *In re Chapman*, 156 U. S. 211, and *In re Belt*, 159 U. S. 95, that it might lie. It is quite possible that the language used in the opinions in those cases was somewhat too cautiously worded, but it was with the purpose, as the question was not

raised for decision, of avoiding rather than expressing any views upon it.

We are of opinion that the writ of error cannot be maintained.

Writ of error dismissed.

PRATHER *v.* UNITED STATES.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 546. Submitted November 2, 1896. — Decided November 30, 1896.

Chapman v. *United States*, *ante*, 436, followed.

MOTION to dismiss.

Mr. Solicitor General for the motion.

Mr. H. E. Davis and *Mr. Jeremiah M. Wilson* opposing.

THE CHIEF JUSTICE: On the question of our appellate jurisdiction this case differs in no material respect from *Chapman* v. *United States*, just decided, *ante*, 436. The motion to dismiss the writ of error is sustained.

Writ of error dismissed.

PERRINE *v.* SLACK.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 549. Submitted October 13, 1896. — Decided November 30, 1896.

The controversy in this case being between the mother and the testamentary guardian of infant children, each claiming the right to their custody and care, the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value; and for this, and for the reasons given in *Chapman* v. *United States*, *ante*, 436, it is *held* that this court has no jurisdiction to review judgments of the Court of Appeals under such circumstances.

The court also declines to pass upon the question whether the action of the Court of Appeals, after the writ of error had been granted, was or was not improvident.

THE case is stated in the opinion.

Mr. Jeremiah M. Wilson, *Mr. Calderon Carlisle* and *Mr. William G. Johnson* for plaintiffs in error.

Mr. George E. Hamilton and *Mr. A. S. Worthington* for defendant in error.

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

This proceeding involves a controversy as to the custody of two children of tender years. Mrs. Perrine is the sister of the deceased father of the children and her co-plaintiff in error is her husband. She had the custody of the children under their father's will. Mrs. Slack, defendant in error, is their mother, and filed a petition for a writ of *habeas corpus* in the Supreme Court of the District of Columbia to obtain custody of them. The writ was issued, and return made by plaintiffs in error, which was demurred to, the demurrer overruled and the writ discharged. From this judgment Mrs. Slack appealed to the Court of Appeals of the District of Columbia, which reversed the judgment, and remanded the case, with directions to sustain the demurrer to the return, and to proceed with the case in conformity with the opinion of the court. Thereupon a writ of error, to operate as a supersedeas upon the filing of a bond in the penal sum of ten thousand dollars, was allowed, and the bond required was filed and approved. After this, an order was entered by the Court of Appeals, the Chief Justice dissenting, as he had from the judgment, directing the judge of the Supreme Court of the District, who had entered the order discharging the writ, to place the children in the custody of their mother, pending the prosecution of the writ of error, upon her giving satisfactory security. This order was entered and complied with, and the children were taken from their

aunt, their testamentary guardian, and placed in their mother's custody.

The situation being thus, application was made to this court for the issue of a writ of supersedeas, or other proper writ, to the Court of Appeals, or to the judge of the Supreme Court of the District who had entered the order as directed by that court, to supersede, annul and set aside the proceedings taken after the writ of error to this court had been allowed and made a supersedeas. That application having been submitted, we found it necessary to request counsel to file briefs on the question of the jurisdiction of this court to entertain the writ, and this has been done.

We are of opinion that the writ of error will not lie. The controversy is between the mother and the testamentary guardian of the infant children, each claiming the right to their custody and care, and the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value. *Barry* v. *Mercein*, 5 How. 103.

For the reasons given, and on the authorities cited in *Chapman* v. *United States*, *ante*, 436, we hold that this court has no jurisdiction to review the judgments of the Court of Appeals under such circumstances, and, as the writ of error must be dismissed, we ought not to consider the question whether the action of the Court of Appeals, after the writ of error had been granted and the judgment of that court superseded, was improvident or not.

Writ of error dismissed.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY *v.* CHICAGO.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 11. Argued November 6, 9, 1896. — Decided November 30, 1896.

As the plaintiff in error did not specially set up or claim in the state court any right, title, privilege or immunity under the Constitution of the United States, this court is without jurisdiction to review its final judgment.

Opinion of the Court.

THE case is stated in the opinion.

Mr. E. E. Osborn for plaintiff in error. *Mr. L. W. Bowers* was on his brief.

Mr. W. C. Goudy filed a brief for plaintiff in error on the question of jurisdiction.

Mr. John S. Miller for defendant in error. *Mr. William G. Beale* was on his brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

This was a proceeding instituted by the city of Chicago in the Circuit Court of Cook County, Illinois, for the condemnation of certain real estate. The object of the proposed condemnation was to open West Taylor Street in that city.

The Chicago and Northwestern Railway Company and the Chicago, St. Louis and Pittsburg Railroad Company, being the owners of the property, appeared and filed a cross petition, in which they alleged:

"That in addition to the land described in the above-entitled cause, which will be taken for the opening of the street mentioned in said petition, they are the owners of lands on each side of the said strip of land to be taken for said street, which land is used by them as a right of way for their railroad tracks necessary in the carrying on of their railroad business; that the taking of the said strip of land mentioned in said petition for the opening of said street will damage the other land owned by said companies, and used by them as right of way for their main tracks through the city of Chicago and for side tracks used by them in carrying on their business as common carriers.

"That the taking of said land and opening of said street will interrupt the business of your cross petitioners.

"Your cross petitioners further show that the taking of said land and the opening of said street across the same will necessitate the construction by your cross petitioners of approaches

to such crossings, the planking of their tracks, the draining of the side crossings and the adjoining land owned by said petitioners, the erection of gates at said crossing, and the keeping of a flagman thereat; all of which will cause the said cross petitioners great expense, to the great damage of your cross petitioners.

"Wherefore your cross petitioners say that the damage to your cross petitioners, to their business and to the lands of your cross petitioners not proposed to be taken in the said petition, and all damages caused by the opening of said street and the taking of said lands therefor be assessed as by the statute in such case made and provided."

By consent of the parties, entered of record, the cause was tried by the court without the intervention of a jury. The court found and adjudged that the just compensation to be paid by the city for the taking of the property described for the opening of West Taylor Street was one dollar.

Thereupon the Chicago and Northwestern Railway Company moved — without stating the grounds for its motion — that a new trial be awarded. That motion was overruled, the company excepting, and it was adjudged and decreed "that the sum of money awarded by the court by its finding to the owner of said lot, piece or parcel of land and property is a just compensation and the value thereof for the taking and damaging said lot, piece or parcel of land and property by the proposed public improvement mentioned in said petition, and the said owner shall accept from said city of Chicago such sum as so awarded on account of the lot, piece or parcel of land and property so owned by it, all of said lot, piece or parcel of land and property being in the city of Chicago, county of Cook, and State of Illinois, and that upon payment into this court by the said city of Chicago of the said sum of money for the use of the owner of the said lot, piece or parcel of land and property, or upon proof made to or before the court that the said sum of money has been paid to the owner of said lot, piece or parcel of land or property, the said city of Chicago shall have the right at any time thereafter to take possession of and damage the property in respect to which

such compensation shall have been paid or deposited." The company excepted to the entry of that judgment.

Upon appeal to the Supreme Court of Illinois the judgment was affirmed.

This court has no authority to review the final judgment of the highest court of a State in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege or immunity protected by the Constitution of the United States, unless the party, against whom such judgment was rendered, "specially set up or claimed" such right under that instrument. Rev. Stat. § 709.

It is assigned in this court for error that the judgment of the court of original jurisdiction had the effect to deprive the railroad company of its property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. But the record does not show that the company specially set up or claimed in the state courts or either of them any right under the Constitution of the United States. It does not appear that the attention even of the trial court was called to the fact that the company, in any form or for any purpose, invoked the protection of that instrument. Nor does it appear from the record that any Federal right was specially set up or claimed in the Supreme Court of the State. The assignments of error in the latter court are that the Circuit Court erred in finding that the company "was not entitled to any compensation for the land taken in said proceeding"; in finding that the just compensation to the company "was not more than one dollar"; in failing to allow it "any sum as damages sustained by it in the operation of its road and to its property caused by the taking of the land in the petition described"; and that the amount awarded as just compensation was "grossly inadequate."

In view of these assignments of error, it is not strange that the Supreme Court of Illinois made no reference in its opinion to the clause of the Constitution of the United States which, in this court for the first time, is invoked to sustain the proposition that the company's property has been taken without

due process of law. It disposed of the case upon general principles of law, and does not appear to have considered it with reference to any provision of the Constitution of the United States. At any rate, as the company did not specially set up or claim any right, title, privilege or immunity under the Constitution of the United States, this court is without jurisdiction to review the final judgment of the state court.

The writ of error is, therefore,

Dismissed.

THE KATE.[1]

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

No. 106. Argued January 6, 7, 1896. — Decided November 30, 1896.

A New York corporation owned and operated steamships plying between that port and Brazil. A Pennsylvania company was in the habit of supplying these ships with coal as ordered, charging the New York company therefor upon its books, and as further security for the running indebtedness, filed specifications of lien against the vessels under a statute of New York. Subsequently the New York company began to employ in their business other steamers under time charter parties which required the charterers to provide and pay for all coals furnished them, and the Pennsylvania company supplied these ships also with coals, knowing that they were not owned by the New York company, and understanding, although not absolutely knowing, and not inquiring about it, that the charterers were required to provide and pay for all needed coals. None of such coals were supplied under orders of the master of a chartered vessel, but the bills therefor were rendered to the New York company, which, when the supplies were made owed nothing for the hire of the vessels. The coals were not required in the interest of the owners of the chartered vessels. Proceedings having been taken in admiralty to enforce liens for coal against the vessel, *Held*,

(1) That as the libellant was chargeable with knowledge of the provisions of the charter party no lien could be asserted under maritime law for the value of the coal so supplied;

[1] The docket title of this case is "The Berwind-White Coal Mining Company, Appellant, *v.* The Steamship Kate &c."

Opinion of the Court.

(2) Without deciding whether the statute of New York would be unconstitutional if interpreted as claimed by the libellant, it gives no lien where supplies are furnished to a foreign vessel on the order of the charterer, the furnisher knowing that the charterer does not represent the owner, but, by contract with the owner, has undertaken to furnish such supplies at his own cost.

THE case is stated in the opinion.

Mr. George Bethune Adams for appellant.

Mr. J. Parker Kirlin and *Mr. William Pierrepont Williams* for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a proceeding in admiralty for a decree condemning the steamship Kate, an English vessel, her boilers, engines, tackle, apparel and furniture, to be sold in satisfaction of the claim of the Berwind-White Coal Mining Company, the libellant herein, for the alleged value of seven hundred and sixty-six tons of coal furnished to and delivered on board of that vessel at the city of New York on the 23d day of December, 1892.

The owner, a British subject, intervened and filed an answer denying the liability of the vessel. The District Court having dismissed the libel, 56 Fed. Rep. 614, the cause was transferred by appeal to the United States Circuit Court of Appeals, in which court certain questions of law arose which were certified to this court under the sixth section of the act of March 3, 1891, c. 517, 26 Stat. 826. Upon examining the questions so certified, as well as the statement of facts that accompanied them, this court, by appropriate order, required the whole record to be sent up that the cause might be here determined, as fully as if it had been brought here for review by appeal.

The case made by the pleadings and proofs is substantially as stated by the Circuit Court of Appeals, and is as follows:

The United States and Brazil Mail Steamship Company, a New York corporation, having a place of business at the city

of New York, owned and operated vessels plying between that city and ports in Brazil. Coal for their use was obtained from the libellant, a Pennsylvania company, which was engaged in mining and selling coal and had a place of business in the city of New York. The coal was furnished upon the order of the steamship company, and, in each instance, was charged upon the libellant's account books to that company as well as to the respective vessels.

In June, 1891, the steamship company being indebted to the libellant for coal delivered in the sum of twenty-five thousand dollars, the latter for its security filed specifications of lien against the vessels under a statute of New York providing for the collection of demands against ships and vessels. Laws of New York, 1862, p. 956, c. 482. Subsequently, upon an adjustment of accounts between the parties, it was agreed that the libellant should continue to furnish coal to the vessels of the steamship company, and in its discretion and for its security to file in the proper office specifications of lien against each vessel for the coal supplied to it. All the vessels, for which the libellant had, up to that time, furnished coal, upon the order of the steamship company, were owned by that company. But shortly thereafter the steamship company began to employ in its business steamers obtained under time charter parties. Among the vessels so employed was the steamship Kate.

The charter party under which the steamship company obtained the possession and control of the Kate was executed December 15, 1892. It contained, among other conditions, the following:

"That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the captain, officers, engineers, firemen and crew, and shall pay for the insurance of the vessel; also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"*That the charterers shall provide and pay for all the coals*, port charges, pilotages, agencies, commissions *and all other charges whatsoever, except those above stated.* That the char-

terers shall accept and pay for all coal in the steamer's bunkers on delivery, and the owners shall, on the expiration of this charter party, pay for all coal left in the bunkers each, at the current market prices at the respective ports when she is delivered to them."

"That the charterers shall pay for the use of said vessel at the rate of six shillings and six pence per gross register ton per calendar month, commencing from the time the vessel (after entry at the custom-house) is placed with clean holds at charterers' disposal, and at and after the same rates for any part of a month. . . ."

"Owners to provide rope, falls, block and slings necessary for handling ordinary cargoes up to three-ton weight."

"That the captain shall prosecute his voyage with the utmost dispatch, and take every advantage of wind, by using the sails with a view to economize fuel, and shall render all possible assistance with ship's crews and boats.

"*That the captain* (although appointed by the owners) *shall be under the orders and direction of the charterers as regards employment, agency or other arrangements;* and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with their orders and directions. That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, they shall make such complaint in writing to the agent in New York, specially appointed by owners, who shall have full power to act on their behalf, and, if necessary, dismiss any of the officers should they find the complaints made by charterers are justified and proven.

"That the charterers shall have permission to appoint a supercargo and/or purser, who shall accompany the steamer, and be furnished free of charge with first-class fare and accommodation, and see that the voyages are prosecuted with the utmost dispatch.

"That the master shall be furnished, from time to time, with all requisite instructions and sailing directions, and shall keep a full and correct log of the voyage or voyages in which

the consumption of coal shall be correctly entered, which are always to be open to inspection of the charterers or their agents."

"That the owners shall have a lien upon all cargoes and all subfreights for any amount due under this charter; and the charterers shall have a lien on the ship for all moneys paid in advance and not earned."

The owners of each chartered vessel, as the libellant knew, had an agent for the business of the vessel at New York city. The libellant knew or could easily have known what vessels belonged to the steamship company and what vessels were operated by the latter under time charters. It is true that its agents did not examine the charter parties, nor make any inquiry as to their provisions; but from what they had always heard about such instruments they believed and assumed, or took it for granted, that they contained conditions requiring the charterers, at their own expense, to provide and pay for all coals needed by the vessel. It was under these circumstances that the libellant furnished each vessel, operated by the steamship company, with coal as ordered by that company, charging the company and the vessel therefor, without making any distinction in the mode of keeping its accounts between the vessels owned by the steamship company and those operated by it under time charter parties. Specifications of lien were filed in the proper office against each vessel to which coal was delivered.

None of the coal furnished to the chartered vessels was ordered by the master of the vessel, nor were any of the bills therefor submitted to him for approval. They were submitted only to the steamship company. Nor did the agents of the chartered vessels know that coal was supplied by the libellant on the credit of the vessel, or that any specifications of lien were filed under the local statute.

The coal received by the chartered vessels was delivered at different dates, between August 17, 1892, and December 31, 1892; that received by the Kate and referred to in the libel being delivered on the 23d of December, 1892.

The steamship company was not informed until after Decem-

ber 31, 1892, of specifications of lien having been filed under the statute against the chartered vessels.

In January, 1893, the libellant having been advised by the steamship company not to remain unprotected in the future, the latter was then informed by the libellant that it had filed specifications of lien against all the vessels, including those chartered.

The coal furnished to the chartered vessels was contracted for and delivered at a time when nothing was due to the owners from the charterer, the hire of the vessels having been paid in advance.

Coal was not required in the interest of the owners of the chartered vessels at the time it was furnished; for the agent of each vessel had sufficient funds in hand, or could have obtained sufficient funds upon the credit of the vessel, to supply coal for any given voyage.

It may be assumed, for the purposes of the present case — although the evidence upon this point is not very satisfactory — that the libellant in fact relied upon the credit both of the charterer and the vessel, and believed that it acquired a lien, in each instance, by the filing of specifications under the statute of New York of 1862, which statute was subsequently amended, but not in any particular affecting the determination of this case. Its provisions, so far as it is material to refer to them, are as follows:

"§ 1. Whenever a debt, amounting to fifty dollars or upwards, as to a sea-going or ocean-bound vessel, or amounting to fifteen dollars or upwards, as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them within this State, for either of the following purposes:

"1st. On account of work done or materials or other articles furnished in this State for or towards the building, repairing, fitting, furnishing or equipping such ship or vessel;

"2d. For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel at the time when the same were furnished. . . .

". . . Such debt shall be a lien upon such vessel, her tackle,

apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages."

"§ 3. Such specification shall be filed in the office of the clerk of the county in which such debt shall have been contracted, except that when such debt shall have been contracted in either of the counties of New York, Kings or Queens, such specification shall be filed in the office of the clerk of the city and county of New York."

The charterers of the Kate having failed to pay for the coal delivered to it, the present libel was filed.

The decree of the District Court dismissing the libel proceeded upon two principal grounds: 1. That as the libellant did not deal with the owner of the vessel, or with its master or other officer, but only with the charterer, which had no authority to charge the vessel with liability for coal, and as the libellant knew, or must under the circumstances be assumed to have known, that the charterer himself had undertaken, with the owners, to furnish such coal as the vessel required, there was no lien under the maritime law — citing *The Stroma*, 11 U. S. App. 673; *The Samuel Marshall*, 49 Fed. Rep. 754, affirmed in 6 U. S. App. 383; *The Turgot*, 11 Prob. Div. 21; *The Aeronaut*, 36 Fed. Rep. 497. 2. That the statute of New York, properly construed, presupposes for its application a relation of express or implied authority, and if that authority does not exist, and that fact is known to the material man, or if he is legally chargeable with knowledge of it, no lien arises, by virtue of the statute, when the transaction is with a charterer, any more than when the dealing is with any other agent or consignee known to be unauthorized and forbidden to contract the debt; that if the statute be considered as imposing a lien upon the vessel, notwithstanding the libellant knew, or should be held to have known, that the charterer was required by the charter party under which he controlled the vessel to provide himself the coal needed by it, then such statute is unconstitutional and void in its application to commercial and maritime transactions "as an unreasonable and unjust interference with commerce, and as imposing an unjust burden on ships as the instruments of

commerce, beyond the power of state authority." 56 Fed. Rep. 614.

1. Touching the first of these grounds, the contention of the libellant is, that the stipulation in the charter party binding the charterer to pay for all coal was only an executory agreement, for the breach of which the owner could hold the charterer personally responsible; that the law will not permit the owner and the charterer, by agreement, express or implied, to withdraw the vessel from the operation of a lien in favor of those who furnish supplies to it in a foreign port; that even actual knowledge, upon the part of the person furnishing supplies, that the charterer had agreed himself to furnish, at his own expense, the coal needed by the vessel, was wholly immaterial under the New York statute.

We are of opinion that, as the libellant knew, or, under the circumstances, is to be charged with knowledge, that the charter party under which the Kate was operated obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libellant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense, was known or could have been known to the libellant by the exercise of due diligence on its part. Under the circumstances, the libellant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in bad faith to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as "the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries

furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world." *The Aurora*, 1 Wheat. 95, 101. "The vessel must get on," and "the necessities of commerce require, that when remote from the owner, he [the master] should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests." *The St. Iago de Cuba*, 9 Wheat. 409, 416; *The J. E. Rumbell*, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reasons urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.

There are many cases in which the recognition or rejection of liens under the maritime law have depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel. As they throw light upon the present inquiry, it is proper to refer to some of them.

In *Thomas* v. *Osborn*, 19 How. 22, 31, 32, the court said that all the commentators agree "that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. *Valin*, Article 19; *Émérigon*, *Contrats à la Grosse*, Chap. 4, Sec. 8, and the older commentators cited by him. *Boulay-Paty*, *Cours de Droit Com. Mar.* Tit. 1, Sec. 2; Tit. 4, Sec. 14; and see the authorities cited by him in Note 1, page 153." "If," the court

said, "the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." In the same case it was said: "We are of opinion Loring & Co. [merchants who had given a credit to Leach, to whom had been committed the entire possession, command and navigation of the vessel] had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances."

In *The Grapeshot*, 9 Wall. 129, 136, the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: "They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing [of supplies and materials] was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was unnecessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the material man knew, or could, by proper inquiry, have readily informed himself of the facts."

So, in *The Lulu*, 10 Wall. 192, 201–204, the court said: "Good

faith is undoubtedly required of a party seeking to enforce a lien against a vessel for such a claim [for advances to the master, or for repairs or supplies furnished at his request], but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had been actually received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made." Again: "Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel."

In *The Emily Souder*, 17 Wall. 666, 671, the court said that the presumption of law, in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or

for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, "can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry."

In *The Sarah Starr*, 1 Sprague, 453, 455, the court said that "in giving credit to the vessel and owners, the material man should act in good faith, and he would not be deemed to act in good faith, if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him, which would create suspicion, and put him upon inquiry, when such inquiry would have led to the knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the material man had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have led to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the material man had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created."

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the

master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

2. But a lien is claimed in virtue of the statute of New York giving a lien upon the vessel for a debt contracted by the master, owner, charterer, builder or consignee, on account of work done or materials or other articles furnished in the State "for or towards the building, repairing, fitting, furnishing or equipping" the vessel, or for such provisions and stores furnished within the State "as may be fit and proper for the use of such vessel at the time when the same were furnished." Literally or narrowly construed, the statute takes no account of any arrangement or agreement between the charterer and the owner whereby the authority of the former to pledge the credit of the vessel is restricted, although the conditions under which the charterer obtained possession and control of the vessel were known or could reasonably have become known to the person with whom the charterer contracted.

We are of opinion that the statute need not and should not be so construed. It ought not to be so interpreted as to put it in the power of the charterer and the person with whom he contracts to combine for the purpose of accomplishing a result inconsistent with the known agreement between the charterer and the owner.

If the libellant in this case had furnished the coal upon the

order of the master, and without knowledge or notice that the vessel was operated under a charter party, or if coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, under circumstances which did not charge libellant with knowledge of the terms of the charter party, but charged it only with knowledge of the fact that the vessel was being operated under a charter party, a different question would be presented.

It is unnecessary for the decision of this case to consider whether the statute of New York, if interpreted as claimed by the libellant, would be repugnant to the commerce clause of the Constitution. We decide only that libellant has no lien on the vessel under the maritime law, and that the statute of New York, reasonably construed, does not assume to give a lien where supplies are furnished to a foreign vessel upon the order of the charterer, with knowledge upon the part of the person or corporation furnishing them, that the charterer does not represent the owners, but by contract with them has undertaken to furnish such supplies at his own cost.

The decree of the District Court dismissing the libel is, therefore,

Affirmed.

NEW ORLEANS WATER WORKS COMPANY *v.* NEW ORLEANS.

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

No. 134. Argued November 4, 1896. — Decided November 30, 1896.

In the absence of parties interested, and without their having an opportunity to be heard, a court is without jurisdiction to make an adjudication affecting them.

A court of equity cannot properly interfere with, or in advance restrain the discretion of a municipal body while it is in the exercise of powers that are legislative in their character.

Legislatures may delegate to municipal assemblies the power of enacting ordinances relating to local matters, and such ordinances, when legally enacted, have the force of legislative acts.

THE case is stated in the opinion.

Mr. J. R. Beckwith for appellant.

Mr. Samuel L. Gilmore and *Mr. Henry J. Leovy* for appellee.

Mr. Thomas J. Semmes filed a brief for appellee.

MR. JUSTICE HARLAN delivered the opinion of the court.

This suit was determined in the court below upon demurrer to the bill. The question presented is whether the bill set forth a cause of action entitling the appellant, who was the plaintiff below, to the relief asked.

The case made by the bill is substantially as follows: By the fifth section of the act of the general assembly of Louisiana, commonly known as Act No. 33, Extra Session of 1877, it was provided that the New Orleans Water Works Company, in its corporate capacity, should own and possess the privileges acquired by the city of New Orleans from the Commercial Bank; that it should have, for fifty years from the passage of the act, the exclusive privilege of supplying the city of New Orleans and its inhabitants with water from the Mississippi River, or any other stream or river, by means of pipes and conduits, and for erecting or constructing any necessary works or engines or machines for that purpose; that it might contract for, purchase or lease any land or lots of ground, or the right to pass over and enter the same from time to time as occasion required, through which it might be necessary to convey the water into said city, or to distribute the same to the inhabitants of said city, and construct, dig or cause to be opened any canals or trenches whatsoever for the conducting of the water of the rivers from any place or places it deemed fit, and raise and construct such dykes, mounds and reservoirs as might be required for securing and carrying a full supply of pure water to the city and its inhabitants; enter upon and survey such lands as it might think proper, in order to ascertain

the best mode of furnishing a supply of water; and lay and place any number of conduits or pipes or aqueducts, and cleanse and repair the same, through or over any of the lands or streets of the city, provided the same should not be an obstruction to commerce or free circulation.

The eighteenth section of the same act provided: "That nothing in this act shall be so construed as to prevent the city council from granting to any person or persons, contiguous to the river, the privilege of laying pipes to the river exclusively for his own or their own use."

While the New Orleans Water Works Company was proceeding under the above legislative enactment constituting its charter, the Louisiana constitution of 1879 was adopted. By article 258 of that constitution it was provided: "All rights, actions, prosecutions, claims and contracts, as well of individuals as of bodies corporate, and all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if the said constitution had not been adopted. But the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby repealed."

After this constitutional provision took effect, the city council of New Orleans passed, November 15, 1882, an ordinance allowing Robert E. Rivers, the lessee of the St. Charles Hotel in New Orleans, "the right of way and privilege to lay a water pipe from the Mississippi River, at any point opposite the head of Common or Gravier streets, through either of these streets to said hotel, its front and side streets, with all needed attachments and appurtenances, and to distribute said water through said hotel as said Rivers, or lessee, may desire from said pipes," etc.

Rivers being about to take the benefit of this ordinance, the Water Works Company commenced suit against him in the Circuit Court of the United States for the Eastern District of Louisiana, in which it sought a decree perpetually restraining him from laying pipes, conduits or mains in the public streets of New Orleans for the purpose of conveying water from the Mississippi River to his hotel. The company proceeded in

that suit upon the ground that it had a valid contract with the State and city for an exclusive right for the full term of fifty years, from March 31, 1877, of supplying the city of New Orleans and its inhabitants, other than those contiguous to the Mississippi River, with water from that stream by means of pipes and conduits placed in the streets of that city, and that the obligation of that contract was protected by the Constitution of the United States against impairment by any act of the State. Rivers claimed the right to proceed with the construction of pipes, mains and conduits under the authority of the ordinance above referred to, which rested for its validity, as he claimed, upon the constitution and laws of Louisiana.

The bill filed by the Water Works Company against Rivers was dismissed in the Circuit Court, and upon appeal to this court the judgment of dismissal was reversed, with the direction to enter a decree perpetually restraining Rivers, as prayed for in the bill filed by the Water Works Company. The opinion in *New Orleans Water Works Company* v. *Rivers*, 115 U. S. 674, states fully the grounds upon which this court proceeded.

In 1882 the St. Tammany Water Works Company was organized under the general laws of Louisiana for the purpose of furnishing and supplying the inhabitants of the city of New Orleans and other localities contiguous to the line of its works with an ample supply of clear and wholesome water from such rivers, streams and other fountain sources as might be found most available for such purpose by means of pipes and conduits. The company being about to take steps to obtain authority for bringing into New Orleans the waters of the Bogue Falaya River in the parish of St. Tammany, and distributing the same by means of pipes, mains and conduits placed in the streets of the city parallel with those constructed by the New Orleans Water Works Company, the latter corporation instituted, in the Circuit Court of the United States for the Eastern District of Louisiana, a suit for an injunction to restrain the other company from carrying out its scheme. On appeal from the decree of the Circuit Court granting the

injunction, this court reaffirmed the principles announced in the *Rivers case*, saying: "As the exclusive right of the appellee to supply the city of New Orleans and its inhabitants with water was not restricted to water drawn from the Mississippi River, but embraced water from any other stream, it is impossible to distinguish this case in principle from that of the *New Orleans Water Works Company* v. *Rivers*. Upon the authority of the latter case it must be held that the carrying out by the appellant of its scheme for a system of water works in New Orleans would be in violation of the rights of the appellee, and that the state constitution of 1879, so far as it assumes to withdraw the exclusive privileges granted to the appellee, is inconsistent with the clause of the national Constitution forbidding a State from passing any law impairing the obligation of contracts." *Tammany Water Works Co.* v. *New Orleans Water Works Co.*, 120 U. S. 64, 67.

The present suit was brought February 8, 1894, by the New Orleans Water Works Company against the city of New Orleans. The bill sets out the foregoing facts, and gives the history of the two cases to which reference has been made.

It further alleged that after the above adjudications the defendant continued to make and promulgate ordinances conferring upon individuals and corporations the right to lay pipes and mains through the streets and public ways of New Orleans to premises not contiguous to the rivers and waters with which said pipes and mains connected, from which the water supply is drawn and consumed within the city of New Orleans, such premises not being included in the proviso in the plaintiff's charter relating to the owners of property contiguous to said waters; that the defendant has continued to pass and promulgate such ordinances, and threatens to continue to do so in the future; that the ordinances set forth by copy, and contained in Exhibit C^2, filed with and made a part of the bill, had been adopted and promulgated by the defendant in open defiance and disregard of the plaintiff's rights; that the plaintiff is advised and believes that the said ordinances set forth in said Exhibit C constitute but a portion of those of like character adopted and promulgated by the defendant;

that in nearly all instances where said ordinances have been adopted and promulgated the parties named as the beneficiaries or grantees therein have availed themselves of the said act of the city to lay pipes and mains through the streets and public ways of the city, and established pumping machinery to draw water through said mains for a water supply; that in the instances where they have not already availed themselves of this supposed warrant to establish water works of their own they are intending to so establish pipes and mains, and will do so unless restrained therefrom by the courts; and that none of the premises referred to in said ordinances are contiguous to the Mississippi River, or within the proviso contained in the plaintiff's charter and contract with the State relating to or affecting the owners of property contiguous to the river.

The bill also alleged that most of the persons and corporations named as grantees in said ordinances are large consumers of water, and but for said wrongful act of the city would be customers of and consumers of the water provided as public water supply by the plaintiff; that the plaintiff has pipes and mains so located that it could supply all of said premises with water, and should receive recompense and profit thereby; that its franchises, and the income that should accrue to it from public water supply, have been lessened and its revenues diminished by a sum exceeding thirty thousand dollars in the past, and that such loss of income and revenue is continuing, and if continued during the lifetime or corporate existence of the plaintiff, would amount to many thousand dollars more; that many of the said ordinances of the city of New Orleans complained of contain on the face thereof a condition that said license or grant of the right to lay pipes and mains and pump water from the river shall continue only during the will of the defendant; that in the cases where that provision is not contained in the text of the ordinances, the city has full and complete power to revoke and recall such fraudulent and wrongful grants and permissions at its will, and thereby cease to countenance said wrongdoers, or furnish them with any colorable right to continue and maintain said pipes and mains

so wrongfully established, and in good conscience should recall, revoke and expunge all of said pretended ordinances and regulations, of its own motion, without compulsion; that by reason of the said wrongful acts of the defendant, and the large number of grants and privileges made by the city, it is practically impossible for the plaintiff to obtain full and adequate relief through proceedings instituted against the said several persons and corporations receiving said supposed grants and authority to establish pipes and pumping machinery for the purpose of drawing water from the Mississippi River by reason of the great delays and the enormous expense of litigating with so many several defendants, and the multiplicity of suits and actions necessary to restrain said wrongful acts by proceeding against the several supposed grantees.

It was further alleged that the defendant and other persons proposing to assail the plaintiff's rights contend that there is ambiguity and uncertainty in the 18th section of plaintiff's charter; that at the time of the acceptance of its charter and grant the plaintiff was advised, and it believes correctly, that said section 18 could only lawfully be construed as conferring upon the city the right to grant the privilege of laying pipes to such person or persons, or corporations as may, at the time of such grant, be the owner of, or in the lawful possession of, real estate or property extending down to the river front and touching the said river, and having riparian rights on the banks of said river, subject only to such public servitude, or right of way, as may be impressed upon said property by the operation of the general statutes of Louisiana, bearing upon servitudes attaching to public waters, relating to the right of the public to moor and unload vessels at such banks, and a right of way for travel, or public roads on or along the banks of such waters, and the servitude or right the public may have to occupy the banks of rivers, and to establish levees, or embankments, to prevent overflow, where such public waters are subject or liable to overflow, from any cause; that the defendant and others allege and insist that such construction does not express the intent of the legislature of the State in granting said franchises, and insist upon a construction and range

for § 18, which, if correct, would destroy the plaintiff's rights and privileges conferred under and by its charter, in so far as the same relate to the territory and limit within which the plaintiff has the exclusive right to furnish public water supply through pipes and mains; that this alleged ambiguity has given rise to serious contention, has already caused, and, if continued, will in the future cause, the plaintiff much contention, litigation, expense, loss and damage; that it is important that the true, actual and proper construction of said § 18, and the proviso therein contained, should be judicially ascertained and decreed; that the court should adjudge, decree and declare, as between the plaintiff and the defendant, the true and actual meaning and construction of said section and proviso, in order that all future disputes and contentions in relation thereto may be at an end, and the plaintiff have knowledge of its actual rights in the premises; that the plaintiff is remediless in a court of law, and therefore applies and appeals to the court sitting in equity, having peculiar and full power and jurisdiction in the premises by virtue of the Constitution and laws of the United States; and that all of said actings and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of the plaintiff.

The relief sought by the bill is a decree determining to what class the property, ownership or possession of the property specified contained in that § 18 applies, and establishing and defining the limit beyond which the defendant has no power under said state legislation to authorize any person or corporation to invade the plaintiff's exclusive rights by laying pipes and drawing water from the Mississippi River or other public waters; that it be also adjudged and decreed that the rights conferred upon the plaintiff are those declared in *New Orleans Water Works Company* v. *Robert E. Rivers*, and in the case of *The New Orleans Water Works Company* v. *The St. Tammany Water Works Company;* that the plaintiff is lawfully entitled to have for and during the period named in said act of incorporation all of the exclusive rights and privileges named and set forth therein; that all the said acts, reso-

lutions and grants sought to be made by the defendant to persons or corporations, not being possessors or owners of property not touching the banks of the Mississippi River within the parish of Orleans, are null, void and of no effect; that defendant be ordered, adjudged and decreed, within a time certain, to be named in the decree, to recall, expunge, repeal and cancel each and all of said alleged ordinances, resolutions, grants or licenses so made by it, since the date the plaintiff became invested with said exclusive rights, save only such grants, permits, ordinances or resolutions as relate to or are confined to property and premises contiguous to the Mississippi River; and that in the event defendant shall neglect or refuse in some public way to declare the same recalled, cancelled, annulled and avoided within a time specified in such decree, the court will declare, adjudge and decree the same, and each and all of them, to be absolutely null and void and of no effect, and as conferring no rights or authority whatsoever, nor lawful reason for the invasion of the plaintiff's said exclusive rights.

The plaintiff asked that a writ of injunction be issued, inhibiting and forbidding the city of New Orleans, its council, officers, agents or departments, from granting or allowing to any person, persons or corporation any further or other like grants, licenses, privileges or warrants in any form, on the face thereof assuming to grant unto any person, persons or corporation any right or privilege to lay or maintain any pipes, mains or conduits from the Mississippi River across, along or through any public place or territory within the limits of New Orleans, where said premises are not contiguous to the Mississippi River; also, that it be adjudged and decreed that in so far as the matters were in issue and litigated in said cause of the said New Orleans Water Works Company against the St. Tammany Water Works Company, the judgment and decree therein determined the rights of the plaintiff, as between it and the city of New Orleans, beyond further contention and dispute, and that the defendant "be compelled to abide by, observe and enforce the same"; and that such decree be carried into full force and effect by such proper order, judgment

or decree therein as might be necessary to accomplish that end and compel obedience to its provisions.

The Circuit Court sustained a demurrer to the bill, and dismissed the suit with costs to the city.

It appears from the bill of complaint — the facts therein set forth being admitted by demurrer — that the city of New Orleans has by ordinances granted to a large number of corporations, associations and individuals the privilege of laying pipes in its streets for the purpose of conveying water to their respective premises from the Mississippi. These ordinances, the plaintiff contends, are in derogation of its rights and privileges as heretofore declared and adjudged by this court in the *Rivers* and *St. Tammany cases.* None of the parties for whose benefit the ordinances above referred to were passed were brought before the court or given an opportunity to be heard. Nevertheless, the plaintiff seeks a decree not only declaring those ordinances to be null and void, but requiring the city, within a named time, to recall, expunge, repeal and cancel each ordinance that does not relate to premises contiguous to the Mississippi River, and if the city does not, within such time, and in some public way, cancel and annul those ordinances, then that the court, in this suit, shall adjudge and decree them to be null and void as illegally interfering with the rights of the plaintiff.

We do not suppose that any precedent can be found that would justify a court of equity in giving such relief. A decree declaring the ordinances in question void would have no effect in law upon the rights of the beneficiaries named in the ordinances; for, in the absence of the parties interested and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear, upon the very face of the record, not to be due process of law, and could be treated everywhere as a nullity. *Windsor* v. *McVeigh*, 93 U. S. 274, 277; *Pennoyer* v. *Neff*, 95 U. S. 714, 733; *Scott* v. *McNeal*, 154 U. S. 34, 46.

Ought the court to have proceeded to a decree, or held the bill to be sufficient for relief, as between the plaintiff and the

city? In effect, a decree is asked against the city reasserting, for its guidance in the future, the principles announced in the *Rivers* and *St. Tammany cases*, and informing it that, in passing the ordinances complained of, it had done violence to those principles. But of what avail would such a decree be, if the city council, the members of which are not before the court, were left free to enact ordinances granting to other parties, in violation of the plaintiff's rights, the privilege of placing pipes in the streets of the city through which to convey water from the Mississippi River to their respective premises? If it be said that a final decree against the city, enjoining it from making such grants in the future, will control the future action of the city council of New Orleans, and will, therefore, tend to protect the plaintiff in its rights, our answer is that a court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have the force of laws passed by the legislature of the State and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin. *Chicago* v. *Evans*, 24 Illinois, 52, 57; *Des Moines Gas Co.* v. *Des Moines*, 44 Iowa, 505; 1 Dillon on Mun. Corp. § 308, and notes; 2 High on Injunctions, § 1246. If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement. *Page's case*, 34 Maryland, 558, 564; *Baltimore* v. *Radecke*, 49 Maryland, 217, 231.

As no decree can be properly rendered that will affect the

rights of the beneficiaries named in the ordinances enacted before this suit was commenced — such beneficiaries not being before the court — a court of equity ought not, by any form of proceeding, to interfere with the course of proceedings in the city council of New Orleans, and enjoin that branch of its municipal government from hereafter passing ordinances similar to those heretofore enacted and which are alleged to be obnoxious to the plaintiff's rights. The mischievous consequences that may result from the attempt of courts of equity to control the proceedings of municipal bodies when engaged in the consideration of matters entirely legislative in their character, are too apparent to permit such judicial action as this suit contemplates. We repeat that when the city council shall pass an ordinance that infringes the rights of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere, and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions. But that circumstance cannot justify any such decree as it asks.

Upon the grounds we have indicated, and without considering the merits of the case, the decree below must be

Affirmed.

GRIMES DRY GOODS COMPANY *v.* MALCOLM.

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

No. 60. Argued and submitted October 21, 1896. — Decided November 30, 1896.

In Arkansas a conveyance of personal property of the grantor to the grantee in trust accompanied by delivery, conditioned that, as the grantor is indebted to several named persons in sums named, if he shall within a time named pay off and discharge all that indebtedness and interest, then the conveyance shall be void, otherwise the grantee is to sell the property at public sale, after advertisement, and apply the proceeds to the expenses of the trust, the payment of the debts named, in the order named, and the surplus, if any to the grantor, is, under the decisions of the Supreme Court of that State, a deed of trust in the nature of a mortgage.

The submission of special questions to the jury under the statute of Arkansas is within the discretion of the court.

What the mortgagor in such an instrument said to a third party, after execution and delivery, respecting his intent in executing the instrument, is not admissible to affect the rights of the mortgagee.

All the evidence in the case being before this court, and it being clear from it that the trial court would have been warranted in peremptorily instructing the jury to find for the defendant, the plaintiff suffered no injury from the refusal of the court to permit the jury to retire a second time.

THE case is stated in the opinion.

Mr. G. B. Denison and *Mr. N. B. Maxey*, for plaintiff in error, submitted on their brief.

Mr. A. G. Moseley for Waples, defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This action was brought by the plaintiff in error, a Missouri corporation, in the United States court for the Indian Territory, Second Judicial Division, to recover from Malcolm, one of the defendants in error, the sum of $1845, alleged to be due the plaintiff on open account for goods, wares and merchandise

sold and delivered by it to Malcolm. The plaintiff alleged that $1200 of the account was due, and that the remainder thereof was to become due; also, that Malcolm had sold, conveyed or otherwise disposed of his property or suffered or permitted it to be sold with the intent to cheat or defraud his creditors or to hinder or delay them in the collection of their debts. A writ of attachment based upon affidavit was issued and levied upon one storehouse and fixtures, one stock of general merchandise and one gin house and saw mill as the property of Malcolm. Malcolm filed an affidavit controverting the grounds of the attachment.

By leave of the court the appellee Waples interpleaded, alleging that at the time of the filing of the suit and of the levying of the attachment, he was rightfully in possession and control of the attached property in virtue of an instrument of writing executed by Malcolm on the 19th day of January, 1891, at Durant, in the Indian Territory, at which time Malcolm was in rightful possession and control of the property; that at the time of the execution and delivery of that instrument Malcolm delivered to him, Waples, actual possession of such property; that when the property was seized he notified the United States marshal of his claim to it, and demanded possession; that said instrument "was and is a mortgage with power of sale; that the same was intended by said defendant, John Malcolm, as a security for certain debts therein enumerated, and was so accepted by interpleader."

The above instrument recited that Malcolm does "bargain, sell and deliver" to Paul Waples certain described personal property, including the property attached in this case, "to have and to hold the same unto the said Paul Waples, and his successors in this trust forever." The condition of the conveyance is recited to be: "Whereas I am indebted to the Leeper Hardware Company, $2552.23; and to Waples Platter Company, two notes aggregating $745.00, not including interest or attorney's fees and an open account for $259.39; and to Lingo, Waples & Company, two notes aggregating $399.20, not including interest or attorney's fees; and to Waterman, Starr & Company, $224.95; and to Burton, Lingo & Company,

$184.00; and to John R. Garr estate, $142.90, and to various other parties, named in Schedules 'A' and 'B,' hereto annexed and made a part hereof, in the sums set opposite their respective names. Now if, at any time within sixty days from this date, I pay off and discharge all of the indebtedness described aforesaid, including interest, then this conveyance shall be null and void, and of no further force or effect, and said goods, merchandise and property shall be restored to me. But if I fail to pay all of said indebtedness, with accrued interest, if any, within sixty days aforesaid, then said Paul Waples, or his successors, shall have the right, and it shall be his duty at the expiration of said sixty days, after first advertising the time, terms and place of sale for ten days previous to the day of sale, . . . to sell all of the aforesaid property then on hand at public outcry, for cash."

It was further provided in that instrument that Waples should take exclusive possession of the personal property in person or by his agents or employés, and should have the right to sell the merchandise in the due course of business for cash only. The money realized from the sale of the property, or any portion thereof, was to be appropriated first to the payment of the reasonable expenses "of executing this trust"; next to the payment of the claims of certain parties named; then to the payment of creditors, first those named in Schedule A, then those named in Schedule B, each set to be paid in full, and if not enough to pay all, then to be paid *pro rata;* the balance, if any, left in the hands of Waples was to be paid to Malcolm.

The plaintiff filed a reply, controverting all the allegations of Waples' pleading, and denying that Waples was in possession and control, and entitled to possession and control, of the attached property or that the instrument referred to was or is or was intended to be a mortgage with power of sale. It averred that, as to it, "the said instrument and all acts done by said Malcolm and said Waples in connection with the execution thereof, and all acts done by either of them or by any person under and by virtue of it, are and ever have been fraudulent and tended to hinder and delay plaintiff in the collec-

tion of *their* debt, and was contrived and intended with the fraudulent intent to cheat, hinder or delay the plaintiff and the creditors in the collections of its and their debt, and was and is void."

The reply further alleged "that the said instrument was and is a deed of assignment, and as such is in violation of the law governing voluntary assignments, and was and is wholly void, and the said interpleader never acquired any rights under the same, and it never gave him any right to the possession of the property attached in this action, and that said Waples never had, and has not now, under and by virtue of the said instrument, any right to take or hold possession of the said property, and has no right to recover the same in this action."

Judgment was taken by the plaintiff against Malcolm for the amount of the debt due from him, and the cause having been tried between the plaintiff and Waples, as well as upon the issue raised by the attachment, the jury found for Malcolm on the latter issue and for Waples as to the property in controversy. Judgment upon that verdict having been entered, a writ of error was prosecuted to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment of the court in the Indian Territory was affirmed. 19 U. S. App. 229; 58 Fed. Rep. 670.

The fundamental question in this case is whether the instrument of January 19, 1891, executed by Malcolm is a deed of trust in the nature of a mortgage, or a deed of assignment for the benefit of creditors. This instrument was before the Circuit Court of Appeals of the Eighth Circuit in *Rainwater-Boogher Hat Co.* v. *Malcolm*, 10 U. S. App. 249; 2 C. C. A. 476; 51 Fed. Rep. 734, 737; and that court held it to be a deed of trust in the nature of a mortgage — the legal equivalent of a mortgage with a power of sale — upon the authority of the decisions of the Supreme Court of Arkansas construing the statute of that State regulating assignments for the benefit of creditors; which statute became a part of the law of the Indian Territory under the act of Congress of May 2, 1890, c. 182, § 31, 26 Stat. 81, 94.

By the statutes of Arkansas relating to assignments it is

provided: "Sec. 305. In all cases in which any person shall make an assignment of any property, whether real, personal, mixed or choses in action, for the payment of debts before the assignee thereof shall be entitled to take possession, sell or in any way manage or control any property so assigned, he shall be required to file in the office of the clerk of the court exercising equity jurisdiction a full and complete inventory and description of such property, and also make and execute a bond to the State of Arkansas in double the estimated value of the property in said assignment, with good and sufficient security, to be approved by the clerk of said court, conditioned that such assignee shall execute the trust confided to him, sell the property to the best advantage and pay the proceeds thereof to the creditors mentioned in said assignment according to the terms thereof, and faithfully perform the duties according to law." Act February 16, 1859, § 1, as amended by act February 23, 1883, Mansfield's Digest, 1884, p. 219.

If the instrument executed by Malcolm was, within the meaning of the statute, an assignment for the benefit of creditors, then Waples' possession of the property was unauthorized, for he did not comply with the provisions of the statute by filing the inventory and giving the bond required.

In *Richmond* v. *Mississippi Mills*, 52 Arkansas, 31, the court said: "We do not hold that the giving of one or more mortgages, the confession of judgments or other means adopted to give security or preference, constitute necessarily or even ordinarily an assignment. But we do hold that where one or more instruments are executed by a debtor, in whatsoever form or by whatsoever name, with the intention of having them operate as an assignment, and with the intention of granting the property conveyed absolutely *to the trustee* to raise a fund to pay debts, the transaction constitutes an assignment." The doctrines of that case were affirmed in *Fecheimer* v. *Robertson*, 53 Arkansas, 101, 104, the court saying: "The confidence of the mortgagors that no surplus would result to them in this case is apparent from the deeds, as also from the testimony. The purpose was to devote the property to the payment of debts. This may be accomplished by either a

mortgage or an assignment. The question is, have the grantors by stipulations in the deeds or by their agreements and acts impressed the character of a trust for creditors upon this transaction?" In *Robson* v. *Tomlinson*, 54 Arkansas, 229, 233–234, where the question was whether a certain instrument was to be taken as a mortgage given to secure a debt, or a deed of assignment for the benefit of creditors, the court said: "The instrument relied upon by Tomlinson, the interpleader, is in form a mortgage, and not an assignment for the benefit of creditors. The presumption, until overcome by proof, is that the parties intended it to have the effect the law gives to a mortgage — that is, that it should stand as security for a debt. The fact that it provides that the mortgagor should surrender immediate possession to the trustee for the mortgagee does not convert it into an assignment. To accomplish that result it must be shown that it was the intention of the parties that the debtor should be divested not only of his control over the property, but also of his title. *Cadwell's Bank* v. *Crittenden*, 66 Iowa, 237. The equity of redemption may be mortgaged or sold, and so be of value to a debtor who has not the pecuniary ability to redeem; and he has a right to reserve it in dealing with his creditor, regardless of his solvency. . . . Neither the possession of the goods, nor the unreasonableness of the debtor's expectation of paying the debt at maturity, nor his intent never to pay, is the criterion for distinguishing a mortgage from an assignment. The controlling guide, according to the previous decision of the court, is, was it the intention of the parties, at the time the instrument was executed, to divest the debtor of the title and so make an appropriation of the property to raise a fund to pay debts? . . . If the equity of redemption remains in the debtor, his title is not divested, and an absolute appropriation of the property is not made. In arriving at the intent of the parties, therefore, the question is, not whether the debtor intended to avail himself of the equity of redemption by payment of the debt, but was it the intention to reserve the equity? If so, the instrument is a mortgage and not an assignment." See also *Penzel Co.* v. *Jett*, 54 Arkansas, 428, 430.

These cases, as was said in *Appolos* v. *Brady*, 4 U. S. App. 209; 49 Fed. Rep. 401, 403; "declare the test to be: Has the party made an absolute appropriation of property as a means for raising a fund to pay debts, without reserving to himself, in good faith, an equity of redemption in the property conveyed?"

Accepting, as we properly may, the law of Arkansas, upon the subject of assignments for the benefit of creditors and mortgages given to secure the payment of debts, to be as declared by the Supreme Court of that State, we are of opinion that the instrument executed by Malcolm to Waples, tested alone by its words, is a deed of trust in the nature of a mortgage. It does not make an absolute appropriation of the property for the purpose of creating a fund for the payment of the debts named, but creates a lien to secure those debts, subject to an express reservation by the grantor of a right, within a specified time, to pay the debts, and have possession of such of the property as then remained unsold restored to him. Clearly, this instrument, upon its face, is nothing more than a security for certain debts — an equity of redemption remaining in the debtor. It did not make an absolute, fixed appropriation of the property for the payment of debts.

An effort was made to show that the parties really intended the instrument to operate as an assignment for the benefit of creditors. Without stopping to consider whether parol proof could be properly admitted for such a purpose, we content ourselves with saying, as did the Circuit Court of Appeals, that the proof wholly fails to show that either of the parties to the instrument intended it to be other than what it purports to be on its face, namely, a mortgage.

It is assigned for error that the trial court refused to submit to the jury certain special questions framed and presented by the plaintiff after the charge to the jury and before the argument. This contention rests upon certain provisions of the statutes of Arkansas relating to pleading and practice, (c. 119,) which are made part of the law of the Indian Territory by the above act of Congress of May 2, 1890, c. 182, 26 Stat. 81, 94. Those provisions are: "Sec. 5141. A special verdict is that by which the jury finds the facts only. It must present the

facts as established by the evidence, and not the evidence to prove them, and they must be so presented as that nothing remains to the court but to draw from them conclusions of law. Sec. 5142. In all actions the jury, in their discretion, may render a general or special verdict, but may be required by the court in any case in which they render a general verdict to find specially upon particular questions of fact to be stated in writing. This special finding is to be recorded with the verdict." The submission of special questions to the jury is, under the statute, in the discretion of the court. It was so held in *Little Rock & Fort Smith Railway* v. *Pankhurst*, 36 Arkansas, 371, 378. Independently of the statute of Arkansas, this court has held that "the personal conduct and administration of the judge in the discharge of his separate functions was neither practice, pleading nor a form or mode of proceeding" within the meaning of the practice act of June 1, 1872, 17 Stat. 197, now § 914 of the Revised Statutes, and that "the statute was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common law powers with which in that respect he is clothed." *Mutual Accident Association* v. *Barry*, 131 U. S. 100, 119.

One of the exceptions taken by the plaintiff at the trial was to the action of the court in not permitting Malcolm to state what he said to one Wiswell, within two days after the execution of the instrument in question, as to what he intended that instrument to be, whether a mortgage or a deed of assignment. What the mortgagor said to others, after the execution of the mortgage and delivery of possession under it, could not affect the rights of the mortgagee. *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161, 165.

The bill of exceptions contains the following statement of what occurred in the trial court before the jury retired to consider their verdict:

"And after the court had delivered its charge, and plaintiff had saved its exception thereto, as above set forth, the case was argued to the jury by the attorneys of the respective parties, and when the argument had closed, it being near adjourning hour, it was agreed between the parties in open

court that in case the jury agreed upon a verdict during the recess of court they might seal their verdict and give it to their foreman, and report it at the meeting of court to-morrow morning. And at the meeting of court the following morning, being the 24th day of September, 1892, said jury returned into court, and upon being asked by the court if they had agreed upon a verdict, the foreman of the jury, —— Oaks, replied: 'We have.' And thereupon —— Sheimer, one of the jurors, arose and said: 'Your Honor, I agreed to a verdict last night, but would like to change my vote, if I can do so.' Whereupon the court replied: 'That is a very strange proceeding,' and ordered the jury to return to their jury-room; and one of the jurors thereupon arose and said if he was permitted to introduce evidence he could prove that Sheimer was not a competent juror. And thereupon A. G. Moseley, counsel for the interpleader, rose and said that we had agreed that the jury might seal their verdict and report it at the opening of the court this morning, and insisted that the jury should return the verdict they had given their foreman. And thereupon the court ordered the jury to take their seats in the box, and said that he would not permit any such conduct, and ordered the foreman to hand the sealed verdict to the clerk, and the clerk to read it. And after the clerk had read the verdict, plaintiff, by its counsel, requested that the jury be polled, and the court thereupon asked each juror separately if that was his verdict, and each of them answered 'Yes, sir,' with the exception of the juror Sheimer, who replied, in answer to the court's question, 'Is that your verdict?' 'Yes, sir; I suppose so.' Plaintiff, by its counsel, excepted to the action of the court in not permitting the jury to again retire to their jury-room to again consider of their verdict, and also to the action of the court in directing the foreman of the jury to hand said sealed verdict to the clerk, and ordering the clerk to read it, and to the entering of said verdict as the verdict of the jury in the case. This exception was taken in open court before the jury had retired from the bar of the court or from their jury-box."

The bill of exceptions brings before the court all the evi-

dence, and it is clear that the trial court could properly have instructed the jury peremptorily to return a verdict for the defendant. *Delaware, Lackawanna &c. Railroad Co.* v. *Converse*, 139 U. S. 469, 472; *Anderson County Commissioners* v. *Beal*, 113 U. S. 227, 241; *North Pennsylvania Railroad* v. *Commercial Bank*, 123 U. S. 727, 733. In this view of the case the Circuit Court of Appeals well said that it was not error for the court to direct one juror to do what it ought to have directed all of them to do.

Other questions are presented by the assignments of error, but it is not necessary to discuss them. None of them furnish a ground for reversal. We perceive no error in the record, and the judgment of the Circuit Court of Appeals is

Affirmed.

ALLEN *v.* UNITED STATES.

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

No. 371. Submitted October 23, 1896. — Decided December 7, 1896.

There is no error in an instruction that evidence recited by the court to the jury leaves them at liberty to infer not only wilfulness, but malice aforethought, if the evidence is as so recited.

There is no error in an instruction on a trial for murder that the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but that it may spring up at the instant, and may be inferred from the fact of killing.

The language objected to in the sixth assignment of error is nothing more than the statement, in another form, of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act.

Mere provocative words, however aggravating, are not sufficient to reduce a crime from murder to manslaughter.

To establish a case of justifiable homicide it must appear that the assault made upon the prisoner was such as would lead a reasonable person to believe that his life was in peril.

There was no error in the instruction that the prisoner was bound to retreat as far as he could before slaying his assailant. *Beard* v. *United States*,

158 U. S. 550, and *Alberty* v. *United States*, 162 U. S. 499, distinguished from this case.

Flight of the accused is competent evidence against him, as having a tendency to establish guilt; and an instruction to that effect in substance is not error, although inaccurate in some other respects which could not have misled the jury.

The refusal to charge that where there is a probability of innocence there is a reasonable doubt of guilt is not error, when the court has already charged that the jury could not find the defendant guilty unless they were satisfied from the testimony that the crime was established beyond a reasonable doubt.

The seventeenth and eighteenth assignments were taken to instructions given to the jury after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions. These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. *Held*, that there was no error.

The facts constituting the offence for which Allen was indicted are set forth in *Allen* v. *United States*, 150 U. S. 551, and 157 U. S. 675. The rulings passed upon in the present case are stated in the opinion of the court.

No appearance for plaintiff in error.

Mr. Solicitor General for defendants in error.

Mr. Justice Brown delivered the opinion of the court.

This was a writ of error to a judgment of the Circuit Court of the United States for the Western District of Arkansas sentencing the plaintiff in error to death for the murder of Philip

Henson, a white man, in the Cherokee Nation of the Indian Territory. The defendant was tried and convicted in 1893, and upon such conviction being set aside by this court, 150 U. S. 551, was again tried and convicted in 1894. The case was again reversed, 157 U. S. 675, when Allen was tried for the third time and convicted, and this writ of error was sued out.

The facts are so fully set forth in the previous reports of the case that it is unnecessary to repeat them here.

We are somewhat embarrassed in the consideration of this case by the voluminousness of the charge, and of the exceptions taken thereto, as well as by the absence of a brief on the part of the plaintiff in error; but the principal assignments of error, set forth in the record, will be noticed in this opinion.

1. The third assignment of error is taken to certain language in the charge, the material portion of which is as follows:

"If you believe the story as narrated by the two Erne boys, who testified as witnesses, is true — that is, that the defendant went up to the fence with his pistol; that he went through the wire fence, and went out in the wheat field where Philip Henson was, and met him, first halloed at him, placed his pistol upon the fence and stopped the boys, and then went through the wire fence and went out to where he was, and struck him first in the mouth with his left fist, and at the same time undertook to fire upon him, and that that firing was prevented by the action of Henson in taking hold of the pistol, and it went off into the ground, and then he fired at him and struck him in the side, and then he fired at him and struck him in the back, you have a state of facts which would authorize you to say that the killing was done wilfully; and, not only that, but to say that it was done with malice aforethought, because that state of case, if that be true, would show the doing of a wrongful act, an illegal act, without just cause or excuse, and in the absence of mitigating facts to reduce the grade of the crime."

The learned judge was stating in this connection the theory of the prosecution, and if the facts were as stated by the

Ernes, there was no error in saying to the jury, not that they were bound to, but that they were at liberty to, infer not only wilfulness but malice aforethought.

2. The fourth assignment was to the following language:

"How can you find a deliberate intent to kill? Do you have to see whether or not the man had that intent or not in his mind a year or month or day or an hour? Not at all, for in this age of improved weapons, when a man can discharge a gun in the twinkling of an eye, if you see a man draw one of these weapons and fire it, and the man toward whom he presents it falls dead, you have a deliberate intent to kill, as manifested by the way he did that act. You have the existence of a deliberate intent, though it may spring up on the spur of the moment — as it were, spring up cotemporaneous with the doing of it — evidenced by shooting of the man, if the act was one he could not do under the law and then claim it was manslaughter, or an act that he could not do in self-defence from the fact that it was done without just cause or excuse, or in the absence of mitigating facts, and that is precisely the definition of this characteristic of murder, known as malice aforethought. It does not, as I have already told you, necessarily import any special malevolence towards the individual slain, but also includes the case of a generally depraved, wicked and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation. Malice, says the law, is an intent of the mind and heart."

The substance of this instruction is that the intent necessary to constitute malice aforethought need not have existed for any particular time before the act of killing, but that it may spring up at the instant and may be inferred from the fact of killing. This is within the authorities as applied to the common law crime of murder, though where the crime is classified as in some States, proof of deliberate premeditation is necessary to constitute murder in the first degree. *United States* v. *Cornell*, 2 Mason, 91; *People* v. *Clark*, 7 N.Y. 385; Whart. on Homicide, § 33; Whart. on Crim. Law, 10th ed. § 117.

3. The sixth assignment is to the following language:

"The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design that it is not necessary to prove that such design existed for any definite period before the fatal blow was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired, we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant."

This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 Greenl. Ev. § 18; *Regina* v. *Jones*, 9 C. & P. 258; *Regina* v. *Hill*, 8 C. & P. 274; *Regina* v. *Beard*, 8 C. & P. 143; *People* v. *Herrick*, 13 Wend. 87, 91.

4. The eighth assignment is taken to the following definition of manslaughter:

"It is the killing of a man unlawfully and wilfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is, the doing of a wrongful act without just cause or excuse and in the absence of mitigating facts in such a way as to show a heart void of social duty and a mind fatally bent upon mischief must be out of the case. If that is driven out of the case, then if it is a crime at all, it must come under this statute; it must come under this definition of the crime of manslaughter. The common law, which I will read to you, defines it in the same way. It tells you in a little broader terms what kind of conditions it springs out of. Speaking of voluntary manslaughter, it says it is the wilful and unlawful killing of another on sudden quarrel or in the heat of passion. Let us see what is meant

by this definition. The party who is killed, at the time of the killing, must offer some provocation to produce a certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must be doing some act — that is, the deceased, Philip Henson in this case, the party killed — which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion; in a heat of passion where he is incapable of deliberating."

There is no error in this instruction. It is well settled by the authorities that mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter. *Commonwealth* v. *York*, 9 Met. (Mass.) 93, 103; Whart. on Homicide, § 393; Whart. on Crim. Law, 10th ed. § 455*a*.

5. The ninth alleged error turned upon the statement made by the court of the circumstances under which the killing would be justifiable:

"It does not mean that defendant was assaulted in a slight way, or that you can kill a man for a slight attack. The law of self-defence is a law of proportions as well as a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, against which you can exercise a deadly attack. If he is attacked by another in such a way as to denote a purpose to take away his life, or to do him some great bodily harm from which death or permanent injury may follow, in such a case he may lawfully kill the assailant. When? Provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling him without killing him, if it be in his power. The act coming from the assailant must be a deadly act, or an act that would produce great violence to the person, under this proposition. It means an act that is hurled against him, and that

he has not created it, or created the necessity for it by his own wrongful, deadly or dangerous conduct — conduct threatening life. It must be an act where he cannot avoid the consequences. If he can, he must avoid them, if he can reasonably do so with due regard to his own safety."

It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril. *Wallace* v. *United States*, 162 U. S. 466.

Nor is there anything in the instruction of the court that the prisoner was bound to retreat as far as he could before slaying his assailant that conflicts with the ruling of this court in *Beard* v. *United States*, 158 U. S. 550. That was the case of an assault upon the defendant upon his own premises, and it was held that the obligation to retreat was no greater than it would have been if he had been assailed in his own house. So, too, in the case of *Alberty* v. *United States*, 162 U. S. 499, the defendant found the deceased trying to obtain access to his wife's chamber through a window, in the night time, and it was held that he might repel the attempt by force, and was under no obligation to retreat if the deceased attacked him with a knife. The general duty to retreat instead of killing when attacked was not touched upon in these cases. Whart. on Homicide, § 485.

6. The fourteenth assignment is to the following language of the court upon the subject of the flight of the accused after the homicide: "Now, then, you consider his conduct at the time of the killing and his conduct afterwards. If he fled, if he left the country, if he sought to avoid arrest, that is a fact that you are to take into consideration against him, because the law says unless it is satisfactorily explained — and he may explain it upon some theory, and you are to say whether there is any effort to explain it in this case — if it is unexplained the law says it is a fact that may be taken into account against the party charged with the crime of murder upon the theory that I have named, upon the existence of this monitor

called conscience that teaches us to know whether we have done right or wrong in a given case."

In the case of *Hickory* v. *United States*, 160 U. S. 408, 422, where the same question, as to the weight to be given to flight as evidence of guilt, arose, the court charged the jury that "the law recognizes another proposition as true, and it is that 'the wicked flee, when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition that has been recognized so often by mankind that we can take it as an axiom and apply it to this case." It was held that this was error, and was tantamount to saying to the jury that flight created a legal presumption of guilt, so strong and conclusive, that it was the duty of the jury to act on it as an axiomatic truth. So, also, in the case of *Alberty* v. *United States*, 162 U. S. 499, 509, the court used the same language, and added that from the fact of absconding the jury might infer the fact of guilt, and that flight was a silent admission by the defendant that he was unwilling or unable to face the case against him, and was in some sense feeble or strong, as the case might be, a confession. This was also held to be error. But in neither of these cases was it intimated that the flight of the accused was not a circumstance proper to be laid before the jury as having a tendency to prove his guilt. Several authorities were quoted in the *Hickory case*, (p. 417,) as tending to establish this proposition. Indeed, the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt. Whart. on Homicide, § 710; *People* v. *Pitcher*, 15 Michigan, 397.

This was the substance of the above instruction, and although not accurate in all its parts we do not think it could have misled the jury.

7. In the fifteenth assignment exception is taken to the following instruction: "You will understand that your first duty in the case is to reject all evidence that you may find to be false; all evidence that you may find to be fabricated, because it is worthless; and if it is purposely and intentionally invoked by the defendant it is evidence against him; it is the basis for

a presumption against him, because the law says that he who resorts to perjury, he who resorts to subornation of perjury to accomplish an end, this is against him, and you may take such action as the basis of a presumption of guilt." There was certainly no error in instructing the jury to disregard evidence that was bound to be false, and the further charge that false testimony, knowingly and purposely invoked by defendant, might be used against him, is but another method of stating the principle that the fabrication of testimony raises a presumption against the party guilty of such practice. 1 Phillips' Evidence, 448; *State* v. *Williams*, 27 Vermont, (1 Williams,) 724; 3 Russell on Crimes, 6th ed. 358.

8. The sixteenth assignment was to the refusal of the court to charge the jury that where there is a probability of innocence there is a reasonable doubt of guilt. In the case of *Coffin* v. *United States*, 156 U. S. 432, 452, it was held that a refusal of the court to charge the jury upon the subject of the presumption of innocence was not met by a charge that they could not convict unless the evidence showed guilt beyond a reasonable doubt.

In the case under consideration, however, the court had already charged the jury that they could not find the defendant guilty unless they were satisfied from the testimony that the crime was established beyond a reasonable doubt. That this meant, "first, that a party starts into a trial, though accused by the grand jury with the crime of murder, or any other crime, with the presumption of innocence in his favor. That stays with him until it is driven out of the case by the testimony. It is driven out of the case when the evidence shows, beyond a reasonable doubt, that the crime as charged has been committed, or, that a crime has been committed. Whenever the proof shows, beyond a reasonable doubt, the existence of a crime, then the presumption of innocence disappears from the case. That exists up to the time that it is driven out in that way by proof to that extent." The court having thus charged upon the subject of the presumption of innocence, could not be required to repeat the charge in a separate instruction at the request of the defendant.

9. The seventeenth and eighteenth assignments were taken to instructions given to the jury after the main charge was delivered, and when the jury had returned to the court, apparently for further instructions. These instructions were quite lengthy and were, in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. These instructions were taken literally from a charge in a criminal case which was approved of by the Supreme Court of Massachusetts in *Commonwealth* v. *Tuey*, 8 Cush. 1, and by the Supreme Court of Connecticut in *State* v. *Smith*, 49 Connecticut, 376, 386.

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally

honest and intelligent as himself. There was no error in these instructions.

Several other assignments were made, to which it is unnecessary to call attention.

For the reasons above stated the judgment of the court below will be

Affirmed.

WILLARD *v.* WOOD.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 61. Argued October 26, 27, 1896. — Decided November 30, 1896.

Remedies are determined by the law of the forum; and, in the District of Columbia the liability of a person by reason of his accepting a conveyance of real estate, subject to a mortgage which he is to assume and pay, is subject to the limitation prescribed as to simple contracts, and is barred by the application in equity, by analogy, of the bar of the statute at law.

The covenant attempted to be enforced in this suit was entered into in the District of Columbia, between residents thereof, and, although its performance was required elsewhere, the liability for non-performance was governed by the law of the obligee's domicil, operating to bar the obligation, unless suspended by the absence of the obligor.

If a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit, or the action abates or is dismissed, and during the pendency of the action the limitation runs, the remedy is barred.

Courts of equity withhold relief from those who have delayed the assertion of their claims for an unreasonable time; and this doctrine may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to.

Laches may arise from failure in diligent prosecution of a suit, which may have the same consequences as if no suit had been instituted.

In view of the laches disclosed by the record, that nearly sixteen years had elapsed since Bryan entered into the covenant with Wood, when, on March 10, 1890, over eight years after the issue of the first subpœna, alias process was issued against Bryan and service had; that for seven years of this period he had resided in the District; that for seven years he had been a citizen of Illinois as he still remained; that by the law of Illinois the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt; that Christmas did not bring a suit against Bryan in Illi-

Statement of the Case.

nois, nor was this bill filed during Bryan's residence in the District, and when filed it was allowed to sleep for years without issue of process to Bryan, and for five years after it had been dismissed as to Wood's representatives, Wood having been made defendant, by Christmas' ancillary administrator, as a necessary party; that in the meantime Dixon had been discharged in bankruptcy and had died; Palmer had also departed this life, leaving but little if any estate; Wood had deceased, his estate been distributed, and any claim against him had been barred; and the mortgaged property had diminished in value one half and had passed into the ownership of Christmas' heirs: *Held*,

(1) That the equitable jurisdiction of the court ought not to be extended to enforce a covenant plainly not made for the benefit of Christmas, and in respect of which he possessed no superior equities;

(2) That the changes which the lapse of time had wrought in the value of the property and in the situation of the parties were such as to render it inequitable to decree the relief sought as against Bryan;

(3) That, without regard to whether the barring in this jurisdiction of the remedy merely as against Wood would or would not in itself defeat a decree against Bryan, the relief asked for was properly refused.

Charles Christmas, a citizen of Brooklyn, New York, sold and conveyed certain real estate there situated, for the consideration of $17,000, to one Dixon, who, to secure $14,000 of the purchase money, executed July 7, 1868, a bond to Christmas for twice that amount, payable July 7, 1873, with semi-annual interest at the rate of 7 per cent per annum, and also a mortgage in fee of the property with power of sale in case of default. Charles Christmas died, and January 20, 1869, Charles H. Christmas, his executor, and Elizabeth Gignoux, his executrix (two of his children), on dividing the estate of the deceased, assigned the bond and mortgage to their brother, Frederick L. Christmas, who died at Brooklyn, November 13, 1876, and of whose estate Charles H. Christmas was appointed administrator June 28, 1877. April 19, 1869, for the consideration of $17,000, Dixon conveyed the real estate to W. W. W. Wood, in fee, by a deed which declared that the conveyance was subject to the mortgage above mentioned, "which said mortgage with the interest due and to grow due thereon, the party of the second part hereby assumes and covenants to pay, satisfy and discharge, the amount thereof forming a part of the consideration herein expressed and having been deducted

therefrom." This conveyance from Dixon to Wood was not executed by Wood, but he entered into possession of the mortgaged premises, paid interest on the mortgage debt up to February 1, 1874, and diminished the principal of the debt through two payments of two thousand dollars each, the last being made February 16, 1874.

By deed dated March 14, 1874, acknowledged March 17, 1874, and recorded in April, 1874, Wood, for the recited consideration of $17,583, conveyed the mortgaged premises, in fee, to Thomas B. Bryan, "subject however to a certain indenture of mortgage made by the former owner of said property Martin Dixon to Charles Christmas to secure fourteen thousand dolls. (14,000,) dated July 7, 1868, recorded in the office of the register of King's County, New York, in Liber 784 of Mortgages, page 542, upon which principal sum there has been paid the sum of four thousand dolls. (4000,) the said Thos. B. Bryan hereby assuming and expressly agreeing to pay the balance with the interest at 7 per ct., he signing this deed in evidence of his said covenant." The deed was signed by Bryan, as well as Wood and his wife, and at this date the mortgage debt had been overdue for about eight and one half months.

By deed dated the same day, March 14, 1874, acknowledged March 14, and recorded March 21, 1874, and for a like consideration of $17,583, Bryan conveyed certain lots in Washington to Wood, in fee, subject to three certain incumbrances to secure an aggregate indebtedness of $7500, "which said indebtedness with the interest thereon at ten (10) p'r c't p'r annum, the said party of the second part hereby expressly assumes, and he executes this deed, as one of the parties thereto in evidence of his covenant to pay the same," but the conveyance was not executed by Wood. The transaction between Wood and Bryan was an exchange of property, the property of Wood being incumbered with the debt of $10,000 with interest at seven per cent and that of Bryan with an indebtedness of $7500 with interest at ten per cent per annum, the consideration of the two being identical, and Wood paid to Bryan $2000 in money to equalize the exchange. This

transaction occurred in the District of Columbia where Wood and Bryan resided and where the conveyances were executed and delivered. It appeared in evidence that Bryan resided in the District in and after 1874; in the State of Colorado from 1881 to 1883; and from 1883 in the State of Illinois.

On March 20, 1874, the Brooklyn property with other real estate was conveyed by Bryan to Waterman Palmer, in fee, by a deed bearing that date, acknowledged March 28, and recorded April 9, 1874, and executed by both Bryan and Palmer, subject to the mortgage and reciting that the principal of the mortgage debt had been reduced to $10,000, and declaring that the balance and interest was "hereby expressly assumed by said Palmer." The copy of the Dixon bond shows payment of interest thereon for two years later than the period up to which interest was paid by Wood. Bryan paid neither principal nor interest upon the mortgage debt, nor was he shown to have taken possession of the property.

Charles H. Christmas, as administrator of Frederick L. Christmas, filed a complaint August 28, 1877, in the county court of King's County, for the foreclosure and sale of the mortgaged premises against Dixon, Palmer and wife, and some others, averring that the co-defendants of Dixon had or claimed to have some interest acquired subsequent to the mortgage, and praying against Dixon only a personal judgment in case of deficiency of proceeds of sale. To this suit neither Wood nor Bryan was made a party, and none of the defendants appeared, but some were brought in by personal service of summons and some by publication. November 13, 1877, the cause was sent to a referee, who reported the next day that the debt, with interest, amounted to $11,307.92, and on November 15, 1877, the report was confirmed and a sale of the mortgaged premises by or under the direction of the sheriff was ordered. The sheriff's report of sale was dated January 5, 1878, and represented that he had on December 10, 1877, sold the mortgaged property for $5000 to Charles H. Christmas, Elizabeth A. Gignoux and Harriet Gignoux, to whom he had executed a deed (who were the heirs at law of Frederick L. Christmas); that the proceeds of sale applied

to the payment of the mortgage debt were $4556.61, and that the debt itself with interest amounted to $11,422.14; that the deficiency was $6865.63, and that this sum "should be docketed as judgment against Martin Dixon, one of the defendants herein."

Some evidence was given of notices of a proposed sale in May, 1877, being mailed in April, 1877, to Wood and Bryan at Washington, and of an intention to hold them for any deficiency, but Wood was dead many years before proofs were taken in this cause, and Bryan could not recall having received any such notice or having been otherwise notified in any way.

The property had diminished in value from seventeen thousand dollars when Wood purchased to eight thousand dollars when the sale took place.

Dixon died intestate March 13, 1878, domiciled at Brooklyn, and on March 25, 1878, letters of administration were issued there to his widow. The sheriff's report of the sale was filed March 9, 1879, and confirmed April 17, 1879, and on November 11, 1880, the report of the sheriff was docketed as a judgment against Dixon.

Dixon had been discharged in bankruptcy, March 1, 1878, from all claims provable against his estate on December 7, 1877. In the schedule of his obligations appeared a debt of $12,000 as due by the bankrupt to Charles H. Christmas as administrator of Frederick L. Christmas, on the bond and mortgage, and it was therein represented that the mortgaged premises were equal in value to the debt.

Palmer died in 1878 or 1879, having exhausted his estate.

Charles H. Christmas, as administrator of Frederick L. Christmas, obtained leave from the Supreme Court of Brooklyn in April, 1879, to bring a suit against Wood and Bryan, or either of them, to recover the deficiency reported by the sheriff in the foreclosure proceeding, and July 24, 1879, an action of covenant was commenced in this District against Bryan in respect of the unpaid balance of the mortgage debt, in the name of Wood for the use of Charles H. Christmas,

administrator of Frederick L. Christmas, to which Bryan pleaded but which was subsequently dismissed.

February 27, 1880, letters of administration on the estate of Dixon were issued in this District to Henry K. Willard in order to enable Willard as ancillary administrator of Dixon to proceed against Wood for the sum of about $7000, which Willard claimed in his application to be due to the estate of Dixon in law, but equitably to Charles H. Christmas, administrator. The petition averred the death of Dixon intestate, that he "did not die insolvent," that his estate had been settled up in New York, and that his widow renounced her right of administration in this District.

March 9, 1880, Willard, as administrator of Dixon for the use of Charles H. Christmas, as administrator, commenced an action of assumpsit against Wood.

October 25, 1880, Willard was appointed in this District the administrator also of Frederick L. Christmas, and on November 11, 1880, commenced an action of assumpsit as such administrator against Wood. Issues were joined in the last two actions on pleas of the statute of limitations and the general issue. The plaintiff filed to the pleas of limitation an additional replication, to the effect that the defendant by accepting the conveyance from Dixon and entering into possession had become bound by the deed.

On July 15, 1881, Willard as administrator of Frederick L. Christmas filed the present bill against Wood and Bryan, seeking to charge them under their several assumptions of the mortgage debt with a deficiency arising upon the sale and foreclosure, averring that such deficiency had been docketed as a personal judgment against Dixon; that Wood as grantee of Dixon had paid $4000 of the principal of the mortgage debt; that Bryan as grantee of Wood had entered into possession and enjoyed the rents and profits; and that Wood when he conveyed to Bryan had paid to the latter the sum of $2000 to be applied to the reduction of the mortgage debt, but that Bryan although agreeing to do so had failed to so apply that sum. The subpœna was returned August 18, 1881, served on Wood only.

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Wood answered the bill October 10, 1881, setting up, among other things, laches and the statute of limitations, and insisting that the plaintiff as against Wood should be required to elect between his remedy under the bill and his remedy in the action at law, the causes of action in each of these proceedings being claimed to be identical against Wood. On June 26, 1882, Wood filed a motion to compel the election upon which his answer had insisted. He died August 31, 1882, and the motion was renewed in effect October 25, 1883, by his executor and executrix. At their instance the equity cause was placed on the calendar for final hearing, September 16, 1884, but it was taken off the calendar on the suggestion by complainant's solicitor, as shown by a docket entry of November 12, 1884, that another suit was to be brought by complainant, and it appears that it was because the solicitor of the personal representatives of Wood learned that the bill against Wood was to be dismissed, that he refrained from insisting upon a hearing.

December 30, 1884, an action of covenant was brought in the Supreme Court of the District by Willard, as administrator of Frederick L. Christmas, against Mrs. Wood, as executrix of her husband.

On January 5, 1885, counsel for Willard, administrator, filed in the present cause the following: "And now comes the said complainant and dismisses his said bill, so far as the same relates to the defendant Mary L. C. Wood, executrix; but without prejudice. The clerk will please make the entry on the docket accordingly." And on the same day the clerk made this entry on the docket: "Dismissal of bill as to Mary L. C. Wood, ex'x, ordered by compl't, precipe filed." On the same day, Willard, administrator, also dismissed, without prejudice, the three actions at law pending in the Supreme Court of the District at the time of the filing of the bill, the counsel for Wood's representatives being informed in advance by the counsel of Willard, administrator, that this would be done.

In the action of covenant brought against the executrix of Wood, the Supreme Court of the District in general term gave judgment for the defendant, January 17, 1887, holding that

the action should have been in assumpsit and was barred. 4 Mackey, 538. To review this judgment, a writ of error from this court was sued out, and, pending its decision, the estate of Wood was completely distributed. The judgment of the District Supreme Court was affirmed by this court May 5, 1890. 135 U. S. 309. Meanwhile and on March 10, 1890, a subpœna against Bryan was issued in the present suit and was served on him on that day. April 30, 1890, Bryan answered the bill, not admitting the right or authority of plaintiff as administrator to maintain the suit against him; he denied the right of plaintiff to compel him to pay any balance due upon the mortgage; he set up, among other things, his continuous residence beyond the District; the service of process on him during his appearance in the District on business; that the transaction between him and Wood was an exchange of equities of redemption, which the $2000 was paid to equalize, any claim in respect of which was, moreover, barred; the defence of the bar of the statute of limitations, existing and pleaded in favor of Wood; the dismissal of the bill as to the executrix of Wood; the judgment rendered in her favor by the court in general term; the distribution made of the estate of Wood; the non-liability of Wood and his estate and the consequent non-liability of Bryan. July 1, 1890, a replication was filed, without leave, to the answer filed by Wood on October 10, 1881. Wood had died August 31, 1882, and Mrs. Wood, his executrix, had deceased as early as the middle of March, 1887. July 31, 1890, counsel for complainant, without leave of court, filed in the cause the following: "And now comes the said complainant and withdraws his direction to the clerk to dismiss the bill, so far as it relates to Mary L. C. Wood, executrix, filed January 5, 1885, the same having been filed through mistake and misapprehension."

By Wood's will, Mrs. Wood was appointed executrix and Thomas N. Wood, his son, executor, and letters testamentary were granted to them October 27, 1882. The son, after qualifying as executor, performed no duties as such during the lifetime of his mother, who administered upon the estate. In March, 1887, after his mother's decease, the son filed as

executor a new appraisement and inventory and wound up the estate.

In the action of assumpsit brought by Willard, as administrator of Frederick L. Christmas, against Wood, the clerk was directed by plaintiff's attorney, on the suggestion of the death of defendant, to issue summons to Mrs. Wood as executrix to appear and defend, so in this cause a subpœna was directed to bring in Mrs. Wood as executrix, and so in the action brought by Willard in Wood's name for the use of Charles H. Christmas, administrator, the death of Wood was suggested, and on application of plaintiff's attorney the suit was revived in the name of Mrs. Wood as executrix. The action of covenant brought by Willard, as administrator of Christmas, against Mrs. Wood, as executrix, was conducted and tried throughout on the theory of her exclusive representative character; and, similarly, the dismissal of this bill, January 5, 1885, was as to Mrs. Wood as executrix.

Willard's counsel had notice of the executorship of the son, whose appearance as executor was entered in the present suit, with that of his mother as executrix, October 25, 1883, but both sides went on with the proceedings as if Mrs. Wood were sole executrix.

This suit was on January 12, 1892, ordered to be heard by the Supreme Court of the District at the general term in the first instance, but, before such hearing, became transferred under the act of Congress of February 9, 1893, c. 74, 27 Stat. 434, to the Court of Appeals of the District of Columbia, where the bill was dismissed with costs in accordance with an opinion delivered by Mr. Chief Justice Alvey, made part of the record and reported in 1 D. C. App. 44.

The Court of Appeals held that the bill was effectually dismissed as to the estate of Wood by the order of January 5, 1885; that the right, if any, attempted to be enforced against the estate of Wood by reason of the assumption in favor of Dixon was fully barred by the statute of limitations or the lapse of time before the bringing of this suit; that plaintiff as the representative of the mortgagee could not be substituted to the position of Wood with the right to enforce the covenant

Bryan made with and for the benefit of Wood, under the circumstances; and that the covenant of Bryan in the deed from Wood, if it could be availed of at all, could not be deemed a lawful asset of the estate of the deceased in this District, which vested in the administrator here and entitled him to sue Bryan therefor.

Mr. William Henry Dennis and *Mr. Enoch Totten* for appellant. *Mr. Stephen Condit* was on their brief.

Apart from technical objections urged by the defendants, the Court of Appeals denied relief on the grounds: (*a*) That the right sought to be enforced against the estate of Wood was barred by time, by analogy to the statute of limitations, before this suit was brought; (*b*) That this suit was dismissed as to the estate of Wood by the *præcipe* as to Mrs. Wood; (*c*) That the remedy against Bryan was lost when the remedy against Wood's estate was lost.

All these propositions are respectfully controverted by complainant.

Such a theory of subrogation might be carried even further, and the right to recover against Wood be denied, because Dixon was discharged in bankruptcy from his debt to the mortgagee. The answer to that, of course, is that a discharge in bankruptcy results merely by operation of law, is an act *in invitum* as regards the creditor, avails only the bankrupt and does not discharge any other person liable for the same debt. Bankrupt Law, Rev. Stat. § 5118. See Story on Notes, § 428.

(*a*) The estate of William W. W. Wood is liable notwithstanding the lapse of time. His bargain with Dixon to buy the house and assume the mortgage was a New York contract and governed by the laws of New York.

"It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which land is situated must we look for the rules which govern its descent, alienation and transfer, and for the effect and construction of conveyances." *McGoon* v. *Scales*, 9 Wall. 23; *Orvis* v. *Powell*,

98 U. S. 176; *Brine* v. *Ins. Co.*, 96 U. S. 627; *Pritchard* v. *Norton*, 106 U. S. 124; *Canada Southern Railway* v. *Gebhard*, 109 U. S. 527; *Dennick* v. *Railroad Co.*, 103 U. S. 11.

By the law of the State of New York, a purchaser of mortgaged real estate who accepts a deed thereof, by the terms of which he assumes, covenants and agrees to pay the mortgage as a part of the purchase money, is liable for the amount of the incumbrance, and his liability is precisely the same, whether he actually signs and seals the deed or not. He is bound by the covenants in the instrument in either case, and an action may be maintained on the contract by the mortgagee. *Trotter* v. *Hughes*, 12 N. Y. 74; *Burr* v. *Beers*, 24 N. Y. 178; *Thorp* v. *Keokuk Coal Co.*, 48 N. Y. 253; *Hand* v. *Kennedy*, 83 N. Y. 149; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Vrooman* v. *Turner*, 69 N. Y. 280; *Bowen* v. *Beck*, 94 N. Y. 86.

The precise question involved here was decided by the Court of Appeals of New York in *Bowen* v. *Beck*, 94 N. Y. 86. The purchaser who assumed the mortgage debt in that case did not sign the deed, but accepted it and its benefits; the deed purported, as here, to be a deed of "indenture," and the statute of limitations was pleaded; that statute as applicable to *simple contracts* barred the action, but as applicable to a *specialty* it did not. That case was in all respects undistinguishable from this, and the court held that the statute was not a defence. If this action were pending in New York, it would clearly be controlled by that case. See also *Hoff's Appeal*, 24 Penn. St. 200.

This court, in *Willard* v. *Wood*, 135 U. S. 309, declined to decide this question, although it was argued at length at the bar.

The Court of Appeals concedes that such is the law of New York, and that international jurisprudence requires it to be respected in this case, but undertakes to say that the liability of Wood was not what the law of New York declares it to be, that of a party to the deed, but only a "simple contract" on Wood's part. It is submitted that this fails to give due effect to the *lex loci contractus*. It changes the *nature* of the con-

tract, and makes a different one. In *United States Bank* v. *Donnally*, 8 Pet. 361, cited by the Court of Appeals, the paper sued upon was, *on its face*, a promissory note, not under seal, and it was held that it could not be sued upon in Virginia as if it were a sealed instrument. The case at bar is not an action of covenant at law, but in equity upon the obligation imposed by the law of New York. If Wood was liable (and it is conceded he was), he was liable as the law of New York said he was, as if he had joined in executing the deed he accepted, — and there was no mere "simple contract."

It is quite supposable that Wood did not sign the deed because the law of New York made that form superfluous.

There is nothing in the statute of limitation of the District of Columbia which excludes or conflicts with the New York doctrine. Section 6 of the Maryland act of 1715 expressly includes a recognizance, which, like the assumption of a mortgage in New York, does not need to be sealed or even signed by the obligor.

Section 2 of the same act, on which defendants rely, provides as follows: "All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, surtrover or replevin for taking away goods or chattels, all actions of account, contract, debt, book or upon the case, other than such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants which are not residents within this province, all actions of debt for lending, or contract without specialty, all actions of debt for arrearages of rent, all actions of assault, menaces, battery, wounding and imprisonment, or any of them, shall be sued or brought by any person or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time and limitation hereafter expressed, and not after; that is to say, the said action of account, and the said actions upon the case, upon simple contract, book debt or account, and the said actions for debt, detinue and replevin for goods and chattels, and the said actions for trespass *quare clausum fregit*, within three years ensuing the cause of such action, and not after." . . .

Moreover, this suit does not assert a claim of Willard directly against Wood, but, by subrogation, the claim of Dixon, surety, against Wood, principal, for the obligation under the mortgage. *Keller* v. *Ashford*, 133 U. S. 610, 625.

The statute does not begin to run on the surety's claim against his principal until the surety is compelled or compellable to pay the debt — *i.e.*, in this case not until the sheriff's report of sale was confirmed (April 17, 1879), or when the deficiency was ascertained. This suit was filed in 1881. Wood, Limitation of Actions, § 145. *Elwood* v. *Diefendorf*, 5 Barb. 410.

The court below appears to have cited no authority for declaring that, "according to the principles of the common law, no mere agreement or assumption to pay, by a grantee in a deed, neither signed nor sealed by him, can be deemed or treated as a specialty or covenant, in this District." There appears to be no decision in Maryland prior to the cession of this District in 1801, and no District decision prior to the case at bar, that declares such to be the common law in this District. The States which have adopted the same doctrine as that declared in New York, have adopted it as being part of the common law of England, and no reason is perceived why it is not the common law in this jurisdiction. The learned court below took an erroneous view as to the common law of England on this subject. Finch, Book of the Law, 109; *Staines* v. *Morris*, 1 Ves. & Beam. 8; Com. Dig. Title Covenant, A 1, pl. 5, 6; *Finley* v. *Simpson*, 2 Zabriskie (22 N. J. Law), 311.

Certainly *in equity* there should be no technical difficulty, arising from the "form of the action," in treating Wood as if he had signed and sealed the indenture.

(*b*) The præcipe was wholly ineffectual to dismiss the suit as against the estate of Wood, and was certainly subject to the withdrawal filed by the complainant. It referred only to "Mary L. C. Wood, executrix," who is since deceased, and not to Thomas N. Wood, the executor, against whom this suit is now pending.

The dismissal of a bill in equity as to one of two executors

is inoperative. Executors are joint tenants and not tenants in common. An equity suit against one of two executors would support a judgment or decree binding on the estate, if no objection were made or want of parties suggested by the defendant.

The plaintiff in an equity suit cannot effectually dismiss his suit, especially after answer, except by means of an order of the court. 1 Daniell, Ch. Pr. 795; *Fisher* v. *Quick*, 1 Stockton (9 N. J. Eq.), 312.

In *Orphan Asylum* v. *McCartee*, 1 Hopk. Ch. 372, cited by the court below, the dismissal was by order of court, after argument, and the court was asked to vacate *its own* order.

Thomas N. Wood having duly qualified as co-executor, the question how much actual service he performed during the life of the co-executrix was one merely between themselves. He did not cease at any time to be co-executor. *Estate of Patten*, 7 Mackey, 392; *Richardson* v. *Stansbury*, 4 H. & J. 275.

(*c*) Whatever may be the case as to Dixon and Wood, the defendant Bryan should be held liable in equity upon his signed and sealed covenant.

He intentionally bought the property *cum onere*. If it had risen in value above the price at which he bought it, including the mortgage he assumed, he would have reaped what some have called "the unearned increment." As it has fallen below the amount of debt secured upon it, he should bear the loss. His liability is not merely technical, but founded in equity and good conscience, and it should not be cancelled, even if it be held that Dixon's estate or even Wood's estate for any reason is no longer liable.

It is established and conceded that as between themselves Bryan was principal and Wood was surety. The fact that the right to sue the surety has been barred by the statute of limitations, if it be a fact, should not and does not destroy in equity the right to be subrogated to any security held by the surety.

An apt illustration of this is afforded by *Eastman* v. *Foster*, 8 Met. (Mass.) 19, per Shaw, C. J., where the maker of a note had given a mortgage to his surety to secure him, and it was

decided, after argument and full consideration, that the holder of the note was entitled, by subrogation, to the benefit of the mortgage, even though his right to sue the surety was barred by limitation. The court said (p. 24):

"The effect of the mortgage was, in equity, to pledge the property in the form of a hypothecation to the surety, for the payment of the mortgagor's debt; and the pledge is not redeemed, nor the equitable lien upon it discharged, until the debt is paid."

In the case at bar, Bryan in the view of equity is the principal debtor, Wood is the surety, and the covenant in the deed between Wood and Bryan is the security held by the surety, and which is not discharged until the debt is paid.

The only effect of limitations, if any, in this case, is to take away the *remedy* against Wood's estate. It does not affect the *right*, and should not have any collateral effect on claims against another. *Michigan Ins. Bank* v. *Eldred*, 130 U. S. 693, 696; *Campbell* v. *Holt*, 115 U. S. 620, 625; *Sturges* v. *Crowninshield*, 4 Wheat. 122.

Pomeroy's Equity Jurisp., § 1206, says that the "mortgagee may release the mortgagor without releasing the purchaser."

In *Keller* v. *Ashford*, 133 U. S. 610, 623, this court said: "If the person who is admitted to be the creditor's [mortgagee's] debtor stands, *at the time of receiving the security*, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, *when the debt was contracted.* In short, if one person agrees with another to be *primarily* liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt."

And the court quotes and adopts this language: "But the right of the mortgagee to this remedy does not result from any fixed or vested right in him, arising either from the ac-

ceptance by the subsequent purchaser of the conveyance of the mortgaged premises, or from the obligation of the grantee to pay the mortgage debt as between himself and his grantor. . . . And it will not in any case be available to the mortgagee, unless the mortgagor *was* himself personally liable for the payment of the mortgage debt."

In *Keller* v. *Ashford*, the mortgagor was not made a party to the suit against the mortgagor's grantee, and this court said that this omission could not prejudice any interest of his, or *any right of either party to that suit.*

The plain deduction from the language and action of this court in that case is that the subrogation in question takes place, *in the contemplation of equity*, when the grantee takes the property, and assumes the mortgage debt, if the claim of the mortgagee is *then* valid against the mortgagor. The mortgagee, having notice on the public records of the assumption of the debt by the new owner of the property, may very well rely upon the right which he is advised equity gives him against such owner and elect to take him as the debtor in equity. Why should the mortgagee then be obliged to keep his claim alive indefinitely against the original mortgagor, and against a chain of intermediate owners, who may be dead or bankrupt, or in foreign parts, under penalty of being told, if he fails to do so in regard to any one of them, "Oh, the *vinculum* of obligation is broken; there is a missing link; and you are not entitled to the benefit of subrogation." Why should he not rather have an equitable right similar to that of the holder of a promissory note, who can strike off intermediate endorsers and sue any particular one?

In the rapid transfer of real estate from owner to owner in modern times, any other construction of the equitable doctrine so carefully built up by the courts would, in many cases, reduce it to a nullity. That it is a salutary doctrine in aiding to make real estate a subject of commerce, none will deny, who consider how it tends to shift the burden of a mortgage debt from the mortgagor to the purchaser who assumes the mortgage, thereby accomplishing the very object which those parties have in mind, without the ne-

cessity of asking the consent of the mortgagee to the change of debtor.

Mr. John Sidney Webb for Wood. *Mr. H. Randall Webb* and *Mr. Harris Lindsley* were on his brief.

Mr. John Selden for Bryan.

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

The action of covenant brought by Willard against Wood, December 30, 1884, was heard by the Supreme Court of the District of Columbia in general term in the first instance, and it was held that the acceptance by Wood of the deed of Dixon to him created no specialty obligation on the part of Wood, though he might be held liable on it in assumpsit, as on a simple contract, and that the act of limitations of the District barred such action because brought more than three years after the cause of action accrued. 4 Mackey, 538.

The case being brought on writ of error to this court, it was ruled that whether an agreement by the grantee of a mortgagor to assume the mortgage debt could be enforced at law or in equity was governed by the law of the place where the action was brought, and that by the law of the District of Columbia, whether such an agreement was or was not considered as under seal, it was an agreement made with the grantor only, and created no direct obligation to the mortgagee upon which the latter could sue at law. If the agreement of the grantee was considered under seal, by reason of the deed being sealed by the grantor, it fell within the settled rule in force in the District of Columbia, that no one could maintain an action at law on a contract under seal, to which he was not a party; and if the agreement of the grantee was considered as in the nature of assumpsit, implied from his acceptance of the deed, "still, being made with the grantor only and for his benefit, upon a consideration moving from him alone, there being no privity of contract between the grantee and the mortgagee, and the latter not having known

of or assented to the agreement at the time it was made, nor having since done or omitted any act on the faith of it, it follows that, by the law as declared by this court, and prevailing in the District of Columbia, the mortgagee cannot maintain an action at law against the grantee. *Keller* v. *Ashford*, 133 U. S. 610, 620, 622; and *National Bank* v. *Grand Lodge*, 98 U. S. 123, there cited. . . . Moreover, if the grantee's liability was in assumpsit only, it was, in any view of the case, barred by the statute of limitations in three years." And the judgment of the Supreme Court of the District was accordingly affirmed. *Willard* v. *Wood*, 135 U. S. 309, 314.

In *Keller* v. *Ashford*, above referred to, it was held that although the contract of the purchaser to pay the mortgage, being made to the mortgagor and for his benefit only, created no direct obligation of the purchaser to the mortgagee, yet that in a court of equity the mortgagee may avail himself of the right of the mortgagor against the purchaser upon the familiar principle in equity that a creditor shall have the benefit of any obligation or security given by the principal to the surety for the payment of the debt. And it was said: "The doctrine of the right of a creditor to the benefit of all securities given by the principal to the surety for the payment of the debt does not rest upon any liability of the principal to the creditor, or upon any peculiar relation of the surety towards the creditor; but upon the ground that the surety, being the creditor's debtor, and in fact occupying the relation of surety to another person, has received from that person an obligation or security for the payment of the debt, which a court of equity will therefore compel to be applied to that purpose at the suit of the creditor. Where the person ultimately held liable is himself a debtor to the creditor, the relief awarded has no reference to that fact, but is grounded wholly on the right of the creditor to avail himself of the right of the surety against the principal. If the person, who is admitted to be the creditor's debtor stands, at the time of receiving the security, in the relation of surety to the person from whom he receives it, it is quite immaterial whether that person is or ever has been a debtor of the principal creditor, or whether

the relation of suretyship or the indemnity to the surety existed, or was known to the creditor, when the debt was contracted. In short, if one person agrees with another to be primarily liable for a debt due from that other to a third person, so that as between the parties to the agreement the first is the principal and the second the surety, the creditor of such surety is entitled, in equity, to be substituted in his place for the purpose of compelling such principal to pay the debt." 133 U. S. 623.

After citing many cases and quoting from *Crowell* v. *St. Barnabas Hospital*, 12 C. E. Green, 650, 655, the opinion continued (p. 625): "The decisions of this court, cited for the defendant, are not only quite consistent with this conclusion, but strongly tend to define the true position of a mortgagee, who has in no way acted on the faith of, or otherwise made himself a party to, the agreement of the mortgagor's grantee to pay the mortgage; holding, on the one hand, that such a mortgagee has no greater right than the mortgagor has against the grantee, and therefore cannot object to the striking out by a court of equity, or to the release by the mortgagor, of such an agreement when inserted in the deed by mistake; *Elliott* v. *Sackett*, 108 U. S. 132; *Drury* v. *Hayden*, 111 U. S. 223; and, on the other hand, that such an agreement does not, without the mortgagee's assent, put the grantee and the mortgagor in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will discharge the mortgagor. *Shepherd* v. *May*, 115 U. S. 505, 511."

The Court of Appeals rightly held that remedies are determined by the law of the forum; that Wood's liability by reason of his acceptance of Dixon's deed was subject to the limitation prescribed as to simple contracts; and was barred by the application in equity, by analogy, of the bar of the statute at law.

We also concur with the Court of Appeals that the bill was effectually dismissed as against the estate of Wood on the 5th of January, 1885. That court held that there could be no doubt that it was the intention of plaintiff by the order of that date to dismiss the bill as to the representatives of Wood's estate, and that it was supposed at the time to have been

effectually done; that this dismissal was a concession to the demand of Wood that plaintiff should elect as between his action at law then pending against the representatives and the bill in equity; that it could not be urged that the defendant or his representative might object to the dismissal; and that after a voluntary dismissal of the bill by plaintiff he would not be allowed to reinstate it unless it was shown that there was surprise or mistake. It was further held that though the order of dismissal referred alone to Mrs. Wood, she was the only active representative of the estate, and that the fair construction of the order of dismissal would not permit of the contention that the bill was still intentionally retained as against the co-executor, the son; and that indeed, being dismissed voluntarily as against the active representative, it was left fatally defective, even though technically still pending against the son.

The proceedings show that Mrs. Wood was regarded as the sole representative, she only having administered; and the attempts by filing a replication July 1, 1890, without leave of court, to the answer filed by Wood, who had then been dead nearly eight years, and by filing a paper signifying the withdrawal of the direction to dismiss the bill, July 31, 1890, also without leave of court, were unavailing in the premises.

But it is insisted that, conceding the remedy as to Wood was barred, it does not follow that Bryan was entitled to avail himself of that bar, since the right was not extinguished; that Bryan joined in the execution of the deed of Wood, and thereby expressly agreed to pay the balance due on the mortgage; that this was an absolute promise to pay and not merely a contract of indemnity; and that it could be proceeded on as a specialty irrespective of whether the remedy on Wood's contract with Dixon was barred in the District or not.

It is not denied that the enforcement of the contract was open to all defences existing between Wood and Bryan. *Episcopal City Mission* v. *Brown*, 158 U. S. 222. Christmas had not been deprived by either of them of any security he ever had; there was no mutual agreement between him and them; and he had in no way acted on the faith of the agreement between them in such a way as to bind either of them by estoppel.

The sixth section of chapter 23 of the act of 1715 of the State of Maryland, and which is in force in this District, is as follows:

"No bill, bond, judgment, recognizance, statute merchant, or of the staple, or other specialty whatsoever, except such as shall be taken in the name or for the use of our sovereign lord the king, his heirs and successors, shall be good and pleadable, or admitted in evidence against any person or persons of this province, after the principal debtor and creditor have been both dead twelve years, or the debt or thing in action above twelve years' standing; saving to all persons that shall be under the aforementioned impediments of infancy, coverture, insanity of mind, imprisonment, or being beyond the sea, the full benefit of all such bills, bonds, judgments, recognizances, statutes merchant, or of the staple, or other specialties, for the space of five years after such impediment removed, anything in this act before mentioned to the contrary notwithstanding." 1 Kilty's Laws of Maryland.

This section was peculiar to the State of Maryland, and in effect went to the cause of action. In some aspects it has often received the consideration of the courts of that State. Some of the decisions are referred to by Chief Justice Alvey in *Mann* v. *McDonald*, 22 Wash. Law Rep. 98, and it is there said: "Unlike the construction that has been placed upon the terms of the statute employed in the second section, in regard to simple contract debts, the construction uniformly placed on the terms employed in the sixth section in regard to judgments, recognizances and specialties of various kinds, owing to the peculiar force and prohibitory nature of the language employed in this latter section, has been different, and unyielding to circumstances that would remove the bar of the statute as applied to simple contract debts; hence it has been uniformly held that a mere acknowledgment of the debt due on judgment, or even an express promise to pay the same, will not arrest the running of the statute, or remove the bar, as against the judgment or specialty mentioned in the act; though such judgment or specialty may form the basis or inducement to a new express promise to pay, upon which an action may be maintained. *Lamar* v. *Munro*, 10 G. & J. 50;

Young v. *Mackall*, 4 Maryland, 367. And so the payment of interest, or even part of the principal of the judgment debt will not have the effect of avoiding the operation of the statute as applied to proceedings on the judgment to revive, or to recover on the judgment by action of debt. In the case of *Carroll* v. *Waring*, 3 G. & J. 491, it was held that the payment of interest upon a bond was no avoidance of the bar of the act of limitations of 1715, c. 23; nor would even an express acknowledgment of the debt revive the remedy upon a bond barred by that act." And see *Digges* v. *Eliason*, 4 Cranch C. C. 619; *Thompson* v. *Beveridge*, 3 Mackey, 170; *Galt* v. *Todd*, 23 Wash. Law Rep. 98.

The saving clause of the section relates to creditors only, and by section 466 of the Revised Statutes of the District all exceptions in favor of parties beyond the District were repealed. However, as this sixth section of the act of 1715 was not pleaded we need not consider whether its benefits are denied to non-resident debtors by the fourth and fifth sections relating to "persons absenting the province, or wandering from county to county," or by the act of November, 1765, c. 12, as to persons who "may be absent out of this province, at the time when the cause of action hath arisen or accrued," Kilty's Laws; *Hysinger* v. *Baltzell*, 3 G. & J. 158; *Maurice* v. *Worden*, 52 Maryland, 283; or other statutory provision.

But it is well to observe that this covenant was entered into in the District between residents thereof, and, although its performance was required elsewhere, the liability for non-performance was governed by the law of the obligee's domicil, operating to bar the obligation, unless suspended by the absence of the obligor.

The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. *Alexander* v. *Pendleton*, 8 Cranch, 462, 470; *Young* v. *Mackall*, 4 Maryland, 367; Wood on Limitations, § 293, and cases cited.

In his answer Bryan relied on Wood's answer, which set up laches and the statute of limitations. But the recognized doctrine of courts of equity to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time may be applied in the discretion of the court, even though the laches are not pleaded or the bill demurred to. *Sullivan* v. *Portland & Kennebec Railroad*, 94 U. S. 806, 811; *Lansdale* v. *Smith*, 106 U. S. 391, 394; *Badger* v. *Badger*, 2 Wall. 87, 95; *Syester* v. *Brewer*, 27 Maryland, 288, 319; *Williams* v. *Rhodes*, 81 Illinois, 571.

The deed of Wood to Bryan was executed March 14, 1874, and at that time the mortgage bond was overdue, having matured, according to its terms, July 7, 1873, but interest up to February 1, 1874, had been paid on it by Wood. Bryan's obligation to Wood was to pay forthwith, or within a reasonable time, a distinction of no importance here, and lapse of time and changes in condition began immediately to affect it.

Frederick L. Christmas, the owner of the bond, was then living. He accepted interest for two years thereafter, but this was not paid by either Wood or Bryan, and if such payment operated as an extension of time, it does not appear to have been with the assent of either of them.

Bryan sold within a few days of his purchase, and conveyed to Palmer, the deed being recorded in Kings County, April 9, 1874, and Palmer covenanted to pay the outstanding balance. To the foreclosure proceedings Christmas did not make Wood and Bryan parties, or either of them, but made Palmer a defendant, though asking a deficiency decree against Dixon only.

Wood gave seventeen thousand dollars for the property, but its value had been gradually declining, and it was bid in December 10, 1877, at the foreclosure sale by the heirs of Christmas for $5000, the testimony showing that eight thousand dollars was then a fair price.

Palmer died in 1878 or 1879, being reputed to have parted with "most of his estate."

The various law suits which had been previously commenced, except the action of covenant of December 30, 1884, against

Wood's executrix, were abandoned and dismissed January 5, 1885, on which day this bill was also dismissed, as we have seen.

The bill was filed July 15, 1881, against Wood and Bryan, as alike liable to Christmas as principal debtors, and service of process was had on Wood only, August 18, 1881. The mere fact that the bill was left on the files would not, in itself, relieve from the effects of laches, for failure in diligent prosecution may have the same consequences as if no suit has been instituted. *Johnston* v. *Standard Mining Co.*, 148 U. S. 360, 370.

Nearly sixteen years had elapsed since Bryan entered into the covenant with Wood, when, on March 10, 1890, over eight years after the issue of the first subpœna, alias process was issued against Bryan and service had. For seven years of this period he had resided in the District. For seven years he had been a citizen of Illinois as he still remained. By the law of Illinois the mortgagee may sue at law a grantee, who, by the terms of an absolute conveyance from the mortgagor, assumes the payment of the mortgage debt. *Dean* v. *Walker*, 107 Illinois, 540, 545, 550; *Thompson* v. *Dearborn*, 107 Illinois, 87, 92; *Day* v. *Williams*, 112 Illinois, 91; *Union Life Insurance Co.* v. *Hanford*, 143 U. S. 187, 190. But Christmas did not see fit to bring a suit against Bryan in Illinois, nor was this bill filed during Bryan's residence in the District, and when filed it was allowed to sleep for years without issue of process to Bryan, and for five years after it had been dismissed as to Wood's representatives, Wood having been made defendant, by Christmas' ancillary administrator, as a necessary party.

In the meantime Dixon had been discharged in bankruptcy and had died; Palmer had also departed this life, leaving but little if any estate; Wood had deceased, his estate been distributed, and any claim against him had been barred; and the mortgaged property had diminished in value one half and had passed into the ownership of Christmas' heirs. In view of the laches disclosed by this record, we do not think the equitable jurisdiction of the court ought to be extended to enforce a covenant plainly not made for the benefit of Christmas, and in respect of which he possessed no superior equities. The changes which the lapse of time had wrought in the value

of the property and in the situation of the parties were such as to render it inequitable to decree the relief sought as against Bryan. So that whether the barring in this jurisdiction of the remedy merely as against Wood would or would not in itself defeat a decree against Bryan, without more, we hold that relief was properly refused, and the decree is

Affirmed.

UNITED STATES *v.* OREGON AND CALIFORNIA RAILROAD COMPANY.

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

No. 318. Argued November 12, 1896. — Decided December 14, 1896.

The grant of public land made to the Oregon Central Railroad Company by the act of May 4, 1870, c. 69, 16 Stat. 94, "for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville in the State of Oregon" contemplated a main line from Portland to Astoria opening up to settlement unoccupied and inaccessible territory and establishing railroad communication between the two termini, and also the construction of a branch road from Forrestville to McMinnville, twenty-one miles in length, running through the heart of the Willamette Valley, and it devoted the lands north of the junction, not absorbed by the road from Portland to that point, to the building of the road to the north.

The construction of the branch road, though included in the act, was subordinate and subsidiary, and this court cannot assume that if the promoters had sought aid merely for the subordinate road, their application would have been granted.

The facts that the act of 1870 grants land for the purpose of aiding in the construction of a railroad — in the singular number — and that the act of January 31, 1885, c. 46, 23 Stat. 296, does the same, do not affect these conclusions.

This was a bill brought by the United States against the Oregon Central Railroad Company and the Oregon and California Railroad Company, in the Circuit Court of the United States for the District of Oregon, to quiet title to about ninety thousand acres of land in the State of Oregon; and a cross bill filed by the defendants to quiet title to the same land in the Oregon

and California Railroad Company. The cause was heard on the pleadings and a stipulation as to the facts with accompanying maps and documents.

On May 4, 1870, an act of Congress was approved, (16 Stat. 94,) which is as follows:

"CHAP. LXIX. — An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinville,[1] in the State of Oregon.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinville, in the State of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands for depots, stations, side tracks and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid preëmption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency.

"SEC. 2. *And be it further enacted*, That the Commissioner of the General Land Office shall cause the lands along the line

[1] In this act McMinnville is spelled with one "n."

of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: *And provided also*, That settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding.

"SEC. 3. *And be it further enacted*, That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said *complected* [completed] sections.

"SEC. 4. *And be it further enacted*, That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre.

"SEC. 5. *And be it further enacted*, That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested

in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road, depots, stations, side tracks and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the [rate] of seven per centum per annum; and no part of the principal or interest of the said fund shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section.

"SEC. 6. *And be it further enacted*, That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

Within one year from the passage of this act, the Oregon Central Railroad Company filed with the Secretary of the Interior its assent to the act, and prior to July 31, 1871, and February 2, 1872, filed in that department maps of survey and definite location of its line of railroad, being a location from Portland to the Yamhill River near McMinnville *via* a point near Forest Grove, and from that point to Castor Creek, a point twenty miles toward Astoria; and from Castor Creek to Astoria; the distances being about twenty-six miles from Portland to Forest Grove; about twenty-two and three fourths miles from there to the Yamhill River; and about one hundred and two and a half miles from Forest Grove to Astoria. The lands adjacent to and coterminous with the entire line of definite location were segregated and withdrawn from the pub-

lic lands. Twenty miles of road from Portland, running due west and terminating at a point near the town of Hillsboro, in Washington County, Oregon, were constructed, and about six miles more to a point near Forest Grove; and from that point something over twenty-one miles running almost directly south to a point near McMinnville in Yamhill County. The line was constructed on a curve as it approached Forest Grove.

The Secretary of the Interior on February 16, 1872, accepted the first twenty miles as completed under the act, and on June 23, 1876, he accepted another twenty-seven and one half miles as so completed, being the distance from Hillsboro to a point near Forest Grove, and from that point to McMinnville.

On October 6, 1880, the Oregon Central Railroad Company, for value, sold and conveyed to the Oregon and California Railroad Company all the title and interest which it had acquired in and to the lands granted under the act, and all its road, franchises and privileges; but it was not admitted by the United States that the Oregon Central Railroad Company had a legal right to make said sale and conveyance. On that day the Oregon Central Railroad Company was insolvent and went into liquidation, and the conveyance was made to settle its business and dispose of its property. Neither of these railroad companies nor any one else has ever constructed or equipped any portion or part of any railroad from the point near Forest Grove to Astoria.

January 31, 1885, Congress passed an act, 23 Stat. 296, c. 46, the first section of which is as follows:

"That so much of the lands granted by an act of Congress entitled 'An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May fourth, eighteen hundred and seventy, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and the same are hereby, declared to be forfeited to the United States and restored to the public domain, and made subject to disposal under the general land laws of the United States as though said grant had never been made."

Statement of the Case.

July 8, 1885, the Commissioner of the General Land Office issued to the local land office at Oregon City instructions for its guidance under the act of January 31, 1885, and a diagram showing the limits of the forfeited lands and that portion of the grant which was not affected by the act. 4 Land Dec. 15. These instructions were approved by the Acting Secretary of the Interior. The diagram showed that the road ran from Portland west to a point near Forest Grove where it turned almost at a right angle and ran south to McMinnville. From that point two lines were drawn, one due north and the other due west, both terminating at the twenty mile limits. The granted lands lying within the quadrant formed by these lines and the twenty mile limits, and also the indemnity lands within said lines and the twenty-five mile limits, were designated on the diagram as "forfeited." The forfeited lands on the line from Forest Grove to Astoria were also shown.

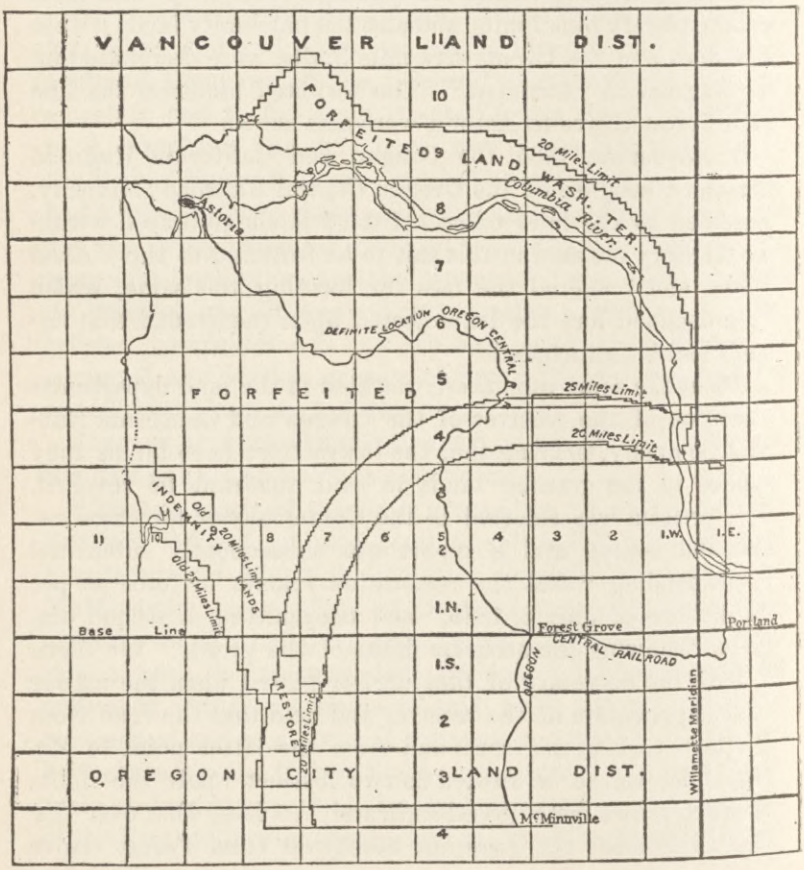
In November, 1885, the Oregon and California Railroad Company, assignee of the Oregon Central Railroad Company, presented to the land office a list of lands embraced within the territory claimed in this suit to be forfeited to the United States, and tendered the fees for locating the same, which were declined and the list rejected upon the ground that the lands had been forfeited.

About the same time there was filed in the land department a petition of the receiver of the Oregon and California Railroad Company, praying that the instructions in so far as they applied to the granted lands in said quadrant be revoked. This petition was referred to the Commissioner for examination and report, and a report was subsequently submitted recommending "that the restoration remain in force as per instructions of July 8, 1885," and transmitting a second diagram, "showing the accurate limits of the grant." On April 5, 1887, the Secretary of the Interior passed upon the matter of the application of the receiver and held that the road from Portland to Forest Grove, and from the latter point to McMinnville, was to be treated as two distinct roads, the limits of which should be adjusted separately. 5 Land Dec. 549. By that adjustment the quadrant northwest from Forest Grove

fell within the lands forfeited, which was in accordance with the restoration of July 8, 1885.

Some of the lands claimed to have been forfeited to the United States have been patented and are in the actual occupation of the patentees or persons claiming under them, and other portions of said lands for which patents have been issued are unoccupied and are wild lands, as is true of some of the lands claimed by the United States, which have not been sold or patented, and are not in the actual physical possession of any person or party.

The following is a sufficient reproduction of the diagram:



Argument for Appellees.

The Circuit Court, Bellinger, J., held that the lands within the quadrant were included within the lands forfeited to the government, and decreed accordingly. 57 Fed. Rep. 426. The Circuit Court of Appeals for the Ninth Circuit reversed this decree and directed a decree in favor of the Oregon and California Railroad Company. 29 U. S. App. 497. Thereupon the present appeal was prosecuted.

Mr. Assistant Attorney General Dickinson and *Mr. George H. Williams* for appellants.

Mr. J. Hubley Ashton and *Mr. Joseph H. Choate* (with whom were *Mr. Charles H. Tweed* and *Mr. William F. Herrin* on the brief), for appellees.

I. The act of May 4, 1870, made a grant *in præsenti* to the Oregon Central Railroad Company, "and to their successors and assigns," of alternate sections of the public lands to the amount of ten sections per mile "on each side," of the road, providing for indemnity within an additional five miles, or within twenty-five miles "from the track of said road," with the right on the part of the company to locate its road in sections of twenty or more miles, and to construct its road in like sections, and thereupon receive patents for so much of the granted lands as should be "adjacent to and coterminous with the said completed sections." *Schulenberg* v. *Harriman*, 21 Wall. 44; *Wisconsin Central Railroad* v. *Price County*, 133 U. S. 496; *Deseret Salt Co.* v. *Tarpey*, 142 U. S. 241; *Bybee* v. *Oregon & California Railroad*, 139 U. S. 663; *Lake Superior &c. Co.* v. *Cunningham*, 155 U. S. 354.

II. The Secretary of the Interior, in executing the act of May 4, 1870, construed the act as a grant providing for the construction of one railroad from Portland to Astoria and McMinnville, and providing for the continuity of the line and the corresponding continuity of the grant from Portland to McMinnville, and not as a grant for two different and distinct railroads, one from Portland to Astoria, and the other from a junction point near Forest Grove to McMinnville.

This original and contemporaneous construction of the granting act by the department charged by law with the execution of the act remained unchanged for fifteen years in that department.

III. Agreeably to the settled doctrine of this court, the contemporaneous construction and effect given by the Department of the Interior to the granting act of May 4, 1870, as above stated, if not decisive, is entitled to very great weight, and should not be disregarded except for some strenuous reasons. *United States* v. *Union Pacific Railway*, 148 U. S. 562; *United States* v. *Johnston*, 124 U. S. 236; *Merritt* v. *Cameron*, 137 U. S. 542; *United States* v. *Alabama Southern Railway*, 142 U. S. 621.

The contemporaneous decision of the Secretary of the Interior in and in respect to those matters had by law the force and effect of a final and conclusive adjudication, and was binding as authority upon his successors and upon the Executive Department of the government. The rights of the grantee, in the act, as vested under that determination, could not be impaired or affected except by a proceeding directly taken for that purpose. *Noble* v. *Union River Logging Railroad*, 147 U. S. 165; *United States* v. *Bank of the Metropolis*, 15 Pet. 377; *Kendall* v. *Stokes*, 3 How. 87; *Lamborn* v. *County Commissioners*, 97 U. S. 181, 185.

IV. The act of forfeiture of January 31, 1885, must be regarded as a legislative interpretation of the granting act, involving an understanding by Congress that the granting act provided for one railroad and telegraph line, beginning at Portland, and having termini respectively at Astoria and McMinnville.

The language of the forfeiting act of 1885 is as follows:

"That so much of the lands granted by an act of Congress entitled 'An act granting land to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon,' approved May 4, 1870, as are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portions of said road, be, and

the same are hereby, declared to be forfeited to the United States."

It will be perceived that for its description, and its sole description, of the railroad and telegraph line provided for by the granting act, the forfeiting act refers to the title of the granting act, which is recited in the forfeiting act and describes the railroad and telegraph line, contemplated by the granting act, as "a railroad and telegraph line from Portland to Astoria and McMinnville."

Throughout the body of the forfeiting act, the road thus described is referred to only as "said road," showing distinctly that Congress, when it passed the forfeiting act, understood that the road which the granting act had in view was one road from Portland to Astoria and McMinnville, as expressed in the title of that act.

Congress in 1885 thus affirmed the construction of the granting act upon which the Department of the Interior had proceeded and acted in executing the provisions of that act, and expressed its understanding that such executive construction of the granting act conformed to its intention when it passed that act.

If the effect we have thus attributed to the act of 1885, as a legislative interpretation of the act of 1870, involving an understanding by Congress that the act of 1870 had in view one railroad from Portland to McMinnville, be the correct legal effect of the act of 1885, the question of the construction to be given to the act of 1870 in respect of the point here in controversy, is removed from the region of legal doubt or contestation.

V. The contemporaneous construction of the act of 1870 by the Department of the Interior, in execution of it, and the legislative interpretation of the act by Congress in 1885, were plainly correct. The provisions of the act of 1870 show clearly that Congress intended to make one grant to one company for one railroad and telegraph line "from Portland to Astoria and McMinnville," as expressed in the title of the act, and declared in the act of forfeiture of 1885.

The one railroad described in the act was to run from Port-

land, as its initial point, to Astoria and to the Yamhill River, near McMinnville, and it was to run through a point of junction near Forest Grove; showing that what the act contemplated was a union of the tracks of this one railroad from Portland to Astoria and to the Yamhill River, near McMinnville, at a suitable point of junction near Forest Grove, one line of tracks proceeding to Astoria and another line of tracks proceeding to the Yamhill River, near McMinnville.

The road from Portland was to be bifurcated, so to speak, at a suitable point of junction near Forest Grove, and to run to Astoria and to McMinnville, thus affording communication by railroad from Portland to Astoria and McMinnville.

It is conceded that the maintenance of any other view of the meaning and intent of the act involves and requires the insertion of the words, "a railroad and telegraph line," before the words, "from a suitable point of junction near Forest Grove," etc., in the first section, so as to make the section read: "That for the purpose of aiding in the construction of a railroad and telegraph from Portland to Astoria, and [a railroad and telegraph line] from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville, in the State of Oregon, there is hereby granted," etc.

But the words referred to cannot be inserted into the statute agreeably to the settled doctrine of this court. *Leavenworth, Lawrence &c. Railroad* v. *United States*, 92 U. S. 733; *Newhall* v. *Sanger*, 92 U. S. 761, and if it can be said that the words of the statute admit of any reasonable doubt as to their meaning or application, it is clearly proper that the title of the act be considered in determining the intent of Congress, agreeably to the principle so recently stated by this court in the case of *Holy Trinity Church* v. *United States*, 143 U. S. 457.

VI. It thus appears that the so-called quadrant lands in question were fully earned by the Oregon Central Railroad Company under the terms of the grant by the completion and acceptance of the second constructed section of its road from the twenty mile post, near Hillsboro, to McMinnville, as lands within the limits of the grant adjacent to and coterminous with that section.

Opinion of the Court.

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

If the act of May 4, 1870, should be held to have authorized the construction of a main road from Portland to Astoria, and that the lands adjacent to, and coterminous with, such main road, on both sides, were granted in order to accomplish that purpose; and also to have authorized the construction of a branch from the main line, at a junction near Forest Grove, to McMinnville, then it would follow that all of the lands available on both sides as far as Forest Grove, and to an extent of twenty miles on each side, would be absorbed in aiding to build the main line; and so of the lands along the main line from Forest Grove to Astoria. And inasmuch as the line from Forest Grove to Astoria, and from Forest Grove, at the junction with the main line, south toward McMinnville, was, in its general bearing, at right angles to the main line from Portland to Forest Grove, the line from Portland to Forest Grove would absorb nearly all of the lands lying east of the branch line to McMinnville, and a part of the lands lying east of the line from McMinnville through Forest Grove, the point of junction, northwards toward Astoria. Hence but little could be earned for building the branch line except the lands lying west of it and south of the point of junction at Forest Grove, and none of the land lying north of a line drawn from Portland through Forest Grove could be held to have been within the contemplation of the act as donated for the purpose of building a branch road from the junction to McMinnville.

In this aspect, as no road was built from Forest Grove toward Astoria, substantially all that was earned was the land lying within the twenty mile limits on each side of the main road from Portland to Forest Grove, and the land lying west of the McMinnville branch and south of a line drawn from Portland through Forest Grove; and all of the lands lying in the quadrant north and west of Forest Grove were unearned lands, and forfeited under the act of January 31, 1885. These lands "are adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of

said grant for the completed portions of said road." But although a part of the lands lying east of this quadrant "are adjacent to and coterminous with the uncompleted portions of said road," yet they are "embraced within said grant for the completed portions of said road," for they lie within the twenty mile limits of the completed portion from Portland to Forest Grove.

The railroad companies contend that no such thing as a branch road or a junction in the ordinary sense of the word was contemplated, and that, having a right to build from Portland to Astoria, and "from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville," they could treat the act as if it authorized the building of a continuous road from Portland *via* Forest Grove to McMinnville, without regard to the provisions for a road beyond Forest Grove to Astoria; and, by constructing their road with a curve at Forest Grove, could properly claim all of the lands falling within twenty miles of this circuitous route from Portland to McMinnville as intended to be granted for the construction of such a road. And, having actually so built, that they were entitled to all the lands lying within a quadrant produced by a radius reaching twenty miles from the curve.

Secretary Lamar rejected this contention and held that the act of May 4, 1870, contemplated two distinct roads, a road from Portland to Astoria, and a road from Forest Grove to McMinnville; that the words "point of junction" were to be given their usual meaning of a point where two or more roads join; that had the words of forfeiture "so much of the lands granted . . . as are adjacent to and coterminous with the uncompleted portion of said road," been unqualified, the line dividing the forfeited lands from those not forfeited would have been drawn through Forest Grove at right angles to the unconstructed road at that point and terminating at the lateral limits of the grant, but that as this would have thrown out of the grant large tracts of lands that were opposite to the constructed portions of the road, Congress qualified the words of forfeiture by adding "and not embraced within the limits

of said grant for the completed portions of said road," which saved to the grant a full complement of lands granted for every mile of road actually constructed, and the Secretary remarked that this view of the act was much strengthened "when it is observed that the lands in said quadrant lie along the uncompleted portion on both sides thereof, and could have been earned, if at all, by that line."

The rule of construction applicable to the granting act is the familiar rule that all grants of this description must be construed favorably to the government, and that nothing passes but what is conveyed in clear and explicit language. *Dubuque & Pacific Railroad* v. *Litchfield*, 23 How. 66, 88; *Leavenworth, Lawrence &c. Railroad Co.* v. *United States*, 92 U. S. 733, 740; *Slidell* v. *Grandjean*, 111 U. S. 412, 437; *Coosaw Mining Company* v. *South Carolina*, 144 U. S. 550, 562. And that the construction should be such as will effectuate the legislative intention, avoiding, if possible, an unjust or absurd conclusion, is also well settled.

In *Sioux City & St. Paul Railroad* v. *United States*, 159 U. S. 349, 360, it was said by Mr. Justice Harlan, speaking for the court: "If the terms of an act of Congress, granting public lands, 'admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.' *Leavenworth &c. Railroad* v. *United States*, 92 U. S. 733, 740. Acts of this character must receive such construction 'as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance.' *Winona & St. Peter Railroad* v. *Barney*, 113 U. S. 618, 625. 'Nothing is better settled,' this court has said, 'than that statutes should receive a sensible construction such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.' *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59. Giving effect to these rules of statutory interpretation, we cannot suppose that Congress

intended that the railroad company should have the benefit of more lands than it earned."

In the light of these principles we have no difficulty in arriving at the same result as that reached by the Secretary of the Interior and by the Circuit Court.

The act declares that the grant is made "for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River, near McMinnville." This does not describe a road from Portland to the Yamhill River, but a road from Portland to Astoria, and a road expressly stated to be from a point of junction near Forest Grove to the Yamhill River.

We are unable to see why any other than their usual meaning should be attributed to the words "point of junction." Junction in the ordinary acceptation as applied to railroads is the point or locality where two or more lines of railway meet. Two lines of distinct companies, or separate roads of the same company, or a main line and a branch road of the same company, may have points of union or meeting, styled junctions, but this can hardly be predicated of a single continuous road from one point to another. If the act had not used the word "junction" and had defined the line as running from Portland to Astoria, and to McMinnville *via* Forest Grove, there would be more force in the suggestion that Forest Grove was a point of bifurcation of one road rather than a point of junction of two roads, but the act was not couched in those terms, and the word "junction" cannot be rejected, or wrested from its obvious meaning.

As the road from Portland to Astoria and the road from Forest Grove to McMinnville were to be constructed by and belong to one company and together constituted a single enterprise, they were naturally spoken of as one railroad, as, in that sense, they were. But this is of no special significance in the present inquiry, which is whether, in view of the language of the act and the purposes to be accomplished, a main road and a branch road were provided for, in aid of which the lands were granted subject to the adjustment applicable to two

roads. And the general rule is that "words importing the singular number may extend and be applied to several persons or things; words importing the plural number may include the singular," as provided in the first section of the Revised Statutes.

Nor are we impressed with the argument that the title of the act compels to another conclusion. The title is: "An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon." The text of the act is: "That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill River near McMinnville in the State of Oregon," the grant is made. Insert the comma after Astoria in the title, which appears after that word in the act (and for the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required, *Hammock* v. *Loan & Trust Co.*, 105 U. S. 77, 84; *United States* v. *Lacher*, 134 U. S. 624, 628), and the title is sufficiently comprehensive to fairly describe a road from Portland to Astoria, and a road to McMinnville, as the subject of the act. The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous. *United States* v. *Fisher*, 2 Cranch, 358, 386; *Yazoo & Mississippi Railroad* v. *Thomas*, 132 U. S. 174, 188. The ambiguity must be in the context and not in the title to render the latter of any avail.

And so of the title of the act of January 31, 1885. That title is: "An act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon," and the granting act is referred to in the text by its title. We do not regard the use of the singular number as persuasive of the intention of Congress that, in the adjustment of the grant as affected by the forfeiture, the fact that a main road and a branch road were provided for should be ignored.

It seems to us quite clear that a main road was to be built from Portland, the principal city of Oregon, situated on the

Columbia River, to Astoria, a port on the Pacific Ocean at the mouth of that river, a distance of some one hundred and twenty-eight and a half miles, being over one hundred miles beyond Forest Grove; and a branch from Forest Grove to McMinnville, a distance somewhat exceeding twenty-one miles. It is not denied that, as stated in the opinion of the Circuit Court, "four fifths of the line of road from Portland to Astoria traversed a rough and wholly unsettled district, but one known to be rich in timber, and believed to be in iron and coal, with considerable areas of agricultural land," while the twenty-one miles from Forest Grove to McMinnville ran through "the heart of the Willamette Valley and through the oldest settled portion of the country." The opening up to settlement of unoccupied and inaccessible territory and the establishment of railroad communication between Portland and Astoria by the construction of the main line were the obvious inducements to and the primary objects of the grant, and the construction of the branch, though included in the act, was subordinate and subsidiary. The line, both main and branch, was wholly within the State of Oregon, and we cannot assume that if the promoters had sought aid merely for a road running from Portland by way of Forest Grove to McMinnville, the application would have been granted.

The grant contemplated a main line which ran from Portland west to the point of junction and a branch from the point of junction nearly south, substantially at right angles, and devoted the lands north of the junction, not absorbed by the road from Portland to that point, to the building of the road to the north; and while the company was left free to construct parts of the road as might suit its convenience, its action could not change the effect of the grant or control its administration to the contrary of the manifest intention of Congress.

On the twentieth of May, A.D. 1871, a map of definite location was filed with the Secretary of the Interior, described in the certificate of the company's officers as showing "the location of the Oregon Central railroad from the city of Portland, Oregon, to the Yamhill River near McMinnville a distance of forty-seven and three fourths ($47\frac{3}{4}$) miles, and also

from a junction near Forest Grove towards Astoria to a point one mile north of the summit of the range of hills dividing the Tualatin from the Nehalem Valley, a distance of 20 miles, as definitely fixed in compliance with said act of Congress."

Subsequently the company certified a map of definite location of the road between Astoria and Castor Creek (the western point in the preceding map), which was filed with the Secretary of the Interior, and transmitted by him, February 2, 1872, to the Commissioner of the General Land Office. The lands were withdrawn under both these maps.

The first section of constructed road from Portland twenty miles west to Hillsboro was accepted February 16, 1872. The second section was accepted June 23, 1876. This was a section of 27½ miles from Hillsboro *via* Forest Grove to McMinnville, constructed on a curve thus described by counsel for the railroad companies: "The line of this section of the road runs from the twentieth mile post for about two miles (for the most part upon indicated curves) to a point a little south of the Portland base line, and thence extends west about two miles — almost entirely upon a tangent until it passes Cornelius — to a point about two miles east of Forest Grove, when it begins to curve upon a radius of 8564 feet (equal to about 1.6 miles) until it reaches about a southwest by west direction, in which it runs upon a tangent 8956 feet (equal to about 1.7 miles), passing the town of Forest Grove at a distance of about one half or three quarters of a mile; from the end of this tangent it again curves until it reaches a southwesterly direction, and then proceeds on southerly by various curves to the Yamhill River."

If these maps of definite location and the construction of the road from Hillsboro to McMinnville *via* Forest Grove in the manner described are to be regarded as an attempt to make a part of the main road from Portland to Astoria and the branch a continuous and single road from Portland to McMinnville, eliminating Astoria altogether, and to entitle the company to claim all the lands within the quadrant by reason of the construction of the railroad on the above stated curve, we can only say that that attempt was unsuccessful,

and the rights of the government remained unaffected by the course pursued by the company.

It is forcibly argued that the acceptance of the completed section from Hillsboro to McMinnville amounted to a construction by the Secretary of the Interior of the granting act as providing for one continuous railroad from Portland *via* Forest Grove to McMinnville. But we cannot accede to this view. At the time of that acceptance the entire line of both main and branch roads had been definitely located and the lands withdrawn. It could not be presumed that all the lands would not be earned or that a forfeiture would be declared. Still less can it be supposed that it occurred to the Secretary that what the company was apparently doing for its own convenience was being done with the design of committing the Department to the recognition of the untenable position that the lands within the quadrant passed by virtue of the building of the road to McMinnville. This was a matter not then before the Secretary for determination, and when it did arise was otherwise disposed of.

And this is true as respects the approval of the first map of definite location. Such approval was *diverso intuitu* and should be given no effect as contemporaneous construction. Under that location lands were withdrawn from Portland to Castor Creek, as well as to McMinnville, and the overlap at the east of the road to McMinnville was inevitable and was not a loss to be made up from lands belonging to other parts of the grant.

In the view we take of the grant the termini of the main road were Portland and Astoria, and of the branch, the junction and McMinnville. Lands lying north of a line drawn at right angles with the branch at its northern terminus were not within the grant made in aid of the branch. Lands lying west of a line drawn at right angles with the main road at the junction were not within the grant for the main road east thereof.

As heretofore remarked, however, some of the lands lying east of the quadrant were not only coterminous with the uncompleted portion of the main road beyond Forest Grove, but

were embraced within the limits of the completed road from Portland to the junction, and, therefore, Congress, in the act of forfeiture, was careful to save those lands from its operation. There is nothing in the language used from which it can properly be concluded that Congress intended to accept the theory of the railroad companies that the circuitous route adopted in construction entitled them to the lands in the quadrant because thereby brought within the grant, or to do anything more than so qualify the phraseology as to prevent an unintended forfeiture. So far as the act operated as a legislative interpretation, it was in harmony with the granting act as subsequently construed by Secretary Lamar, and cannot be treated as proceeding on the theory of prior construction which we do not agree had been had. And although the failure of the company to build beyond Forest Grove towards Astoria left but one road, and that from Portland to McMinnville, it would be quite inadmissible to make the defeat of the primary object of Congress the basis of imputing to that body the intention of narrowing the forfeiture declared for noncompliance with the conditions imposed.

In *United States* v. *Union Pacific Railway*, 148 U. S. 562, the question before us was not presented. The decision there was controlled by the determination that the whole line was a continuous main line and that the grant was not cut in two by one company being authorized to contract with another for the construction of part of the line and a proportionate share of the grant. The whole line was built. Here the grant for building the line from Portland beyond Forest Grove to Astoria became fixed by the location of the road as did the grant in aid of the road from the junction to McMinnville. The main line was not constructed beyond the junction. The lands in controversy were not adjacent to nor coterminous with the branch road between lines drawn perpendicularly to its termini; were not coterminous with the road from Portland to the junction; and were donated to build the portion of the main line which was abandoned. The ruling in the former case has no decisive bearing under the facts in this.

Syllabus.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is affirmed, and the cause remanded to that court accordingly.

MR. JUSTICE FIELD and MR. JUSTICE SHIRAS dissented.

ROWE *v.* UNITED STATES.

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

No. 439. Submitted October 22, 1896. — Decided November 30, 1896.

On the trial of a person indicted for murder, the defence being that the act was done in self-defence, the evidence on both sides was to the effect that the deceased used language of a character offensive to the accused; that the accused thereupon kicked at or struck at the deceased, hitting him lightly, and then stepped back and leaned against a counter; that the deceased immediately attacked the accused with a knife, cutting his face; and that the accused then shot and killed his assailant. The trial court in its charge pressed upon the jury the proposition that a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful acts. *Held*, that this principle had no application in this case; that the law did not require that the accused should stand still and permit himself to be cut to pieces, under the penalty that, if he met the unlawful attack upon him, and saved his own life by taking that of his assailant, he would be guilty of manslaughter; that under the circumstances the jury might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter with a knife in any sense that would deprive him of the right of self-defence against such attack; and that the accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary, or what he had grounds to believe at the time was necessary, to save his life, or to protect him from great bodily harm.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defence is restored when the person assaulted, in violation of law pursues him with a deadly weapon and seeks to take his life, or do him great bodily harm.

Statement of the Case.

THIS was an indictment for murder, alleged to have been committed by the plaintiff in error, in the Cherokee Nation, Indian Territory, on the 30th day of March, 1895, — the person killed, Frank Bozeman, being a white man and not an Indian. The verdict was guilty of manslaughter, and a motion for new trial having been overruled, the accused was sentenced to imprisonment in the penitentiary at Columbus, Ohio, for the term of five years, and to pay to the United States a fine of five hundred dollars.

The following agreed statement as to the evidence is taken from the record:

"The testimony on the part of the government tended to show that on the evening of the 30th of March, 1895, the defendant, David Cul Rowe, who is a Cherokee Indian, and the deceased, Frank Bozeman, a white man, a citizen of the United States, and not an Indian, met at a hotel at Pryor's Creek, Indian Territory, at the supper table; that the defendant appeared to be drinking, but was not much intoxicated; that defendant said that he had his gun, and that he had a right to carry it, as he was a 'traveller'; that he had made a gun play in that town on one occasion and he would make another one; that he said to deceased, 'What do you think of that?' The deceased did not reply, and defendant said to him, 'God damn you, I'll make you hide out or I'll make you talk to me'; that in a short time deceased got through his supper and walked out into the office of the hotel, and presently defendant came out of the dining-room; that defendant said something to deceased, which was not understood by the witnesses, but the deceased did not answer; that defendant turned to some other parties present and said, 'He (meaning deceased) will not talk to me'; that one of the parties addressed said to defendant, 'Talk Cherokee to him'; that the deceased then said, 'He has got too damn much nigger blood in him to talk anything with any sense'; that defendant then kicked at deceased, hitting him lightly on the lower part of the leg; that immediately deceased sprang at defendant, striking him with a knife and cutting him in two places on the face; that after deceased began cutting defendant the

latter drew his pistol and fired, shooting deceased through the body; that at the time the defendant fired the two men were in striking distance of one another. The shot struck deceased in the right arm, near the elbow, and ranged through the body from right to left side; that when shot was fired deceased ran, and when defendant turned round the blood was streaming from his face, where he had been cut by deceased, and he said to the bystanders to go for a doctor, that he was killed; that a short time after the difficulty the knife used by deceased on defendant was found near the place where the trouble occurred; that a knife was also found on the person of deceased after his death.

"The testimony on the part of the defence tended to show that on the day of the difficulty defendant came into town from his home, about twenty miles distant, with his wife to do some shopping; that he brought his pistol with him and left it at the livery stable where he put up his team, and at supper time went by the stable and got his pistol, fearing that it might be stolen; that defendant did not have anything to say to deceased in the dining-room, but was talking with the father of the deceased, and that defendant was not intoxicated; that when defendant came out in the office deceased used the language indicated in the statement for the government, or words to that effect, and defendant kicked at him and probably struck him lightly; that when defendant kicked he stepped back and leaned up against the counter and deceased sprang at him and began cutting him with a knife; that deceased cut him in the face and kept on striking at him with the knife, and after he was cut in the face defendant drew his pistol and fired at deceased, who was in the act of striking him again with the knife. The foregoing is in substance the statement of the defendant who testified in his own behalf.

"Proof was also offered tending to show that the reputation of the deceased as a dangerous and lawless man was bad; that the reputation of the defendant as a peaceable and law-abiding man was good, and that the reputation of prosecuting witness Thomas Boseman was bad for truth in the communities where he had resided."

Statement of the Case.

The court delivered an oral charge, occupying twenty-seven pages of the printed record, and embracing a discussion of most of the leading principles in criminal law, as well as many extracts from adjudged cases and elementary treatises.

Referring to the law of self-defence, the court said to the jury:

"A man might be to some extent in the wrong, and yet he might avail himself of the law of self-defence, but what is meant by his being in the lawful pursuit of his business means that he is not himself attempting to kill, or that he is not doing an act which may directly and immediately produce a deadly affray between himself and his adversary. He is not allowed to do either. The only time when he can do an act of that kind is when the condition exists which gives him the right to invoke this law. I say if he is attempting directly to kill, he is not in the lawful pursuit of his business unless it is in his own defence under this law; and when he is doing a wrongful act which immediately contributes to the result — brings into existence an affray in which violence may be used by the adversary and he may kill because of that violence — when that is the case, the law says he is so far the author of that violent condition as that he cannot invoke this law of self-defence, and it depends upon the circumstances and conditions of the case whether or not he can invoke the law so far as to have his crime mitigated from murder to manslaughter. Then, when he is in the lawful pursuit of his business — that is, when he is occupying the relation to the state of case where the killing occurred which I have named — and then is attacked by another under circumstances which denote an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. Now, let us go over that again and see what these propositions are. He must be measurably in the right — and I have defined to you what that means — and when he is so situated he is attacked, in this case, by Frank Bozeman, the man who

was killed, and attacked under circumstances which denoted an intention to take away his life or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can or disabling his adversary without killing him, if it be in his power. This proposition implies that he is measurably in the right. If he is doing any of these things which I will give you after awhile, which deprive him of the law of self-defence because of his own conduct in precipitating a conflict in which he kills, then he is not in the right; he is not doing what he had a right to do, and this proposition of the law of self-defence would not avail him; he could not resort to it, because his own conduct puts him in an attitude where, in the eye of the law, he is by his own wrong the creator of the necessity under which he acts, and he cannot invoke that necessity. The necessity must be one created by the man slain and which was not brought into existence by the direct act of the defendant contributing to that necessity."

After saying that both the accused and the deceased were upon the same plane in respect of the place or house in which they were at the time, each having the right to be there, the court proceeded: "Neither one of them was required to retreat under such circumstances, because the hotel or temporary stopping place of a man may be regarded as his dwelling place, and the law of retreat in a case like that is different from what it would be on the outside. Still, situated as was the defendant and as was the deceased, there was a rule incumbent upon both of them which required that they should use all reasonable means to avoid the condition which led to a deadly conflict, whether that means could have been avoided by keeping out of the affray or by not going into it or by stepping to one side; and this law says again that if a man is in the right, if he stands without being the creator of that condition and that condition is created by the man whom he kills, and the man is doing that in the shape of exercising an act of violence which may destroy his life or inflict great injury upon his person, yet if he could have paralyzed that

arm, if he could have turned aside that danger by an act of less deadly character than the one he did exercise, the law says he must do that. If he could have inflicted a less dangerous wound upon the man under the circumstances the law commands him to do that, because when he is doing that he is accomplishing the only purpose the law of self-defence contemplates he has right to accomplish — that is, to protect himself and not to execute vengeance, not to recklessly, wantonly and wickedly destroy human life, but to protect his own life when he is in the right and the other party is in the wrong."

Mr. Benjamin T. Duval and *Mr. William F. Cravens* for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

I. The court properly charged that malice must be gathered, as an inference of law, from facts and circumstances proved. It was correct in saying that a man is presumed to intend the natural and probable consequence of his voluntary acts. *Clarion Bank* v. *Jones*, 21 Wall. 337; *Commonwealth* v. *York*, 9 Met. (Mass.) 93, 103; *Commonwealth* v. *Webster*, 5 Cush. 295, 305; *People* v. *Potter*, 5 Michigan, 1, 8; *People* v. *Scott*, 6 Michigan, 287, 296; *United States* v. *Taintor*, 11 Blatchford, 374, 375.

II. The portion of the charge which relates to the right to kill in self-defence when necessary is criticised on two grounds.

(*a*) It is said that the proof tended to show that defendant had retreated and had declined further contest, and that the above portion of the charge is erroneous because it does not recognize the right of self-defence on the part of one who has begun an affray, has in good faith retired from it, and has thus manifested his purpose, and after that is assailed by his adversary.

This portion of the charge was not upon the particular facts of this case, or upon the theory of either the government or

the defence. It was a general declaration of the law of self-defence, confined to a state of facts where the one who does a wrongful act "which immediately contributes to the result" kills his adversary who followed up this act with an attack.

There was no error in what the court said.

Self-defence is no excuse for a homicide if the accused brought on the difficulty and was himself the aggressor. 1 Hale, P. C., 482. *Gibson* v. *State*, 89 Alabama, 121; *People* v. *Robertson*, 67 California, 646; *Kinney* v. *People*, 108 Illinois, 519; *State* v. *Neeley*, 20 Iowa, 108; *State* v. *Murdy*, 81 Iowa, 603; *State* v. *Scott*, 41 Minnesota, 365; *Allen* v. *State*, 66 Mississippi, 385; *State* v. *Brittain*, 89 N. C. 481; *Stewart* v. *State*, 1 Ohio St. 66; *Stoffer* v. *State*, 15 Ohio St. 47; *State* v. *Hawkins*, 18 Oregon, 476.

This part of the charge had no application to the case of withdrawal from combat assumed in the brief and which is the foundation of the criticism. If the judge did not charge sufficiently, or at all, on that theory, he should have been so requested. No request was preferred.

Therefore, if he charged the law of self-defence correctly as far as he went, the case should not be reversed because he did not extend the charge to a particular theory advanced by defendant. This theory rests on the narrowest of grounds.

There was nothing in the proof for defendant tending to disprove the evidence for the government which tended to show that after they came out of the dining-room defendant accosted deceased. The evidence for the defendant tended to show that immediately after the remark of deceased, which followed this accosting, defendant kicked deceased, and stepped back and leaned up against the counter, and deceased sprang at him, cutting him with a knife, and then defendant shot him. There was no evidence here tending to show a retirement from the affray. The whole tragedy was in one act. There is nothing to indicate any interval.

Even if there be any grounds for saying that this evidence might have indicated such a purpose, it is so slight that the judge ought not to be put in error for not charging upon that aspect of the right of self-defence without a special request.

Argument for Defendants in Error.

Counsel for defendant were not asleep when the charge was given. They must have been very alert, for they took fifty exceptions.

The record may present sufficient facts to warrant a renewal, if such an instruction had been asked and declined; but the judge should not now be put in error for such cause. The facts which the proof tended to show do not approach what is required to predicate a theory of withdrawal. There must be a withdrawal in good faith, and it must be such as to show the adversary that it is not desired to continue the conflict. The adversary must pursue him. *Parker* v. *State*, 88 Alabama, 4; *People* v. *Wong Ah Teak*, 63 California, 544; *Hittner* v. *State*, 19 Indiana, 48; *State* v. *Dillon*, 74 Iowa, 653; *Brazzil* v. *State*, 28 Tex. App. 584.

Here there was no retreat, no withdrawal, no pursuit. Can it be that a man can strike another, merely step back and stand his ground, and, when the party assailed strikes back with a deadly weapon, or attempts to shoot, kill him and go free on the plea of self-defence!

(*b*) That portion of the extract from the charge is assailed which says: "Provided he use all means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power." It is said that "defendant could not have retreated farther than he did, and the fierceness of the attack made it impossible to save his life by other means than by slaying his adversary."

What the judge said in this extract about retreating was in the way of a general disquisition. When he came to consider defendant's rights he plainly said that he, being a guest of the hotel, was not bound to retreat at all, as follows: "Upon the question of retreating as far as he can, there is a law which says that if a man is in his dwelling house he need not retreat; and that the hotel where defendant was lodging as a guest or was about to lodge — was there for his supper anyway — and where the other man was, put them both upon the same plane. Neither one of them was required to retreat under such circumstances, because the hotel or temporary stopping place of

a man may be regarded as his dwelling place, and the law of retreat in a case like that is different from what it would be on the outside."

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

We think that these portions of the charge (to which the accused duly excepted) were well calculated to mislead the jury. They expressed an erroneous view of the law of self-defence. The duty of the jury was to consider the case in the light of all the facts. The evidence on behalf of the government tended to show that the accused sought a difficulty with some one; that on behalf of the accused, would not justify any such conclusion, but rather that he had the reputation of being a peaceable and law-abiding man. But the evidence on both sides was to the effect that the deceased used language of an offensive character for the purpose of provoking a difficulty with the accused, or of subjecting him to the indignity of a personal insult. The offensive words did not, it is true, legally justify the accused in what he did — the evidence of the government tending to show that "he kicked at deceased, hitting him lightly on the lower part of the leg"; that on the part of the accused tending to show that he "kicked at" the deceased and "probably struck him lightly." According to the evidence of the defence, the accused then "stepped back, and leaned up against the counter," indicating thereby, it may be, that he neither desired nor intended to pursue the matter further. If the jury believed the evidence on behalf of the defence, they might reasonably have inferred from the actions of the accused that he did not intend to make a violent or dangerous personal assault upon the deceased, but only, by kicking at him or kicking him lightly, to express his indignation at the offensive language of the deceased. It should have been submitted to the jury whether the act of the accused in stepping back and leaning against the counter, not in an attitude for personal conflict, was intended to be, and should have been reasonably

interpreted as being, a withdrawal by the accused in good faith from further controversy with the deceased. On the contrary, the court, in effect, said that if, because of words used by the deceased, the accused kicked at or kicked the deceased, however lightly, and no matter how offensive those words were, he put himself in a position to make the killing manslaughter, even if the taking of life became, by reason of the suddenness, rapidity and fierceness of the assault of the deceased, absolutely necessary to save his own. By numerous quotations from adjudged cases, the court, by every form of expression, pressed upon the jury the proposition that "a person who has slain another cannot urge in justification of the killing a necessity produced by his own unlawful and wrongful acts." But that abstract principle has no application to this case, if it be true — as the evidence on behalf of the defence tended to show — that the first real provocation came from the deceased when he used towards the accused language of an offensive character, and that the accused immediately after kicking at or lightly kicking the deceased, signified by his conduct that he no longer desired controversy with his adversary; whereupon the deceased, despite the efforts of the accused to retire from further contest, sprang at the latter, with knife in hand, for the purpose of taking life, and would most probably have accomplished that object, if the accused had not fired at the moment he did. Under such circumstances, did the law require that the accused should stand still, and permit himself to be cut to pieces, under the penalty that if he met the unlawful attack upon him and saved his own life, by taking that of his assailant, he would be guilty of manslaughter? We think not.

If a person, under the provocation of offensive language, assaults the speaker personally, but in such a way as to show that there is no intention to do him serious bodily harm, and then retires under such circumstances as show that he does not intend to do anything more, but in good faith withdraws from further contest, his right of self-defence is restored when the person assaulted, in violation of law, pursues him with a deadly weapon and seeks to take his life or do him great

bodily harm. In *Parker* v. *The State*, 88 Alabama, 4, 7, the court, after adverting to the general rule that the aggressor cannot be heard to urge in his justification a necessity for the killing which was produced by his own wrongful act, said: "This rule, however, is not of absolute and universal application. An exception to it exists in cases where, although the defendant originally provoked the conflict, he withdraws from it in good faith, and clearly announces his desire for peace. If he be pursued after this, his right of self-defence, though once lost, revives. 'Of course,' says Mr. Wharton, in referring to this modification of the rule, 'there must be a real and *bona fide* surrender and withdrawal on his part; for, if there be not, then he will continue to be regarded as the aggressor.' 1 Wharton's Cr. Law, (9th ed.) § 486. The meaning of the principle is that the law will always leave the original aggressor an opportunity to repent before he takes the life of his adversary. Bishop's Cr. Law, (7th ed.) § 871." Recognizing this exception to be a just one, the court properly said, in addition: "Due caution must be observed by courts and juries in its application, as it involves a principle which is very liable to abuse. The question of the good or bad faith of the retreating party is of the utmost importance, and should generally be submitted to the jury in connection with the fact of retreat itself, especially where there is any room for conflicting inferences on this point from the evidence." Both parties to a mutual combat are wrong-doers, and the law of self-defence cannot be invoked by either, so long as he continues in the combat. But, as said by the Supreme Court of Iowa in *State* v. *Dillon*, 74 Iowa, 653, 659, if one "actually and in good faith withdraws from the combat, he ceases to be a wrong-doer; and if his adversary have reasonable ground for holding that he has so withdrawn, it is sufficient, even though the fact is not clearly evinced." See also 1 Bishop's New Crim. Law, § 702; *People* v. *Robertson*, 67 California, 646, 650; *Stoffer's case*, 15 Ohio St. 47. In Wharton on Homicide, § 483, the author says that "though the defendant may have thus provoked the conflict, yet, if he withdrew from it in good faith and clearly announced his

desire for peace, then, if he be pursued, his rights of self-defence revive."

We do not mean to say that the jury ought to have found that the accused, after kicking the deceased lightly, withdrew in good faith from further contest and that his conduct should have been so interpreted. It was for the jury to say whether the withdrawal was in good faith, or was a mere device by the accused to obtain some advantage of his adversary. But we are of opinion that, under the circumstances, they might have found that the accused, although in the wrong when he kicked or kicked at the deceased, did not provoke the fierce attack made upon him by the latter, with knife in hand, in any sense that would deprive him altogether of the right of self-defence against such attack. If the accused did, in fact, withdraw from the combat, and intended so to do, and if his conduct should have been reasonably so interpreted by the deceased, then the assault of the latter with a deadly weapon, with the intent to take the life of the accused or to do him great bodily harm, entitled the latter to the benefit of the principle announced in *Beard* v. *United States*, 158 U. S. 550, 564, in which case it was said: "The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or to do him great bodily harm, he was not obliged to retreat, nor to consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force as, under all the circumstances, he, at the moment, honestly believed, and had reasonable grounds to believe, was necessary to save his own life or to protect himself from great bodily injury."

The charge, as above quoted, is liable to other objections. The court said that both the accused and the deceased had a right to be in the hotel, and that the law of retreat in a case like that is different from what it would be if they had been on the outside. Still, the court said that, under the circum-

stances, both parties were under a duty to use all reasonable means to avoid a collision that would lead to a deadly conflict, such as keeping out of the affray, or by not going into it, or "by stepping to one side"; and if the accused could have saved his life, or protected himself against great bodily harm, by inflicting a less dangerous wound than he did upon his assailant, or "if he could have paralyzed that arm," without doing more serious injury, the law commanded him to do so. In other words, according to the theory of the charge, although the deceased sprang at the accused, with knife in hand, for the purpose of cutting him to pieces, yet if the accused could have stepped aside or paralyzed the arm of his assailant, his killing the latter was not in the exercise of the right of self-defence. The accused was where he had the right to be, and the law did not require him to step aside when his assailant was rapidly advancing upon him with a deadly weapon. The danger in which the accused was, or believed himself to be, at the moment he fired is to some extent indicated by the fact, proved by the government, that immediately after he disabled his assailant (who had two knives upon his person) he said that he, the accused, was himself mortally wounded and wished a physician to be called. The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life or to protect himself from great bodily harm. And under the circumstances, it was error to make the case depend in whole or in part upon the inquiry whether the accused could, by stepping aside, have avoided the attack, or could have so carefully aimed his pistol as to paralyze the arm of his assailant without more seriously wounding him.

Without referring to other errors alleged to have been committed, the judgment below is reversed and the case is remanded for a new trial.

Reversed.

Mr. Justice Brown and Mr. Justice Peckham dissented.

Syllabus.

THE ROGERS LOCOMOTIVE MACHINE WORKS *v.* AMERICAN EMIGRANT COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

No. 23. Argued March 24, 1896. — Decided December 7, 1896.

In a suit by the American Emigrant Company to obtain a decree quieting its title to certain lands in Calhoun County, Iowa, of which the defendants have possession, the plaintiff asserted title under the act of Congress known as the Swamp Land act of 1850, 9 Stat. 519, c. 84; the defendants under the act of Congress of May 15, 1856, 11 Stat. 9, c. 28, granting land to Iowa to aid in the construction of railroads in that State, including one from Dubuque to Sioux City. The principal contention of the plaintiff was that the lands passed to the State under the act of 1850, and were not embraced by the railroad act of 1856. By an act passed January 13, 1853, the State of Iowa granted to the counties respectively in which the same were situated the swamp and overflowed lands granted to the State by the Swamp Land act of 1850. Congress, by an act approved May 15, 1856, granted lands to Iowa to aid in the construction of certain railroads in that State, among others a railroad from Dubuque to Sioux City. That act excepted from its operation all lands previously reserved to the United States by any act of Congress, or in any other manner, for any purpose whatsoever. The lands, interests, rights, powers and privileges granted by the last-named act, so far as they related to the proposed road from Dubuque to Sioux City, were transferred by the State in 1856 to the Dubuque and Pacific Railroad Company. In the same year, the county court of Calhoun County, Iowa, appointed an agent to select and certify the swamp lands in that county, in accordance with the above act of 1853. The lands in controversy are within the limits of the railroad grant of May 15, 1856, and were earned by the building of the road from Dubuque to Sioux City, if they were subject at all to that grant. The several defendants hold by sufficient conveyance all the title and interest which passed under the railroad grant, if any title or interest thereby passed. Under date of December 25, 1858, these with other lands were certified to the State by the General Land Office of the United States as lands within the place limits defined by the railroad act of 1856 of the Dubuque and Pacific Railroad. A list of the tracts so certified to the State was approved by the Secretary of the Interior, subject to the conditions of the act of 1856 and to any valid interfering rights existing in any of the tracts embraced in the list. The selection of these lands as swamp lands by the agent of Calhoun County was reported to the county court of that county September 30, 1858. March 27, 1860, the surveyor general for the State certified these lands as swamp and overflowed lands, and this certificate was received in the General Land Office

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March 27, 1860, and at the local land office at Des Moines, Iowa, February 18, 1874. It did not appear that the Secretary of the Interior ever took any action in respect to the lists made by the agent of Calhoun County of lands selected by him as swamp lands, nor that the State or the county, or any one claiming under the county, ever directly sought any action by the General Land Office or by the Secretary of the Interior in respect to such selection. December 12, 1861, a written contract was made between the county of Calhoun, Iowa, and the American Emigrant Company in relation to the swamp and overflowed lands in that county. Subsequently, in 1863, the county, although no patent had ever been issued to the State, conveyed to that company the lands in controversy. *Held*,

(1) That the Secretary of the Interior had no authority to certify lands under the railroad act of 1856 which had been previously granted to the State by the Swamp Land act of 1850;

(2) That whether the lands in controversy were swamp and overflowed lands within the meaning of the act of 1850 was to be determined, in the first instance, by the Secretary of the Interior; and that when he identified lands as embraced by that act, and not before, the State was entitled to a patent, and on such patent the fee simple title vested in the State, and what was before an inchoate title then became perfect as of the date of the act;

(3) That when the Secretary of the Interior certified in 1858 that the lands in controversy inured to the State under the railroad act of 1856, he, in effect, decided that they were not embraced by the Swamp Land act of 1850; that it was open to the State, before accepting the lands under the railroad act, to insist that they passed under the act of 1850 as swamp and overflowed lands; that if the State considered the lands to be covered by the Swamp Land act, its duty was to surrender the certificate issued to it under the railroad act; and that it could not take them under one act, and, while holding them under that act, pass to one of its counties the right to assert an interest in them under another and different act;

(4) That the county of Calhoun, being a mere political division of the State, could have no will contrary to the will of the State; that its relation to the State is such that the action of the latter in 1858 in accepting the lands under the railroad act was binding upon it as one of the governmental agencies of the State; that the county could not, after such acceptance, claim these lands as swamp and overflowed lands, or, by assuming to dispose of them as lands of that character, pass to the purchaser the right to raise a question which it was itself estopped from raising; that the Emigrant Company could not, by any agreement made with the county in 1861 or afterwards, acquire any greater rights or better position in respect to these lands than the county itself had after the certification of them to the State in 1858 as lands inuring under the railroad

act of 1856; and that the plaintiff claiming under the county and State was concluded by the act of the State in accepting and retaining the lands under that statute.

The present suit was brought by the American Emigrant Company for the purpose of obtaining a decree quieting its title to certain lands in Calhoun County, Iowa. The plaintiff asserts title under the act of Congress known as the Swamp Land act of September 28, 1850, c. 84, 9 Stat. 519; the defendants, under the act of Congress of May 15, 1856, 11 Stat. 9, c. 28, granting land to Iowa in aid of the construction of various railroads in that State, among others a railroad from Dubuque to Sioux City with a branch from the mouth of Tête des Morts to the nearest point on that road.

The principal contention of the plaintiff is that the lands passed to the State under the act of 1850, and were not embraced by the railroad act of 1856.

A decree was passed adjudging the plaintiff to be the owner of some of the tracts described in its petition. As to other tracts the suit was dismissed. Upon appeal by the defendants to the Supreme Court of Iowa the decree was affirmed. 83 Iowa, 612. The present writ of error brings that decree before us for examination.

By the above act of September 28, 1850, all swamp and overflowed lands made unfit thereby for cultivation were granted to the respective States in which they were situated that they might be reclaimed by the construction of the necessary levees and drains. By the second section of that act it was made the duty of the Secretary of the Interior, as soon as practicable after the passage of the act, to make out an accurate list and plats of such lands, and transmit the same to the Governor of the State, and at the request of the latter, "cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State" — the proceeds of the lands, whether from sale or by direct appropriation in kind, to be applied, exclusively, as far as necessary, to the purpose of reclaiming the lands by means of the levees and drains. By the third section it was provided that "in making out a list and plats of the land aforesaid, all

legal subdivisions, the greater part of which is 'wet and unfit for cultivation,' shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it should be excluded therefrom." 9 Stat. 519.

The legislature of Iowa, by an act passed February 5, 1851, authorized the commissioner of the state land office to take steps necessary to secure to the State the lands granted by the above act. To that end, the commissioner, having reason to believe there were any tracts of swamp land within the State not reported as such by the United States surveyor, sufficient to justify a more particular examination, was to direct the county surveyor of any county in which the lands were located "to make the examination and provide the proofs necessary to secure such lands to the State, a list of which shall be returned to the land commissioner or the authority acting in that capacity, verified by affidavit," etc. Laws of Iowa, 1850, 1851, p. 169, c. 69.

By a subsequent statute of Iowa, passed January 13, 1853, the swamp and overflowed lands granted to the State by the act of 1850 were granted "to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same — and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county." The same act provided that "whenever it shall appear that any of the lands granted to the State by the aforesaid act of Congress, shall have been sold by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof." It also provided that in all the counties where the county surveyor had made no examination and report of the swamp lands within his county, in compliance with the instructions from the governor, the county court should appoint some competent person, who should proceed "to examine said lands, and make due report, and plats, upon which the topography of the

country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers, lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgment of the same by the General Government, shall be recorded in a well-bound book provided for that purpose, and filed among the records of the county court." Laws of Iowa, 1852, p. 29, c. 12.

By an act passed January 25, 1855, the governor of Iowa was authorized and empowered to draw from the Treasury of the United States all moneys arising from the disposition of the swamp lands of Iowa by the government of the United States. The same act provided: "3. That the Governor is hereby authorized to adopt such measures as to him may seem expedient, to provide for the selection of the swamp lands of this State, and to secure to the State the title to the same, and also for the selection in the name of the State, [of] other lands, in lieu of such swamp lands as may have been or may hereafter be entered with warrants: *Provided*, That the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this State under the provisions of any previous law: *And provided further*, That this act shall not be construed to impair the rights of the counties of this State to any swamp lands within said counties under the provisions of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the Governor to the authorities at Washington." Laws of Iowa, 1854–1856, p. 261, c. 138; Iowa Revision, 1860, p. 154, c. 47, art. 4.

By another act also passed January 25, 1855, amendatory of the act of January 13, 1853, it was provided: "§ 1. That no swamp or overflowed lands granted to the State, and situate in the present unorganized counties, shall be sold or disposed of till the title to said lands shall be perfected in the State, whereupon the titles to said lands shall be transferred to the said counties where they are situated: *Provided*, That

said counties shall refund to the State the expenses incurred in selecting said lands, under the provisions of an act of the General Assembly, authorizing the Governor to cause said lands to be surveyed and selected, with ten per cent interest thereon. Each county to refund its proportional amount of said expenses." Laws of Iowa, 1854–1856, p. 173, c. 110; Iowa Revision, 1860, p. 154, c. 47, art. 5.

It appears that in 1856 the county court of Calhoun County appointed Charles Amy to select and survey the swamp lands in that county, in accordance with the provisions of the above act of January 13, 1853.

This was after the passage by Congress of the railroad act of May 15, 1856, granting lands to the State of Iowa to aid in the construction of certain railroads in that State. 11 Stat. p. 9, c. 28. By that act there was granted to Iowa, to aid in the construction of railroads, among them a railroad from Dubuque to Sioux City, with a branch, every alternate section of land, designated by odd numbers, for six sections in width on each side of the respective roads named by Congress. If it appeared at the time the route of a road was definitely fixed that the United States had sold any of the sections or parts of sections granted, or that the right of preëmption had attached to the same, then the State, "subject to the approval of the Secretary of the Interior," was entitled to select other lands nearest to the sections granted to supply the deficiency. But, it was declared, "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 for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States."

The above act of May 15, 1856, with its provisions and restrictions, was accepted by the State by an act approved July 14, 1856, and the lands, interests, rights, powers and privileges

granted by Congress, so far as they related to the proposed road from Dubuque to Sioux City, were granted and transferred to the Dubuque and Pacific Railroad Company, to aid in the construction of its railroad and branch, subject to the conditions and incumbrances prescribed by Congress. These lands were transferred to the railroad company upon the express condition that, if it did not complete and equip a given number of miles of its road within a named time, and its entire line, on or before such certain date, then the State might resume all rights to the lands so granted and remaining undisposed of by the company. Iowa Revision, 1860, p. 215, c. 55, art. 2.

By a supplementary act, passed January 28, 1857, the companies obtaining the benefits of the act of Congress of 1856, and of the act of the Iowa legislature of July 14, 1856, were authorized to make such disposition, by mortgage or deed of trust, of the lands granted by the act of 1855, as might be deemed proper to secure construction bonds necessary for the completion of their roads; such mortgage or deed of trust to be a binding and valid lien upon all the property mentioned therein, including rolling stock, and the purchasers, under a trustee's sale or foreclosure of mortgage, to have and enjoy all the rights of a purchaser on execution sale. Iowa Revision, 1860, p. 222, c. 55, art. 5.

It was stipulated by the parties that the lands in controversy "are within the limits of the railroad grant of May 15, 1856, to aid in building a railroad from Dubuque to Sioux City, and were earned by the building of said road if they were subject to said grant; and that the various defendants hold by apt and sufficient conveyance all the title and interest in said lands which passed under and by said grant, if any title or interest did pass thereunder or thereby." This, of course, implies that the railroad company performed all the conditions prescribed, in reference to these lands, either by the act of Congress of May 15, 1856, or by the acts of the Iowa legislature.

It appears in evidence that the lands in controversy and other lands were certified to the State by the General Land Office of the United States, under date of December 25, 1858,

as lands within the six-mile or place limits defined by the act of Congress of May 15, 1856, "being the vacant and unappropriated lands in the alternate sections designated by odd numbers, for six sections in width on each side of the Dubuque and Pacific Railroad and branch within the State of Iowa." The lists of those tracts were first submitted by the Commissioner of the General Land Office "for the approval of the Secretary of the Interior, in accordance with the requirements of the said act of May 15, 1856, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embraced in the foregoing list." The certificate of December 25, 1858, was endorsed by the Secretary of the Interior, "Approved, subject to the conditions and rights above mentioned."

It was further stipulated, in this case, that "all of the lands in controversy were selected by duly authorized and appointed agents of Calhoun County as swamp lands under the act of Congress, September 28, 1850, and reported the same to the county court of Calhoun County September 30, 1858."

On the 27th of March, 1860, the surveyor general for the State of Iowa certified that the lists of lands that had been selected by the county surveyors or state locating agents as swamp lands had been carefully compared with field notes, plats and other evidence on file in his office, and, "by the affidavits of said county surveyors or state locating agents, it appears that the greater part of each smallest legal subdivision of the lands embraced in said list is swampy or subject to such overflow as to render the same unfit for cultivation, and is therefore of the character contemplated by the act of 28th of September, 1850." The list was endorsed in the General Land Office, "Received with the surveyor general's letter of March 27, 1860."

The list of the lands selected in the manner above stated by the agent of Calhoun County, together with a letter from the Commissioner of the General Land Office, dated February 12, 1874 (this date is erroneously stated in the record to be 1884), was received at the local land office at Des Moines, Iowa, on the 18th day of February, 1874.

Argument for Defendant in Error.

It does not appear that the Secretary of the Interior ever took any action in respect to the lists made by the agent of Calhoun County of lands selected by him as swamp lands, nor that the State or the county, nor any one claiming under the county, ever directly sought any action by the General Land Office or by the Secretary of the Interior in respect of such selections.

It should be here stated that on the 12th day of December, 1861, a written contract was made between the county of Calhoun, Iowa, and the American Emigrant Company, in relation to the swamp and overflowed lands in that county. Subsequently, in 1863, the county conveyed to the company, subject to the provisions of the Swamp Land act of 1850, the lands in controversy and other lands, upon certain conditions, which it is unnecessary to set forth.

Mr. Charles A. Clark for plaintiffs in error.

Mr. J. J. Davis for defendant in error.

The selection of the lands by the duly authorized agents of the State, and the approval thereof by the surveyor general of the United States, and the report of the same to the General Land Office, and the reception and recognition thereof by said office, constitute an identification and segregation of the lands as swamp lands, pursuant to the laws of the State, and the instructions of the Secretary of the Interior, and are evidence of the swamp character of the land, and that the title thereto vested in the State of Iowa under the swamp land grant. *Martin* v. *Marks*, 97 U. S. 345.

It is held by the United States land office, in a case of contest of swamp lands, that the selection of land by the State under the swamp land grant, establishes a *prima facie* case that the land so selected is swamp land within the meaning of the act of September 28, 1850.

That act *ex proprio vigore*, was a grant *in præsenti* to the States of all the swamp and overflowed lands therein situated. The title to the lands vested in the State at once on the pas-

sage of the act. The title was not inchoate and was not merely equitable, but was absolute and complete. The requirement of the second section of the act that a patent be thereafter issued is not to be deemed as withholding the vesting of the title under the language of the first section of the grant. The patent when issued is merely evidential of what was granted, the title to which had theretofore vested.

The holder of the swamp land title, even before patent has been issued, can maintain an action at law to recover swamp lands against a subsequent patent held by a preëmptioner under the preëmption laws of the United States. *Wright* v. *Roseberry*, 121 U. S. 488; *Irwin* v. *San Francisco Savings Union*, 136 U. S. 578; *Railroad Co.* v. *Smith*, 9 Wall. 95.

Not only was the swamp grant a grant *in præsenti*, vesting the title of the land in the State immediately upon the passage thereof, but by its terms and the nature of the case it furnished a means of identifying the subject-matter of the grant, and any one who, subsequently to the date of the grant, attempts to enter upon such land, or to claim any rights thereto, does so with notice and knowledge of the fact that the land is of the character embraced within the terms of the grant, and that he can obtain no right, title or interest thereto. This is the settled rule of this court. *Wright* v. *Roseberry*, *ubi supra*.

It is the province of the Secretary of the Interior, or of the Land Department acting for him, in the first instance, to determine the character of land claimed to be swamp, but if he fails, refuses or neglects to do his duty, or if he deprives himself of jurisdiction in the premises, then the question is for the courts to determine. It will not be disputed that parol evidence is admissible before the Secretary of the Interior, and when the courts are vested with jurisdiction to determine the question, the same evidence that is admissible before the Secretary of the Interior is necessarily admissible before the court.

In this case the Secretary of the Interior has neglected and failed to pass upon the question of the character of the lands in controversy; and by certifying them to the railroad company subsequently to the swamp grant, and prior to the pres-

entation to him of the swamp selection, has deprived himself of jurisdiction to act in the premises, thereby bringing the case within the exact rule of the case of *Railroad Co.* v. *Smith*, 9 Wall. 95. See also *McCormick* v. *Hayes*, 159 U. S. 332; and *Railroad Co.* v. *Fremont County*, 9 Wall. 89.

When the Land Department of the United States certified the lands in suit under the railroad grant, it deprived itself of jurisdiction to investigate and determine the character of the lands, or to patent the same under the swamp grant. In this connection, it will be remembered, that the certifications under the railroad grant were made before the swamp land selections had reached the Department. The Executive Department had no power to recall the certifications after they were issued, however wrongful they may have been; nor could it cancel these certifications; nor had it any right or authority to issue patents under the swamp grant after the certifications had been issued. This is the well-established rule of the department in such cases, and it is based upon the decisions of this court. *Buena Vista County* v. *Iowa Falls &c. Railroad*, 112 U. S. 165; *Wright* v. *Roseberry*, *ubi supra*; *Bicknell* v. *Comstock*, 113 U. S. 149; *Mullan* v. *United States*, 118 U. S. 271.

The lands in suit have been certified as railroad lands, but they should have been patented as swamp lands. The railroad claimant is a trustee of the rightful owner, who is entitled to any appropriate relief that a court of equity has power to grant. The swamp title may be established and quieted, and the railroad claimant enjoined from asserting any adverse claim, as has been done in this case; or the railroad claimant may be compelled to convey to the rightful owners. *Stark* v. *Starrs*, 6 Wall. 402, 413; *Silver* v. *Ladd*, 7 Wall. 219; *Lytle* v. *Arkansas*, 9 How. 314; *Warren* v. *Van Brunt*, 19 Wall. 646.

The lands in controversy herein having been thus found to be swamp and overflowed lands within the meaning of the act of September 28, 1850, by the referee, by the trial court, and by the Supreme Court of the State, these findings will not be disturbed by this court in this proceeding in error. *Dower* v. *Richards*, 151 U. S. 658.

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

In the light of the facts as stated above, and of the Federal and state legislation relating to the matters in controversy, we proceed to the consideration of the questions presented for our determination.

As the railroad act of 1856 excepted from its operation all lands theretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for any purpose whatever, the certification to the State by the Department of the Interior of the lands in controversy as having inured, under the railroad act of May 15, 1856, to the State for the benefit of the Dubuque and Pacific Railroad Company, was unauthorized, if at the date of the Swamp Land act of 1850 the lands were swamp and overflowed lands, whereby they were unfit for cultivation; for, lands of that character were expressly reserved from the operation of the railroad grant of 1856. If they were not granted to the State for the benefit of the railroad company, because previously granted to the State as swamp and overflowed lands, they could not properly have been certified or transferred to the State to be applied in aid of the construction of the railroad. *McCormick* v. *Hayes*, 159 U. S. 332, 338.

But it is equally true that the act of 1850 made it the duty of the Secretary of the Interior, as soon as practicable after the passage of that act, to make out an accurate list and plats of the swamp and overflowed lands granted to any State and transmit them to the executive of such State, "and, at the request of said governor, cause a patent to be issued to the State therefor; and *on that patent* the fee simple to said lands shall vest in said State," subject to the disposal of its legislature. While, therefore, as held in many cases, the act of 1850 was *in præsenti*, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title became perfect as of the date of the granting act. *Wright* v. *Roseberry*, 121 U. S. 488, 494 *et seq.*; *Tubbs* v. *Wilhoit*, 138 U. S. 134, 137; *Chandler* v. *Calu-*

met & Hecla Mining Co., 149 U. S. 79, 91. So, in *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 68: "In *French* v. *Fyan*, 93 U. S. 169, this court decided that, by the second section of the Swamp Land act, the power and duty devolved upon the Secretary of the Interior, as the head of the Department which administered the affairs of the public lands, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling." The identification of lands as lands embraced by the Swamp Land act was therefore necessary before the State could claim a patent or exercise absolute control of them.

In *McCormick* v. *Hayes*, above cited, it appeared that the Secretary of the Interior, proceeding under the railroad act of May 15, 1856, had certified certain lands as inuring to Iowa under that act. It was insisted in that case that the lands were covered by the act of 1850, and, therefore, that they were improperly certified under the railroad act of 1856; a fact which, it was contended, could be established by parol evidence, so as to fix the title in certain parties, independently of any action that may have been taken by the Interior Department upon the subject. The precise nature of that case is shown by this extract from the opinion of the court: "The controlling question, therefore, in this case, so far as the plaintiff is concerned — and he must recover upon the strength of his own title, even if that of the defendant be defective — is whether, under the circumstances disclosed by the record, the particular lands in controversy, in the absence of any selection and certification of them by the United States to the State, under the Swamp Land act, can be shown by parol testimony to have been, in fact, at the date of that act, swamp and overflowed lands. Congress having made it the duty of the Secretary of the Interior to make out accurate lists and plats of the lands embraced by the Swamp Land act, and transmit the same to the governor of the State, and, at the request of the latter, to cause a patent to be issued to the State therefor, and having provided that 'on that patent the fee simple to said lands shall vest in said State subject to

the disposal of the legislature thereof,' did the title vest in the State, by virtue alone, and immediately upon the passage, of the act, without any selection by or under the direction of the Department of the Interior, so that the State's grantees could maintain an action to recover the possession of them?"

In determining that question this court, after an extended review of former decisions, thus stated (pp. 346–347) its conclusions: "The case before us is not like that of *Railroad Co.* v. *Smith*, in which, as subsequently explained in *French* v. *Fyan*, it was shown that there was an absolute neglect of duty on the part of the Interior Department, in that it neither made nor would make any selection of lists whatever, and, therefore, there was no action by that Department that could be relied on as a determination of the question whether the particular lands then in dispute were or were not embraced by the Swamp Land act. That case was exceptional in its circumstances, and seemed to justify the decision rendered, in order to prevent a total failure of justice, arising from the unexplained neglect of the Land Department to perform the duty imposed by the act of 1850. What was said in *French* v. *Fyan* shows that this court not only so regarded the previous case, but it was in effect said that the ruling in *Railroad Company* v. *Smith* was not to be extended to any case in which the Land Department had taken action, or made a decision or determination under the Swamp Land act." Again, and in reference to the certification of lands under the railroad act of 1856: "Twice the Land Department certified these lands to the State as inuring to it under the railroad land grant act, and it does not appear that the State has ever questioned the correctness of that certification or applied to the Secretary of the Interior for a reëxamination as to the character of the lands. . . . Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and state officers, having authority in the premises, that these lands were, in fact, at the date of the act of 1850, swamp and overflowed grounds, which should have been embraced by Linn County in its selection of land of that char-

acter, and withheld from the State as lands granted expressly in aid of railroad construction within its limits."

One of the prior adjudications referred to in *McCormick* v. *Hayes* was *Chandler* v. *Calumet & Hecla Mining Co.*, 149 U. S. 79, 88, 89, 92. In that case, the plaintiff claimed title under the Swamp Land act of 1850; the defendant under an act of Congress of 1852 granting public lands to Michigan in aid of the construction of a ship canal around the Falls of St. Mary. The lands there in controversy were not included in swamp land selections under the act of 1850, but were included in selections under the canal grant of 1852. Referring to *Wright* v. *Roseberry*, 121 U. S. 488, in connection with previous cases, this court, speaking by Mr. Justice Jackson, said: "Under the principle announced in that case, and under the foregoing facts in the present case, it would seem that there had been such affirmative action on the part of the Secretary of the Interior in identifying the lands in this particular township, containing the lands in controversy, as would amount to an identification of the lands therein, which pass to the State by the swamp land grant, and that the selection by the State of the demanded premises under the canal grant of 1852, with the approval of the Secretary of the Interior, and the certification of the Department to the State that they were covered by the latter grant, may well be considered such an adjudication of the question as should exclude the introduction of parol evidence to contradict it. The exclusion of the land in dispute from the swamp lands, selected and patented to the State, and its inclusion in the selection of the State as land coming within the grant of 1852, with the approval of such selection by the Interior Department and the certification thereof to the State, operated to pass the title thereto as completely as could have been done by formal patent, *Frasher* v. *O'Connor*, 115 U. S. 102; and being followed by the State's conveyance to the canal company, presented such official action and such documentary evidence of title as should not be open to question by parol testimony at law. Under the facts of this case we are of opinion that the plaintiff in error could not properly establish by oral evidence that the land in

dispute was in fact swamp land, for the purpose of contradicting and invalidating the Department's certification thereof to the State and the latter's patent to the canal company."

These decisions give much greater weight to the action of the Land Department in certifying the lands in dispute under the railroad grant of 1856, than was done by the judgment below.

The Emigrant Company lays much stress upon that clause of the railroad act of 1856 exempting from its operation all lands previously reserved by the United States for any purpose. And upon this foundation it rests the contention that no lands embraced by the Swamp Land act of 1850 could, under any circumstances, be withdrawn by the Land Department from its operation, and certified to the State under the railroad act of 1856. This contention assumes that the lands in controversy were, within the meaning of the act of 1850, swamp and overflowed lands. But that fact was to be determined, in the first instance, by the Secretary of the Interior. It belonged to him, primarily, to identify all lands that were to go to the State under the act of 1850. When he made such identification, then, and not before, the State was entitled to a patent, and "on such patent" the fee-simple title vested in the State. The State's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued.

But it is equally clear that when the Secretary of the Interior certified in 1858 that the lands in controversy inured to the State under the railroad act of 1856, he, in effect, decided that they were not embraced by the Swamp Land act of 1850. This, perhaps, furnishes an explanation not only of the fact that no action was taken upon the report filed in the General Land Office in 1860 showing that the agent of Calhoun County had selected these lands as swamp and overflowed lands, but of the further fact that, so far as this record discloses, the attention of the Secretary of the Interior was never directly called by the county to any claim by it, under the act of 1850, to the lands certified under the railroad act of 1856. Nor does it appear that the American Emigrant Company,

whose original contract with the county was made in 1861, ever questioned before the Land Department the validity of the Secretary's certification in 1858 of these lands as passing to the State under the act of 1856, or asserted a claim to them, until it brought this suit in 1877, nearly twenty years after that officer certified them to the State under the railroad act. And it is significant that this action of the Interior Department does not seem ever to have been called in question by the State.

The case then is this: In 1858, the Secretary of the Interior decided that the lands in controversy inured to the State under the railroad act of 1856, and, if that decision was correct, then they were not reserved from the operation of that act by the Swamp Land act of 1850. The State was entitled to the lands either under the act of 1850 or under that of 1856. It was open to it, before accepting the lands under the railroad act, to insist that they passed, under the act of 1850, as swamp and overflowed lands. No such claim was made. The State — the party primarily interested, and with whom the Land Department directly dealt — accepted the lands under the act of 1856, and, therefore, not as inuring to it as swamp and overflowed lands within the meaning of the act of 1850, and, as just stated, has never repudiated its action of 1858, nor sought to have reopened the question necessarily involved in the action of the Secretary when he certified the lands to the State under the act of 1856.

It would seem that, upon every principle of justice, the action of the Secretary of the Interior in certifying these lands to the State under the act of 1856 should not be disturbed. The fact that his certification was made subject "to any valid interfering rights which may exist to any of the tracts" embraced in his certificate does not affect this conclusion. That reservation could not have referred to any rights which the State acquired or could have asserted under some other act of Congress than that of 1856. Certainly, it was not intended by the Interior Department to certify the lands under the railroad act of 1856 subject to the right of the State, while holding them under that certificate, to claim them under some other and prior act. The action of the Department in 1858

was intended to be final, as between the United States and the State, in respect of the lands then certified as railroad lands. If the State considered the lands to be covered by the Swamp Land act, its duty was to surrender the certificate issued to it under the railroad act. It could not take them under one act, and while holding them under that act pass to one of its counties the right to assert an interest in them under another and different act.

Are those in this action who claim under the State and under the act of 1850 in any better condition than the State? Can they be heard to question the action of the Land Department in 1858, if the State is estopped from so doing? We have seen that the county of Calhoun made a written agreement in 1861 with the American Emigrant Company relating to swamp and overflowed lands. But if no such agreement had been made, would the county be heard to say that the Land Department erred, as matter of fact, when, in 1858, it decided that these lands passed to the State under the railroad act? Would the creature of the State be permitted to say what its creator was estopped from saying? The county of Calhoun is a mere political subdivision of the State, created for the State's convenience, and to aid in carrying out, within a limited territory, the policy of the State. Its local government can have no will contrary to the will of the State, and it is subject to the paramount authority of the State, in respect as well of its acts as of its property and revenue held for public purposes. The State made it, and could, in its discretion, unmake it, and administer such property and revenue through other instrumentalities. *Jefferson County* v. *Ford*, 4 Greene, (Iowa) 367, 370; *Soper* v. *Henry County*, 26 Iowa, 264, 267; *Maryland* v. *Baltimore & Ohio Railroad*, 3 How. 534, 550; *United States* v. *Railroad*, 17 Wall. 322, 329; *Hamilton County Commissioners* v. *Mighels*, 7 Ohio St. 109, 118; *Askew* v. *Hale County*, 54 Alabama, 639, 640; 1 Dillon's Mun. Corp. §§ 22–23, 54–71 inclusive and authorities there cited; Angel & Ames on Corp. § 31.

It would seem to be clear that the relations of the county and the State are such that the action of the latter in accept-

ing the lands in controversy under the railroad act was binding upon the county of Calhoun, as one of the governmental agencies of the State; and that the county could not, after such acceptance, claim these lands as swamp and overflowed lands, or, by assuming to dispose of them as lands of that character, pass to the purchaser the right to raise a question which, in view of its subordination to the State, it was estopped from raising. We are of opinion that the plaintiff could not, by any agreement made with the county in 1861 or afterwards, acquire any greater rights, or better position, in respect of these lands, than the county itself had after the certification of them in 1858 as lands inuring to the State under the railroad act of 1856.

When the equities of the respective parties are considered, the view we have expressed is much strengthened by the circumstance that the defendants and those under whom they claim, or some of them, have paid taxes upon these lands ever since 1862, that is, for fifteen years before the institution of this suit in 1877.

We are of opinion that the Supreme Court of Iowa did not give proper effect to the action of the Interior Department in 1858. It should have been adjudged that, so far as the lands in controversy are concerned, the plaintiffs claiming under the county of Calhoun and the State, as well as under the act of 1850, were concluded by the act of the Secretary of the Interior when he certified such lands as inuring to the State under the railroad act of 1856, and by the act of the State in accepting and retaining the lands under that act; consequently, the suit should have been dismissed for want of equity, with costs to the respective defendants.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Syllabus.

COVINGTON AND LEXINGTON TURNPIKE ROAD COMPANY *v.* SANDFORD.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

No. 50. Submitted May 7, 1896. — Decided December 14, 1896.

The legislature of Kentucky, by an act passed in 1834, created the Covington and Lexington Turnpike Road Company with authority to construct a turnpike from Covington to Lexington. One section prescribed the rates of tolls which might be exacted; another provided "that if at the expiration of five years after the said road has been completed, it shall appear that the annual net dividends for the two years next preceding of said company, upon the capital stock expended upon said road and its repairs, shall have exceeded the average of fourteen per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of dividends per annum, and no more." In 1851 two new corporations were created out of the one created by the act of 1834, one to own and control a part of the road, and the other the remaining part, and each of the new companies was to possess and retain "all the powers, rights and capacities in severalty granted by the act of incorporation, and the amendments thereto, to the original company." In 1865 an act was passed reducing the tolls to be collected on the Covington and Lexington turnpike. In 1890 another act was passed largely reducing still further the tolls which might be exacted. *Held*,

(1) That the new corporations created out of the old one did not acquire the immunity and exemption granted by the act of 1834 to the original company from legislative control as to the extent of dividends it might earn;

(2) That the statute of Kentucky passed February 14, 1856, reserving to the legislature the power to amend or repeal at will charters granted by it, had no application to charters granted prior to that date;

(3) That an exemption or immunity from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption;

(4) That corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law as well as a denial of the equal protection of the laws;

(5) That the principle is reaffirmed that courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable and such as to work a practical destruction of rights

of property, and if found so to be, to restrain its operation, because such legislation is not due process of law;

(6) That the facts stated make a *prima facie* case invalidating the act of 1890, as depriving the turnpike company of its property without due process of law. Where a defence arises under an act of Congress or under the Constitution, the question whether the plea or answer sufficiently sets forth such a defence is a question of Federal law, the determination of which cannot be controlled by the judgment of the state court;

(7) That when a question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered; and if the establishment of new lines of transportation should cause a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property, but that the public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends;

(8) That the constitutional provision forbidding a denial of the equal protection of the laws, in its application to corporations operating public highways, does not require that all corporations exacting tolls should be placed upon the same footing as to rates; but that justice to the public and to stockholders may require in respect to one road rates different from those prescribed for other roads; and that rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road.

The case is stated in the opinion.

Mr. W. H. Mackoy and *Mr. James W. Bryan* for plaintiff in error.

Mr. William Goebel for defendants in error.

Mr. Justice Harlan delivered the opinion of the court.

The general assembly of Kentucky, by an act approved May 24, 1890, made it unlawful to demand, charge, collect or receive tolls in excess of the rates specified in that act for travel on that portion of the Covington and Lexington Turnpike Road which was then maintained.

The company announced its purpose to disregard the provisions of the act and to charge such tolls as were prescribed by the prior statutes. Thereupon the appellees living on or near the line of the turnpike road, and accustomed to travel on it daily with animals and vehicles, brought this suit for an injunction restraining the appellant from exacting tolls in excess of those fixed by the act of 1890.

A temporary injunction, in accordance with the prayer of the petition, was granted, and the company filed its answer. A demurrer to the answer was sustained. An amended answer was then tendered by the defendant, but the court would not allow it to be filed, and by final order made the injunction perpetual. That judgment was affirmed by the Court of Appeals of Kentucky. 20 S. W. Rep. 1031.

The principal questions are: 1. Whether the act of 1890 impairs the obligation of any contract that the turnpike company had with the State touching the matter of tolls. 2. Whether, independently of any question of contract, the act made such a reduction in tolls as to amount to a deprivation of the company's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. 3. Whether the act is repugnant to the clause of the Federal Constitution forbidding the denial by the State to any person within its jurisdiction of the equal protection of the law.

As these questions were properly raised by the pleadings, and were decided adversely to the company, the jurisdiction of this court to review the final judgment of the Court of Appeals of Kentucky cannot be doubted.

It is necessary to a clear understanding of the issues presented that reference be made to the enactments preceding the statute of 1890.

The Covington and Lexington Turnpike Road Company was incorporated by an act approved February 22, 1834, with authority to construct and permanently maintain a turnpike road from Covington, Kentucky, through Williamstown and Georgetown, to Lexington in that State.

By the nineteenth section of that act the company was

authorized to collect certain specified tolls. It is contended that the twenty-sixth section is a part of the defendant's contract with the State. That section provided: "That if at the expiration of five years after said road has been completed, it shall appear that the annual net dividends for the two years next preceding of said company, upon the capital stock expended on said road and its repairs, shall have exceeded the average of fourteen per cent per annum thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of net dividends per annum, and no more." Acts of Kentucky, 1833, pp. 537, 548.

By an act approved February 23, 1839, amendatory of the act of 1834 — the road then having been constructed from Covington to Williamstown — it was provided: "§ 1. That the stockholders in the Covington and Lexington Turnpike Road Company, residing south of Williamstown, in Grant County, and anywhere between that place and Georgetown, may elect a separate board of directors, to consist of the same number, as authorized by the original charter; and the directors, chosen by them, shall have the control and shall superintend the construction of that part of the road to be located and constructed between Georgetown and Williamstown. § 2. That the stockholders in said road, residing north of Williamstown, shall have power, also, to elect a separate board of directors, for the purpose of controlling and superintending that portion of the road extending from Williamstown to Covington; and each board, so chosen, shall exercise separate control over its own portion of the road; but nothing herein shall be construed to divide and separate the stock in said road, but the same shall continue joint and common to all the stockholders, after the completion of said road." Acts of Kentucky, 1838–1839, p. 371. This amendment, it is admitted, was accepted by the turnpike company.

Subsequently, by the second section of an act approved March 22, 1851, it was provided:

"§ 2. That so much of the second section of said act to amend the charter of the Lexington and Covington Turnpike

Road Company [meaning the act of 1839] as declares that the stock in said road shall continue joint and common to all the stockholders, after the completion of said road, is hereby repealed; and the stockholders whose stock is now under the control and management of the board of directors having control of the road north of Williamstown shall be and are hereby constituted a separate and independent company, under the name and style of the Covington and Lexington Turnpike Road Company, who shall be and forever remain separate and independent of that portion of said company owning the stock in the road now constructed south of Williamstown; and the stockholders whose stock is now under the control and management of the board of directors having the control and construction of the road south of Williamstown, shall be and are hereby constituted a separate and independent company, under the name and style of the Georgetown and Dry Ridge Turnpike Road Company, who shall be and forever remain separate and independent of that part of said company owning the stock in the road north of Williamstown; and that neither of said companies, thus formed, shall be held as in anywise responsible for the actings or doings of the other; but each shall have the exclusive ownership and control of that portion of road which they have respectively made, or, under the provisions of this act shall make, and shall have full power and authority to elect its own president and directors, to declare its own dividends, and pay the same to its own stockholders, *each company possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation, and the amendments thereto, to the original company,* and subject to all the restrictions to which said company is subject, not inconsistent with the provisions of this act; and that neither company shall be in anywise liable for the debts or contracts of the other now in existence, or which may be hereafter made or contracted." Acts of Kentucky, 1850–1851, p. 479, v. 2.

It is claimed that the words in this section, "possessing and retaining all the powers, rights and capacities in severalty granted by the act of incorporation and the amendments

thereto, to the original company," embraced, or carried into the charters of the two corporations created by this act, the immunity or exemption, given by the twenty-sixth section of the above act of 1834, from legislation that would preclude the company from earning as much as fourteen per cent upon its capital stock.

The separate and independent company created by the last-named act as the Covington and Lexington Turnpike Road Company is the defendant in this suit. To it was committed the control of that portion of the road lying north of Williamstown. The act of 1851 further provided that it should be in force as soon as a majority of the stockholders of each company assented to its provisions. Such assent was duly given by the stockholders.

The next statute, in point of time, relating to the Covington and Lexington Turnpike Road Company was that of December 11, 1865, amending the charter of that company. That act provided that the company might charge tolls on their road as prescribed in that act, "instead of the rates now allowed by law." Private Acts of Kentucky, 1865, p. 2. The rates so prescribed were, it is alleged, different from and lower than those prescribed by the original charter of 1834.

The petition alleged that the defendant submitted to the regulation of its tolls, as indicated by the act of 1865, "and consented to and accepted said act, and has ever since acted thereunder and exacted the rates of toll therein specified." The answer, touching this point, avers: "It [the defendant] admits, also, the passage of the act by the general assembly of the Commonwealth of Kentucky mentioned in said petition as having been approved December 11, 1865, and entitled 'An act to amend the charter of the Covington and Lexington Turnpike Road Company,' which provided other and different rates of toll from those authorized to be collected by the act of February 22, 1834, above mentioned, which act of December 11, 1865, this defendant accepted and has acted under, but it denies that it submitted to the regulation of its tolls by the general assembly of the Commonwealth of Kentucky then or at any time, but says that it accepted said act and has acted

thereunder of its own volition, and that the acceptance of said act was voluntary on the part of said corporation, its stockholders and directors."

By the sixth section of an act of the general assembly of Kentucky, approved February 13, 1872, it was provided that the trustees of the Cincinnati Southern Railway, whose line extended across Kentucky, might "also, for the purpose of constructing and maintaining said line of railway, occupy or use any turnpike or plank road, street or other public way or ground, or any part thereof, upon such terms and conditions as may be agreed upon between said trustees and the municipal or other corporations, persons or public authorities owning or having charge thereof. . . . If no agreement can be made for the right to use or occupy any road, street or ground that may be necessary, the said trustees may take and appropriate said rights in the manner provided in the next section."

The trustees of the last-mentioned company gave the defendant notice that they required that portion of its turnpike road extending from the line between Scott and Grant counties to within about a mile of Walton, in Boone County, Kentucky, a distance of about thirty miles. Thereupon the defendant sold to the Cincinnati Southern Railway its road between Williamstown and Walton, in length twenty-two miles, for the consideration of $100,000, which sum was distributed among the stockholders of the turnpike company, each stockholder receiving $22 on each share of stock, which was in excess of its real or market value. Since the above sale the defendant has exercised and maintained control only over that portion of its road between Walton and Covington, a distance of eighteen miles.

Then came the act of May 24, 1890, to which reference has heretofore been made.

In our consideration of the questions presented by the record we lay aside the statute of Kentucky, passed February 14, 1856, providing that "all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legisla-

ture, unless a contrary intent be therein plainly expressed: *Provided*, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested"; and which also provided that that act "shall only apply to charters and acts of incorporation to be granted hereafter." Acts of Kentucky, 1855, vol. 1, p. 15, c. 148. The provision in the General Statutes of Kentucky, which took effect on the 1st day of December, 1873, is that "all charters and grants of or to corporations or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, That, whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." Gen. Stat. Kentucky, 1888, p. 861, c. 68, § 8. It is clear that the statute of 1856 had no application to charters and grants of or to corporations and amendments thereof, enacted or granted prior to February 14, 1856, but only to charters and acts of incorporation granted after that date. It, therefore, has no application to the act of 1851, granting to the Covington and Lexington Turnpike Company "the powers, rights and capacities" given by the act of 1834. Nor is there any ground for holding that the turnpike company was brought by the act of 1865 under the operation of the general statute reserving to the legislature the right to amend or repeal charters of or grants to corporations. That act did nothing more than reduce the rates of toll to be charged. It did not create a new corporation, nor give any additional franchises or privileges to the company. The mere collecting of tolls, in conformity with such rates, does not show that the company assented to the exercise by the legislature, at will, of the power to amend or repeal its charter. Whatever authority, therefore, the general assembly had, by statute, to regulate the tolls of the plaintiff in error arose from its general power to regulate the affairs of a corporation which came into existence by its authority, and which owned and controlled a highway established for public

use. *Ruggles* v. *Illinois*, 108 U. S. 526, 531; *Railroad Commission cases*, 116 U. S. 307, 325; *Dow* v. *Beidelman*, 125 U. S. 680, 688; *Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, 215.

Was the Covington and Lexington Turnpike Road Company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent "upon the capital stock expended upon said road and its repairs," as prescribed in the act of 1834?

The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851, and which, by the terms of that act, succeeded "to all the powers, rights and capacities" granted by the act of 1834 to the original corporation. This view was properly rejected by the Court of Appeals of Kentucky. It was well said by Judge Pryor, speaking for that court, that "the liability and duties owing the State and the public by the one corporation had been severed by the act of 1839, and by the act of 1851 two new corporations were created, with the rights and powers of the one entirely distinct from the other, and no means of ascertaining what per cent the old corporation would have made upon its stock. In fact, the old corporation was extinct, and to hold that the new corporations were exempt from legislative interference would be to restrain the exercise of legislative power by implication, when a reasonable construction of the new grants must lead to a different conclusion."

These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained

unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan* v. *Louisiana*, 93 U. S. 217, without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case, *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667, 673, we had occasion to say, in harmony with repeated decisions, that, "in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the State to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee"; and that this was a "salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris*. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Chesapeake & Ohio Railway* v. *Miller*, 114 U. S. 176."

The same principles should be recognized when the claim is of immunity or exemption from legislative control of tolls to be exacted by a corporation established by authority of law for the construction of a public highway. It is of the highest importance that such control should remain with the State, and it should never be implied that the legislative department intended to surrender it. Such an intention should not be imputed to the legislature if it be possible to avoid doing so by any reasonable interpretation of its statutes. It is as vital that the State should retain its control of tolls upon public highways as it is that it should not surrender or fetter its power of taxation. We admit there is some ground for the contention that, by the grant in the act of 1851 to each of the two corporations named in it, of "the powers, rights and capacities" granted to the corporation of 1834, the legislature

intended to exempt the new corporations, as it did the original one, from all legislation that would prevent them from earning as much as fourteen per cent on the capital stock expended on their respective roads and for repairs. But as the act of 1851 may not unreasonably be interpreted as intended only to pass to the new corporations such powers, rights and capacities as were necessary to the successful working of the respective roads, and not an exemption from legitimate and ordinary legislative control of their affairs and business, it must, in the interest of the public, be so interpreted. It is settled law that in grants by the public nothing passes merely by implication; and if a contract with a State, relating to the exercise of franchises, is susceptible of two meanings, "the one restricting and the other extending the powers of a corporation, that construction is to be adopted which works the least harm to the State." *The Binghampton Bridges*, 3 Wall. 51, 75; *Ruggles* v. *Illinois*, 108 U. S. 526; *Stein* v. *Bienville Water Supply Co.*, 141 U. S. 67, 80, 81.

The views we have expressed find some support in the fact that, by the act of 1865, the legislature prescribed rates of toll for the turnpike company, without any reference to the twenty-sixth section of the act of 1834, and the provisions of that statute were accepted, and have ever since been acted upon by that company. So far as the record shows, that acceptance was unconditional, and without any reservation of a right by the company, under the previous law, to earn as much as fourteen per cent on its capital stock. Touching this part of the case, the Court of Appeals of Kentucky said: "Nor ought this court, in the absence of express enactment, after the lapse of more than half a century, with legislation not only severing the old corporation, but regulating the rate of toll on these roads, to hold that this immunity from legislative interference was a perpetual right in the nature of a contract that could not be disturbed. The stockholders have consented and asked an entire change of the original grant, and submitted to legislation regulating their tolls, evidencing that with their own contention the immunities in the act of

1834 were not regarded as forming a part of the corporate grants subsequently made."

For the reasons stated, we are of opinion that when the act of 1890 was passed, the power of the general assembly over the subject of tolls to be exacted by the plaintiff in error was not impaired or restrained by any contract with the State in reference to the amount which the company might earn from the use of its road.

It is, however, contended that the act of 1890, by its necessary operation, deprives the company of its property without due process of law, in that if tolls cannot be charged in excess of those prescribed by that act, the company cannot possibly maintain its road or derive any profit whatever for stockholders. This is a more serious question than the one we have just examined, and is not so easy of solution.

In its original answer, filed in 1890, and to which a demurrer was sustained, the turnpike company referred to the section of the act of 1834 reserving to the legislature the right, in a certain contingency, to reduce rates of toll, and alleged that, "at the expiration of five years after said road had been completed the annual net dividends for the two years next preceding of said defendant company upon the capital stock expended upon said road and its repairs had not exceeded and did not exceed the average of fourteen per centum per annum thereof, and that since the completion of this defendant's road the annual net dividends of the defendant company upon the capital stock expended upon said road and its repairs have not averaged to exceed fourteen per centum per annum, but, upon the contrary, have averaged very much less, and for a number of years last past the average annual net dividends of said company have not exceeded four per centum upon the capital stock of said company."

The company further alleged that "its receipts from tolls for a number of years last past under the rate of tolls prescribed by the act of December 11, 1865, mentioned in the petition, have averaged only about $16,000 per annum, and that the ordinary annual expenses of operating and maintaining its road during the same time have averaged about $8000

per annum; that during this and the coming year it will be necessary for it to incur certain extraordinary expenses in the purchase of ground for and building a new toll house for the second toll gate from Covington on its road and in the purchase or condemnation of ground for straightening its road and laying out a side road along that portion of its road between that part of the city of Covington known as Lewisburg and the first toll gate on its said turnpike road, which extraordinary expenses will amount to about $4000; that the act of May 24, 1890, attempts to reduce the tolls on this defendant's road about fifty per cent, and that if the same were adopted the income of the company from tolls would not be more than $8000 per annum, nor more than sufficient to enable defendant to meet the ordinary expenses of its road, and would leave nothing with which to meet said extraordinary expenses, and there would be no income out of which dividends could be paid to stockholders upon the money which they had invested in the stock of said road. This defendant also says that within the last few years the Louisville and Nashville Railroad, which has a station on the line of this company's turnpike, and the Cincinnati Southern Railway, which has several stations on the line of this defendant's turnpike, have diverted a large amount of travel from said turnpike and have diminished this company's earning capacity very largely, and that other railroads and electric roads touching defendant's road and having stations thereon have been chartered and are in contemplation, the effect and construction of which will be to still further impair the earning capacity of this defendant and to diminish the dividends of this defendant under the rate of tolls in force by an act of December 11, 1865.

"This defendant further says that the grade of the first two and a half miles of its road leading out of the city of Covington is very steep; that for a portion of said two and a half miles its road is built along the side of a hill; that the entire said two and a half miles is expensive to maintain, especially that portion along the side of the hill, the portion of the road towards the slope of the hill having frequently given away

and slipped and entailed great expense upon the defendant in the repair of the same, and that from the nature of the soil over and along which said portion of said road is built said process of sliding and giving away is liable to continue in the future and to entail still further expense upon the defendant. It says that the adoption of the rate of tolls fixed by the act of May 24, 1890, would disable and prevent this defendant from performing the duties that it owes to the public and would prevent it from ever hereafter paying any dividends to its stockholders, and that the rate of tolls prescribed in said act of May 24, 1890, is unreasonable and unjust to defendant and its stockholders, and that to permit the same to be enforced would be to destroy entirely the value of the property of the defendant and the value of the shares of capital stock of the defendant held by its stockholders and destroy entirely the dividend earning capacity of this defendant, and that to permit said act of May 24, 1890, to be enforced would be to exercise absolute arbitrary power over the property of the defendant and its stockholders, in violation of section 2 of the bill of rights of the constitution of Kentucky, and would be depriving the defendant and its stockholders of their property without due process of law and the taking of the same for public use without the consent of the defendant and its stockholders and without just compensation being previously made to them, and that to permit the enforcement of said act of May 24, 1890, is to violate article 5 of the amendments to the Constitution of the United States and sections 3, 12, 14 and 15 of the bill of rights of the Constitution of the United States and the amendments thereto and to the constitution of the State of Kentucky."

It was also alleged in the original answer that, under the act of 1890, sufficient income could not be earned "to maintain the road and provide for its ordinary expenses, without taking into consideration any extraordinary expenses."

We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls "agreeable" to certain named rates, and which is required by a subsequent legislative enactment

to conform to a tariff of rates that is unjust and unreasonable, and prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no State shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative.

It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws. *Santa Clara County* v. *Southern Pacific Railway Co.*, 118 U. S. 394; *Pembina Mining Co.* v. *Pennsylvania*, 125 U. S. 181, 189; *Minneapolis & St. Louis Railway* v. *Beckwith*, 129 U. S. 26; *Charlotte &c. Railroad* v. *Gibbes*, 142 U. S. 386, 391. And, as declared in *St. Louis & San Francisco Railway* v. *Gill*, 156 U. S. 649, 657, upon the authority of previous decisions, "there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws" — citing *Railroad Commission cases*, 116 U. S. 307, 331; *Dow* v. *Beidelman*, 125 U. S. 681; *Chicago, Milwaukee &c. Railway* v. *Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway* v. *Wellman*, 143 U. S. 339; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362.

In the *Railroad Commission cases*, the court, speaking by Chief Justice Waite, recognized it as settled that "a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own

jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." But it took care also to announce that "it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under the pretence of regulating fares and freights, the State cannot require a railroad to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

So, in *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399, 410, 412, in which previous decisions were referred to, the court said that beyond doubt it was within the power and duty of the courts "to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if so found to be, to restrain its operation." Again: "These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the

public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. . . . If the State were to seek to acquire the title to these roads, under its power of eminent domain, is there any doubt that constitutional provisions would require the payment to the corporation of just compensation, that compensation being the value of the property as it stood in the markets of the world, and not as prescribed by an act of the legislature? Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at less than its market value? . . . It is unnecessary to decide, and we do not wish to be understood as laying down, as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

The cases to which we have referred related to the power of the legislature over rates to be collected by railroad corporations. But the principles announced in them are equally applicable, in like circumstances, to corporations engaged under legislative authority in maintaining turnpike roads for the use of which tolls are exacted. Turnpike roads established by a corporation, under authority of law, are public highways, and the right to exact tolls from those using them comes from the State creating the corporation. *California* v. *Central Pacific Railroad*, 127 U. S. 1, 40. And the exercise of that right may be controlled by legislative authority to the same extent that similar rights, connected with the construction and management of railroads by corporations, may be controlled. A statute which, by its necessary operation, com-

pels a turnpike company, when charging only such tolls as are just to the public, to submit to such further reduction of rates as will prevent it from keeping its road in proper repair and from earning any dividends whatever for stockholders, is as obnoxious to the Constitution of the United States as would be a similar statute relating to the business of a railroad corporation having authority, under its charter, to collect and receive tolls for passengers and freight.

It is suggested by counsel for the plaintiffs that neither the original nor the amended answer sufficiently disclosed the facts upon which the company rested its contention as to the invalidity of the act of 1890, and that, upon the showing made by the company, the court, under the established rule forbidding the annulment of a legislative enactment not clearly and palpably unconstitutional, was not obliged to hold that act to be repugnant to the Constitution of the United States. We do not concur in this view. The answer disclosed what had been the average annual receipts of the company under the act of 1865 for a number of years immediately preceding the passage of the act of 1890, and what during that period had been the average annual expenses; alleged that the receipts for the several preceding years had not admitted of dividends greater than four per centum on the par value of the company's stock; that the act of 1890 reduced the tolls 50 per cent below those allowed by the act of 1865; and that such reduction would so diminish the income of the company that it could not maintain its road, meet its ordinary expenses and earn any dividends whatever for stockholders. These allegations were sufficiently full as to the facts necessary to be pleaded, and fairly raised for judicial determination the question — assuming the facts stated to be true — whether the act of 1890 was in derogation of the company's constitutional rights. It made a *prima facie* case of the invalidity of that statute. When a party specially sets up and claims a right or privilege under the Constitution or laws of the United States, the question of the sufficiency of allegations to present that issue is not concluded by the view expressed by the state court. In *Mitchell* v. *Clark*, 110 U. S. 633, 645, this court

said: "The question whether a plea sets up a sufficient defence, when the defence relied on arises under an act of Congress, does present, and that necessarily, a question of Federal law; for the question is and must be, does the plea state facts which under the act of Congress constitute a good defence." This principle was approved in *Boyd* v. *Thayer*, 143 U. S. 135, 180. We decide, however, nothing more on this hearing than that upon the facts alleged the demurrer to the answer should have been overruled; and upon the completion of the pleadings — unless the plaintiffs elected to stand by their demurrer — the parties should be allowed to make their proofs touching the issues involved.

It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock. It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property. The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature

has the authority, in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority. If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as in view of the nature and value of the service rendered by the company are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable. That inquiry also involves other considerations, such, for instance, as the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise. In short, each case must depend upon its special facts; and when a court, without assuming itself to prescribe rates, is required to determine whether the rates prescribed by the legislature for a corporation controlling a public highway are, as an entirety, so unjust as to destroy the value of its property for all the purposes for which it was acquired, its duty is to take into consideration the interests both of the public and of the owner of the property, together with all other circumstances that are fairly to be considered in determining whether the legislature has, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law. What those other circumstances may be, it is not necessary now to decide. That can be best done after the parties have made their proofs.

It is further insisted by the company that the rates prescribed for it by the act of 1890 are much less than those imposed by the General Statutes of Kentucky upon other turnpike companies of the State; consequently, that that act denies to it the equal protection of the laws. The proposition of the defendant is, that the constitutional provision referred

to requires all turnpike companies in the State to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the Court of Appeals of Kentucky said: "A turnpike road leading into and connected with a populous city like that of the city of Covington could afford to charge less toll by reason of the immense travel upon it than turnpikes in thinly settled portions of the county or State, and hence under former constitutions the legislature has seen proper to regulate the tolls as the turnpike road may happen to be located." The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower — taking them as a whole — than the legislature has, by general law, prescribed for other corporations whose circumstances and location are not unlike those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the act of 1890 denies to the defendant the equal protection of the laws.

For the reasons we have given,

The judgment of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

MAISH *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

No. 89. Submitted October 29, 1896. — Decided December 21, 1896.

In proceedings in Arizona to enforce the collection of taxes assessed upon real estate, a printed copy of the delinquent list, instead of the original filed in the office of the county treasurer, was offered in evidence. To the introduction of this objection was made, but not upon the ground that the original was the best evidence, or that the copy offered was not an exact copy. In this court it was for the first time objected that the list, as filed in this case, was not a copy of the original. *Held*, that this court would not disturb the judgment of the court below on such technical grounds, apparently an afterthought.

For the hearing of the objections of the appellants against the assessment of the tax the court convened on the 14th of March. The notice published by the tax collector was that the sale would begin on the 20th of March. On March 15 a judgment was entered directing the sale on the 20th of all the property, to which no objection had been filed. As to those parties making objections (and included among them were the present appellants) the case was set down for hearing at a subsequent day, and a trial then had; but the judgment was not entered until the 7th day of May, 1892, and the order was to sell on the 13th day of June. *Held*, that the purpose and intention of the act being the collection of taxes, but only of such taxes as ought to be collected, and judicial determination having been invoked to determine what taxes were justly due, the fact that the court took time for the examination and consideration of this question did not oust it of jurisdiction.

In Arizona the delinquent tax list is made by law *prima facie* evidence that the taxes charged therein are due against the property, as well the unpaid taxes for past years as those for the current year.

It was the intention of the legislature of Arizona, and a just intention, that no property should escape its proper share of the burden of taxation by means of any defect in the tax proceedings, and that, if there should happen to be such defect, preventing for the time being the collection of the taxes, steps might be taken in a subsequent year to place them again upon the tax roll and collect them.

The testimony does not sustain the contention that the board of equalization raised the value of appellants' property arbitrarily and without notice or evidence.

A party in possession under a perfect Mexican grant, that is, a grant absolute and unconditional in form, specific in description of the land, passing a certain, definite and unconditional title from the Mexican govern-

Statement of the Case.

ment to the grantee, has a possessory and equitable right sufficient to sustain taxation, although the grant may not have been confirmed.

A court cannot strike down a levy of taxes said to be for the payment of interest on bonds illegally issued in violation of statutory law, without a full disclosure of all the indebtedness, the time when it arose, and the circumstances under which it was created.

To warrant the setting aside of an assessment as unfair and partial, something more than an error of judgment must be shown, something indicating fraud or misconduct; as matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown.

This was a suit in the District Court of the First Judicial District of the Territory of Arizona, sitting in and for the county of Pima, to recover delinquent taxes. Several parties were included as defendants. A decree was rendered May 7, 1892, establishing the taxes and foreclosing the tax liens. The appellants, after a motion for a new trial, carried the case to the Supreme Court of the Territory, by which, on January 17, 1894, the decree was affirmed, 37 Pac. Rep. 370, and thereupon an appeal was taken to this court.

These judicial proceedings to collect delinquent taxes were authorized by statute. Rev. Stats. Arizona, 1887, §§ 2684, 2685, 2686, 2687 and 2688. The first of these sections provides that the tax collector on the third Monday of December in each year shall prepare and file in the office of the county treasurer a list of delinquent taxes. Section 2685 requires him on or before the first Monday in February thereafter to publish such delinquent tax list, with a notice that he will apply to the District Court of the county at the next ensuing term thereof for judgment. Section 2686 directs the district attorney, upon the completion of the publication, to file a complaint in the District Court setting forth the fact of the delinquent list, its publication and the notice, and praying for judgment and decree against the property described in said list for the taxes assessed thereon. It further provides:

"The delinquent list shall be *prima facie* evidence that the taxes therein are due against the property described in said list. Upon said publication and advertisement being made and the filing of said complaint, the said District Court shall

acquire full and complete jurisdiction over the lands, real estate and property described and contained in said delinquent list for all purposes whatever necessary to enable the said court to carry out the purposes and intention of this act."

Section 2687 contains certain general provisions in reference to the proceedings. Section 2688 is as follows:

"The court shall examine said list, and if defence (specifying in writing, the particular cause of objection) be offered by any person interested in any of said property, to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner; without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments, interest, penalties and costs as shall appear to be due, and such judgment shall be considered as a several judgment against each parcel of property, or part of the same, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such property against which judgment is given, which shall be substantially in the following form."

Mr. Charles Weston Wright for appellants.

Mr. William H. Barnes for appellee.

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

The statute, as will be seen, authorizes any one interested in any of the property to defend against the taxes sought to be charged thereon, "specifying in writing the particular cause of objection," and requires the court, when such defence is made, to "hear and determine the matter in a summary manner, without pleadings," and to "pronounce judgment, as the right of the case may be." The statute also provides that the delinquent tax list is *prima facie* evidence that the "taxes therein are due against the property."

The appellants filed ten objections to the taxes charged

against their property, one of which was that "said delinquent list as published and filed herein is not a copy of the original." It appears from the bill of exceptions that on the hearing before the court the printed copy of the delinquent list, and not that filed in the office of the county treasurer, was offered and received in evidence. To the introduction of this printed copy appellants made several objections, but not that the original was the best evidence or should be first offered, or that the printed list was not an exact copy of the original. It would seem from the findings, and the rulings made by the trial court, as well as from the motion for a new trial, that the published delinquent list was treated as though it were the original; and that in the Supreme Court of the Territory was the question for the first time distinctly made that no judgment could be rendered except upon the evidence furnished by the original list. Be that as it may, and conceding without deciding that properly in an action like this the original list should be offered in evidence, nevertheless we are of opinion that the appellants cannot now take advantage of this. They did not in their objections point out wherein the delinquent list was incorrectly published, and they made no objection to the admission in evidence of such published list on the ground that the original had not first been offered or that the published list was different from the original. It might be that in the description of other property, or the taxes charged thereon, there were such mistakes as to defeat the proceedings as to such property, or in reference to their own property and the taxes charged thereon that there was some trifling inaccuracy so as to make it true that the published list was not a copy of the original, but it would not follow therefrom that they were entitled to a judgment. *De minimis non curat lex* might uphold the publication. As they were called upon in the challenge of these taxes to point out specifically their objections, and as they did not show wherein the published list differed from the original, we cannot assume that the variance, if any there were, was sufficient to affect their substantial rights. While in a general sense it may be true that in such a proceeding the Territory is the plaintiff and is called

upon to prove its case, yet the presumptions which by the statute attach to the regularity of the proceedings, and the duty cast upon the objectors to specifically point out the defects, forbid our disturbing the judgment upon such technical ground, one apparently an afterthought and not affecting the substantial rights of the appellants.

Again, it is insisted that the court had lost its power to enter judgment by reason of lapse of time. The facts upon which this contention is based are these: Section 2685, which provides for a publication of the delinquent list, requires that the collector append to and publish with the list, in addition to the notice of application for judgment, a notice that on the Monday next succeeding the day fixed by law for the commencement of the term of the District Court the property will be sold. Section 2690 directs the clerk of the District Court to give a duly certified copy of the judgment to the tax collector as the process under which the property is to be sold. Section 2693 requires the collector to attend on the day named in the notice, expose the property for sale, and continue the sale from day to day until all the property is sold, completing the sale within twenty days from the commencement thereof. Section 2687 makes special provisions for action by the court at an ensuing term, but is inapplicable to the questions here presented.

The court convened on the 14th of March. The notice published by the tax collector was that the sale would begin on the 20th of March. On March 15 a judgment was entered directing the sale on the 20th of all the property, to which no objection had been filed. As to those parties making objections (and included among them were the present appellants) the case was set down for hearing at a subsequent day, and a trial then had; but the judgment was not entered until the 7th day of May, 1892, and the order was to sell on the 13th day of June. Now the argument is that as this is a special statutory proceeding its exact terms must be complied with or the court loses its jurisdiction; the effect of which as applied to a case like the present would be that if the objectors present questions which the court cannot conscientiously de-

cide at the moment and takes time for consideration, it may thereby lose its jurisdiction to act at all. We do not so understand the law. The District Court is one of general jurisdiction. Section 2686 provides that upon the completion of the publication and the filing of the complaint the "court shall acquire full and complete jurisdiction" over the property for all purposes whatever necessary to enable it to carry out the purposes and intention of the act. The special provisions, to which we have heretofore referred, will doubtless guide in all cases in which no contest is made. They were evidently designed to secure prompt action on the part of the tax collector, as well as the court, and if no objections be made and a delinquent tax list, correct in form and duly published, is presented there need be no delay in entering the judgment. But inasmuch as this proceeding is one in a court of general jurisdiction it would require very precise and prohibitory language in the statute in order to withhold from that court the ordinary functions and powers of such a tribunal, among which is not only the right but the duty of giving such full consideration to all questions presented as its judgment determines is necessary. No such prohibitory language is found. The purposes and intention of the act are the collection of taxes, but only of such taxes as ought to be collected, and judicial determination is invoked to determine what taxes are justly due; and that the court takes time for the examination and consideration of this question does not oust it of jurisdiction.

Another objection is to the entry on this delinquent tax list of taxes for the year 1889. It appears that on the 21st of September, 1891, the board of supervisors adopted a resolution, reciting in substance that the property described therein (which included the property of appellants) was duly assessed for the taxes of the year 1889; that it became delinquent; that a suit to recover the taxes was duly brought, in which it was finally adjudged that the publication was insufficient, and that the taxes could not be recovered in such action; and that they had not been paid, and directing that the property be reassessed, and the taxes for the year 1889 be relevied upon it,

and that the clerk insert such taxes on the tax roll for the current year. This was done under authority of an act of the legislature (Sess. Laws, 1891, p. 146), which reads as follows:

"SEC. 1. Whenever any tax or assessment, or any part thereof, levied on real or personal property, whether heretofore or hereafter levied shall have been set aside or determined to be illegal or void, or the collection thereof prevented by the judgment of any court, or wherever any tax collector shall have been prevented by injunction from collecting or returning any such tax or assessment in consequence of any irregularity or error in any of the proceedings in the assessment of such real or personal property, the levy of such tax, or the proceedings for its collection, or of any erroneous or imperfect description of such property, or of any omission to comply with any form or step required by law, or the including of any illegal addition with the lawful tax, or for any other cause; then, if the real or personal property was properly taxable or assessable, if it be not a proper case to collect by a resale of the property, such tax, or so much thereof as shall not have been collected and as may be taxable or assessable thereto, may be reassessed or relevied upon such property at any time within four years after such judgment or the dissolution of the injunction, if any was granted as above stated; and the proper county board of supervisors shall make an order directing the same to be reassessed upon such property; and the clerk of the board of supervisors of said county shall insert the same in the tax roll, opposite such description of said property, in a separate column, as an additional tax, and the same shall be collected as a part of the tax for the year when so placed on the tax roll, in the same manner and with like penalties as other taxes are collected."

No other evidence was offered by the Territory than the delinquent tax list and the above resolution. It is contended that this evidence is insufficient; that the board of supervisors have no power to act except upon the existence of certain precedent conditions which must be affirmatively shown; and, further, that if this be not so, the recital in the resolution, of itself, shows that there was no sufficient warrant for charging

these taxes against the property. This contention cannot be sustained. The delinquent tax list is made *prima facie* evidence that the taxes charged therein are due against the property. This means all the taxes; not only those for the current year, but those for past years, and this tax list was, therefore, *prima facie* evidence, of the rightfulness of the charge against the property for the taxes of the prior year. If there were any valid reason why the property should not be subjected to those taxes it was the duty of the objectors to state the reason and give evidence in support thereof. While it may be, as counsel insist, that the section quoted is "unhappily worded" and "certainly crude," yet its meaning is obvious. The clauses "the collection thereof prevented by the judgment of any court" and "if the real or personal property was properly taxable or assessable, if it be not a proper case to collect by a resale of the property, such tax . . . may be reassessed or relevied upon such property at any time within four years after such judgment," mean that whenever a suit has been instituted in a court, as provided by the statute heretofore referred to, and fails to become operative through the judgment of the court, then, if the property is properly taxable and no resale can be had without further action of the court, the board of supervisors may place the property upon the tax roll of the current year to be collected as other taxes of that year.

From the recital in this resolution, it appears that certain proceedings for the collection of taxes for 1889 failed by reason of the judgment of the court, declaring the publication insufficient. That put an end to the suit. It was not a defect in the process issued after and upon the judgment, which, perhaps, might be obviated by the issue of new process, but a failure of the court to render judgment because of prior defects. Under those circumstances the power and the duty of the board of supervisors to renew efforts to collect such taxes were given and imposed by this section, and the procedure provided was a reassessment and the placing of the taxes on the tax roll for the current year. This was done and nothing more; and no evidence was offered to show that those

taxes were not properly chargeable upon the property, or that they had ever been paid. Evidently it was the intention of the legislature, and a just intention, that no property should escape its proper share of the burden of taxation by means of any defect in the tax proceedings, and that, if there should happen to be such defect, preventing for the time being the collection of the taxes, steps might be taken in a subsequent year to place them again upon the tax roll and collect them.

Again, it is contended that the board of equalization raised the value of the property of appellants arbitrarily and without notice or evidence. But the testimony does not sustain this contention. The only evidence in respect to the matter was that of a witness, T. A. Judd, who testified that the board of equalization added six per cent to the value of stock cattle; but nowhere does it appear that this was done without proof of the value, or without due notice to all parties interested. We cannot assume, in the face of the *prima facie* evidence furnished by the delinquent tax list, that any official failed in his duty.

Another objection is that part of the property held to be subject to taxation was an unconfirmed Mexican land grant. It was admitted on the hearing in the District Court that certain tracts of land in the list described were "each Mexican land grants, and that the same are not and have never been confirmed." Upon this it is strongly insisted that no title passes until confirmation; that it may yet be adjudged that these lands are the property of the United States, and that until that question is definitely decided the lands are not subject to taxation. The cases relied upon are *Colorado Company* v. *Commissioners*, 95 U. S. 259; *Botiller* v. *Dominguez*, 130 U. S. 238, and *Astiazaran* v. *Santa Rita Land & Mining Co.*, 148 U. S. 80. In the first of these cases a Mexican land grant, covering some five hundred thousand acres, was confirmed by Congress to the extent of eleven square leagues, with a proviso that there should be a survey of those leagues, and that the confirmation should not become legally effective until the claimant had paid the cost thereof; and it was held, following *Railway Company* v. *Prescott*, 16 Wall. 603, and

Railway Company v. *McShane*, 22 Wall. 444, that until the survey fees had been paid the United States retained such an interest in the land as to exempt it from taxation. In the second the decision was that no title to land in California depending upon Spanish or Mexican grants could be of any validity until submitted to and confirmed by the board provided for that purpose under the act of March 3, 1851, c. 41, 9 Stat. 631, but that decision was based upon § 13 of the act, which expressly provided that "all lands the claims to which shall not have been presented to the said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." In the last of these cases it was held that under the acts of July 22, 1854, c. 103, 10 Stat. 308, and July 15, 1870, c. 292, 16 Stat. 291, 304, a private claim to land in Arizona under a Mexican grant, which had been reported to Congress by the surveyor general of the Territory, could not, before Congress had acted on that report, be contested in the courts of justice. In other words, the validity of such claim could only be determined in the particular tribunal which had been provided for such purpose.

It must be borne in mind that in the record before us these land grants are not otherwise described than as Mexican land grants. For aught that appears, they may have been "perfect grants," as they are sometimes called; that is, grants absolute and unconditional in form, specific in description of the land, passing a title from the Mexican government to the grantee as certain, definite and unconditional as a patent to a similar tract from the United States: and not "imperfect grants"; that is, grants of so many acres or leagues of land within large exterior boundaries, and based upon conditions precedent, and creating only an inchoate though equitable title to some as yet indefinite and undescribed tract. These perfect grants vest at least an equitable title in the owner. The general rule of international law is that a mere transfer of sovereignty over a territory has no effect upon vested rights of property therein; and whatever provision may be made in the treaty or by the law of the nation receiving the trans-

fer for purposes of identification, such provision is not to be considered as tantamount to either a denial or a suspension of these vested rights. Certainly a party in possession of a tract of land under a perfect grant has a possessory and equitable right which is of value, and that is enough to sustain taxation. The revenue act of the Territory (Rev. Stats. Arizona, § 2630) provides "that all property of every kind and nature whatsoever within this Territory shall be subject to taxation," and § 2631 defines the term "real estate," as used in the act, "to mean and include the ownership of, or claim to, or possession of or right of possession to any land within the Territory."

It has been held that possessory rights founded upon mere occupation and improvements upon government land, though invalid as against the government, may be made the subject of barter and sale, and may be treated under the laws of the State and Territory as having all the attributes of property. *Lamb* v. *Davenport*, 18 Wall. 307; *Bishop of Nesqually* v. *Gibbon*, 158 U. S. 155, 168.

In *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512, it was decided that the possessory claim of the railroad company to lands within the State of Nevada was subject to taxation, notwithstanding the fact that the lands might thereafter be determined to be mineral lands, and so excluded from the operation of the railroad grant. See also *Northern Pacific Railroad Company* v. *Patterson*, 154 U. S. 130, 132. Within the reasoning of these decisions, as it does not appear that these lands were not held by perfect grants under the laws of Mexico, or that they were not in the possession of the appellants, and covered with valuable improvements, it must be held that the objection to their taxation cannot be sustained.

Another objection is that a levy of fifty cents on the hundred dollars included in these taxes was made solely for the purpose of raising money to pay interest on bonds, and it is insisted that the bonds for which the levy was made were void under the act of July 30, 1886, c. 818, 24 Stat. 170, which prohibits a county from becoming indebted to an amount exceeding four per cent of the value of the taxable property

within the county. The bonds, which were in excess of the four per cent, were issued on June 30, 1887, and subsequently to the passage of the act. But, as is shown in the testimony, they were funding bonds. For aught that appears, the real indebtedness of the county had been created long before the passage of the act, and these funding bonds may have been, and probably were, nothing but simply a change in the form of the indebtedness. Even if it were regarded as a new indebtedness, it would not follow that the whole series was invalid, for the circumstances of the transaction might, if fully disclosed, show that even as new indebtedness they were valid for a certain amount, that is, an amount equal to four per cent of the value of the county's taxable property. It cannot be that, in this indirect way, and without a full disclosure of all the facts concerning the indebtedness, the time when it arose and the circumstances under which it was created, a court can strike down a levy for the payment of interest on the bonds.

A final objection is that the assessment was grossly unfair, and that there was a fraudulent discrimination in favor of the Southern Pacific Railroad Company. It appears that the assessment of ordinary range cattle was fixed by the territorial board at $7.42, while one witness testified that their value was from $6 to $6.50 per head. It also appears that the territorial board valued the railroad property at $6811.14 per mile, while there was testimony that to duplicate the roadbed and track alone would cost from $21,000 to $22,000 per mile; and appellants offered to prove that the railroad company stated to the board that if the valuation was fixed at about the rate which was fixed it would pay the taxes; if much higher, it would resist collection in the courts; and that the board concluded that it was better to get some taxes out of the railroad company than none, and therefore fixed the valuation at the sum named.

There is nothing tending to show that the board, in fixing the value of cattle at $7.42, acted fraudulently or with any wrongful intent, or that that valuation was not the result of its deliberate judgment upon sufficient consideration and

abundant evidence, and it would be strange, indeed, if an assessment could be set aside because a single witness is found whose testimony is that the valuation was excessive. No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown, something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the equalization board that it was guided largely by the valuation placed in other States and Territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and Territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown. *Pittsburgh, Cincinnati &c. Railway* v. *Backus*, 154 U. S. 421–435.

These are all the matters presented by counsel. We find in them nothing which justifies us in disturbing the judgment of the court below, and it is

Affirmed.

GONZALES *v.* CUNNINGHAM.

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

No. 643. Submitted December 7, 1896. — Decided December 21, 1896.

An appeal lies to this court from a final order of the Supreme Court of the Territory of New Mexico, ordering a writ of *habeas corpus* to be discharged.

The cases deciding that there is a want of jurisdiction over a similar judgment rendered in the District of Columbia are reviewed, and it is held that the legislation in respect of the review of the final orders of the territorial Supreme Courts on *habeas corpus* so far differs from that in respect of the judgments of the courts of the District of Columbia, that a different rule applies.

Section 1852 of the Compiled Laws of New Mexico of 1884 which provides that "when any justice of the Supreme Court shall be absent from his district, or shall be in any manner incapacitated from acting or performing any of his duties of judge or chancellor, in his district, or from holding court therein, any other justice of the Supreme Court may perform all such duties, hear and determine all petitions, motions, demurrers, grant all rules and interlocutory orders and decrees, as also all extraordinary writs in said district," was within the legislative power of the assembly which enacted it, and is not inconsistent with the provision in the act of July 10, 1890, c. 665, 26 Stat. 226, for the assignment of judges to particular districts, and their residence therein; and while, for the convenience of the public, it was provided in the organic act, that a justice should be assigned to each district and reside therein, there was no express or implied prohibition upon any judge against exercising the power in any district other than the one to which he had been assigned, and there was nothing in the language of the provision requiring such a construction as would confine the exercise of the power to the particular justice assigned to a district when he might be otherwise incapacitated.

In that territory a trial judge may continue any special term he is holding until a pending case is concluded, even if the proceedings of the special term are thereby prolonged beyond the day fixed for the regular term.

APPELLANTS were indicted at the June, A.D. 1894, term of the District Court for the county of Santa Fé, New Mexico, in the first judicial district of that Territory, for the murder of one Francisco Chaves. On the fourth of March, A.D.

1895, Hon. N. B. Laughlin, associate justice of the Supreme Court of the Territory of New Mexico, assigned to the first judicial district thereof, the regular December term of the court not having been held, convened "a special term of the District Court for the county of Santa Fé in and for the first judicial district in and for the Territory of New Mexico," to be begun on March 18, 1895, "for the term of four consecutive weeks, and for such further time as in the discretion of the judge of said court may be deemed proper and necessary for the disposition of any business now pending in said court or that may come before it in the usual course of business of said court and as provided by law."

The indictment coming on for trial, April 23, 1895, the following order was entered:

"Now comes the said plaintiff, by her attorney, J. H. Crist, Esquire, and the said defendants come in their own proper person, attended by their counsel, Catron & Spiess, and the judge of the court, Honorable N. B. Laughlin, considering himself disqualified from presiding at the trial of this cause owing to the fact of his having been connected with the prosecution herein previous to his appointment as judge, resigns the bench to the Honorable H. B. Hamilton, associate justice of the Supreme Court of the Territory of New Mexico and judge of the fifth judicial district court thereof; thereupon the said district attorney, on behalf of said Territory, and T. B. Catron, Esquire, on behalf of said defendants, agree that no objections shall be hereafter raised in case the Honorable N. B. Laughlin remains within this judicial district during the trial of this cause, and thereupon, a jury not having been obtained for the trial of this cause, the jurors already called are placed in the custody of the sheriff of the county of Santa Fé until to-morrow morning at ten o'clock."

The trial of the case commencing on that day continued until May 29, 1895, when the jury found the defendants guilty as charged in the indictment, and, motions in arrest of judgment and for new trial having been submitted and denied, judgment was entered on the verdict, and defendants sentenced to be executed. To review this judgment and

sentence defendants sued out a writ of error from the Supreme Court of the Territory, and the judgment was affirmed, September 1, 1896. 46 Pac. Rep. 349. The order of affirmance was set aside September 4, and a rehearing granted, and thereupon the Territory suggested diminution of the record and prayed for a *certiorari*, which was issued. On the ninth of September, Judge Laughlin convened a special term of the District Court in and for the county of Santa Fé, to be begun September 21, for the term of two consecutive weeks, or such further time as might be deemed necessary, "for the purpose of hearing and determining all causes that may be pending in said court, both civil and criminal, and any business pending in said court or that may come before it in the usual course of business of said court will be taken up and acted upon and disposed of in the same manner as at a regular term of said court and as provided by law."

On September 22, 1896, in the said special term, Judge Hamilton presiding, the motion of the Territory of New Mexico for an order directing the clerk "to make a proper and sufficient entry in the records of the proceedings of this court had on the 23d day of April, 1895, of the arraignment in said court at said time of the said defendants above named, upon the indictment in said cause, and of their respective pleas of not guilty thereto," came on to be heard, and it appearing to the court from evidence adduced, the recollection of the presiding judge, and certain notes and memoranda deposited with the clerk in pursuance of law, that the record "is not a full and correct record of the proceedings had in said court upon said date in said cause," in that the record failed to show the arraignment of the defendants and their respective pleas of not guilty, it was ordered "that the said proceedings be entered now upon the records of this court in this cause as of the 23d day of April, 1895, according to the facts thereof"; and the arraignment and pleas were set forth in said order. This order, together with the order convening the special term at which it was entered, having been returned to the Supreme Court of the Territory, that court on September 24, 1896, the cause coming on to be heard

on the rehearing, "and upon the amended record," again affirmed the judgment and sentence of the District Court, and fixed a day of execution. 46 Pac. Rep. 361. Thereupon the defendants, plaintiffs in error, on the same day filed a petition in the Supreme Court of the Territory of New Mexico for a writ of *habeas corpus*, alleging, among other things, that they were unlawfully restrained of their liberty pursuant to the judgment of the District Court of the first judicial district of New Mexico sitting within the county of Santa Fé, inasmuch as the District Court was without jurisdiction to render the judgment, the verdict and judgment thereon being *coram non judice*, because the special term of the District Court at which they were rendered overreached and conflicted with the regular terms of the court; the record did not show that defendants had been arraigned and the amendment was improperly made; the judge of the fifth judicial district court had no power or authority to preside over the first judicial district court, and that his acts, while so presiding, were absolutely null and void. The writ of *habeas corpus* was issued, and on consideration of the sheriff's return to the writ, and the petitioners' answer thereto, it was ordered that the writ be discharged and the petitioners remanded to custody to be dealt with in pursuance of the judgment, conviction and sentence. From this order petitioners prayed an appeal, which was denied for reasons then stated. *In re Gonzales*, 46 Pac. Rep. 211. Subsequently an appeal was allowed by one of the justices of this court.

Mr. Solicitor General, *Mr. John P. Victory*, Solicitor General of New Mexico, and *Mr. H. L. Warren* for the motion to dismiss or affirm.

Mr. Thomas B. Catron, *Mr. Samuel Field Phillips* and *Mr. Frederick D. McKenney* opposing.

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

This is a motion to dismiss the appeal on the ground that

appeals will not lie to this court from final orders of the Supreme Courts of the Territories on *habeas corpus;* and a motion in the alternative to affirm the final order sought to be reviewed because so manifestly correct that the appeal must be regarded as taken for delay only.

In *Cross* v. *Burke*, 146 U. S. 82, it was held that we had no jurisdiction over the judgments of the Supreme Court of the District of Columbia in this class of cases. The statutes in relation to *habeas corpus* were there reviewed, and it is not necessary to go over them again in detail.

By section 763 of the Revised Statutes it was provided that an appeal to the Circuit Court might be taken from decisions on *habeas corpus:* (1) In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States; (2) in the case of the subjects or citizens of foreign States, when in custody, as therein set forth. By section 764 an appeal from the Circuit Court to this court might be taken in "the cases described in the last clause of the preceding section."

Section 705 of the Revised Statutes read: "The final judgment or decree of the Supreme Court of the District of Columbia, in any case where the matter in dispute, exclusive of costs, exceeds the value of one thousand dollars, may be reexamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments, or appeals from decrees rendered in a Circuit Court."

Section 846 of the Revised Statutes of the District of Columbia was as follows: "Any final judgment, order or decree of the Supreme Court of the District may be reëxamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the Circuit Courts of the United States."

On February, 25, 1879, an act was passed which provided: "The final judgment or decree of the Supreme Court of the

District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of twenty-five hundred dollars, may be reëxamined and reversed or affirmed in the Supreme Court of the United States, upon writ of error or appeal, in the same manner and under the same regulations as are provided in cases of writs of error on judgments or appeals from decrees rendered in the Circuit Court." 20 Stat. 320, c. 99, § 4.

By act of Congress of March 3, 1885, 23 Stat. 437, c. 353, § 764 of the Revised Statutes was so amended as to remove the restriction to the second clause of § 763, and restore the appellate jurisdiction of this court from decisions of the Circuit Courts in *habeas corpus* cases as it had existed prior to the passage of the act of March 27, 1868. 15 Stat. 44, c. 34. But this did not have that effect as to judgments of the Supreme Court of the District of Columbia in those cases for the reasons given in *In re Heath*, 144 U. S. 92; *Cross* v. *Burke*, 146 U. S. 82.

On the same third of March, A.D. 1885, Congress passed an act "regulating appeals from the Supreme Court of the District of Columbia and the Supreme Courts of the several Territories." 23 Stat. 443, c. 355. The first section of this act provided "that no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or in the Supreme Court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars"; and the second section, that the first section should not apply to any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." We have repeatedly decided that this act did not apply, in either section, to any criminal case, and that it was only applicable to judgments and decrees in suits at law or in equity in which there was a pecuniary matter in dispute.

Hence, that, as it was well settled that a proceeding in *habeas corpus* was a civil and not a criminal proceeding, and was only availed of to assert the civil right of personal liberty, the matter in dispute had no money value, and an appeal would not lie. *Cross* v. *Burke*, 146 U. S. 82; *Farnsworth* v. *Montana*, 129 U. S. 104; *United States* v. *Sanges*, 144 U. S. 310, 320; *Washington & Georgetown Railroad* v. *District of Columbia*, 146 U. S. 227; *In re Lennon*, 150 U. S. 393, 397; *In re Chapman, Petitioner*, 156 U. S. 211, 215; *In re Belt, Petitioner*, 159 U. S. 95, 100; *Chapman* v. *United States*, 164 U. S. 436; *Perrine* v. *Slack*, 164 U. S. 452.

The Supreme Court of New Mexico declined to allow an appeal in this case because of the rule laid down in *Cross* v. *Burke* and in *In re Lennon*, *supra*, and it may be admitted that the view that an appeal would not lie might well have been entertained. But we think that the legislation in respect of the review of the final orders of the Territorial Supreme Courts on *habeas corpus* so far differs from that in respect of the judgments of the courts of the District of Columbia that a different rule applies.

It will be perceived that the revision of the final judgments or decrees of the Supreme Court of the District depended on the provision that they should be so reëxaminable in the same cases and in like manner as the final judgments of the Circuit Courts of the United States, and that there was no special provision in relation to the review of final orders of such courts on *habeas corpus*.

Sections 702 and 1909 of the Revised Statutes are as follows:

"Sec. 702. The final judgments and decrees of the Supreme Court of any Territory, except the Territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the Supreme Court, upon writ of error or appeal in the same manner and under the same regulations as the final judgments and decrees of a Circuit Court. . . ."

"SEC. 1909. Writs of error and appeals from the final decisions of the Supreme Court of either of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming, shall be allowed to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decision of the Supreme Courts created by this title, or of any judge thereof, or of the District Courts created by this title, or of any judge thereof, upon writs of *habeas corpus* involving the question of personal freedom."

This section was one of those under title 23, "The Territories," and the exception was brought forward from section 10 of the organic law of New Mexico, approved September 9, 1850. 9 Stat. 446, 449, c. 49.

As to the Supreme Court of the District of Columbia, its final judgments, orders and decrees were reviewable by this court on writ of error or appeal by section 705 of the Revised Statutes, and section 846 of the Revised Statutes of the District, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the Circuit Courts of the United States, and there was no mention of final orders on *habeas corpus;* but as to the Supreme Courts of the Territories, the right of appeal in *habeas corpus* was given in addition by the special provision of section 1909 of the Revised Statutes. When the Revised Statutes and the Revised Statutes of the District were approved, both on the same day, June 22, 1874, appeals could not be taken from the decisions of Circuit Courts on *habeas corpus* except in the instance of the subjects or citizens of foreign States; and the act of March 3, 1885, c. 353, 23 Stat. 437, restoring the appellate jurisdiction of this court in respect of final decisions of the Circuit Courts on *habeas corpus* in cases of persons alleged to be restrained of their liberty in

violation of the Constitution or any law or treaty of the United States, did not operate to give the same right of appeal to the courts of the District of Columbia. And then the second act of March 3, 1885, c. 355, 23 Stat. 443, came in to furnish the exclusive rule as to appeals and writs of error to review the final judgments and decrees of the courts of the District. And this would have been equally true as to the courts of the Territories if jurisdiction had depended solely on § 702 of the Revised Statutes; but under section 1909 an appeal would lie to this court from the decisions of the Territorial Supreme Courts on *habeas corpus* when it would not lie from Circuit Courts or courts of the District of Columbia in like case, and the question on this record as to the right of appeal is whether Congress intended to repeal that special provision as to final orders on *habeas corpus* by including the Supreme Courts of the Territories in the act of March 3, 1885, c. 355. The intention to do so is not expressed, and repeals by implication are not favored. The act covered substantially the entire ground as to the District of Columbia as the statutes stood, but while it might be fairly argued that it did so as to the Territories, it does not necessarily follow that the exception in respect of final orders on *habeas corpus* was designed to be affected. The act has its obvious field of operation without being assumed to be in every respect a substitute for the earlier law in relation to the Territories, and since the last clause of § 1909 was directed to a special object and applicable to particular cases, we think it may properly be held that the act of March 3, 1885, had only general cases in view, and that it was not intended to do away with the special provision. Indeed, it was distinctly ruled in *In re Snow*, 120 U. S. 274, that an appeal would lie under section 1909 from a final order entered in 1886 on *habeas corpus* by the Supreme Court of the Territory of Utah; and this notwithstanding the act of March 3, 1885, c. 355, which was quoted and referred to in *Snow* v. *United States*, 118 U. S. 346. Jurisdiction was also entertained of such an appeal in *Nielsen, Petitioner*, 131 U. S. 176, from a final order of a District Court of the Territory of Utah and in *In re Delgado, Petitioner*, 140

U. S. 586, from a final order of a District Court of New Mexico.

This result is not affected by the judiciary act of March 3, 1891, c. 517, 26 Stat. 826. *Shute* v. *Keyser*, 149 U. S. 649; *Folsom* v. *United States*, 160 U. S. 121; *In re Lennon*, 150 U. S. 393; *In re Heath*, 144 U. S. 92.

But although the motion to dismiss for want of jurisdiction will be overruled, we are of opinion that the motion to affirm must be sustained. The general rule is well established that a writ of *habeas corpus* cannot be used to perform the office of a writ of error, and that this doctrine applies not only to original writs of *habeas corpus* issued by this court, but on appeals to it from courts below in *habeas corpus* proceedings. *In re Schneider*, 148 U. S. 162; *Benson* v. *McMahon*, 127 U. S. 457, 461, 462; *Stevens* v. *Fuller*, 136 U. S. 468, 478.

The contention here is that the proceedings before Judge Hamilton were *coram non judice* and void because, being the member of the Supreme Court assigned to the fifth district, he could not exercise judicial power in the first district.

By § 1851 of the Revised Statutes, it was provided that "the legislative powers of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States."

By § 1865, that "every Territory shall be divided into three judicial districts; and a District Court shall be held in each district of a Territory by one of the justices of the Supreme Court, at such time and place as may be prescribed by law, and each judge, after assignment, shall reside in the district to which he is assigned."

By § 1874, that "the judges of the Supreme Court of each Territory are authorized to hold court within their respective districts, in the counties wherein, by the laws of the Territory, courts have been or may be established, for the purpose of hearing and determining all matters and causes except those in which the United States is a party."

Section 1907 provided that "the judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Mon-

tana and Wyoming shall be vested in a Supreme Court, District Courts, Probate Courts and in justices of the peace."

These provisions, *mutatis mutandis*, were contained in the organic law of New Mexico.

The number of judges of that Territory having been raised to five, it was provided by an act of July 10, 1890, c. 665, 26 Stat. 226: "Sec. 3. That the said Territory shall be divided into five judicial districts, and a District Court shall be held in each district by one of the justices of the Supreme Court, at such time and place as is or may be prescribed by law. Each judge, after assignment, shall reside in the district to which he is assigned. Sec. 4. That the present Chief Justice and his associates are hereby vested with power and authority, and they are hereby directed, to divide said Territory into five judicial districts, and make such assignments of the judges provided for in the first section of this act as shall in their judgment be meet and proper."

Section 1852 of the Compiled Laws of New Mexico of 1884 is as follows: "When any justice of the Supreme Court shall be absent from his district, or shall be in any manner incapacitated from acting or performing any of his duties of judge or chancellor, in his district, or from holding court therein, any other justice of the Supreme Court may perform all such duties, hear and determine all petitions, motions, demurrers, grant all rules and interlocutory orders and decrees, as also all extraordinary writs in said district."

It appears to us that this enactment was within the power of the legislative assembly under the Revised Statutes, and that it is not inconsistent with the provision for the assignment of the judges to particular districts and their residence therein.

By the organic act and the Revised Statutes, the whole of the judicial power of the Territory was vested in the Supreme Court, District and Probate Courts and justices of the peace; and the Supreme Court and District Courts possessed common law and chancery jurisdiction. The Supreme Court of the Territory held that the judicial power which was thus vested in plenary terms in the District Courts was to be exercised in

each district "by one of the justices of the Supreme Court," and that the organic law did not require that it should be exercised by any particular one of the justices; that while for the convenience of the public it was provided that a justice should be assigned to each district and reside therein, there was no express or implied prohibition upon any judge against exercising the power in any district other than the one to which he had been assigned; and that there was nothing in the language of the provision requiring such a construction as would confine the exercise of the power to the particular justice assigned to a district when he might be otherwise incapacitated. 46 Pac. Rep. 363. We concur in these views, and are unable to perceive any want of jurisdiction on the part of the District Court in the proceedings had against petitioners, or any violation of the Constitution or laws of the United States in that regard.

And this disposes of the objection that the amendment of the record so as to show the arraignment and pleas of defendants was improvidently made. Jurisdiction existed, and the action of the District Court and its recognition by the Supreme Court were in accordance with the rule as to entries *nunc pro tunc*. *In re Wight*, 134 U. S. 136; *United States* v. *Vigil*, 10 Wall. 423.

It is insisted, however, that jurisdiction to render the judgment was lacking because of the expiration of the special term or its termination by conflict with the regular terms of the District Court before the trial was concluded.

The sections of the compiled laws of New Mexico of 1884 bearing on this subject and the first section of the Territorial act of February 22, 1893 (Laws New Mex. 1893, p. 51, c. 34), are given in the margin.[1]

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[1] "§ 543. The terms of the district courts shall be held in the several counties of this Territory, beginning at the times hereinafter fixed and continuing until adjourned by order of the court. . . ."

"§ 551. Whenever any regular term of the district court for any county in this Territory shall for any cause fail to be held, the judge of the district in which such failure shall have taken place, or, in the absence of any such resident judge, then any district judge in this Territory, if he deem it advisable and necessary to hold a special term of said court for such county, may order a special term to be held at the court-house of said

These compiled laws were prepared by a commission authorized to make "a careful and accurate compilation of all of the laws, general, local and private, which shall be in force on the fifth day of May, 1884," and the commissioners were careful, as they say in the preface to their work, to avoid "making changes in any original law." The compilation of general laws embraced the revision of 1865 and the session laws thereafter. Section 553 was taken from section four of chapter eighteen of the revised laws of 1865, the chapter embodying the previous law of January 13, 1862. Section 552 was section three of chapter twenty-six of the laws of 1874, approved January 3, and section 552*a* was section three of chapter twenty-seven of the laws of 1874, approved January 6. Laws 1874, pp. 47, 49. The compilation of 1884 was published in accordance with the act authorizing it to be made.

June 14, 1858, Congress passed an act, carried forward as § 1874 of the Revised Statutes, providing "that the judges of the Supreme Court of each Territory of the United States are hereby authorized to hold court within their respective districts, in the counties wherein, by the laws of said Territories, courts

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county at a certain time to be specified in said order, which shall be made in writing, and filed with the clerk of such district court, and a copy thereof posted up at the court-house door of the said county at least ten days previous to the time specified for holding said special term.

"§ 552. The respective district judges are hereby authorized at any time, to hold special terms of the district court in any county of their judicial districts, when a term thereof in said county may have failed: *Provided*, Said special term shall not conflict with a term of said district court in any other county in the same judicial district. Said terms to be called in the same manner now provided by law for the holding of special terms of the district courts in this Territory.

"§ 552*a*. When in the discretion of the judge of any district court, a furtherance of justice may require it, a special term of the district court may be held in any county of his district; which said special term may be called in the same manner now provided by law for the calling of special terms, and any business at the time pending in said court, or that may come before it in the usual course of business of the court, may be taken up, and acted upon, and disposed of in the same manner as at a regular term of said court.

"§ 553. Any special term of the district court that may be ordered under the provisions of this act, shall be held for the purpose of hearing and

have been or may be established, for the purpose of hearing and determining all matters and causes, except those in which the United States is a party: *Provided*, That the expenses thereof shall be paid by the Territory, or by the counties in which said courts may be held, and the United States shall in no case be chargeable therewith." 11 Stat. 366, c. 166. Accordingly terms of court in the several counties were duly provided for by the Territorial legislature, and these terms in the counties in the first judicial district were fixed by the first section of the Territorial act of February 22, 1893.

By other sections than those before given, it was provided that District Courts in the several counties in which they might be held should have power and jurisdiction of all criminal cases that should not otherwise be provided for by law; of all criminal cases that might originate in the several counties, which according to law belong to the District Courts, or that might be presented by indictment, information or appeal; and that the costs, charges and expense of holding and maintaining the District Courts and the costs in causes determined against the Territory should be paid by the Territory. Comp. Laws, 1884, §§ 531, 532, 540.

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determining all causes that may be depending in said court, both civil and criminal, and may continue in session the same length of time that is allotted to the regular term of court for such county and no longer."

"§ 557. It shall be the duty of the attorney-general of this Territory, to attend all such special terms of the district court, having been duly notified thereof, or provide that some one learned in the law shall attend for him, and the said attorney-general or his deputy, shall be required to perform the same duties at such special term, as he is required by law to perform at the regular terms of the district court, . . ."

"An act to fix the time of holding the district courts." Approved February 22, 1893.

"SECTION 1. The terms of the district court hereafter to be held in the counties of Santa Fé, San Juan, Rio Arriba and Taos shall be held in said counties beginning at the times hereinafter fixed and continuing until adjourned by order of the court, to wit:

"In the county of San Juan, on the third Mondays in April and October.

"In the county of Rio Arriba, on the first Mondays in May and November.

"In the county of Taos, on the third Mondays in May and November.

"In the county of Santa Fé, on the second Mondays in June and December."

By section 20 of chapter 61 of the acts of 1893 the respective counties of the Territory were required to provide for the expenses of the District Courts by levy of taxes as therein prescribed. Laws 1893, p. 108.

The Supreme Court of the Territory held that the requirement that the respective counties should provide for the expenses of their District Courts under this section, which we have not felt called upon to set forth *in extenso*, practically inhibited terms in counties in which there were no funds, and declared that it had been a frequent consequence of this system that courts could not be and were not held in some of the counties at the time fixed by the statute. The laws of New Mexico contained the usual provision for adjournment of terms to terms in course on the non-attendance of the judge (§ 537), and it was not contended here that in fact regular terms of the District Court were held in the county of San Juan in April, in the county of Rio Arriba in May, and in the county of Taos in May, while the special term was in session. From the various provisions of the acts referred to, it appears that no specific duration of either regular or special terms was prescribed by law, but that they were subject, when lawfully commenced, to be continued until adjourned by order of court, and that therefore they could not be necessarily determined by the advent of the particular days designated for the commencement of regular terms; and that special terms might be ordered when regular terms failed to be held, and also whenever in the discretion of the judge of any District Court a furtherance of justice required it.

Under section 552, which was section 3 of chapter 26 of the laws of 1874, when special terms were held because the regular term had failed, it was provided that any such special term should not conflict with the regular term in any other county in the same judicial district, that is, that it should not be so called as to produce a conflict or be held in actual conflict; while by section 3 of chapter 27 of the laws of 1874, being section 552*a*, no specific limitations were imposed in respect of a special term called thereunder. There was nothing in any of these provisions which controlled the discretion

of the trial judge in continuing any special term he may have been holding until a pending case was concluded, and nothing which operated to invalidate the proceedings of such special term because prolonged beyond the day fixed for a regular term. Jurisdiction did not depend on the stroke of the clock. *Election cases*, 65 Penn. St. 20; *Briceland* v. *Commonwealth*, 74 Penn. St. 463; *Mechanics' Bank* v. *Withers*, 6 Wheat. 106; *Maish* v. *Arizona*, 164 U. S. 599.

This trial was commenced on April 23, 1895, which was, as the record declared, the thirty-second day of the special term, which had commenced March 18, and was concluded on May 29, 1895, the sixty-third day of said special term, by the return of a verdict of guilty. The motions for new trial and in arrest were denied, and the sentence pronounced on June 15, 1895, one of the days of the regular term of the District Court, the postponement to that day having been granted on the request of defendants. Under these circumstances the proceedings in any view cannot be held void for want of jurisdiction. *McDowell* v. *United States*, 159 U. S. 596.

Order affirmed.

STARR *v.* UNITED STATES.

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

No. 389. Submitted October 23, 1896. — Decided January 4, 1897.

The objection that the warrant of arrest of the plaintiff in error purports to be issued by a "Commissioner U. S. Court, Western District of Arkansas" instead of a "commissioner of the Circuit Court," as required by statute, is without merit.

The ruling in *Hickory* v. *United States*, 160 U. S. 408, and the similar ruling in *Alberty* v. *United States*, 162 U. S. 499, that it is misleading for a court to charge a jury that, from the fact of absconding they may infer the fact of guilt, and that flight is a silent admission by the defendant that he is unable to face the case against him, are reaffirmed, and such an instruction in this case is held to be fatally defective.

The case is stated in the opinion.

Mr. A. H. Garland for plaintiff in error.

Mr. Solicitor General for defendants in error.

Mr. Justice White delivered the opinion of the court.

On a former trial for the crime of murder, the plaintiff in error was found guilty and sentenced, and the conviction was by this court reversed. *Starr* v. *United States*, 153 U. S. 614. The case is again here, in consequence of a second conviction, to review which a writ of error was sued out.

In the course of the first trial below the accused objected to the admissibility of a certain warrant. The matter was thus stated in the record:

"The Court. If you want to urge this objection" (*i.e.* absence of a seal), "I want to know the law you refer to. If you hav'nt got any law, say so. The court decides that the paper is competent, unless you deny the signature. What do you say as to the signature?

"Mr. Cravens (of counsel for defendant). We do not deny that.

"The Court. Mr. Stenographer, let the record show that the signature to this paper is admitted by counsel for the defendant to be the signature of Stephen Wheeler.

"The Court (to counsel for defendant). Do you admit his office — that he is United States Commissioner for the Western District of Arkansas?

"Mr. Cravens (of counsel for defendant). We do not deny he is a United States Commissioner, but we simply make this point: In speaking as such commissioner he must speak with his seal. I am frank enough to state to the court that I am not entirely satisfied about our position myself, but I am under the impression that we are sustained by the law.

"The Court. Mr. Stenographer, let the record show that it is admitted by the counsel for the defendant that Stephen Wheeler was a United States Commissioner for the Western

District of Arkansas at the time of the issuance of this writ, and is now such commissioner, and the signature to this writ is his signature, but that defendant denies the authenticity of the writ because the commissioner's seal is not on it.

"Mr. Cravens (of counsel for defendant). Yes, sir; that is the point we make on it, and it being admitted by the court we save an exception to its admission."

It was therefore apparent that the objection addressed itself solely to the want of a seal, and not only did not question the capacity of the officer by whom the warrant purported to be issued, but on the contrary expressly admitted it. Notwithstanding this fact when the case was previously here it was contended in argument that the court below erred in admitting the warrant, not only because it was without a seal, but because the officer by whom it was issued was without capacity to have done so. The question of the want of a seal was held to be untenable, but the frivolous attempt to predicate error because of the want of the capacity of the officer when such authority was admitted on the face of the record, was deemed unworthy of notice, and was therefore ignored. On the second trial the admission of the warrant was again objected to as follows:

"Mr. W. H. H. Clayton (of counsel for defendant). The ground of objection is, if your honor please, of course we make no objection to the fact that it has no seal, but we object to it because it does not purport to be issued by any officer authorized to issue a warrant of arrest. The warrant is signed 'Stephen Wheeler, Commissioner U. S. Court, Western District of Arkansas.' The statute of the United States on this subject gives a name to the commissioner who has a right to issue such warrant, and that name is 'commissioner of the Circuit Court,' and the statute says he shall be called by that name. Now, this writ is issued, not by a commissioner of the Circuit Court, but by a Commissioner of the U. S. Court, Western District of Arkansas. We say there is no such officer as that who is authorized to issue such a writ. There are commissioners appointed by the District Court who have no authority to issue writs, and commissioners of the Court of Claims have no such right. The commissioner who has the right to

issue such a writ is designated by the statute as 'commissioner of the Circuit Court,' and the statute says that he shall be designated and called by that name. We submit that the writ is not in due form."

The overruling of this objection is assigned for error.

Passing consideration of the question whether the objections taken to the admissibility of the warrant on the second trial are not concluded by the decision on the previous writ of error, they are manifestly without merit.

The fact that the officer who issued the warrant affixed to his signature the words "Commissioner United States Court, Western District of Arkansas," did not affirmatively imply that he was not a commissioner of the Circuit Court of the United States for the Western District of Arkansas. It is true that section 627 of the Revised Statutes, reënacting the provisions of early statutes, provides that "each Circuit Court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary, who shall be called 'commissioners of the Circuit Courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of Circuit Courts." But it is well known that the term "United States Commissioner" is generally understood to mean a commissioner acting under the authority of section 627 of the Revised Statutes, and that the mere fact that a person signs himself as Commissioner, United States Court, does not imply that he is not a commissioner possessed of the authority conferred by the section just alluded to. The statute law itself contains instances where such commissioners are described in other than the express language of the section of the law which authorizes their appointment. Thus, in the act of June 1, 1872, c. 255, § 14, 17 Stat. 196, 198, now sections 1042 and 5296 of the Revised Statutes, a poor convict seeking his discharge is authorized to make application in writing "to any Commissioner of the United States Court in the district where he is imprisoned."

The recital in the body of the warrant that the commissioner was "appointed by the United States District Court" did not imply that he was not a commissioner of the Circuit Court.

Opinion of the Court.

The District Court for the Western District of Arkansas was vested with the Circuit Court power. Rev. Stat. 571. Whilst by the act of February 6, 1889, c. 113, 25 Stat. 655, a Circuit Court was established for the Western District of Arkansas, it does not follow that the commissioners who were originally appointed by the District Court, and who after the creation of the Circuit Court continued to be such by the approval of the court, were not commissioners thereof because primarily appointed by the District Court. Clearly the appointment of such officers being valid at the time they were made they were in any view, if thereafter continued by the Circuit Court, *de facto* in the discharge of their duties even if their continuance was not evidenced by express reappointment. *McDowell* v. *United States*, 159 U. S. 596.

These views dispose also of the objection to the admissibility of the affidavit taken before the commissioner, as it is substantially predicated on grounds identical in reason with those made to the warrant.

All but one of the remaining assignments of error virtually depend upon or are connected with the question of the admissibility of the warrant and affidavit, and we deem it unnecessary to consider them, as they will not be likely to arise on the new trial, which the result of our consideration of another assignment of error makes it necessary to grant.

The instruction given by the trial judge to the jury upon the inferences to be drawn by them from flight was specifically objected to, and the objection was duly reserved. The instruction covered by this exception is as follows:

"The law says that a man is to be judged by his consciousness of the right or wrong of what he does, to some extent. If he flees from justice because of that act, if he goes to a distant country and is living under an assumed name because of that fact, the law says that is not in harmony with what innocent men do, and jurors have a right to consider it as an evidence of guilt, because he is an eyewitness to the occurrence; he knows how it did transpire; he is presumed to have a consciousness of that act, and therefore because he does abscond, because he does further become a fugitive from justice, because

he goes to a distant State and is living under an assumed name, living so as to conceal himself, the law says you have a right to take that fact into consideration as one from which you may infer guilt, a presumption of fact, the law says, that is proper for the jury to take into account in passing upon the defendant's own conception of the act done by him.

". . . It is impossible to deny that, logically as well as juridically, flight is always relevant evidence when offered by the prosecution, and that it is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is, in some sense feeble or strong, as the case may be, a confession, and it comes in with other incidents, the *corpus delicti* being proved, from which guilt may be cumulatively inferred."

The law on the subject of the weight to be given to the evidence of the flight of the accused thus stated by the trial court to the jury for their guidance is not only substantially similar but, indeed, is identical with instructions heretofore held by this court to be fatally defective. *Alberty* v. *United States*, 162 U. S. 501, 502; *Hickory* v. *United States*, 160 U. S. 408. It therefore differed from the language held not to contain reversible error in *Allen* v. *United States*, 164 U. S. 492. The error committed by the court doubtless resulted from the fact that the case was tried before the ruling in either the *Hickory* or *Alberty case* was announced.

Judgment reversed, and case remanded with directions to grant a new trial.

In re ATLANTIC CITY RAILROAD.

ORIGINAL.

Submitted December 7, 1896. — Decided January 4, 1897.

The power of this court to issue a writ of *mandamus* to an inferior court is well settled, but, as a general rule, it only lies where there is no other adequate remedy, and cannot be availed of as a writ of error.

The objection to the jurisdiction in the Circuit Court, presented by filing the demurrer for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled.

THE case is stated in the opinion.

Mr. William Houston Kenyon for petitioner.

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

This is an application for leave to file a petition for a writ of *mandamus*. The petition states that the Atlantic City Railroad Company is a corporation created, organized and existing under the laws of the State of New Jersey; that May 20, 1896, a bill in equity was filed by the Union Switch and Signal Company and the Fidelity Title and Trust Company, corporations organized and existing under the laws of Pennsylvania, against petitioner and Joseph S. Harris, its president, defendants, in the United States Circuit Court for the Eastern District of Pennsylvania, for the alleged infringement of certain letters-patent for improvements in electrical signalling apparatus; that July 6, 1896, petitioner appeared specially for the purpose of objecting to the jurisdiction of the court, and, on August 3, filed a demurrer raising the question, and on the same day defendant Harris also filed a demurrer to the bill of complaint; that petitioner's demurrer was overruled and defendant Harris was granted permission to withdraw his demurrer, if he so elected.

That by virtue of the order overruling the demurrer petitioner is required, "as it is advised and believes, to enter a general appearance by the 28th day of December, 1896, and

file an answer by the fourth day of January, 1897, or within other reasonable time fixed by the court, or an interlocutory decree will be issued against it directing the issuance of an injunction against it and awarding damages and costs and an accounting." That petitioner has a defence on the merits which is an adequate and complete answer to the bill; "that it is advised and believes that it has no adequate remedy by appeal"; and "that if it enters a general appearance or files an answer in said case, it will thereby and by that act and fact forever waive all objection to the jurisdiction of said court, and this court will be forever ousted of its jurisdiction to determine the jurisdiction of said court in said case, and that, accordingly, your petitioner has no adequate remedy unless this court will grant the mandamus as herein petitioned."

The prayer was for a writ of mandamus directed to the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, commanding them to dismiss, "as against your petitioner," the bill of complaint in the suit, and "to vacate, as against your petitioner, the said order of November 24, 1896, overruling the said demurrer of your petitioner, and to enter a decree to that effect, all as prayed for."

Copies of the bill of complaint, the special appearance, the demurrer and of the order overruling the demurrer and granting leave to withdraw the demurrer of Harris, without prejudice, were annexed. The bill of complaint showed complainants to be corporations of Pennsylvania and citizens thereof; the defendant, the Atlantic City Railroad Company, to be a corporation and citizen of New Jersey, having its principal office at Philadelphia, and defendant Harris, its president, to be a citizen of Pennsylvania.

Petitioner's demurrer showed for cause "that it appears upon the face of said bill of complaint that this court has no jurisdiction over the person of this defendant the Atlantic City Railroad Company, as it appears upon the face of the said bill of complaint that this defendant is not an inhabitant or citizen of the Eastern District of Pennsylvania or the State

of Pennsylvania, but is an inhabitant and citizen of the district and State of New Jersey."

The general power of the court to issue a writ of *mandamus* to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error. *In re Pennsylvania Co., Petitioner*, 137 U. S. 451; *In re Morrison, Petitioner*, 147 U. S. 14; *Ex parte Railway Company*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566.

In *In re Hohorst, Petitioner*, 150 U. S. 653, the bill was filed in the Circuit Court of the United States for the Southern District of New York against a corporation and certain other defendants, and was dismissed against the corporation for want of jurisdiction. From that order complainant took an appeal to this court, which was dismissed for want of jurisdiction because the order, not disposing of the case as to all the defendants, was not a final decree from which an appeal would lie. 148 U. S. 262. Thereupon an application was made to this court for leave to file a petition for a writ of *mandamus* to the judges of the Circuit Court to take jurisdiction and to proceed against the company in the suit. Leave was granted and a rule to show cause entered thereon, upon the return to which the writ of *mandamus* was awarded.

In this case, however, the Circuit Court entertained jurisdiction and the petitioner has its remedy by appeal, if a decree should pass against it. The objection to the jurisdiction presented by filing the demurrer, for the special and single purpose of raising it, would not be waived by answering to the merits upon the demurrer being overruled. *Southern Pacific Company* v. *Denton*, 146 U. S. 202.

To direct the exercise of jurisdiction is quite different from a mandate not to do so, and we think we should not interpose at this stage of the case in the manner desired.

Leave denied.

TEXAS AND PACIFIC RAILWAY COMPANY *v.* BLOOM'S Administrator.

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

No. 88. Argued and submitted October 29, 1896. — Decided January 4, 1897.

A passenger on the road of the Texas and Pacific Railway Company sued that company and its receiver, in a Texas court, in an action at law, to recover for injuries received when travelling on its road while it was in the hands of the receiver. The case was removed to the Circuit Court of the United States, where a trial was had. The receivership had been terminated before the commencement of the action, and the property had, by order of court, been transferred to the company under the circumstances and on the conditions described in *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, and in this case. The company contended that it was not liable, or, if liable, that the claim could only be enforced in equity. The trial resulted in a verdict and judgment for the plaintiff. *Held*, that, under the circumstances, the company was liable to the plaintiff in an action at law for the damages found by the jury; that the conduct of the railway company in procuring, or, at least, in acquiescing in the withdrawal of the receivership and the discharge of the receiver, and the cancellation of his bond, and in accepting the restoration of its road, largely increased in value by the betterments, affords ground to charge an assumption of such valid claims against the receiver as were not satisfied by him, or by the court which discharged him.

In January, 1889, one Bloom, describing herself as a resident of Lamar County, Texas, brought an action in the District Court of that county against the Texas and Pacific Railroad Company and John C. Brown, receiver of said company, claiming damages for personal injuries received while travelling as a passenger on said railroad. The railroad company and Brown, the receiver, respectively filed petitions for the removal of the suit into the Circuit Court of the United States for the Eastern District of Texas. The District Court refused to grant the removal, to which ruling the defendants duly excepted. Pending the making up of the issue, John C. Brown, the receiver, died. The trial resulted in a verdict and judgment in favor of the plaintiff for the sum of six thousand dollars. The cause was then

taken to the Supreme Court of Texas, where, for error of the District Court in refusing the petition for removal, the judgment was reversed and the cause was remanded.

In June, 1893, the case came on for trial in the Circuit Court of the United States, and the plaintiff recovered a verdict and judgment for the sum of eight thousand dollars, and, on a writ of error, that judgment was, on January 30, 1894, affirmed by the United States Circuit Court of Appeals for the Fifth Circuit. 23 U. S. App. 143. The case was then brought on error to this court. The plaintiff Bloom having died, Charles Manton entered an appearance as her administrator.

Mr. David D. Duncan for plaintiff in error. *Mr. John F. Dillon* and *Mr. Winslow F. Pierce* were on his brief.

Mr. James G. Dudley, *Mr. A. H. Garland*, and *Mr. R. C. Garland* for defendant in error submitted on their brief.

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

The plaintiff's original petition in the District Court of Lamar County disclosed that the injuries complained of were received in August, 1888, while the railroad was in the hands of John C. Brown, receiver, and alleged that the property of the Texas and Pacific Railway Company was placed in the hands of said John C. Brown as receiver, at the instance of the said railroad company and for its own benefit, and for the purpose of avoiding its traffic liability in the carrying of passengers and freight. The petition further alleged that the property of the said railroad company was never sold by said receiver to pay its debts, and was never contemplated to be sold, and that the entire earnings and current receipts of the said railroad while in the hands of the receiver, amounting to more than two millions of dollars, were applied to the payment of mortgage debts and in the betterment of the property of the company. It also alleged

that by an order made on January 2, 1889, by the United States Circuit Court for the Eastern District of Louisiana, John C. Brown was directed to make delivery unto the said Texas and Pacific Railway Company of all property, funds and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the said June 1, 1888, —such delivery to be made as of October 31, 1888; and it was further ordered that said receiver be discharged on said October 31, 1888, from his receivership, on payment of all costs legally taxed, and thereupon his bond vacated and cancelled. The said order, a copy of which was attached as an exhibit to plaintiff's petition, contained the following further provisions:

"It is further ordered that said property, nevertheless, shall be delivered to and received by said Texas and Pacific Railway Company, subjected to and charged with all traffic liabilities due to connecting lines and all contracts for which said receiver is or might be held under or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case, and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of intervenors, while it retains the cases for their determination, or intervenors now pending and undetermined, or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assignees to the same extent they could have been enforced if said property had not been surrendered into the possession of said company, and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, assume possession of said property. The bills in these cases will be retained for the purpose of investigating such liabilities and obligations, and

for such other purposes as may seem needful. It is ordered that all claims against the receiver as such, up to said October 31, 1888, be presented and prosecuted by intervention, prior to February 1, 1889, and if not so presented by that date, that the same be barred and shall not be a charge on the property of said company. It is further ordered that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge and a notice to said claimants to make claim within the time aforesaid, to wit, before February 1, 1889, and that he post a printed notice of similar purport in the station houses of said railway."

The first contention on behalf of the plaintiff in error is that, as whatever claim plaintiff acquired by reason of her injury was one not against the defendant company but against the receiver operating the road at the time under the orders of the court appointing him, and as it was within the power of such court, on terminating the receivership, to make and provide for settlement of all claims of parties against such receiver growing out of his operation of the road, and as, in the present instance, by its order, the Circuit Court had made such provision by directing that all claims against the receiver should be presented and prosecuted by intervention prior to February 1, 1889, and, that if not so presented by that date, that the same be barred and shall not be a charge on the property of said company, and that as the plaintiff did not so present or prosecute her claim, she was thereby precluded from maintaining an action against the company.

Undoubtedly, if this were a controversy between a party whose claim originated while a railroad was in the control of a receiver appointed during a foreclosure suit and a purchaser at a judicial sale decreed under that proceeding, the plaintiff's proposition would be a sound one. If the property sequestrated had gone to sale and a fund had been thus realized for distribution, then, upon notice appropriate to proceedings *in rem*, such a claimant would, in the absence of special and unusual circumstances, have been bound by the disposition so made.

But the present case is one in which no judicial sale was

made and no fund realized for distribution by final decree after notice to and a hearing of those having claims against the fund. It was not the ordinary case of a sale and purchase in which compliance with stipulated conditions forms part of the consideration, and in which the extent of the burdens assumed is defined. Here, the railroad and its appurtenances, whose value was largely enhanced during the pendency of the receivership, were returned to the possession of the railroad company; and while it was proper for the court, in order to protect its receiver, to make an order for those who had claims against him to bring them forward for disposition, it by no means follows that the company took back its property free from all claims that may have originated during the receivership. Such might be the case if the claim originated in some personal delinquency of the receiver, for which he and his bondsmen could be held responsible. But where the claim was incidental to the ordinary management of the railroad, not attributable to personal misconduct of the receiver, and where the court which had appointed the receiver had not been put in possession of a fund by a foreclosure sale, but had, at the request of the company and its mortgage creditors, restored its property to the railroad company, while such a claim was pending, we are unable to concede that an order of the kind that was made in this case precluded the plaintiff from enforcing her claim. There is present no element of estoppel in favor of the railroad company; for the plaintiff's judgment, obtained after a trial in which the company's defence on the merits was fully heard, would have to be paid, and it would be a matter of indifference, so far as the pecuniary result is concerned, whether the claim was satisfied by the action of the court when discharging its receiver, or by remedial proceedings against the company after the foreclosure suit had been abandoned.

We think the order in question, fairly interpreted, meant that the court, when about to release the receiver and his bondsmen by a determination of the foreclosure proceedings and a discharge of the receiver, gave an opportunity to those who had claims to present them; but that, after February 1,

1889, those who had not intervened would cease to be entitled to resort to the Circuit Court in the equity suit, and would be remitted to such other remedies as might be within their reach.

Such was the view of the nature of this order that was taken by this court in the case of *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, which was a case involving the same proceedings which are now under consideration.

It was indisputably shown at the trial, by the testimony of the receiver himself, that the earnings of the railroad while operated by him largely exceeded the expenses, and that a very large sum was applied by him to improvements and new equipments, so that "the road was turned over to the company in far better condition and more valuable by far than when placed in the hands of the receiver."

Such a state of facts certainly discloses an equitable claim against the railroad, on behalf of the plaintiff below.

But the very fact that the claim is an equitable one is made the basis of another contention by the plaintiff in error, and which is thus expressed in the second assignment of error:

"The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court in overruling the general demurrer presented by plaintiff in error to the petition of the defendant in error, for the reason that the matters alleged in said petition, if true as stated, disclose no cause of action at common law against plaintiff in error, nor any personal liability on the part of plaintiff in error to defendant in error such as could support an action at common law in said court; but, if any cause of action or right in defendant in error was shown by such pleading, it was of an equitable nature — to wit, an equitable lien on the property of plaintiff in error — and defendant in error's remedy was an equitable one against such property and not by a suit at common law for a personal judgment against the plaintiff in error, and because the right asserted by defendant in error, and her remedies therefor could only be adjudicated and pleaded upon the equity side of said court and by an appeal to said court sitting as a court of chancery."

In sustaining this assignment, the counsel for the plaintiff

in error complain of what is called a misapprehension by the Circuit Court of Appeals of the case of *Texas & Pacific Railway* v. *Johnson*, 151 U. S. 81, and they seek to distinguish that from the present case by calling attention to the fact that the former case came here by way of a writ of error to the Supreme Court of the State of Texas, and to the other fact that there was evidence in the *Johnson case* tending to show that the receiver was appointed at the instigation of the railway company and in order to enable it to improve its property by making repairs to its track and additions to its rolling stock by using therefor the earnings of the company during the receivership.

It is true that, in meeting the argument that a personal judgment could not be rendered against the railway company because it was not liable for acts committed by the receiver, this court said, in the *Johnson case*, that such a question was "one of general law, and for the state court to pass upon." Nevertheless, this court, in reviewing the decision of the state court, said:

"In the view of that court a railway company might be held directly liable when a receiver is appointed in an amicable suit at the instigation of the company and for the company's own purposes, and, these purposes being accomplished, the property is returned to its owner, the rights of no third persons as purchasers intervening, upon the ground that the acts of the receiver might well be regarded as the acts of its own servant, rather than those of an officer of the court, which, under such circumstances, he would only be *sub modo*. But as the court did not feel authorized to entertain a conclusion which might carry the implication that this receivership would have been created or continued, although its object had only been to place the property temporarily beyond the reach of creditors until it could be augmented in value by improvements made from earnings under the protection of the court, that rule was not applied in this case. The company was held liable upon the distinct ground that the earnings of the road were subject to the payment of claims for damages, and that as, in this instance, such earnings, to an extent far greater than sufficient to pay

the plaintiff, had been diverted into betterments, of which the company had the benefit, it must respond directly for the claim. This was so by reason of the statute (Laws Tex. 1887, 120, c. 131, § 6), and, irrespective of statute, on equitable principles applicable under the facts."

But although this court, in the *Johnson case*, chose to rest its decision upon the well-settled ground that the decisions of the state court in the construction of state statutes are binding on this court, no disapproval was suggested or implied of the reasoning of the state court. And with a similar question now before us, in a case brought from a Circuit Court of the United States, we see no reason to reach a different conclusion.

It will be observed that in this branch of the case the plaintiff in error is conceding that the plaintiff below had a good cause of action against the receiver; that she was not bound to prosecute her claim as part of the foreclosure proceedings; and that the earnings of the railroad, to an amount largely exceeding the claim, had been diverted by the receiver to betterments. But the contention is that the plaintiff's remedy, in such circumstances, was by proceedings in equity. This contention is founded on the proposition that the plaintiff's right to a remedy is solely upon the ground that the income of the road while in the hands of the receiver had been applied to the improvement of the road, and it is argued that such a remedy cannot go beyond the amount of the income so applied, and that the plaintiff must therefore follow the fund in equity, and is not entitled to sue and obtain a personal judgment against the holder of the fund, that is, the railroad company in possession of the railroad increased in value by the betterments.

There is a general principle that a party having a right to resort to a fund in the hands of a receiver or trustee may have the aid of a court of equity in following that fund, where it has been improperly mingled with other funds, or has been invested in property in which third persons have an interest. That is a rule devised for the benefit of the party invoking it, but cannot be applied, as we understand the facts of this case, to the detriment of the defendant in error. The railroad

company did not, at the trial, pretend that the amount of the benefits received by reason of the betterments did not reach the amount of the plaintiff's claim — indeed, the receiver's testimony showed that the betterments amounted to several hundred thousands of dollars — but the company claimed then, as they do now, that the plaintiff's only remedy was in equity. It is obvious that the only right or advantage that would accrue to the railroad company, if the plaintiff was compelled to resort to an equitable proceeding, would be the opportunity to show that the betterments received were less than the amount of the claim. The conduct of the railroad company in procuring, or, at least, in acquiescing in the withdrawal of the receivership, and in the discharge of the receiver and the cancellation of his bond, and in accepting the restoration of its road, largely increased in value by the betterments, well affords ground to charge an assumption of such valid claims against the receiver as were not satisfied by him or by the court which discharged him. The company might, even in such circumstances, have a right to show that the claims exceeded the amount of the betterments, and have the aid of a court of equity to restrict its liability to that amount. But, as we have seen, it is not pretended that there is any such equity in the present case.

The judgment of the Circuit Court of Appeals is

Affirmed.

MILLS *v.* UNITED STATES.

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

No. 536. Submitted December 15, 1896. — Decided January 4, 1897.

On the trial of a person accused of rape, the court, in charging the jury, said: "The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commis-

sion of the crime is all the force that is required to make out this element of the crime." *Held*, that this charge covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious; where there was simply non-consent on her part and no real resistance; and that such non-consent was not enough to constitute the crime of rape.

THE case is stated in the opinion.

No appearance for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiff in error was indicted in the United States District Court for the Western District of Arkansas at the November term, 1895, for the crime of rape committed at the Cherokee Nation, in the Indian country, within the Western District of Arkansas, upon one Florence Hendrix, a white woman and not an Indian, and not a member of any Indian tribe. He was duly arraigned and pleaded not guilty, and was tried upon the indictment at the February term of the District Court in 1896, was found guilty as charged in the indictment, and sentenced to be hanged on the 23d day of June, 1896. A writ of error having been allowed, the record has been removed to this court for review.

Upon the trial the government gave evidence tending to show that on the night of December 7, 1894, James P. Hendrix, the husband of the prosecutrix, occupied a home with her and their four young children in the Indian Territory, about two miles southwest of a place called Foyle. A man named Maxwell was also at the house that night. They lived off the public road about a quarter of a mile. About eight o'clock that night, while the moon was shining, the defendant rode up to the house and asked his way to Kepthart's. He said he was lost and asked the husband, Hendrix, if he would please come to the door and put him in the right direction. When the witness opened the door the defendant "put his gun on

him," and told witness to come out. The prosecutrix said "No; you are not going out," to which the defendant answered, with an oath, "Yes; he is." The husband had on his night clothes, only drawers and shirt, and was barefooted. The defendant, he says, threatened to kill him, and told him to walk along down the road, saying, "My name is Henry Starr," who was a notorious train robber. The husband was then sent down the road by the defendant under threats to kill him if he did not go, and after he went the defendant took the woman, the prosecutrix, and, as she alleged, by threats compelled her to have connection with him twice.

Upon the cross-examination of the prosecutrix it appeared that she was, at the time of the trial, about 25 years old, and that she had been married 9 years. She was married at Mt. Vernon, in Missouri, and from that time had lived a wandering life with her husband, moving, as she said, "So often I could not tell you just exactly where." Her testimony in regard to the commission of the offence after the husband had moved down the road was given in great detail, which it is not necessary to here set forth.

As the verdict of the jury is conclusive upon the merits of the case it becomes of the highest importance that upon an issue of this kind, maintained by evidence such as this record presents, the court should charge the jury with accuracy regarding the ingredients of the crime and the facts necessary to be proved in order to show the guilt of the defendant. No portion of the charge of the court, under such circumstances, can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even although it may be urged that in other portions of the charge the correct rule was laid down.

The crime itself is one of the most detestable and abominable that can be committed, yet a charge of that nature is also one which all judges have recognized as easy to be made and hard to be defended against; and it has been said that very great caution is requisite upon all trials for this crime, in order that the natural indignation of men which is aroused against the perpetrator of such an outrage upon a defenceless

woman may not be misdirected, and the mere charge taken for proper proof of the crime on the part of the person on trial. The defendant in this case denied even being present upon the occasion in question. The credibility of the prosecutrix was put in issue by her appearing on the stand as a witness, and although the jury might have disbelieved the evidence of the defendant, when he said that he was not there at all, yet they were under no legal necessity to believe in full the account given by the prosecutrix. Assuming the presence of the defendant, the jury had the right to believe all the testimony of the prosecutrix or only part of it; that is, they might have believed her testimony as to the fact of the connection between the defendant and herself, but were not bound to believe that it was against her consent and by the use of force overwhelming in its nature and beyond her power to resist, or by virtue of such threats against her life or safety as to overcome her will. Whether such threats were made or whether in their absence she resisted to the extent of her ability at the time and under the circumstances, was a question for the jury. The prosecutrix gave upon cross-examination a minute and extended account of the manner in which the crime was committed and of the circumstances surrounding its commission. How much of this testimony was credible and what inferences ought to be drawn from it all, were matters for the sole consideration of the jury.

With evidence such as has been outlined, the court in charging the jury said: "The fact is that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is non-consent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of the crime." An exception was taken to the definition of the crime as given by the court.

In this charge we think the court did not explain fully enough so as to be understood by the jury what constitutes in law non-consent on the part of the woman, and what is the force, necessary in all cases of non-consent, to constitute this crime. He merely stated that if the woman did not give

consent the only force necessary to constitute the crime in that case was that which was incident to the commission of the act itself. That is true in a case where the woman's will or her resistance had been overcome by threats or fright, or she had become helpless or unconscious, so that while not consenting she still did not resist. But the charge in question covered much more extensive ground. It covered the case where no threats were made; where no active resistance was overcome; where the woman was not unconscious, but where there was simply non-consent on her part and no real resistance whatever. Such non-consent as that is no more than a mere lack of acquiescence, and is not enough to constitute the crime of rape. Taking all the evidence in the case, the jury might have inferred just that amount of non-consent in this case. Not that they were bound to do so, but the question was one for them to decide. The mere non-consent of a female to intercourse where she is in possession of her natural, mental and physical powers, is not overcome by numbers or terrified by threats, or in such place and position that resistance would be useless, does not constitute the crime of rape on the part of the man who has connection with her under such circumstances. More force is necessary when that is the character of non-consent than was stated by the court to be necessary to make out that element of the crime. That kind of non-consent is not enough, nor is the force spoken of then sufficient, which is only incidental to the act itself.

Bishop in his treatise on Criminal Law says that the proposition as to the element of consent, deducible from the authorities, is that although the crime is completed when the connection takes place without the consent of the female, yet in the ordinary case where the woman is awake, of mature years, of sound mind and not in fear, a failure to *oppose* the carnal act is consent; and though she object verbally, if she make no outcry and no resistance, she by her conduct consents, and the act is not rape in the man. 2 Bishop Crim. Law, § 1122. This is consistent, we think, with most of the authorities on the subject. See *People* v. *Dohring*, 59 N. Y. 374, and cases there cited. In the New York case it was

held, after an examination and review of the cases, that if the woman at the time was conscious, had the possession of her natural, mental and physical powers, was not overcome by numbers or terrified by threats, or in such place and position that resistance would have been useless, it must also be made to appear that she did resist to the extent of her ability at the time and under the circumstances.

So where the court stated, that if there was no consent of the woman, the force incident to the commission of the act itself is all that is required to make out this element of the crime, the court should have included in that statement of the law the kind of non-consent which the law declares is necessary should exist. In the cases mentioned above mere non-consent was not enough nor was the force spoken of sufficient. Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury. Where the evidence of the commission of the crime itself impresses us as being somewhat unsatisfactory, and in a case where the life of the defendant is at stake, we feel that it is impossible to permit him to be executed in consequence of a conviction by a jury under a charge of the court which, we think, in some of its features was clearly erroneous in law, because not full enough on the subject herein discussed, even though in some parts of the charge a more full and correct statement of the law was given. Which of the two statements was received and acted upon by the jury it is wholly impossible for this court to determine, and as one of them was erroneous in not more fully and definitely stating what was the character of the non-consent which rendered the mere amount of force incident to the performance of the act itself sufficient to constitute the crime, the judgment of death must be reversed, and the defendant subjected to another trial where the rules of law applicable to the case shall be correctly and fully stated to the jury.

The judgment is, therefore, reversed, and the cause remanded with instructions to grant a new trial.

OSBORNE *v.* FLORIDA.

ERROR TO THE SUPREME COURT OF THE STATE OF FLORIDA.

No. 87. Argued December 8, 1896. — Decided January 4, 1897.

The license tax imposed upon express companies doing business in Florida by § 9 of the statute of that State, approved June 2, 1893, c. 4115, as construed by the Supreme Court of that State, applies solely to business of the company within the State, and does not apply to or affect its business which is interstate in its character; and, being so construed, the statute does not, in any manner, violate the Federal Constitution. The construction of the state statute below is not open to review.

F. R. OSBORNE, the plaintiff in error, was arrested in the State of Florida for an alleged violation of a statute of that State in knowingly acting as the agent, at Jacksonville, for the Southern Express Company, a corporation created under the laws of the State of Georgia and doing business in Florida, without having paid the license provided for by statute. He was required to give a bond for his appearance before the criminal court of record of Duval County, in the State of Florida, to answer the charge, and upon his refusal to give the same he was committed to the common jail of the county there to await trial. He then applied to the judge of the state circuit court for a writ of *habeas corpus*, and upon the hearing his arrest was adjudged to be legal, and he was remanded to the custody of the sheriff. The case was submitted to the circuit court upon an agreed statement of facts as follows: "That the said F. R. Osborne is the agent of the Southern Express Company, and that said company is a corporation created, existing and being under the laws of the State of Georgia; that said Southern Express Company is doing a business in the State of Florida ordinarily done by express companies in the United States of carrying goods and freight for hire from points within the State of Florida to points in said State, and also of carrying goods and freights for hire from points within the State of Florida to points without the State of Florida in other States in divers

parts of the United States, and in carrying goods and freights for hire from points in other States of the United States to points within the State of Florida, and that it has been engaged in such business for more than twenty years, and was so engaged on the 3d day of October, 1893; that of the business done by the Southern Express Company 95 per cent thereof consists of traffic carrying of goods and freights from the State of Florida into other States, and bringing and carrying from other States of the United States to points within the State of Florida, and 5 per cent thereof consists of carrying goods and freights between points wholly within the State of Florida; that F. R. Osborne did knowingly act as the agent of said express company on the 3d day of October, 1893, in the city of Jacksonville, Duval County, Florida, a city having more than 15,000 inhabitants, the said Southern Express Company having then and there failed and refused to pay the license tax as required by article 12, section 9, of an act entitled 'An act for the assessment and collection of revenue,' of the laws of Florida, approved June 2, 1893; that the Southern Express Company does business in and has agents in more than one town in nearly every county in the State, and that said towns differ in population, and that it has an office and agent and does business in Polk County, Florida, in the following incorporated towns, with a population as follows: Bartow, 1500 inhabitants; F't Meade, 600 inhabitants; Columbia, 600 inhabitants; Lakeland, 800 inhabitants; and Winter Haven, 200 inhabitants. In Orange County: Apopka, 500 inhabitants; Orlando, 10,000 inhabitants; Sanford, 5000 inhabitants; Umatilla, 3000 inhabitants; Winter Park, 600 inhabitants; and Zellwood, 300 inhabitants. In Alachua County: Campville, 400 inhabitants; Archer, 150 inhabitants; Grove Park, 110 inhabitants; Gainesville, 5000 inhabitants; Hawthorne, 300 inhabitants; High Springs, 500 inhabitants; and Island Grove, 200 inhabitants. In Duval County: Jacksonville, with a population of over 15,000; Baldwin, 125 inhabitants."

From the order committing plaintiff in error to the custody of the sheriff an appeal was taken to the Supreme Court of

the State of Florida, and that court affirmed the order. *Osborne* v. *State*, 33 Florida, 162. The plaintiff in error then sued out a writ of error from this court.

Mr. John E. Hartridge for plaintiff in error.

Mr. W. B. Lamar, Attorney General of the State of Florida, for defendant in error.

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

The criminal proceedings against the plaintiff in error were taken by virtue of a statute of Florida, known as chapter 4115, approved June 2, 1893. The ninth section of that chapter provides that: "No person shall engage in or manage the business, profession or occupation mentioned in this section unless a state license shall have been procured from the tax collector, which license shall be issued to each person on receipt of the amount hereinafter provided, together with the county judge's fee of twenty-five cents for each license, and shall be signed by the tax collector and the county judge, and have the county judge's seal upon it. Counties and incorporated cities and towns may impose such further taxes of the same kind upon the same subjects as they may deem proper when the business, profession or occupation shall be engaged in within such county, city or town. The tax imposed by such city, town or county shall not exceed fifty per cent of the state tax. But such city, town or county may impose taxes on any business, profession or occupation not mentioned in this section, when engaged in or managed within such city, town or county. No license shall be issued for more than one year, and all licenses shall expire on the first day of October of each year, but fractional licenses, except as hereinafter provided, may be issued to expire on that day at a proportionate rate, estimating from the first day of the month in which the license is so issued, and all licenses may be transferred, with the approval of the comptroller, with the business for which they were taken out, when there is a *bona fide* sale and trans-

fer of the property used and employed in the business as stock in trade, but such transferred license shall not be held good for any longer time, or for any other place, than that for which it was originally issued."

There are various subdivisions to this section not herein set forth, and they enumerate divers occupations and professions, the members of which are required to procure a license and to pay annually therefor the amounts stated in those subdivisions.

The twelfth subdivision provides, among other things, that "all express companies doing business in this State shall pay in cities of fifteen thousand inhabitants or more a license tax of two hundred dollars; in cities of ten thousand to fifteen thousand inhabitants, one hundred dollars; in cities of five thousand to ten thousand inhabitants, seventy-five dollars; in cities of three to five thousand inhabitants, fifty dollars; in cities of one to three thousand inhabitants, twenty-five dollars; in towns and villages of less than one thousand and more than fifty inhabitants, ten dollars. Any express company violating this provision, and any person that knowingly acts as agent for any express company before it has paid the above tax, payable by such company, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, or confined in the county jail not less than six months."

In addition to the criminal penalty above set forth, section 10 provides that the payment of all licenses taxed may be enforced by the seizure and sale of property by the collector.

The plaintiff in error assigns two grounds upon which he seeks for a reversal of the judgment of the state court. One is based upon the allegation that the statute, so far as regards the Southern Express Company or himself as its agent, violates the commerce clause of the Federal Constitution, in that it assumes to regulate interstate commerce. The second ground is that the statute is not sufficiently determinate, definite and certain in its character upon which to ascertain the amount to be paid for licenses.

It may be here assumed that if the statute applied to the

express company in relation to its interstate business, it would be void as an attempted interference with or regulation of interstate commerce.

The particular construction to be given to this state statute is a question for the state court to deal with, and in such a case as this we follow the construction given by the state court to the statutes of its own State. *Leffingwell* v. *Warren*, 2 Black, 599; *People* v. *Weaver*, 100 U. S. 539, 541; *Noble* v. *Mitchell*, 164 U. S. 367, 372, and cases there cited.

The Supreme Court of Florida has construed the ninth section of this act and has held in express terms that it does not apply to or affect in any manner the business of this company which is interstate in its character; that it applies to and affects only its business which is done within the State, or is, as it is termed, "local" in its character, and it has held that under that statute so long as the express company confines its operations to express business that consists of interstate or foreign commerce, it is wholly exempt from the legislation in question. It has added, however, that under the provisions of the statute, if the company engage in business within the State of a local nature as distinguished from an interstate or foreign kind of commerce, it becomes subject to the statute so far only as concerns its local business, notwithstanding it may at the same time engage in interstate or foreign commerce. In other words, this statute as construed by the Supreme Court of Florida does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business the statute does not apply to or affect it. As thus construed we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.

The case of *Crutcher* v. *Kentucky*, 141 U. S. 47, is not in the slightest degree opposed to this view. The act which was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that State without first obtain-

ing a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not state legislation.

It has never been held, however, that when the business of the company which is wholly within the State, is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher case*, that: "Taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection," viz., an objection that the tax or license was a regulation of or that it improperly affected interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax. It was said as to those cases that as the law made the payment of the fee or the obtaining of the license a condition to the right to do any business whatever, whether interstate or purely local, it was on that account a regulation of interstate commerce, and therefore void. Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State.

The company in this case need take out no license and pay

no tax for doing interstate business, and the statute is therefore valid.

The second ground for holding the statute void is that it is not sufficiently determinate, definite and certain in its character upon which to ascertain the amount to be paid for licenses. This ground furnishes no reason for interference by this court. Whether the statute be sufficiently determinate or certain in its character upon which to ascertain the amount to be paid for a license, is a question of the construction of the state statute which does not necessarily involve a Federal question, and the determination of the state court as to the proper construction and sufficiency of such a statute is conclusive upon us. The learned counsel for plaintiff in error is mistaken in assuming that this court has any more power than formerly to review, upon a writ of error from a state court, the determination of that court in regard to the particular construction to be given to the statutes of its own State. The cases of *Horner* v. *United States*, 143 U. S. 570, and *Carey* v. *Houston & Texas Central Railway*, 150 U. S. 170, have no bearing upon this question. They both refer to the jurisdiction of this court under the fifth section of the act of March 3, 1891, upon appeals or writs of error taken direct from the Circuit or District Courts of the United States to this court. By the last subdivision of section 5 of that act it is provided that: "Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State nor the construction of the statute providing for the review of such cases." The cases above cited originated in the Circuit Courts of the United States, and were brought direct by appeal or writ of error to this court. This case comes here by writ of error to the Supreme Court of a State, and our jurisdiction to review that judgment is embraced in section 709 of the Revised Statutes. In exercising jurisdiction under that section we do not review such a question as is here presented by plaintiff in error.

Upon the construction given it by the state court the statute does not violate any provision of the Federal Constitution, and the judgment of that court is, therefore,

Affirmed.

NOFIRE *v.* UNITED STATES.

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

No. 578. Submitted December 15, 1896. — Decided January 4, 1897.

The fact that a marriage license has been issued carries with it a presumption that all statutory prerequisites thereto have been complied with, and one who claims to the contrary must affirmatively show the fact.

Persons coming to a public office to transact business who find a person in charge of it and transacting its business in a regular way, are not bound to ascertain his authority to so act; but to them he is an officer *de facto*, to whose acts the same validity and the same presumptions attach as to those of an officer *de jure*.

The evidence shows that the deceased sought, in his lifetime, to become a citizen of the Cherokee Nation, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. *Held*, that, under those circumstances, it must be adjudged that he was a citizen by adoption, and consequently that the jurisdiction over the offence charged is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that Nation.

THE case is stated in the opinion.

Mr. Assistant Attorney General Whitney for defendants in error.

No appearance for plaintiffs in error.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiffs in error were indicted in the Circuit Court of the United States for the Western District of Arkansas for the murder of Fred. Rutherford "at the Cherokee Nation in the Indian country," on December 15, 1895. They were tried in May, 1896, found guilty by the jury, and, on June 12, the verdict having been sustained, they were sentenced to be hanged.

The principal question, and the only one we deem it neces-

sary to notice, is as to the jurisdiction of the court. The defendants were full-blooded Cherokee Indians. The indictment charged that Rutherford was "a white man and not an Indian," but testimony was offered for the purpose of showing that although a white man he had been adopted into the Cherokee Nation, which, if proved, would oust the Federal court of jurisdiction within the rule laid down in *Alberty* v. *United States*, 162 U. S. 499. In that case it was held that the courts of the Nation have jurisdiction over offences committed by one Indian upon the person of another, and this includes, by virtue of the statutes, both Indians by birth and Indians by adoption. The Cherokee Nation claimed jurisdiction over the defendants. This claim was denied by the Circuit Court, which held that the evidence of Rutherford's adoption by the Nation was not sufficient, and that therefore the United States court had jurisdiction of the offence. An amendment in 1866 to section 5 of article 3 of the Cherokee constitution gives the following definition of citizenship: "All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, . . . and their descendants, who reside within the limits of the Cherokee Nation, shall be taken and be deemed to be citizens of the Cherokee Nation." (Laws of Cherokee Nation, 1892, p. 33.) The Cherokee statutes make it clear that all white men legally married to Cherokee women and residing within the Nation are adopted citizens. (Sections 659, 660, 661, 662, 663, 666 and 667, Laws of the Cherokee Nation, 1892, pp. 329, and following.) Section 659 requires that before such marriage shall be solemnized the party shall obtain a license from one of the district clerks. Sections 660 and 661 provide that one applying for such license shall present to the clerk a certificate of good moral character, signed by at least ten respectable citizens of the Cherokee Nation, and shall also take an oath of allegiance. On October 4, 1894, Rutherford was married to Mrs. Betsy Holt, a Cherokee woman. The marriage license, with the certificate of the minister of the performance of the ceremony, and the indorsement of the record of the certificate, is as follows:

"*Marriage license.*

"CHEROKEE NATION, TAHLEQUAH DISTRICT.

"To any person legally authorized, greeting:

"You are hereby authorized to join in the holy bonds of matrimony and celebrate the rites and ceremonies of marriage between Mr. Fred. Rutherford, a citizen of the United States, and Mis' Betsy Holt, a citizen of the Cherokee Nation, and you are required to return this license to me for record within thirty days from the celebration of such marriage, with a certificate of the same appended thereto and signed by you.

"Given under my hand and seal of office this the 28th day of August, 1894.

[Seal of Tahlequah district, Cherokee Nation.]

"R. M. DENNENBERG,

"*Deputy Clerk, Tahlequah District.*

"This certifies that Mr. Fred. Rutherford, of Tahlequah district, C. N., I. T., and Mrs. Betsy Holt, of Tahlequah dist., Cherokee Nation, I. T., were by me united in the bonds of marriage at my home on the 4th day of October, in the year of our Lord eighteen hundred and ninety-four, conformable to the ordinance of God and the laws of the Cherokee Nation.

"EVANS P. ROBERTSON,

"*Minister of the Gospel.*

"S. E. ROBERTSON,

"*Witness present at the Marriage.*

"I hereby certify that the within certificate of marriage has this day been by me recorded on page 28, Record of Marriages, in the clerk's office in Tahlequah district, Cherokee Nation, this February 4th, 1896.

[Seal of the Tahlequah district, Cherokee Nation.]

"ARCH SPEARS,

"*Deputy Clerk, Tahlequah District, Cherokee Nation.*"

The performance of the marriage ceremony was also proved by the minister, a regularly ordained Presbyterian preacher. T. W. Triplett was the clerk of the Tahlequah district at the date of this certificate. R. M. Dennenberg was his deputy,

but at the time of the issue of the license both the clerk and his deputy were absent, and the signature of the deputy was signed by John C. Dennenberg, his son. The clerk, the deputy and his son, each testified that the latter was authorized to sign the name of the clerk or the deputy in the absence of either, and that the business of the office was largely transacted by this young man, although not a regularly appointed deputy. He made quarterly reports, fixed up records and issued scrip, and his action in these respects was recognized by the clerk and the Nation as valid. No petition, as required by the statute, was found among the papers of the office, but there was testimony that all the papers of the office had been destroyed by fire since the date of the marriage license, and the younger Dennenberg testified that a petition was presented containing the names of ten citizens; that he could not remember the names, but, at the time, made inquiry and satisfied himself that they were all respectable Cherokee citizens. There was testimony also that Rutherford offered to vote at an election subsequent to his marriage; that his vote was challenged, and on inquiry it was ascertained that he was a Cherokee citizen, and his vote received. Upon these facts the question is presented whether Rutherford was a Cherokee citizen by adoption. The Circuit Court held that the evidence was insufficient to show that fact, and that therefore that court had jurisdiction.

With this conclusion we are unable to concur. The fact that an official marriage license was issued carries with it a presumption that all statutory prerequisites thereto had been complied with. This is the general rule in respect to official action, and one who claims that any such prerequisite did not exist must affirmatively show the fact. *Bank of the United States* v. *Dandridge*, 12 Wheat. 64, 70; *Rankin* v. *Hoyt*, 4 How. 327; *Butler* v. *Maples*, 9 Wall. 766; *Weyauwega* v. *Ayling*, 99 U. S. 112; *Gonzales* v. *Ross*, 120 U. S. 605; *Callaghan* v. *Myers*, 128 U. S. 617; *Keyser* v. *Hitz*, 133 U. S. 138; *Knox County* v. *Ninth National Bank*, 147 U. S. 91, 97. In this last case it is said "it is a rule of very general application, that where an act is done which can be done

legally only after the performance of some prior act, proof of the later carries with it a presumption of the due performance of the prior act."

It is true that the younger Dennenberg, who signed the marriage license, was neither clerk nor deputy, but he was an officer *de facto*, if not *de jure*. He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office, and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee Nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least he was an officer *de facto;* and if an officer *de facto*, the same validity and the same presumptions attached to his actions as to those of an officer *de jure*.

Again, it is evident that Rutherford intended to change his nationality and become a Cherokee citizen. He took the steps which the statute prescribed and did, as he supposed, all that was requisite therefor. He was marrying a Cherokee woman, and thus to a certain extent allying himself with the Cherokee Nation. He sought and obtained the license which was declared legally prerequisite to such marriage if he intended to become an adopted citizen of that Nation. That he also obtained a marriage license from the United States authorities does not disprove this intention. It only shows that he did not intend that there should be any question anywhere, by any authority, as to the validity of his marriage. He asserted and was permitted to exercise the right of suffrage as a Cherokee citizen. Suppose, during his lifetime, the Cherokee Nation had asserted jurisdiction over him as an adopted citizen, would he not have been estopped from denying such citizenship? Has death changed the significance of his actions? The Cherokee Nation not only recognized the acts of young Dennenberg as the acts of the clerk, but since the death of Rutherford it has asserted its jurisdiction over the Cherokees who did the killing — a jurisdiction which is conditioned upon the fact that the party killed was a Cherokee citizen.

It appears, therefore, that Rutherford sought to become a citizen, took all the steps he supposed necessary therefor, considered himself a citizen, and that the Cherokee Nation in his lifetime recognized him as a citizen and still asserts his citizenship. Under those circumstances, we think it must be adjudged that he was a citizen by adoption, and consequently the jurisdiction over the offence charged herein is, by the laws of the United States and treaties with the Cherokee Nation, vested in the courts of that Nation.

The judgment of the Circuit Court must be reversed and the case remanded with instructions to surrender the defendants to the duly constituted authorities of the Cherokee Nation.

FORD *v.* DELTA AND PINE LAND COMPANY.

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

No. 25. Argued October 16, 19, 1896. — Decided January 4, 1897.

Exemptions from taxation are to be strictly construed, and no claims for them can be sustained unless within the express letter or the necessary scope of the exempting clause; and a general exemption is to be construed as referring only to the property held for the transaction of the business of the party exempted.

The exemption from taxation conferred by the 19th section of the act of the legislature of Mississippi of November 23, 1859, c. 14, upon the railroad company chartered by that act, does not extend to property other than that used in the business of the company, acquired under the authority of a subsequent act of the legislature in which there was no exemption clause.

A clause in a statute exempting property from taxation does not release it from liability for assessments for local improvements.

It has been held in Mississippi not only that special assessments for local improvements do not come within the constitutional limitation as to taxation, but also that the construction and repair of levees are to be regarded as local improvements for which the property specially benefited may be assessed; and this rule is in harmony with that recognized generally elsewhere, to the effect that special assessments for local improvements are not within the purview of either constitutional limitations in respect of taxation, or general exemptions from taxation.

Statement of the Case.

Under authority granted by the act of March 16, 1872, c. 75, of the legislature of Mississippi, the auditor conveyed to the Selma, Marion and Memphis Railroad Company the lands in question here, by deeds which recited that they had been "sold to the State of Mississippi for taxes due to the said State," and that the company had paid into the state treasury two cents per acre "in full of all state and county taxes due thereon to present date." No reference was made in those deeds to levy taxes or assessments. *Held*, that those deeds were no evidence of the prior payment and discharge of such levy taxes and assessments.

It is well settled that the punctuation of a statute is not decisive of its meaning.

The decision of the Supreme Court of Mississippi in *Green* v. *Gibbs*, 151 Mississippi, 592, followed, as it was, by subsequent decisions of that court, is not only binding on this court, but also commends itself to the judgment of this court as a just recognition of the force of legislative contracts.

This was a bill in equity filed in the Circuit Court of the United States for the Southern District of Mississippi, on February 27, 1889, by the appellants as complainants to quiet their title to certain lands therein described. Upon final hearing, on August 15, 1890, a decree was entered dismissing the bill, 43 Fed. Rep. 181, from which decree the complainants have appealed to this court.

Complainants' chain of title is as follows: 1st. A patent on March 13, 1853, from the United States to the State of Mississippi, under the act of September 4, 1841, c. 16, 5 U. S. Stat. 453, and September 28, 1850, c. 84, 9 U. S. Stat. 519. 2d. Conveyances from the State of Mississippi made during the years 1853 to 1856, inclusive, to E. F. Potts and others, these grantees having entered the lands with scrip issued by the secretary of state, under the acts of March 15 and March 16, 1852, providing for the construction of levees upon the Mississippi River. Laws Miss. 1852, c. 14, pp. 33, 41. 3d. Deeds from the grantees of the State and their privies in interest, in the years 1871 and 1872, to the Selma, Marion and Memphis Railroad Company, made under the authority of an act of the legislature of the State, approved July 21, 1870, authorizing the conveyance of lands to such company in payment of subscription to its capital stock. Laws Miss. 1870, c. 220, p. 566. 4th. Deeds from the State of Missis-

sippi to the railroad company, of date March 18, 1873, executed under authority of an act of the legislature, approved March 16, 1872, Laws Miss. 1872, c. 75, p. 313, providing that all lands which had been sold to the railroad company, and which had become forfeited to the State for non-payment of taxes, might be bought by that company from the State at two cents per acre, upon satisfactory proof that not less than twenty-five miles of the company's road had been built; and also that in all cases in which the lands had been forfeited to or purchased by the levee boards in any of the levee districts in the State and were held and claimed by them for the non-payment of levee taxes the said boards were required to arrange for the payment of such taxes by receiving therefor the bonds of the said districts. 5th. Deeds from the United States marshals for the Northern and Southern Districts of Mississippi to the complainants, executed August 1, 1887, and February 5, 1889, under sales made pursuant to a judgment and decree rendered on July 6, 1886, by the Circuit Court of the United States for the Northern District of Mississippi in the case of *Timpson, Trustee, &c.* v. *Selma, Marion & Memphis Railroad Company.*

The title of the defendant was based upon various statutes of the State of Mississippi, providing for repairing and perfecting the levees of the Mississippi River in certain counties, and making assessments upon all the lands within certain boundaries for the cost of such improvements, and originated in tax sales made for the non-payment of such assessments.

Mr. Casey Young for appellants. *Mr. Michael F. McMullen* was with him on his brief.

Mr. Frank Johnston for appellee.

Mr. Justice Brewer delivered the opinion of the court.

We premise by saying that this case involves over 200 different tracts of land in nine separate counties, and amounting to 112,160 acres; that the titles to these various tracts as claimed

by complainants are not all deraigned by the same conveyances or subject to the same conditions; that in consequence the many questions discussed so elaborately by counsel in their brief and in oral arguments do not affect alike all the tracts. We shall not attempt to consider all the questions presented, but have endeavored to select those which are necessary for a final determination of the case. We believe that the title to every tract falls within the scope of those we shall discuss, and that the propositions laid down are decisive of the rights of the parties hereto.

It is insisted that the lands, while held by the railroad company were, by virtue of certain clauses in its charter, exempt from the levee assessments, and we understood counsel, in their argument at the bar, to state that this question stands in the forefront of the case, and that upon its decision in favor of the complainants their rights depend. The lands were, in the years 1871 and 1872, conveyed by their former owners to the railroad company in payment of stock subscriptions. The company, originally known as the Memphis, Holly Springs and Mobile Railroad Company, was chartered by an act of the legislature of the State, of date November 23, 1859. Laws Miss. 1859, c. 14, p. 51. Sections 19 and 21 of that act are as follows:

"SEC. 19. That the capital stock, and all the property and effects of said company shall be exempt from taxation until said road is completed: *Provided*, said road is commenced within two years and completed within ten years from and after the passage of this act.

"SEC. 21. That said road shall be commenced in three years and completed in twelve years after the passage of this act."

The civil war interfering with the construction of the road, on February 20, 1867, Laws Miss. 1867, c. 464, p. 635, an act was passed reviving the corporation. Section 2 reads: "That said company shall have sixteen years in which to construct the said road, and shall commence the same in three years from and after the passage of this act." Section 3 provides: "That it shall and may be lawful for the said corporators to

receive subscriptions in land to the capital stock of the company: *Provided*, The lands shall be within five miles of the line of said road." On July 21, 1870, Laws Miss. 1870, c. 220, p. 566, a further act was passed, the second section of which is: "That said Selma, Marion and Memphis Railroad Company are hereby authorized to receive, in the way of subscription to the capital stock of said company, lands lying anywhere within the limits of the State of Mississippi." Under the authority of this statute these lands, being all more than five miles from the line of the road, were conveyed to the company. Now, the contention is that section 19 of the original statute was operative to exempt these lands from any charge for levee assessments. It is contended that the general language, "the capital stock and all the property and effects of said company," includes all the property belonging to the railroad company, whether used for railroad purposes or not; that it includes not only all the property which it acquired under the authority of its original charter, but also all property which it acquired under the authority of the amendment of July 21, 1870; and, finally, that the exemption from taxation means not merely exemption from all taxes levied for ordinary purposes by State, county or city, but also all assessments for local improvements. These propositions are denied by the defendant, and certainly present the most important if not the vital questions in the case.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause. *Vicksburg &c. Railroad* v. *Dennis*, 116 U. S. 665, 668; *Chicago &c. Railroad* v. *Guffey*, 120 U. S. 569; *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; *Yazoo &c. Railroad* v. *Delta Commissioners*, 132 U. S. 190; *N. O. & Lake Railroad* v. *New Orleans*, 143 U. S. 192; *Schurz* v. *Cook*, 148 U. S. 397, 409; *Keokuk &c. Railroad* v. *Missouri*, 152 U. S. 301, 306; *Winona &c. Land Company* v. *Minnesota*, 159 U. S. 526.

Indeed, there has been strong judicial dissent from the doctrine of the power of the state legislature to create a permanent

exemption from taxation. *Washington University* v. *Rouse*, 8 Wall. 439, 443.

It has been frequently decided that a general exemption of the property of a corporation from taxation is to be construed as referring only to the property held for the transaction of the business of the company. *Ramsey County* v. *Chicago, Milwaukee &c. Railway*, 33 Minnesota, 537; *Todd County* v. *St. Paul, Minneapolis &c. Railway*, 38 Minnesota, 163; *Illinois Central Railroad* v. *Irvin*, 72 Illinois, 452; *In re Swigert*, 119 Illinois, 83; *State* v. *Mansfield Commissioners*, 23 N. J. Law, 510; *State* v. *Newark*, 25 N. J. Law, 315; *Vermont Central Railroad* v. *Burlington*, 28 Vermont, 193; *Railroad Company* v. *Berks County*, 6 Penn. St. 70; *Worcester* v. *Western Railroad*, 4 Met. 564; *Tucker* v. *Ferguson*, 22 Wall. 527; *Bank* v. *Tennessee*, 104 U. S. 493, 497. In this latter case, after referring to several of the authorities just cited, it was said: "The doctrine declared in them, that the exemption in cases like the one in the charter before us extends only to the property necessary for the business of the company, is founded in the wisest reasons of public policy. It would lead to infinite mischief if a corporation, simply by investing its funds in property not required for the purpose of its creation, could extend its immunity from taxation, and thus escape the common burden of government."

The rule in Mississippi is the same. *McCulloch* v. *Stone*, 64 Mississippi, 378. In that case a railroad company, as here, was authorized to take subscriptions to its capital stock, payable in land. The charter also provided "that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment of the debts and liabilities which the said company may have incurred in the construction of said road or for money borrowed, . . . and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from the company an affidavit made by the president or cashier of said company that the amount of said taxes have actually been paid and applied by said company during the

year in payment of the debts, . . . which receipt so given shall be in full of all taxes — county, state and municipal — to which said company shall be subject." Construing this provision, the Supreme Court held that outside lands (that is, lands not used in the business of the company) were not within the exemption, saying, on page 394:

"The business of a railroad company, the property and instrumentalities ordinarily owned and employed by them, it must be assumed, are well known to the legislative department, and it must also be assumed that the language employed was used in reference to such business and property, unless a contrary intention is shown. 'All taxes to which said company shall be subject' must, therefore, we think, be construed to include only the taxes due upon the property of the company necessary to the construction, equipment, maintenance and operation of its road. Many of the authorities upon the question here involved are collected in Cooley on Taxation, 146 to 153. From them we can deduce no principle of construction which would include in the exemption granted an exemption of the outlying lands owned by the company. The lands involved in this suit have no sort of connection with the business of the company; they are owned by it only as the same character of lands would be owned by a private individual, and for the same purposes; they were bought, not to enable the company to perform any duty it owes to the public, but that it might by dealing in them make a profit as a buyer and seller; in this character we find nothing in the words or spirit of the exemption clause giving immunity from taxation."

Within the scope of these decisions it is, to say the least, not clear that the general language in section 19 is to be construed as referring to property other than that necessary for the business of the railroad company.

But passing that, it is clear that even if the exemption is properly construed as applying not only to the property necessary for the business of the railroad company but also to all other property which by the terms of its charter it was at liberty to acquire, it does not extend to property which, not necessary for its business, it acquired under the authority of a

subsequent act of the legislature, in which is found no exemption clause. The act of 1867, reviving the charter, authorized the corporation to receive payment of subscriptions to its capital stock in lands, provided the lands were within five miles of the line of its road; and if the exempting clause can be construed to apply to property other than that used in the business of the company it would be limited to property which by the charter, as it then stood, it was authorized to acquire. Subsequently thereto, and in 1870, it was authorized to receive in the way of subscription to its capital stock lands lying anywhere within the limits of the State, and it was under this authority that it took title to the lands in question. Now, in this act of 1870 is no mention of any exemption, nothing to suggest that the legislature intended that this roving authority to take title to lands carried with it the right to withdraw all the lands thus taken from the burdens of taxation, and it would be clearly in violation of the accepted rule of construction in respect to contracts of exemption to extend the provisions of the exempting clause in the acts of 1859 and 1867 to property, the right to acquire which was conferred solely by the subsequent act.

Again, it is insisted that section 19 of the act of 1859, which was not changed in any subsequent statute, made the exemption conditional upon the fact that the road was commenced within two years and completed within ten years; that, as a matter of fact, this condition was not complied with, and hence, that the exemption failed entirely. The argument is that all tax levies and sales of these lands were only conditionally invalid, and that, the condition failing, the tax sales became operative and the title passed. On the other hand, it is said that this condition was a condition subsequent; that during the time prescribed in the condition the lands were exempt from taxation, even though after that time proceedings might be instituted under special warrant of the legislature for the assessment and collection of taxes thereon, and hence, that all proceedings instituted and carried through during the pendency of such time of exemption were absolutely void. We do not deem it necessary to decide this

question, and only refer to it as suggesting equitable considerations against any expansion of the claimed exemption.

But, further and chiefly, the only exemption was from taxation, and it is a general rule of construction that a clause exempting from taxation does not release the property so exempted from liability for assessments for local improvements. *Sheehan Jr.* v. *The Good Samaritan Hospital*, 50 Missouri, 155; *Buffalo City Cemetery* v. *Buffalo*, 46 N. Y. 506; *Paterson* v. *Society for establishing Useful Manufactures*, 24 N. J. Law, 385; *State* v. *Newark*, 35 N. J. Law, 157. This question was considered in this court in *Illinois Central Railroad* v. *Decatur*, 147 U. S. 190. The exemption in that case was "from all taxes under the laws of this State," (Illinois) and it was held that that clause did not relieve the property from the burden of special assessments imposed to pay the cost of local improvements. The question was discussed at some length and the various authorities reviewed in the opinion then delivered.

That is also the settled law of the State of Mississippi. *Daily* v. *Swope*, 47 Mississippi, 367; *Vasser* v. *George*, Id. 713; *Macon* v. *Patty*, 57 Mississippi, 378. In the first two of these cases it was held, not only that special assessments for local improvements did not come within the constitutional limitations as to taxation, but also that the construction and repair of levees were to be regarded as local improvements for which the property specially benefited might be assessed. We quote from *Vasser* v. *George*, page 721:

"We are content to refer to our views on this subject, just delivered in *Daily* v. *Swope*. In that case we reached the conclusion that local assessments for local improvements were not embraced in the twentieth section of the twelfth article [said section reading 'taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law,'] but were referable to the general power of taxation, which was supreme, unless restrained by the Constitution of the United States, or of the State. The limitation upon the power in that section only applies and governs taxes levied for the

usual, ordinary and general purposes of the state, county and incorporated city or town, and does not include special assessments for local public objects for the purpose of ameliorating property and enhancing its value, and also contributing to the general convenience, health or welfare of the community. That, in apportioning such assessments, the legislature or local taxing body may levy them on the basis of special benefits received, because of the improvement made. And, further, may adopt that mode which, in its discretion, seems equitable and just, either by specific taxes or according to value, or in the instance of a very small locality, as a street or square in a city, either the area of the lots, the front measurement or value may be selected. So, too, in the levee district, composed of several counties and parts of counties, lands in the river counties, which are supposed to receive the largest benefit, may be assessed higher than those more remote. The legislature may classify the lands and tax accordingly."

That such is now the settled law in Mississippi is not denied by counsel for complainants, but it is insisted that these decisions were subsequent to the vesting of title to those lands in the railroad company; that at that time the rule of decision in the State was different, and that the rights of the railroad company were created and vested under the rule as then announced, and also that no subsequent change in decision could disturb the rights created in reliance upon the previous rule. In support of this they refer to *Southern Railroad Company* v. *Jackson*, 38 Mississippi, 334, but that case does not sustain their contention. In it the railroad company claimed under a statute, providing "that the stock, fixtures and property of said company shall be exempt from taxation," but the taxes which were held included within the exemption were the general taxes of the city for corporate purposes. There was no special assessment for local improvements on property benefited thereby, but simply the ordinary taxes levied for corporate purposes, including, it is true, among them matters of public improvement. Such taxes come strictly within the provisions in respect to taxation.

A city is a municipal corporation, a political subdivision of the State, charged with certain specified duties of government within its territorial limits, and for the full discharge of those duties it is authorized to levy taxes. In this respect it does not differ from a county, and although some of the funds derived from a city tax may have been used for public improvement, that does not change the character of the tax. It does not cease to be a tax properly so called, any more than would a tax levied by the State if a portion of the funds raised thereby were invested in the building of a capitol, or any other public improvement. This is the only decision of the Supreme Court of the State to which our attention is directed as enunciating a doctrine different from that laid down in the cases in 47 and 57 Mississippi, *supra*. The rule therefore established in Mississippi is in harmony with that recognized generally elsewhere, to the effect that special assessments for local improvements are not within the purview of either constitutional limitations in respect to taxation or general exemptions from taxation. It follows, therefore, that the exemption in this charter in no manner released the property from the burden of the special assessments for the construction and repair of the levees.

These special assessments for levee improvements culminated in sales and deeds under express authority of the statutes of the State, and by them a perfect title was transferred, which finally passed to the defendant. No defects are pointed out by the complainants in these proceedings — at least, none which go so far as to vitiate those proceedings if the property was subject to such assessments. This conclusion disposes of the principal question in this case.

We may, however, go further and consider some other matters in reference to these assessments. On March 16, 1872, the legislature passed an act to facilitate the construction of the railroad, Laws Miss. 1872, c. 75, p. 313, section 3 of which reads:

"That all lands which have heretofore been purchased by or forfeited to the State of Mississippi, for taxes due and unpaid thereon, and which have been sold to said Selma, Marion and Memphis Railroad Company by the original owners of the

same, shall be sold to said railroad company by the auditor of public accounts, at two cents per acre, upon the presentation of satisfactory evidence of titles to said railroad company, from said original owners, and satisfactory proof that not less than twenty-five miles of said road have been constructed: *Provided*, The title to the lands shall have been conveyed by said owners to said company, prior to the passage of this act, and that in all cases where the said lands have been forfeited to or purchased by any of the levee boards in the levee districts in this State, in which any of the said lands lie, and are now held or claimed by any of the said levee boards for the non-payment of the levee taxes, and where the title is held by said railroad company, said levee boards are hereby required to arrange for the payment of said taxes by receiving in payment of the same, any of the bonds of the levee boards: *Provided*, That if the said Selma, Marion and Memphis railroad shall receive the $4000.00 subsidy per mile, the said railroad shall pay into the state treasury one and one half of one per cent on the gross earnings of said road, for every mile of said road in this State, beginning two years after they receive the first subsidy: *Provided further*, That this tax shall only be levied until said railroad company shall be required to pay tax on its property."

Under the authority of this statute the auditor conveyed these lands to the company by deeds which recited that the lands had been "sold to the State of Mississippi for taxes due the said State," and that the company had paid into the state treasury two cents per acre "in full of all state and county taxes due thereon to the present date." No reference was made in these deeds to the levee taxes; no recital of any payment of them, or of any adjustments with the levee commissioners. Complainants contend that the deeds are themselves evidence of a prior payment and discharge of the levee taxes, on the theory that such payment was a statutory prerequisite to the conveyance by the auditor. *Nofire* v. *United States*, 164 U. S. 657. We do not so understand the force of the statute. The transactions with the auditor and with the levee board were independent of each other. The auditor sold and

conveyed at two cents an acre for all state and county taxes, *i.e.*, all taxes which the State had full authority over, and which it could compromise at any sum. The levee board held the lands in trust and the company was required to pay all levee taxes in full, either in cash or in levee bonds, the obligations for which the lands were held. The two tribunals acted separately. Neither's action was conditioned upon that of the other. And proof of the action of one is no evidence of the action of the other.

It is true that the punctuation of the statute gives plausibility to a different construction, but it is well settled that punctuation is not decisive. A colon after the word "act" in the first proviso would have made the meaning more apparent. A proviso is not always a condition, much less a condition precedent. As, for instance, the last two provisos in this section. There is no evidence in the record of the payment of the levee taxes by the railroad company, or any one for it, or for the complainants. On the other hand, it does affirmatively appear that the title held by the levee board to these lands has passed to the defendant. In order to a clear understanding of this, reference must be had to the legislation of the State in respect to levee construction and repair.

The levee system was inaugurated prior to the civil war, and some work was done thereon and some debts contracted thereby. On February 13, 1867, Laws Miss. 1867, p. 237, an act was passed creating a board of commissioners, consisting of three persons, for the liquidation of all outstanding liabilities incurred for levee purposes, providing for the issue of bonds in satisfaction of such liabilities, and an annual assessment of five cents an acre on certain lands and three cents per acre on certain other lands supposed to be benefited by the construction of the levees; and directing that the fund thereby created, whether in money or land, should be devoted to the payment of such bonds. All the lands in controversy were sold under the authority of this statute for delinquent levee taxes, and purchased by the levee board, and were so held at the time of the conveyances to the railroad company. Thereafter and in 1877 Josiah Green, the holder of $85,000 of the

levee bonds, filed a bill in the chancery court of Hinds County, in behalf of himself and all other holders of said bonds, against the state auditor and state treasurer (who had been by statute substituted for the levee board) to subject these lands to the satisfaction of such indebtedness. On appeal to the Supreme Court of the State it was held, *Gibbs* v. *Green*, 54 Mississippi, 592, that the act of February 13, 1867, was a legislative proposition to the holders of claims against the original levee board, which, when accepted by such claimants, created a contract beyond the power of the State to disturb, and that under that contract the taxes received and the lands sold for non-payment of taxes became a trust fund, which could not be diverted by any subsequent act of the legislature. In pursuance of that decision a decree was finally entered, ordering a sale of all such lands so conveyed to the levee board for non-payment of delinquent levee taxes in satisfaction of the claims of these bondholders. These lands were sold under that decree and the title acquired thereby passed by subsequent mesne conveyances to the defendant. It is insisted by the complainants that as the railroad company was not a party to these proceedings, they do not conclude its rights; that they were, as to it, and parties holding under it, *res inter alios acta*. Be that as it may, this decision, followed as it was by subsequent decisions of the Supreme Court, is a construction of the act of 1867 which is not only binding upon this court but also commends itself to our judgment as a just recognition of the force of legislative contracts. Inasmuch as we have seen the auditor's deeds are not to be taken as an adjudication that such levee taxes had been paid by the railroad company, and as it was, under the true construction of the statute of 1867, the intent of the legislature that in addition to the two per cent for general taxes all levee assessments should be paid and discharged by the railroad company, and as there is no evidence before us that such payment and discharge was made, it follows that all the title acquired by the levee board, under the act of 1867, has passed to the defendant.

The examination we have thus made of the tax questions in this case renders unnecessary any inquiry into the validity

of the judicial sales by which the complainants claim to have acquired the title of the railroad company, for by those sales, if they took anything, they took no more than the railroad company had, and whatever title it may ever have had was, as we have seen, divested by the tax proceedings.

The decree of the Circuit Court was right, and it is

Affirmed.

FRANCE *v.* UNITED STATES.

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

No. 495. Argued November 13, 1896. — Decided January 4, 1897.

The plaintiffs in error were engaged in the management and conduct of two lotteries at Covington, Kentucky, opposite Cincinnati, Ohio, where there were drawings twice a day. They had agents in Cincinnati, each of whom, before drawing, sent a messenger to Covington, with a paper showing the various numbers chosen and the amounts bet, and the money, less his commissions. After the drawing, what was termed "an official print" was made, which consisted of a printed sheet showing the numbers in their consecutive order as they came out of the wheel and on the line beneath the numbers were arranged in their natural order. In addition to the "official print" these messengers, after the drawing had been had, brought back to the agents at Cincinnati what was known as "hit-slips." These were slips of paper with nothing but the winning numbers on them, together with a statement of a sum in dollars. The money to the amount named on the paper was brought over by the messenger to the agent in Cincinnati. Some of these messengers were arrested as they were coming from Covington, walking across the bridge, and just as they came to the Cincinnati side. They had with them in their pockets the official sheet and the hit-slips, as above described, containing the result of the drawing, which had just been concluded at Covington. They had the money to pay the bets, and were on their way to the various agents in the city of Cincinnati. Procuring the carrying of these papers was the overt act towards the accomplishment of the conspiracy upon which the conviction of plaintiffs in error was based. There was nothing on any of the papers which showed that any particular person had any interest in or claim to any money which the messengers carried. The plaintiffs in error were indicted, under Rev. Stat. § 5440, for conspiring to violate the act of March 2, 1895, c. 191, "for the suppression of lottery traffic through national and interstate commerce."

Held, that the carrying of such books and papers from Kentucky to Ohio was not, within the meaning of the statute, a carrying of a paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert, or similar enterprise, offering prizes depending upon lot or chance, as provided for in such statute; as the lottery had already been drawn; as the papers carried by the messengers were not then dependent upon the event of any lottery and as the language as used in the statute looks to the future.

THE case is stated in the opinion.

Mr. A. W. Goldsmith and *Mr. James C. Carter* for plaintiffs in error. *Mr. Edward Colston* and *Mr. George Hoadly, Jr.*, were on Mr. Goldsmith's brief.

Mr. Assistant Attorney General Whitney for defendants in error.

Mr. JUSTICE PECKHAM delivered the opinion of the court.

The plaintiffs in error were indicted for and convicted of the offence of conspiracy, under section 5440 of the Revised Statutes. They were charged in the indictment with conspiring to violate the act of Congress, passed March 2, 1895, c. 191, for the suppression of lottery traffic through national and interstate commerce, etc. 28 Stat. 963.

The section of the Revised Statutes and the first section of the act, above referred to, are set forth in the margin.[1]

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[1] SEC. 5440. If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years.

ACT OF 1895.

CHAP. 191. An act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United

The indictment contains six counts, charging overt acts on the part of plaintiffs in error, to have been committed in Hamilton County, Ohio, in October, 1895.

The trial of the plaintiffs in error having been duly commenced in the District Court of the United States for the Southern District of Ohio, it appeared in the course of the evidence then taken that there were two lotteries, called respectively the "H" or "Henry Lottery," and the "K" or "Kentucky Lottery," both of which were carried on in Covington, Kentucky, under the management of one of the plaintiffs in error, the others being engaged in the business under his direction.

Witnesses for the government testified to the manner in which the lotteries in question were conducted. It was shown by their evidence that the main office where the drawing was done was situated on the Kentucky side of the river and in the city of Covington. There was a drawing twice in each day for each lottery. The drawing in each case was from a glass wheel in which the numbers, from 1 to 78, were placed, and one number was drawn out at a time until 12 had been drawn. The betting is in regard to the sequence in which the numbers will be drawn from the wheel, and three numbers are usually chosen, such for instance as 7, 28, 16. This is called a "gig." If the player bet on these numbers and they are drawn from the wheel in that order, he has won his bet. There are agents for these lotteries, as some of the witnesses said, "in every street in Cincinnati." An agent has an office consisting of a single room, where he receives persons who

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States, or carried from one State to another in the United States, any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in the first offence by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both, and in the second and after offences by such imprisonment only.

propose to patronize the lottery. The person, coming to the office, chooses his numbers; the agent gives him a paper containing nothing but the numbers and in the sequence which he has chosen, two copies of which the agent keeps. At a certain hour before the drawing of the lottery in Covington, each agent in Cincinnati sends his messenger with a paper showing the various numbers chosen and the amounts bet, and he also sends the money, less his commissions, to the main office across the river. These messengers must arrive a certain time before the drawing or they will not be permitted to share in the drawing which is then about to take place. After the drawing, what is termed an "official print" is made, which consists of a printed sheet showing the numbers in their consecutive order as they came out of the wheel and on the line beneath, the numbers are arranged in their natural order. This "official print" is in the form of a book, and after the drawing it is returned to the agent in Cincinnati, who on his part sends it back again just prior to the next drawing. In addition to the "official print," these messengers, after the drawing has been had, bring back to the agents at Cincinnati what is known as "hit-slips." These are slips of paper with nothing but the winning numbers on them, together with a statement of a sum in dollars. The agent understands this named sum to be the amount payable to those who have won upon the last drawing. The identification of the drawing at which the winning numbers came out is made by numbering each drawing. The money to the amount named on the paper is brought over by the messenger to the agent in Cincinnati.

Some of these messengers were arrested as they were coming from Covington, walking across the bridge, and just as they came to the Cincinnati side. They had with them in their pockets the official sheet and the hit-slips, as above described, containing the result of the drawing, which had just been concluded at Covington. They had the money to pay the bets, and were on their way to the various agents in the city of Cincinnati. Procuring the carrying of these papers was the overt act towards the accomplishment of the

conspiracy upon which the conviction of plaintiffs in error was based.

There was nothing on any of the papers which showed that any particular person had any interest in or claim to any money which the messengers carried. The papers were simply the means used to impart information from the main office in Covington to the agent in Cincinnati as to the result of the drawing of the particular lottery. They in fact referred entirely to a past drawing, and even as to that they furnished no evidence that any particular person or that the bearer had any interest in the result of the lottery already drawn. They were addressed to no one, and were signed by no one. Nothing but figures were there. None but the agent had the necessary information as to the persons who were interested in, or who might be entitled to any money by reason of the result of, the drawing. The papers did not purport to be or to represent a ticket, chance, share or interest in or dependent upon the event of any lottery.

For the purpose of determining one of the questions raised by counsel for the plaintiffs in error, it may be assumed that the evidence was sufficient to justify the jury in finding plaintiffs in error guilty of the conspiracy to do the acts above mentioned, either as managers of a lottery in Covington, or as agents in transmitting papers and books containing the matter above stated. After the evidence was all in, each of the plaintiffs in error asked the court to charge the jury that in regard to his individual case the jury should be directed to find a verdict of not guilty, and that as to him the United States had failed to make out a case, and that the verdict of the jury should, therefore, be in his favor. The court refused to charge as requested, and each defendant duly excepted to such refusal. We think the request was proper and should have been granted by the court.

Some criticism is made by the learned counsel for the defendant in error, based upon the particular language of the request to charge. He says that the only request was made on the part of the defendant A. L. France, and that such request in regard to him was joined in by the other

defendants, so that their request was that he (France) should be acquitted by the direction of the court, and that no request was made in their own behalf. Possibly the language appearing in the record, when read without the context, is capable of such a construction, but it is apparent from the questions in the case and the evidence which had been taken regarding all the defendants, that such was neither the intention of the counsel for the plaintiffs in error nor the understanding of the court. The plain intention was that the same directions which were asked for in regard to the defendant A. L. France were also asked for individually and for himself by each of the other defendants, so that each made the request that the court should charge that he individually was entitled to a verdict of not guilty, upon the same grounds set forth in the special charge asked for by the defendant A. L. France.

When proper and legal evidence has been given on the part of the government in a criminal trial, which if believed is sufficient in law to make out a crime and to sustain a conviction of the person on trial, a request to the court to direct the jury to acquit must be refused, and an exception to such refusal raises no question of law, even though the evidence on the part of the defendant is much stronger and more satisfactory than that for the government. The question under such circumstances is one for the jury and not for the court. In the view we take of this case, however, the request did not depend upon the credibility of witnesses or upon the weight to be given to the evidence in the case. We assume the truth of all the evidence given on the part of the government with all proper inferences which may be drawn from it, but we do not think that such evidence brought plaintiffs in error within the provisions of the statute in regard to lotteries above set forth. Therefore a motion to direct an acquittal raised a question of law, and an exception to the denial of the motion is properly reviewable here.

We are of opinion that in this case the messengers carrying across the border from Kentucky to Ohio the books and papers above referred to did not within the meaning of the statute carry any paper, certificate or instrument purporting

to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert, or similar enterprise, offering prizes depending upon lot or chance, as provided for in such statute. The lottery had already been drawn; the papers carried by the messengers were not then dependent upon the event of any lottery. The language as used in the statute looks to the future. The papers must purport to be or represent an existing chance or interest which is dependent upon the event of a future drawing of the lottery. A paper that contains nothing but figures which in fact relate to a drawing that has already been completed, one that has passed and gone, cannot properly be said to be a paper, certificate or instrument as described in the statute. It purports to show no interest in or dependent upon the event of any lottery. If the lottery has been drawn, the interest is no longer dependent upon it. The condition upon which the bet or the interest was dependent has happened; the solution of the problem has already been arrived at; the bet has already been determined. The bare statement of that solution or determination placed on paper does not impart to that paper the character of a certificate or instrument purporting to be or represent a ticket, etc., dependent upon the event of a lottery. From the statement upon the paper, the agent may acquire the knowledge which will enable him to say who has won, but the book or the paper does not purport to be and is not a certificate, etc., within the act of Congress.

There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati.

The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment,

we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation.

It has also been most strongly urged on the part of the plaintiffs in error that they were not, as shown by the evidence, engaged in the transaction of anything in the nature of interstate commerce, and that Congress had no constitutional right to pass an act which should be applicable to them under the circumstances disclosed by the proof in this case. It was argued that the subject was beyond the jurisdiction of Congress in the exercise of its powers concerning national or interstate commerce. The arguments upon this subject have on both sides been able and interesting, but as our decision in relation to the scope of the statute necessarily leads to a reversal of the judgment and a discharge of the plaintiffs in error, it is not necessary for us to decide the question as to the power of Congress, and we therefore express no opinion in regard to it.

The judgment must be reversed, and the cause remanded to the District Court of the United States for the Southern District of Ohio, with directions to set aside the judgment and discharge the plaintiffs in error.

Mr. Justice Harlan dissented.

BUSHNELL *v.* LELAND.

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

No. 497. Argued December 14, 15, 1896. — Decided January 4, 1897.

It has been repeatedly settled by this court that the Comptroller of the Currency has power to appoint a receiver to a defaulting or insolvent national bank, and to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for such action; and the contention that there is presented in this case a constitutional question not considered in the prior cases is an assumption with no foundation in fact.

THE case is stated in the opinion.

Mr. John J. Crawford for plaintiff in errror.

Mr. Frederick W. Holden and *Mr. Edward Winslow Paige* for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff in error being a stockholder in the State National Bank of Wichita, Kansas, was sued to enforce payment of the double liability imposed by law. The pleadings aver the existence of the legal prerequisites to the stockholder's liability, viz., the subscription by defendant to the stock, the due organization of and the authority conferred on the bank to engage in business, the suspension, the valid appointment of a receiver, and a ratable assessment made by the Comptroller on the stockholders in conformity to law. Revised Statutes, §§ 5151, 5234.

At the trial objection was taken and reserved to the offering in evidence of the assessment made by the Comptroller of the Currency, and upon the close of the testimony, the ground of this objection was reiterated by way of exception to the refusal of the court to give the following instruction:

"Counsel for the defendant then moved the court to in-

struct the jury to return a verdict for the defendant, upon the ground that there is no evidence in the case to show that the action is brought for the purpose of enforcing any claim or lien of the United States; that, so far as appears from the evidence, the individual liability of the defendant as a stockholder of the State National Bank of Wichita is sought to be enforced merely for the purpose of paying the claims of private parties; that there is no evidence in this case to show that such parties are creditors of the State National Bank of Wichita, and there is no evidence to show that the fact that these parties are creditors of the State National Bank of Wichita has ever been established by any decision or order of a court of competent jurisdiction; that, so far as appears, the only decision on this point is that of the Comptroller of the Currency, and that his decision is of no force, for the reason that it is an attempt of an executive officer to exercise judicial functions."

A verdict was returned in favor of the plaintiff, and to the judgment thereon this writ of error is prosecuted.

The assignments of error are based solely on the grounds covered by the exception taken to the introduction of testimony, the refusal to charge, as above stated, and to an asserted want of jurisdiction in the court below. All these alleged errors may be reduced to the single contention that under the national banking law the Comptroller of the Currency is without power to appoint a receiver to a defaulting or insolvent national bank, or to call for a ratable assessment upon the stockholders of such bank, without a previous judicial ascertainment of the necessity for the appointment of the receiver and of the existence of the liabilities of the bank, and that the lodgment of authority in the Comptroller, empowering him either to appoint a receiver or to make a ratable call upon the stockholders, is tantamount to vesting that officer with judicial power in violation of the Constitution. All of these contentions have been long since settled, and are not open to further discussion. *Kennedy* v. *Gibson*, 8 Wall. 498; *Casey* v. *Galli*, 94 U. S. 673; *United States* v. *Knox*, 102 U. S. 422. When, after the adjudication in *Kennedy* v. *Gib-*

son, the questions were for a second time pressed in argument, the court contented itself with calling attention to the fact that they had been affirmatively adjudicated upon and were concluded. We see no reason now to reopen controversies which were then treated as concluded and have since been approved and in all respects fully affirmed. The contention that there is now presented in argument a grave constitutional question, which was not pressed or considered in the prior cases, is a mere assumption which has no foundation in fact. A casual inspection of the points pressed by counsel in *Casey* v. *Galli* makes evident the fact that the very arguments now advanced were then urged upon the court and held to be untenable.

Judgment affirmed.

UNITED STATES AND THE SIOUX NATION *v.* NORTHWESTERN EXPRESS STAGE AND TRANSPORTATION COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

No. 213. Submitted December 7, 1896. — Decided January 4, 1897.

A corporation organized under the laws of a State is a citizen of the United States within the meaning of that term as used in the act of March 3, 1891, c. 538, concerning claims arising from Indian depredations.

THE case is stated in the opinion.

Mr. Assistant Attorney General Howry and *Mr. Alexander Porter Morse* for appellants.

Mr. John B. Sanborn, Mr. Charles King and *Mr. William B. King* for appellees.

MR. JUSTICE WHITE delivered the opinion of the court.

This appeal was taken from a judgment of the Court of Claims awarding to the appellees the sum of seven hundred

and fifty dollars upon the following state of facts found by the court, to wit:

"I. The claimant is and was at the time of the depredation hereinafter mentioned a corporation created under and by virtue of the laws of the State of Minnesota, and was transacting the business of a common carrier in conveying passengers and freight at the time referred to.

"II. The claimant during the year 1879 was engaged in carrying the mails and doing the business of a common carrier from Bismarck, Dakota, to Deadwood and the Black Hills upon the Territorial road from Bismarck to Cook station, in part through the Great Sioux reservation.

"III. On the 5th of February, 1879, near Cedar Canyon, property belonging to the claimant, consisting of four horses and their harness, was taken or destroyed by Indians of the defendant's tribe, the same being of the value of $750. The defendant Indians were at the time in amity with the United States, and the depredation was committed without just cause or provocation on the part of the claimant or its agents, and the property has not been returned or paid for. The claim has not been approved or allowed by the Secretary of the Interior."

The Court of Claims decided on the facts so found as a conclusion of law, that the claimant, by reason of its incorporation by a State of the Union, must be conclusively presumed to be a citizen of the United States for the purposes of this action.

The act of March 3, 1891, c. 538, 26 Stat. 851, is entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations." By the first section of the act jurisdiction and authority was conferred upon the Court of Claims, in addition to the jurisdiction already possessed by the court, to inquire into and finally adjudicate "all claims for property of citizens of the United States" taken or destroyed by Indians, under circumstances specified in the act. The sole question presented by the appeal, therefore, is as to whether, under a proper construction of the act referred to, a corporation of a State for the purpose of the act is embraced within the designation "citizens of the United States."

The act was considered in *Johnson* v. *United States*, 160 U. S. 546, and we there held that a person who was not a citizen of the United States at the time of an alleged appropriation of his property by a tribe of Indians was not entitled to maintain an action in the Court of Claims under the act in question. There was not in that case, however, any assertion that the claimant was a citizen of a State as distinguished from a citizen of the United States. It was also declared that as the Court of Claims had no general jurisdiction over claims against the United States, it could take cognizance only of such matters as by the terms of the act of Congress were committed to it. Whilst undoubtedly in a purely technical and abstract sense citizenship of one of the States may not include citizenship of the United States, this does not meet the question which we are to construe, which is, what is the meaning of the words "citizens of the United States" as used in the statute. Unquestionably, in the general and common acceptation, a citizen of the State is considered as synonymous with citizen of the United States, and the one is therefore treated as expressive of the other. This flows from the fact that the one is normally and usually the other, and where such is not the case, it is purely exceptional and uncommon. These considerations give rise to an ambiguity which we must solve, not by reference to a mere abstract technicality, but by that cardinal rule which commands that we seek out and apply the evident purpose intended to be accomplished by the law-making power.

Congress has frequently in its legislation, as also the treaty-making power, used the words "citizens of the United States" in the broadest sense, and as embracing corporations created by state law. Thus, in section 2319 of the Revised Statutes, the right to purchase mineral deposits in the public lands was conferred upon "citizens of the United States and those who have declared their intention to become such." Section 2321, however, in regulating the mode by which the fact of citizenship should be established, provided that, "in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof," the fact should be evidenced

"by the filing of a certified copy of their charter or certificate of incorporation." By the French Spoliation act of January 20, 1885, c. 25, 23 Stat. 283, authority was conferred on the Court of Claims to adjudicate upon certain claims of "citizens of the United States or their legal representatives." The Court of Claims, however, made no distinction in the exercise of jurisdiction between the claims of natural persons or of corporations. It entered upon no inquiry as to whether the stockholders of such corporations were composed in whole or in part of other than citizens of the United States. Congress appropriated for the payment of judgments thus rendered in favor of corporations. See 26 Stat. 905, 907, where appropriations were made in favor of the receiver of a corporation styled the Baltimore Insurance Company.

In various treaties entered into by the government, the term "citizens of the United States" has been used in the general sense already referred to. Thus in the treaty with Mexico relative to the adjustment of unsettled claims, 15 Stat. 679, 680, jurisdiction is granted to a commission to consider "all claims on the part of corporations, companies or private individuals, citizens of the United States, upon the government of the Mexican Republic." Similar language was also employed in the treaties with Venezuela, 16 Stat. 713, 714; with Peru, 16 Stat. 751, 752; with Great Britain, 17 Stat. 863, 867; and with France, 21 Stat. 673, 674.

In various decisions of this court, commencing with *Railroad Company* v. *Letson*, 2 How. 497, it has been adjudged that for the purpose of suing and being sued in the courts of the United States, a corporation of a State should be deemed a citizen of a State, and for the purposes of jurisdiction, it would be conclusively presumed that all the stockholders were citizens of the State, which, by its laws, created the corporation. *Muller* v. *Dows*, 94 U. S. 444, 445; *St. Louis & San Francisco Railway* v. *James*, 161 U. S. 545.

With this frequent use by Congress of the words "citizens of the United States" as embracing a corporation of a State, it remains only to be ascertained from the nature of the remedy proposed to be effected by the Indian depredation act

whether the words were used in the act in their general signification.

The act in question was a provision made by the United States as the guardian of the Indians, controlling as well their persons as their property, designed to make provision for the payment of the injuries committed by its wards. It certainly contemplated that citizens of the United States, even strictly speaking, should be made whole for the losses they might have sustained. But it is evident that cases might arise, where, in order to make restitution to citizens of the United States, the term in question would require a construction embracing Federal and state corporations. For, as the legal title to the property of a corporation is generally in the corporation, claims for damages to such property could not be presented in the names of the several stockholders. To deny relief to such a corporation would be practically therefore to refuse redress to citizens of the United States.

It must have been contemplated, therefore, that a corporation thus chartered by Congress was to be treated under the terms of the act herein referred to as a citizen of the United States for the purposes thereof; and the same reasoning which thus operates to bring a Federal corporation within the terms of the act, leads also to the necessity of including corporations of the several States of the Union.

It is true, as argued, that in some cases if corporations were embraced within the terms of the act, an alien who was a corporator might be benefited. But the ascertainment of the purposes of Congress by this argument of inconvenience on the one hand is completely destroyed by the overwhelming preponderance of inconvenience which would exist on the other; for, doubtless, whilst the alien corporator may be an exception, the corporator, who is both a citizen of the State and a citizen of the United States, is the rule. To follow the argument therefore would make the exception dominate and destroy the rule.

As the settled law was that for the purposes of Federal jurisdiction such corporations are conclusively presumed to be composed of citizens of the States, and as such construction was

manifestly frequently approved by the reënactment of provisions of the statutes conferring jurisdiction without an attempt to alter the presumption thus indulged in, it is proper to consider that such corporations were within the purview of words as used in the remedial act.

Judgment affirmed.

Ex Parte JONES.

ORIGINAL.

Submitted December 7, 1896. — Decided January 4, 1897.

Since the act of August 13, 1888, c. 866, took effect, the jurisdiction of a Circuit Court of the United States over an action brought by a citizen of another State against a national bank established and doing business in a State within the circuit, depends upon citizenship alone, and if that jurisdiction be invoked on that ground, the jurisdiction of the Court of Appeals of the circuit is final, even though another ground for jurisdiction in the Circuit Court be developed in the course of the proceedings.

This was a petition for an order to show cause why a writ of *mandamus* should not issue to the Circuit Court of Appeals for the First Circuit, to allow an appeal to this court from a decree of that court affirming a decree of the Circuit Court for the District of Massachusetts, dismissing the bill of *Charles F. Jones* against *The Merchants' National Bank*, of Boston; and also for a citation to such bank to appear and show cause why such decree should not be corrected.

The petition set forth, in substance, that petitioner recovered a judgment in the Circuit Court for the District of Massachusetts against one Swift, for the sum of $18,876.82, upon an action of contract; that Swift paid the amount of the judgment to the clerk of the court, who entered satisfaction of the same; that the money so received by the clerk was deposited with the Merchants' National Bank for the benefit of petitioner, as he claims; that the clerk declined to instruct the bank to pay the money over, whereupon petitioner brought

his bill against the bank for an account of such money, to which bill the bank demurred; that the court sustained the demurrer and dismissed his bill, whereupon petitioner appealed to the Circuit Court of Appeals, which affirmed the decree of the Circuit Court.

Petitioner then claimed an appeal to this court, and presented an application for the allowance of such appeal to the Court of Appeals, which was denied, and he thereupon made this application for a *mandamus* to allow the appeal.

Mr. F. A. Brooks and *Mr. Frank W. Hackett* for petitioner.

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

The Circuit Court of Appeals refused to allow an appeal in this case, upon the ground that its jurisdiction of the case was "dependent entirely upon the opposite parties to the suit or controversy, being . . . citizens of different States," and, therefore, under section six of the Court of Appeals act of March, 1891, its decree was final and not the subject of an appeal to this court.

Prior to the act of July 12, 1882, c. 290, 22 Stat. 162, and the jurisdictional act of March 3, 1887, c. 373, 24 Stat. 552, as revised by the act of August 13, 1888, c. 866, 25 Stat. 433, 436, it had always been held that suits against corporations, organized under acts of Congress, were suits arising under the laws of the United States, and, therefore, cognizable by the Circuit Courts, regardless of the citizenship of the parties. This doctrine was applied to the United States Bank more than seventy years ago in *Osborn* v. *United States Bank*, 9 Wheat. 738, 819, and more recently to railways chartered under acts of Congress, *Pacific Railroad Removal cases*, 115 U. S. 1, even since the Court of Appeals act was passed. *Northern Pacific Railroad* v. *Amato*, 144 U. S. 465; *Union Pacific Railway* v. *Harris*, 158 U. S. 326.

But by the act of 1882, and more recently by section four of the acts of March 3, 1887, and August 13, 1888, the privi-

lege of suing and being sued under this clause was taken away from national banks by the following language:

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction, other than such as they would have in cases between individual citizens of the same States."

In *Leather Mfrs. Bank* v. *Cooper*, 120 U. S. 778, it was held by this court that, under the act of 1882, which was similar in its terms, an action against a national bank could not be removed to the Federal court, "unless a similar suit could be entertained by the same court by or against a state bank in like situation with the national bank. Consequently, so long as the act of 1882 was in force, nothing in the way of jurisdiction could be claimed by a national bank because of the source of its incorporation. A national bank was by that statute placed before the law in this respect the same as a bank not organized under the laws of the United States." See also *Whittemore* v. *Amoskeag Nat. Bank*, 134 U. S. 527; *Petri* v. *Commercial Bank*, 142 U. S. 644. The section above cited from the act of 1888 undoubtedly deprives these banks of the privilege of suing or being sued, except in cases where diversity of citizenship would authorize an action to be brought; and in such cases the decree of the Court of Appeals is final.

In this case the original bill averred the complainant to be a citizen of Pennsylvania and the defendant to be a national bank, duly established under the laws of the United States, having its place of business at Boston, and a citizen of the State of Massachusetts. As the bill was filed after the act of 1888 took effect, it must be deemed to be a suit dependent upon citizenship alone. But even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of

citizenship. *Colorado Central Mining Co.* v. *Turck*, 150 U. S. 138; *Borgmeyer* v. *Idler*, 159 U. S. 408.

The petition for *mandamus* must be

Denied.

CARVER *v.* UNITED STATES.

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

No. 588. Submitted December 15, 1896. — Decided January 4, 1897.

In a trial for murder, if the declarations of the deceased are offered, the fact that she had received extreme unction has a tendency to show that she must have known that she was in *articulo mortis*, and it is no error to admit evidence of it.

Where the whole or a part of a conversation has been put in evidence by the government on the trial of a person accused of the commission of crime, the other party is entitled to explain, vary or contradict it.

When the dying declarations of the deceased are admitted on the trial of a person accused of the crime of murder, statements made by the deceased in apparent contradiction to those declarations are admissible.

This was a writ of error to review the conviction of the plaintiff in error for the murder of one Anna Maledon at Muskogee, in the Creek Nation of the Indian Territory. The conviction was a second one for the same offence, the first having been set aside by this court upon the ground that improper evidence had been received of an alleged dying declaration. 160 U. S. 553.

The evidence tended to show that Carver, a man about twenty-five years of age, was grossly intemperate in his habits, and upon the day the homicide took place had been drinking a mixture of hard cider and Jamaica ginger, and was so intoxicated that he could hardly walk; that deceased, who had been his mistress for several years, had agreed to meet him in the evening at a certain mill crossing in Muskogee. They met at about half-past eight, when he soon began to threaten her that he would, before daylight, kill her and one Walker, of

whom he appeared to have been jealous. He was armed with a revolver and his conduct indicated that he was crazed with liquor. During his walk with the deceased, he met a man whom he drove off at the point of his pistol, and amused himself by firing it off at a lot of cattle, which were within range. Meeting one Crittenden, the deceased, believing that Carver was unfit to care for her and accompany her, asked Crittenden, with whom she was acquainted, to take her home. Crittenden started with them, when Carver got out his pistol again, flourished it about and fired it off twice, once in the air and once in the ground. After walking some fifty yards or more Carver again took out his pistol, flourished it around, and, either intentionally or accidentally, shot deceased in the back and mortally wounded her.

Mr. William M. Cravens and *Mr. J. Warren Reed* for plaintiff in error.

Mr. Assistant Attorney General Dickinson for defendants in error.

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

1. Defendant's fourth and fifth assignments of error were taken to the action of the court in permitting the district attorney to prove that a Catholic priest was summoned for Anna Maledon; "that she took the sacrament after she was shot," and that he "performed the last rites of the Catholic church in her behalf." We see no objection to this testimony, and think it was within the discretion of the court to admit it. *Alexander* v. *United States*, 138 U. S. 353, 357. Dying declarations are an exception to the general rule that only sworn testimony can be received, the fear of impending death being assumed to be as powerful an incentive to truth as the obligation of an oath. The fact that the deceased had received extreme unction had some tendency to show that she must have known that she was in *articulo mortis*, and if the

jury were of opinion that the fact that she received it lent an additional sanctity to her statement, it was no error to admit evidence of it. If not, it could do the defendant no harm. It was one of the facts, showing the circumstances under which the declaration was made, that the government was entitled to lay before the jury. In *Regina* v. *Howell*, 1 Den. C. C. 1, the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. Evidence that he was a Roman Catholic, and that an offer was made to fetch a priest, which he declined, appears to have been received without objection, as tending to show that he did not think his end was approaching; but his declaration was held to have been properly received. In *Minton's case*, cited by counsel in *Howell's case*, the fact of a person having received extreme unction was considered evidence that she thought herself in a dying state.

2. The sixth assignment of error was taken to the refusal of the court to permit the defendant to prove by Mary Belstead and Mary Murray the declarations of defendant, and what he said to deceased, and what she said to him, at the place of the fatal shot, immediately after the shot was fired, for the reason that the same was part of the *res gestæ*, and was also a part of the conversation given in evidence by the government witnesses. We fail to understand the theory upon which this testimony was excluded. Hays and Brann, two witnesses for the government, had testified that they had heard the shots fired and the scream of a woman; that Brann started for the place, and met defendant running away; that defendant went back toward the woman, and then returned again, when Brann caught him and took him back to the woman, about thirty yards. About this time Hays came up, and both testified as to the conversation or exclamations that were made, between deceased and the defendant. Defendant's two witnesses, Belstead and Murray, appear to have come up about the same time, and whether the conversation that took place between defendant and deceased at that time was part of the *res gestæ* or not, it is evident that it was practically the same conversation to which the government's witnesses had testified. If it were compe-

tent for one party to prove this conversation, it was equally competent for the other party to prove their version of it. It may not have differed essentially from the government's version, and, it may be, that defendant was not prejudiced by the conversation as actually proved, but where the whole or a part of a conversation has been put in evidence by one party, the other party is entitled to explain, vary or contradict it.

3. There was also error in refusing to permit the defendant to prove by certain witnesses that the deceased, Anna Maledon, made statements to them in apparent contradiction to her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since we think they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have through malice, misapprehension or weakness of mind made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant, *Rex* v. *Pike*, 3 C. & P. 598, or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of rewards or punishment. *State* v. *Elliott*, 45 Iowa, 486; *Commonwealth* v. *Cooper*, 5 Allen, 495; *Goodall* v. *State*, 1 Oregon,

333 ; *Tracy* v. *People*, 97 Illinois, 101 ; *Hill* v. *State*, 64 Mississippi, 431.

It is true, that in respect to other witnesses, a foundation must be laid for evidence of contradictory statements by asking the witness whether he has made such statements, and we have held that where the testimony of a deceased witness, given upon a former trial, was put in evidence, that proof of the death of such witness, subsequent to his former examination, will not dispense with this necessity. *Mattox* v. *United States*, 156 U. S. 237. That case, however, was put upon the ground that the witness had once been examined and cross-examined upon a former trial. We are not inclined to extend it to the case of a dying declaration, where the defendant has no opportunity by cross-examination to show that by reason of mental or physical weakness, or actual hostility felt toward him, the deceased may have been mistaken. Considering the friendly relations which had existed between the defendant and the deceased for a number of years, their apparent attachment for each other, and the alcoholic frenzy under which defendant was apparently laboring at the time, the shooting may possibly not have been with deliberate intent to take the life of the deceased, notwithstanding the threats made by the defendant earlier in the evening. In nearly all the cases in which the question has arisen evidence of other statements by the deceased inconsistent with his dying declarations has been received. *People* v. *Lawrence*, 21 California, 368 (an opinion by Chief Justice Field, now of this court) ; *State* v. *Blackburn*, 80 N. C. 474 ; *McPherson* v. *State*, 9 Yerg. 279 ; *Hurd* v. *People*, 25 Michigan, 405 ; *Battle* v. *State*, 74 Georgia, 101 ; *Felder* v. *State*, 23 Tex. App. 477 ; *Moore* v. *State*, 12 Alabama, 764.

Our attention has been called to but one case to the contrary, viz., *Wroe* v. *State*, 20 Ohio St. 460, cited with apparent approval in the *Mattox case*. But we think, as applied to dying declarations, it is contrary to the weight of authority.

As these declarations are necessarily *ex parte*, we think the defendant is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination. *Rex* v. *Ashton*, 2 Lewin C. C. 147.

Opinion of the Court.

The disposition we have made of these assignments renders it unnecessary to consider the others. The judgment of the court must be

Reversed, the conviction set aside, and a new trial ordered.

Mr. Justice Brewer and Mr. Justice Peckham concurred in reversing upon the sixth assignment only.

DECISIONS ANNOUNCED WITHOUT OPINIONS DURING THE TIME COVERED BY THIS VOLUME.

No. 17. HENRY *v.* ALABAMA AND VICKSBURG RAILROAD COMPANY. Appeal from the Circuit Court of the United States for the Southern District of Mississippi. Submitted October 15, 1896. Decided October 19, 1896. *Per Curiam.* Dismissed with costs, on the authority of *Jacobs* v. *George*, 150 U. S. 415. *Mr. Wade R. Young* for appellant. No appearance for appellee.

No. 20. TUCKER *v.* MCKAY. Appeal from the Circuit Court of the United States for the District of Massachusetts. Argued October 15, 1896. Decided October 19, 1896. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Smith* v. *McKay*, 161 U. S. 355. *Mr. Charles Allen Taber* for appellant. *Mr. James J. Myers* filed a brief for appellee, but the court declined to hear him.

No. 508. KING *v.* UNITED STATES. Error to the Circuit Court of the United States for the Western District of Arkansas. Oct. 19, 1896. Judgment reversed upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law. *Mr. Solicitor General*, *Mr. Assistant Attorney General Whitney* and *Mr. Assistant Attorney General Dickinson* for defendant in error.

No. 333. UNITED STATES *ex rel.* LONG *v.* LOCHREN. Error to the Court of Appeals of the District of Columbia. Submitted October 13, 1896. Decided October 26, 1896. *Per Curiam.* Dismissed without costs to either party, on authority of *United States* v. *Boutwell*, 17 Wall. 604, and other cases. *Mr. Solicitor General* and *Mr. Assistant Attorney General Whitney* for the motion to dismiss. *Mr. Thomas S. Hopkins* and *Mr. Frederick A. Baker* for Long.

Decisions announced without Opinions.

No. 416. WILSON *v.* UNITED STATES. Error to the District Court of the United States for the District of Indiana. Submitted October 22, 1896. Decided November 2, 1896. *Per Curiam.* Judgment affirmed, on the authority of *Rosen* v. *United States*, 161 U. S. 89. *Mr. J. W. Kern* for plaintiff in error. *Mr. Assistant Attorney General Dickinson* for defendants in error.

No. 485. COHEN v. UNITED STATES. Error to the District Court of the United States for the District of Maryland. Submitted October 26, 1896. Decided November 2, 1896. *Per Curiam.* Judgment reversed and cause remanded for further proceedings to be had therein in conformity to law, on the authority of *McElroy* v. *United States*, decided to-day (164 U. S. 76). *Mr. William Colton* for plaintiff in error. *Mr. Assistant Attorney General Whitney* for defendants in error.

No. 90. WASHINGTON, STATE OF, *v.* COOVERT.[1] Appeal from the Circuit Court of the United States for the District of Washington. Submitted October 29, 1896. Decided November 9, 1896. *Per Curiam.* Order reversed with costs, and cause remanded with directions to discharge the writs and dismiss the petitions, on the authority of *Ex parte Royal*, 117 U. S. 241, and *Whitten* v. *Tomlinson*, 160 U. S. 231, 242, and cases cited. *Mr. W. C. Jones* for appellant. *Mr. Charles C. Beaman* and *Mr. Joseph H. Choate* for appellee.

No. 8. WISCONSIN *ex rel.* BALTZELL *v.* SIEBECKER. Error to the Supreme Court of the State of Wisconsin. Argued and submitted October 13, 1896. Decided November 16, 1896. *Per Curiam.* Judgment affirmed with costs, on the authority of *Wurtz* v. *Hoagland*, 114 U. S. 606, and *Fallbrook Irrigation District* v. *Bradley*, just decided (164 U. S. 112). *Mr. A. L. Sanborn* for plaintiff in error submitted on his brief. *Mr.*

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[1] A similar order was made in Nos. 91 to 97, between the same parties.

Charles E. Buell for defendant in error. *Mr. H. W. Chynoweth* was on his brief.

No. 9. HILL *v.* CORCORAN. Error to the Supreme Court of the State of Colorado. Argued October 13, 1896. Decided November 16, 1896. *Per Curiam.* Judgment affirmed with costs by a divided court. *Mr. William C. Beecher* for plaintiff in error. *Mr. M. B. Carpenter* and *Mr. Joseph N. Baxter* were on his brief. *Mr. Frederic D. McKenney* for defendant in error. *Mr. S. F. Phillips* and *Mr. C. S. Thomas* were on his brief.

No. 109. UNITED STATES *v.* KING. Appeal from the Circuit Court of the United States for the District of South Carolina. Submitted November 16, 1896. Decided November 30, 1896. *Per Curiam.* Dismissed on the authority of *Chase* v. *United States*, 155 U. S. 489. *Mr. Assistant Attorney General Dodge* for plaintiffs in error. *Mr. J. P. Kennedy Bryan* for defendant in error.

In re AMBLER, Petitioner. *Ex parte.* Original. Argued October 26, 1896. Decided December 7, 1896. *Per Curiam.* Motions and petitions denied. *Augustin I. Ambler*, petitioner, in *propriâ persona.*

No. 591. GREGORY *v.* VAN EE. Appeal from the Circuit Court for the Dist. of Mass. Submitted November 30, 1896. Decided December 7, 1896. *Per Curiam.* Dismissed with costs. *Mr. F. A. Brooks* for appellant. *Mr. Russell Gray* for appellee.

No. 14. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY *v.* ROBERTS. Error to the Supreme Court of the State of Minnesota. Argued October 14, 15, 1896. Decided December 7, 1896. *Per Curiam.* Judgment affirmed with costs by a divided court. (Mr. Justice Field took no part in

the consideration and decision of this case.) *Mr. Thomas Wilson* for plaintiff in error. *Mr. J. L. Macdonald* for defendant in error. *Mr. W. A. Day* was on his brief.

No. 15. SAME *v.* SAME. Error to the Supreme Court of the State of Minnesota. Argued October 14, 15, 1896. Decided December 7, 1896. *Per Curiam.* Judgment affirmed with costs by a divided court. (Mr. Justice Field took no part in the consideration and decision of this case.) Same counsel as in No. 14.

No. 429. DYER *v.* UNITED STATES. Error to the District Court of the United States for the Western District of Arkansas. Decided December 7, 1896. *Per Curiam.* Judgment reversed, upon confession of error by counsel for the defendant in error, and cause remanded for further proceedings in conformity to law. *Mr. A. H. Garland* and *Mr. R. C. Garland* for plaintiff in error. *Mr. Solicitor General* and *Mr. Assistant Attorney General Dickinson* for defendants in error.

No. 457. CRAEMER *v.* WASHINGTON STATE. Error to the Supreme Court of the State of Washington. Submitted December 7, 1896. Decided December 14, 1896. *Per Curiam.* Dismissed for want of jurisdiction, on the authority of *Spies* v. *Illinois*, 123 U. S. 131, and other cases. *Mr. Frank B. Crosthwaite* and *Mr. James Hamilton Lewis* for plaintiff in error. *Mr. Addison W. Hastie* for defendant in error.

No. 477. KRUG *v.* WASHINGTON STATE. Error to the Supreme Court of the State of Washington. Submitted December 7, 1896. Decided December 14, 1896. *Per Curiam.* Dismissed for the want of jurisdiction, on the authority of *Spies* v. *Illinois*, 123 U. S. 131, and other cases. *Mr. James Hamilton Lewis*, *Mr. J. A. Stratton*, and *Mr. L. C. Gilman* for plaintiff in error. *Mr. Addison W. Hastie* and *Mr. Joseph Shillington* for defendant in error.

Decisions announced without Opinions.

No. 284. NORDSTROM *v.* WASHINGTON STATE. Error to the Supreme Court of the State of Washington. Argued December 9, 10, 1896. Decided December 14, 1896. *Per Curiam.* Judgment affirmed, on the authority of *Hurtado* v. *California*, 110 U. S. 516; *Davis* v. *Texas*, 139 U. S. 651; *McNulty* v. *California*, 149 U. S. 645; *Talton* v. *Mayes*, 163 U. S. 376, and *Draper* v. *United States*, 164 U. S. 240. *Mr. James Hamilton Lewis* for plaintiff in error. *Mr. J. A. Stratton* and *Mr. L. C. Gilman* were on his brief. *Mr. Addison W. Hastie* for defendant in error. *Mr. Joseph Shillington* was on his brief.

No. 69. UNITED STATES v. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY. Error to the Circuit Court of the United States for the Northern District of Illinois. Argued October 27, 1896; November 2, 1896, ordered restored to docket and to be submitted on briefs already filed or which might be filed within thirty days. Submitted December 7, 1896. Decided December 21, 1896. *Per Curiam.* Affirmed by a divided court. *Mr. Solicitor General* for plaintiffs in error. *Mr. Robert Mather* for defendant in error.

Decisions on Petitions for Writs of Certiorari.

No. 561. CHENEY *v.* BILBY. Eighth Circuit. 36 U. S. App. 720. Denied, October 19, 1896. *Mr. Charles E. Magoon* for petitioner.

No. 601. HUBBARD *v.* TOD. Eighth Circuit. 40 U. S. App. 154. Granted, October 19, 1896. *Mr. Henry J. Taylor* and *Mr. John C. Coombs* for petitioner. *Mr. George W. Wickersham* and *Mr. John L. Cadwalader* opposing.

No. 606. UNITED STATES *v.* LIES. Second Circuit. 38 U. S. App. 655. Granted, October 19, 1896. *Mr. Attorney General, Mr. Solicitor General* and *Mr. Assistant Attorney General*

Whitney for petitioners. *Mr. Charles Curie*, *Mr. W. Wickham Smith* and *Mr. David Ives Mackie* opposing.

No. 615. FORSYTH *v.* HAMMOND. Seventh Circuit. 34 U. S. App. 552. Granted, October 19, 1896. *Mr. Charles H. Aldrich* for petitioner. *Mr. W. H. H. Miller*, *Mr. F. Winter* and *Mr. John B. Elam* opposing.

No. 622. MERCER COUNTY *v.* PROVIDENT LIFE & TRUST CO. Sixth Circuit. 43 U. S. App. 21. Granted, October 19, 1896. *Mr. Samuel Dickson* and *Mr. T. W. Bullitt* for petitioner. *Mr. Alexander Pope Humphrey* and *Mr. George M. Davie* opposing.

No. 533. WALKER *v.* KEENAN. Seventh Circuit. Denied, October 19, 1896. *Mr. A. W. Green* and *Mr. H. S. Robbins* for petitioners. *Mr. E. D. Kenna* opposing. 34 U. S. App. 691.

No. 573. BOSTON SAFE DEPOSIT & TRUST CO. *v.* WILKINS. Fifth Circuit. Granted, October 26, 1896. *Mr. Henry B. Tompkins* for petitioner. *Mr. C. E. Lucky* and *Mr. L. H. Spilman* opposing.

No. 574. BOSTON SAFE DEPOSIT & TRUST CO. *v.* GROOME. Fifth Circuit. Denied, October 26, 1896. *Mr. Henry B. Tompkins* for petitioner. *Mr. Willard Parker Butler* opposing.

No. 635. KINGMAN *v.* WESTERN MANUFACTURING CO. Eighth Circuit. Granted, October 26, 1896. *Mr. James H. McIntosh* for petitioners.

No. 556. STUART *v.* EASTON. Third Circuit. 39 U. S. App. 238. Granted, November 2, 1896. *Mr. C. Berkley Taylor*, *Mr. A. T. Freedley* and *Mr. William Brooke Rawle* for petitioner.

Decisions announced without Opinions.

No. 627. HENDRY *v.* OCEAN STEAMSHIP CO. First Circuit. Granted, November 2, 1896. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for petitioners. *Mr. Charles Theodore Russell* opposing.

No. 629. MERCHANTS' & MINERS' TRANSPORTATION CO. *v.* NORFOLK & WESTERN RAILROAD; and No. 630, SAME *v.* SAME. First Circuit. Denied, November 2, 1896. *Mr. Eugene P. Carver* and *Mr. Edward E. Blodgett* for petitioners. *Mr. William G. Roelker* opposing.

No. 645. LOUISVILLE TRUST CO. *v.* NEW ALBANY & CHICAGO RAILWAY. Sixth Circuit. Granted, November 16, 1896. *Mr. George W. Kretzinger* and *Mr. C. E. Field* for petitioner.

No. 646. LOUISVILLE BANKING CO. *v.* SAME. Sixth Circuit. Granted, November 16, 1896. *Mr. George W. Kretzinger* and *Mr. C. E. Field* for petitioner.

No. 490. AMERICAN SUGAR REFINING CO. *v.* STEAMSHIP G. R. BOOTH. Second Circuit. Denied, November 30, 1896. *Mr. Harrington Putnam* for petitioner. *Mr. J. Parker Kirlin* opposing.

No. 660. LOUISVILLE TRUST CO. *v.* CINCINNATI. Sixth Circuit. Denied, December 7, 1896. *Mr. Alexander Pope Humphrey*, *Mr. George M. Davie*, *Mr. E. A. Ferguson* and *Mr. St. John Boyle* for petitioner. *Mr. Frederick Hertenstein* and *Mr. J. D. Brannan* opposing.

No. 651. CHISHOLM *v.* ABBOTT. First Circuit. Denied, December 21, 1896. *Mr. John Lowell* and *Mr. E. S. Dodge* for petitioner.

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Talton v. *Mayes*, 163 U. S. 376, followed. *Nordstrom* v. *Washington*, 705.

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the rates of toll, so that it shall give that amount of dividends per annum, and no more." In 1851 two new corporations were created out of the one created by the act of 1834, one to own and control a part of the road, and the other the remaining part, and each of the new companies was to possess and retain "all the powers, rights and capacities in severalty granted by the act of incorporation, and the amendments thereto, to the original company." In 1865 an act was passed reducing the tolls to be collected on the Covington and Lexington turnpike. In 1890 another act was passed largely reducing still further the tolls which might be exacted. *Held*, (1) That the new corporations created out of the old one did not acquire the immunity and exemption granted by the act of 1834 to the original company from legislative control as to the extent of dividends it might earn; (2) That the statute of Kentucky passed February 14, 1856, reserving to the legislature the power to amend or repeal at will charters granted by it, had no application to charters granted prior to that date; (3) That an exemption or immunity from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption; (4) That corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law as well as a denial of the equal protection of the laws; (5) That the principle is reaffirmed that courts have the power to inquire whether a body of rates prescribed by a legislature is unjust and unreasonable and such as to work a practical destruction of rights of property, and if found so to be, to restrain its operation, because such legislation is not due process of law; (6) That the facts stated make a *prima facie* case invalidating the act of 1890, as depriving the turnpike company of its property without due process of law. Where a defence arises under an act of Congress or under the Constitution, the question whether the plea or answer sufficiently sets forth such a defence is a question of Federal law, the determination of which cannot be controlled by the judgment of the state court; (7) That when a question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered; and if the establishment of new lines of transportation should cause a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation operating the road should be allowed to maintain rates that would be unjust to those who must or do use its property, but that the public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends; (8) That the constitutional provision forbidding a denial of the equal protection of the laws, in its application to corporations operating public highways, does not require that all corporations exacting tolls should be placed upon the

CRIMINAL LAW.

an "official print" was made, which consisted of a printed sheet showing the numbers in their consecutive order as they came out of the wheel, and on the line beneath, the numbers were arranged in their natural order. In addition to the "official print," these messengers, after the drawing has been had, brought back to the agents at Cincinnati what was known as "hit-slips." These were slips of paper with nothing but the winning numbers on them, together with a statement of a sum in dollars. The money to the amount named on the paper was brought over by the messenger to the agent in Cincinnati. Some of these messengers were arrested as they were coming from Covington, walking across the bridge, and just as they came to the Cincinnati side. They had with them in their pockets the official sheet and the hit-slips as above described, containing the result of the drawing, which had just been concluded at Covington. They had the money to pay the bets, and were on their way to the various agents in the city of Cincinnati. Procuring the carrying of these papers was the overt act towards the accomplishment of the conspiracy upon which the conviction of plaintiffs in error was based. There was nothing on any of the papers which showed that any particular person had any interest in or claim to any money which the messengers carried. The plaintiffs in error were indicted under Rev. Stat. § 5440, for conspiring to violate the act of March 2, 1895, c. 191, "for the suppression of lottery traffic through national and interstate commerce." *Held*, that the carrying of such books and papers from Kentucky to Ohio was not, within the meaning of the statute, a carrying of a paper certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift-concert, or similar enterprise, offering prizes depending upon lot or chance, as provided for in such statute; as the lottery had already been drawn; as the papers carried by the messengers were not then dependent upon the event of any lottery; and as the language as used in the statute looks to the future. *France* v. *United States*, 676.

28. On a trial for murder, if the declarations of the deceased are offered, the fact that she had received extreme unction has a tendency to show that she must have known that she was in *articulo mortis*, and it is no error to admit evidence of it. *Carver* v. *United States*, 694.

29. Where the whole or a part of a conversation has been put in evidence by the government on the trial of a person accused of the commission of crime, the other party is entitled to explain, vary or contradict it. *Ib.*

30. When the dying declarations of the deceased are admitted on the trial of a person accused of the crime of murder, statements made by the deceased in apparent contradiction to those declarations are admissible. *Ib.*

CUSTOMS DUTIES.

In 1888, when the goods were imported to recover back the duties paid upon which this action was brought, a right of action accrued to an importer if he paid the duties complained of in order to get possession of his merchandise, and if he made his protest, in the form required, within ten days after the ascertainment and liquidation of the duties. *Saltonstall* v. *Birtwell*, 54.

DIRECT TAX REFUNDING ACT.

1. The last clause of section 4 of the act of March 2, 1891, c. 496, 26 Stat. 822, entitled "An act to credit and pay to the several States and Territories and the District of Columbia all moneys collected under the direct tax levied by the act of Congress approved August 5, 1861," does not refer to or cover the cases of those owners who are mentioned in the first clause of the same section. *McKee* v. *United States*, 287.
2. *Brewer* v. *Blougher*, 14 Pet. 178, affirmed to the point that it is the duty of the court, in construing a statute, to ascertain the meaning of the legislature from the words used in it, and from the subject-matter to which it relates, and to restrain its meaning within narrower limits than its words import, if satisfied that the literal meaning of its language would extend to cases which the legislature never designed to embrace in it. *Ib.*
3. A mortgage creditor, who was such at the time of the sale of real estate in South Carolina for non-payment of taxes to the United States under the tax acts of 1861, is not the legal owner contemplated by Congress in the act of March 3, 1891, c. 496, as entitled to receive the amount appropriated by that act in reimbursement of a part of the taxes collected; but the court, by this decision, must not be understood as expressing an opinion upon what construction might be justified under other facts and circumstances, and for other purposes. *Glover* v. *United States*, 294.
4. A tract of land in South Carolina was sold in 1863 under the direct tax acts for non-payment of the direct tax to the United States, and was bid in by the United States. It was then subdivided into two lots, A and B. Lot A, the most valuable, was resold at public auction to E who had a life estate in it, and it was conveyed to him. Lot B was also resold, but the present controversy relates only to Lot A. This lot was purchased by a person who had been a tenant for life of the whole tract before the tax sale. After the purchase and during his lifetime it was seized under execution and sold as his property. No part of the property has come into the possession of the remaindermen, claimants in this action, nor have they repurchased or redeemed any part of it from the United States, nor has any purchase been made on their account. Under the act of March 2, 1891, c. 496, 26 Stat. 822, they brought this suit in the Court of Claims to assert their claim as

FINDINGS OF FACT.

See MECHANIC'S LIEN.

FRAUD.

The rule that in all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintiff, the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory extends to cases of alleged fraudulent representations, on the faith of which an officer of the government has done an official act upon which rights of the party making the representations may be founded; and in this case the evidence on the part of the plaintiff, when read in connection with that which was given on the part of the defendants, falls far short of the requirements of the rule. *Lalone* v. *United States*, 255.

JURISDICTION.

A. Jurisdiction of the Supreme Court.

1. Sections 651 and 697 of the Revised Statutes, relating to certificates of division in opinion in criminal cases, were repealed by the judiciary act of March 3, 1891, 26 Stat. 826, both as to the defendants in criminal prosecutions, and as to the United States; and certificates in such cases cannot be granted upon the request either of the defendants or of the prosecution. *Rider* v. *United States*, 163 U. S. 132, on this point adhered to. *United States* v. *Hewecker*, 46.
2. In an action between citizens of different States, brought in the Circuit Court of the United States, for the violation of an author's common law right in his unpublished manuscript, and in which the defendant relies on the Constitution and laws of the United States concerning copyrights, and, after judgment against him in the Circuit Court, takes the case by writ of error to the Circuit Court of Appeals, he is not entitled, as of right, to have its judgment reviewed by this court under the act of March 3, 1891, c. 517, § 6. *Press Publishing Co.* v. *Monroe*, 105.
3. The laws of California authorize the bringing of an action in its courts by the board of directors of an irrigation district, to secure a judicial determination as to the validity of the proceedings of the board concerning a proposed issue of bonds of the district, in advance of their issue. The Modesto District was duly organized under the laws of the State, and its directors, having defined the boundaries of the district, and having determined upon an issue of bonds for the purpose of carrying out the objects for which it was created, as defined by the laws of the State, commenced proceedings in a court of the State, seeking a judicial determination of the validity of the bonds which it proposed to issue. A resident of the district appeared and filed an answer. After a hearing, in which the defendant contended that the judgment asked for would be in violation of the Constitution of the United States, the proceedings resulted in a judgment in favor of the district. Appeal being taken to the Supreme Court of the State, it was there adjudged that the proceedings were regular, and the judgment, with some modifications, was sustained. The case being brought here by writ of error, it is *Held*, that a Federal question was presented by the record, but that the proceeding was only one to secure evidence; that in the securing of such evidence no right protected by the Constitution of the United States was invaded; that the State might determine for itself in what way it would secure evidence of the regularity of the proceedings of any of its municipal corporations; and that unless in the course of such proceedings some constitutional right was denied to the individual, this court could not interfere on the ground that the evidence might thereafter be used in some further action in which there might be adversary claims. *Tregea* v. *Modesto Irrigation District*, 179.

B. JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES.

LIMITATION, STATUTES OF.

to secure an issue of bonds to the amount of $2,000,000, the proceeds of which were used in the construction of the company's works, including the canal. On the 12th of March, 1890, the legislature of Utah repealed said statute, and substituted other statutory provisions in its place, and enacted that the repeal should not affect existing rights or remedies, and that no lien claimed under the new act should hold the property longer than a year after filing the statement, unless an action should be commenced within that time to enforce it. On the 1st day of May, 1890, C. contracted with the company to do work on its canal, and did the work so contracted for. The balance due G. not having been paid, he brought an action to recover it, making the company, the mortgage trustees, and C. defendants, which action was commenced more than 90 days after the filing of his claim. To this suit C. replied, setting up his mechanic's lien. The court below made many findings of fact, among which were, (29th,) that the right of way upon which the canal was constructed was obtained by the company under Rev. Stat. § 2339; and, (33d,) that the work done by G. and C. respectively had been done with the consent of the company after its entry into possession of the land. Exception was taken to the 29th finding as not supported by the proof. The court below gave judgment in favor of both G. and C., establishing their respective liens upon an equality prior and superior to the lien of the mortgage trustees. *Held*, (1) That this court will not go behind the findings of fact in the trial court, to inquire whether they are supported by the evidence; (2) That G.'s action was commenced within the time required by the statutes existing when it was brought; (3) That the judgment of the court below thus establishing the respective liens of G. and C. was correct. *Bear Lake & River Water Works &c. Co.* v. *Garland*, 1.

See MORTGAGE, 2, 3.

MOOT QUESTION.

See JURISDICTION, A, 3.

MORTGAGE.

1. A clause in a mortgage which subjects subsequently acquired property to its lien is valid, and extends to equitable as well as to legal titles to such property. *Bear Lake Irrigation Co.* v. *Garland*, 1.
2. Under Rev. Stat. §§ 2339, 2340, no right or title to land, or to a right of way over or through it, or to the use of water from a well thereafter to be dug, vests, as against the government, in the party entering upon possession, from the mere fact of such possession, unaccompanied by the performance of labor thereon; and, as the title in this case did not pass until the ditch was completed, the mortgage was not a valid incumbrance until after the liens of G. and of C. had attached, and will not be held to relate back for the purpose of effecting an injustice. *Ib.*

PENSION.

See CRIMINAL LAW, 6.

PLEADING.

See RAILROAD, 1.

PRACTICE.

See JURISDICTION, B, 5; LOCAL LAW, 2, 4; PUBLIC MONEYS, 4; RECEIVER, 1.

PRESUMPTION.

1. The fact that a marriage license has been issued carries with it a presumption that all statutory prerequisites thereto have been complied with, and one who claims to the contrary must affirmatively show the fact. *Nofire* v. *United States*, 657.
2. Persons coming to a public office to transact business who find a person in charge of it and transacting its business in a regular way, are not bound to ascertain his authority to so act; but to them he is an officer *de facto*, to whose acts the same validity and the same presumptions attach as to those of an officer *de jure*. *Ib.*

PRINCIPAL AND SURETY.

A surety on a bond, conditioned for the faithful performance by the principal obligor of his agreement to convey land to the obligee on a day named on receiving the agreed price, is released from his liability if the vendee fails to perform the precedent act of payment at the time provided in the contract, and if the vendor, having then a right to rescind and declare a forfeiture in consequence, waives that right. *Coughran* v. *Bigelow*, 301.

PUBLIC LAND.

1. The action of local land officers on charges of fraud in the final proof of a preëmption claim does not conclude the government, as the General Land Office has jurisdiction to supervise such action, or correct any wrongs done in the entry. *Orchard* v. *Alexander*, 157 U. S. 372, affirmed and followed to this point. *Parsons* v. *Venzke*, 89.
2. The jurisdiction of the General Land Office in this respect is not arbitrary or unlimited, or to be exercised without notice to the parties interested; nor is it one beyond judicial review, under the same conditions as other orders and rulings of the land department. *Ib.*
3. The seventh section of the act of March 3, 1891, c. 561, 26 Stat. 1098, providing that "all entries made under the preëmption, homestead, desert-land or timber culture laws, in which final proof and payment

granted lands to Iowa to aid in the construction of certain railroads in that State, among others a railroad from Dubuque to Sioux City. That act excepted from its operation all lands previously reserved to the United States by any act of Congress, or in any other manner, for any purpose whatsoever. The lands, interests, rights, powers and privileges granted by the last-named act, so far as they related to the proposed road from Dubuque to Sioux City, were transferred by the State in 1856 to the Dubuque and Pacific Railroad Company. In the same year, the county court of Calhoun County, Iowa, appointed an agent to select and certify the swamp lands in that county, in accordance with the above act of 1853. The lands in controversy are within the limits of the railroad grant of May 15, 1856, and were earned by the building of the road from Dubuque to Sioux City, if they were subject at all to that grant. The several defendants hold by sufficient conveyance all the title and interest which passed under the railroad grant, if any title or interest thereby passed. Under date of December 25, 1858, these with other lands were certified to the State by the General Land Office of the United States as lands within the place limits defined by the railroad act of 1856 of the Dubuque and Pacific Railroad. A list of the tracts so certified to the State was approved by the Secretary of the Interior, subject to the conditions of the act of 1856 and to any valid interfering rights existing in any of the tracts embraced in the list. The selection of these lands as swamp lands by the agent of Calhoun County was reported to the county court of that county September 30, 1858. March 27, 1860, the surveyor general for the State certified these lands as swamp and overflowed lands, and this certificate was received in the General Land Office March 27, 1860, and at the local land office at Des Moines, Iowa, February 18, 1874. It did not appear that the Secretary of the Interior ever took any action in respect to the lists made by the agent of Calhoun County of lands selected by him as swamp lands, nor that the State or the county, or any one claiming under the county, ever directly sought any action by the General Land Office or by the Secretary of the Interior in respect to such selection. December 12, 1861, a written contract was made between the county of Calhoun, Iowa, and the American Emigrant Company in relation to the swamp and overflowed lands in that county. Subsequently, in 1863, the county, although no patent had ever been issued to the State, conveyed to that company the lands in controversy. *Held*, (1) That the Secretary of the Interior had no authority to certify lands under the railroad act of 1856 which had been previously granted to the State by the Swamp Land act of 1850; (2) That whether the lands in controversy were swamp and overflowed lands within the meaning of the act of 1850 was to be determined, in the first instance, by the Secretary of the Interior; and that when he identified lands as embraced by that act, and not before, the State was entitled to a patent, and on

PUBLIC MONEYS.

REMOVAL OF CAUSES.

STATUTE.

A. Construction of Statutes.

See Direct Tax Refunding Act, 2.

B. Statutes of the United States.

C. Statutes of States and Territories.

STATUTE OF FRAUDS.

SURETY.

TAX AND TAXATION.